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Constitutional Court Decision Number 6/PUU-XIX/2021 On The Review Of The Job Creation Law Siyasah Tasyri'iyyah Perspective

Fatmah[1]
Universitas Islam Negeri Sunan Kalijaga Yogyakarta
Email: famahrangkuti@gmail.com

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Abstract

The decision of the Constitutional Court Number 6/PUU-XIX/2021 states that Law Number 11 of 2020 Concerning Job Creation is unconstitutional because it does not fulfill the element of public participation, is not following the technique of drafting laws, and has changed even though it has been agreed in the plenary session of the DPR when it will be ratified. However, the decision of the Constitutional Court still draws protests from the public because it does not firmly state that Law Number 11 of 2020 Concerning Job Creation is unconstitutional, so it must be completely and completely annulled. Therefore, this research will start the analysis of views *siyasah tasyri'iyyah* and the perspective of law science in Indonesia This type of research is library research. In this case, the researcher is dealing with text or data that is directly usable which can be found in the library. The results of this study concluded that the view of *siyasah tasyri'iyyah* and the science of legislation is true the first principle of *siyasah tasyri'iyyah* simplify and simplify, but this must be seen holistically from the point of view of the principle of gradually, in line with human benefit, realizing equitable justice. The Job Creation Law cannot be said to be ideal, so it needs improvement. Even if examined from a philosophical, juridical and sociological basis, the Job Creation Law did not fulfill aspects of public participation, had no legal basis for making it at the time the MK Decision was issued and did not reflect the basic needs of society.

Keywords: Constitutional Court Ruling, Job Creation Law *siyasah tasyri'iyyah*

Abstrak:

Putusan Mahkamah Konstitusi Nomor 6/PUU-XIX/2021 menyatakan bahwa Undang-Undang Nomor Nomor 11 Tahun 2020 Tentang Cipta Kerja inkontitusional bersyarat dengan alasan bahwa tidak memenuhi unsur partisipasi publik, tidak sesuai dengan Teknik penyusunan Undang-Undang dan mengalami perubahan walau telah disepakati dalam paripurna DPR saat akan disahkan. Namun demikian putusan Mahkamah Konstitusi tersebut masih menuai protes dari kalangan masyarakat karena tidak tegas menyatakan bahwa Undang-Undang Nomor 11 Tahun

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2020 Tentang Cipta Kerja inkonstitusional sehingga harus dibatalkan semua dan seluruhnya. Oleh karena itu penelitian ini akan memluai Analisa dari pandangan *siyasah tasyri'iyyah* dan perspektif ilmu perundang-undangan di Indonesia Jenis dari penelitian ini adalah penelitian kepustakaan (*library research*), dalam hal ini peneliti berhadapan dengan teks atau data-data yang bersifat langsung pakai yang dapat ditemukan di perpustakaan. Hasil penelitian ini menyimpulkan bahwa pandangan *siyasah tasyri'iyyah* dan ilmu perundang-undangan bahwa benar prinsip pertama dari *siyasah tasyri'iyyah* mempermudah dan menyederhanakan namun hal ini harus dilihat secara holisitik dari sisi prinsip berangsur-angsur, sejalan dengan kemaslahatan manusia, mewujudkan keadilan yang merata Undang-Undang Cipta Kerja belum bisa dikatan ideal sehingga perlu perbaikan. Pun jika ditelaah dengan landasan filosofis, yuridis dan sosiologis Undang-Undang Cipta Kerja belum memenuhi aspek partisipasi public, tidak memiliki dasar hukum dalam pembuatannya pada saat keluar Putusan MK keluar dan tidak mencerminkan kebutuhan masyarakat secara mendasar.

Kata Kunci: Putusan Mahkamah Konstitusi, Undang-Undang Cipta Kerja *siyasah tasyri'iyyah*

A. INTRODUCTION

President Jokowi has signed Law No. 11 of 2020 on job creation on November 2, 2020 (CNBC Indonesia). The law that was mentioned by President Jokowi at the Plenary Session of the people's Consultative Assembly (MPR) in the framework of the inauguration of the president and Vice President for the period 2019 – 2024 on October 20, 2019 part of President Jokowi's speech was a plan to invite the House of Representatives (DPR) to issue one law (UU) while revising several laws, even dozens of laws called omnibus laws (Anggono, 2020).

The purpose of the omnibus law on job creation, according to President Jokowi, is to overcome all forms of regulatory obstacles that are being experienced by Indonesia so that regulations must be simplified, cut and cut the number (Anggono, 2020). While the emergence of the idea of omnibus law departs from the problems in terms of complexity to invest in Indonesia. These complexities arise in several matters, namely licensing, taxation, land acquisition and other aspects related to investment (Prabowo et al, 2020).

But the law that has been signed by President Jokowi has drawn a lot of criticism and rejection from the public, including academics. Among them is, Zainal Arifin Mochtar constitutional law expert at Gadjah Mada University (UGM), he said that there are formal defects that can be examined in the discussion of the job creation law in the DPR, this, he said, can be drawn from several incidents in the discussion to ratification at the plenary meeting. Among them is the lack of public participation in the discussion of the law (CNN Indonesia, 2020).

Legally, Law No. 12 of 2011 on the establishment of legislation has not included the concept of omnibus law as one of the principles in the formation of legislation. However, omnibus law is not prohibited. The law that received strong rejection from workers, students and academics was considered not to involve many people in the process of its formation. Whereas the formation of laws must be participatory, even in terms of the formation of a law with the concept of Omnibus Law.

According to Bivitri Susanti, between participation and socialization is different.

Participation is to accommodate aspirations, the public gives input on the preparation of draft laws (RUU), while socialization is to introduce existing drafts. The public is the subject of the back of the law must participate in it. The community must participate in determining the priority policy direction for the preparation of legislative regulations, without community involvement in their formation, it is impossible for a legislative regulation to be accepted and implemented properly (Putra, 2020).

This controversial and widely rejected law was then challenged by judicial review at the Constitutional Court, which in its decision the Constitutional Court stated that Law Number 11 of 2020 on job creation was formally disabled and terminated conditional inconstitutional. In consideration of the decision, there are at least three important points that the researcher will describe. First, the compilers of the job creation law did not follow the technique of drafting the rules in Appendix II of Law No. 1. No. 12 of 2011 on the establishment of legislation (PPP law). In this case, the Constitutional Court judge emphasized that the legislators did not follow the standard techniques stipulated in the PPP law. Starting from the title, How to repeal the law, there are general provisions, principles and objectives in the job creation law, these three things still exist even in the old law that has been revised, these three things can cause ambiguity and multiple interpretations of the job creation law differences in the implementation and legal format.

Second, during the trial, it turned out that the content or textual substance of the job creation bill that had been agreed upon by the DPR and the president was changed before it was passed and promulgated as a law. Third, the trial revealed the fact that the framers of the job creation law failed to provide community involvement in the process of its formation.

The decision of the Constitutional Court later received criticism from many circles, activists and academics because it was considered the decision was not firm. If violations are found in the process of its formation, the Constitutional Court must firmly decide that the law is unconstitutional. However, the decision of the Constitutional Court was responded obediently by the Minister of Law and Human Rights Yosona Laoli. Basically, he conveyed respect for the decision of the Constitutional Court and carried out what was the *amar* decision, one of which was to make improvements together with the DPR on points that were considered wrong within 2 years.

In the decision, the Constitutional Court ruled to suspend actions or policies that are outside, and not prohibited from issuing new implementing regulations that correlate with the job creation law. If the government and the DPR do not carry out orders to improve the job creation law in the second term, the job creation law will automatically be permanently unconstitutional.

Departing from the above issue, on the decision of the Constitutional Court No. 6/PUU-XIX/2021tentang lawsuit Judicial review (judicial review) against Law No. 11 of 2010 on job creation, especially judges in their legal considerations as intended *siyasah tasri'iyyah* is a theory that is popular among Muslims, about important points that must be considered and considered in terms of making a decision that results in the birth of a law. Therefore, the author offers a theme with the title review of the Constitutional Court Decision No. 6/PUU-XIX/2021 on the review of Law No. 11 of 2020 on job creation *siyasah tasyri'iyyah* perspective. Departing from the above problems, in this case, the formulation of the problem in this study can be described as follows: How is the decision of the

Constitutional Court No. 6/PUU-XIX/2021 regarding the review of the job creation law according to the perspective of siyasah tasyri'iyyah? How is the decision of the Constitutional Court No. 6/PUU-XIX/2021 regarding the review of the job creation law according to applicable regulations/principles of legal science?

B. RESEARCH METHODOLOGY

The method of approach used is normative juridical approach. Normative juridical approach is a method of legal researches used to examine the literature or secondary materials related to the problems concerning the synchronization related to the problems studied is the study of *siyasah tasyri'iyyah* in the Constitutional Court decision on the job creation law. This type of research is library research, in this case the researcher is dealing with text or data that is directly used that can be found in the library. Qualitative form with the object of study is library data that contains ideas or ideas or thoughts supported by library data sourced from books, journals, previous scientific works, reports, papers, as well as the results of literacy or documentation of scientific discussions and official documents issued by the government or other institutions (Soekanto & Mamudji, 2004).

C. RESULTS AND DISCUSSION

1. Siyasah Tasyri'iyyah Principles in the Formation of Law

Siyasah tasyri'iyyah in the study of *fiqh siyasah*, legislation or legislative power is also called *al-sulthah al-tasyri'iyah*, which is the power of the Islamic government in making and establishing laws. In the discourse of *fiqh siyasah*, the term *al-sulthah al-tasyri'iyah* is used to indicate one of the authorities or powers of the Islamic government in regulating state matters, in addition to executive power (*al-sulthah al-tanfidzhiyah*) and judicial power (*al-sulthah al-qadha'iyah*). In this context, legislative power (*al-sulthah al-tasyri'iyah*) means the power or authority of the Islamic government to establish laws that will be enforced and implemented by its people based on the provisions that have been revealed by Allah SWT in Islamic Shari'ah (Iqbal, 2001).

The people who sit in this legislature consist of mujtahids and fatwa experts (muftis) and experts in various fields. There are two functions of the legislature. First, in terms of its provisions, already contained in the *nash* Al-Qur'an and Sunnah, the laws issued by *al-sulthah al-tasyri'iyah* are divine laws that are stipulated in the Qur'an and explained by the Prophet. Second, do creative reasoning (ijtihad) on problems that are not explicitly explained by *nash*. Another authority of the legislature is in the field of state finance. In this issue, the legislature has the right to supervise and question the state treasury, foreign exchange resources and budget opinions and expenditures issued by the state to the head of state as the executor of government. The elements of legislation in *fiqh siyasah* can be formulated as follows:

a. The government as the holder of the power to establish laws that will be enforced in Islamic Society.
b. The Islamic community will take over.
c. The content of regulations or laws in accordance with the basic values of Islamic Shari'ah (Iqbal, 2001).

2. Principles of Policy Formation in Islam

In the legislative process, there are principles that must be met so that the policies made can bring benefits to the regulated community and avoid harm. Regulations made by the competent authorities must have a solid foundation in order to be accepted and effectively applied in society. In Indonesia, the basis for the legislative process is contained in law no. 15 of 2019 changes to law No. 12 of 2012 on the establishment of regulations and legislation. In Islam, there is a similar thing in *siyasah tashri'iyyah.* Islam knows the principles that must be adhered to in the process of making regulations and the following policies are the principles of *tasyri' islamy* which will be used to analyze the legislative process of the establishment of Omnibus Law of Job Creation Law (Fathurrahman, 1994).

a. Negates the difficulties and narrowness.

The determination of Islamic Shari'ah must still pay attention to the condition of the community so that the rules made are not difficult for humans. The meaning of Islamic law is not a law that makes it difficult for humans, but there is Islamic law will actually make it easier for humans themselves.

b. Gradually in staring at the law.

The Qur'an was revealed at a time when Arabs had a deeply rooted culture. There were many Arabs who did not follow Islam. The Qur'an was revealed to the Arabs in order that they might change their ways. So that it does not cause awkwardness in society because suddenly it has to change significantly the ingrained habits. Because to eradicate social diseases does not necessarily with the blink of an eye can be changed, but done with little by little.

c. In line with human interests.

Islam is the religion of all mankind. In principle, Islamic law cannot prohibit something that is really needed by humans, just as Islam does not allow something that endangers humans themselves (Jamaludin, 2015).

d. Creating a Sense of Justice

In Islam, all human beings are equal before the law, Islam does not look at the nation's class, position, gender and so on. Even when a respectable woman from the tribe of Quraysh stole, the leaders of the Quraysh came to Uthman bin Zaid to ask for forgiveness because the one who had stolen was a respectable woman. Then the Prophet (peace and blessings of Allah be upon him) said.

> *"Indeed, those before you perished, because if the thief was a noble person among them, they left him alone. However, if the thief is a weak person among them, carry out the punishment. By Allah, if Fatimah, the daughter of Muhammad, had stolen, I would have cut off her hand."* (HR. Jama'ah, from Usamah).

The above explanation illustrates that Islam is indiscriminate in imposing a law. So that everyone is considered equal before the law, which means that everyone in Islam is viewed equally in the eyes of the law, there is no difference between high-ranking people, honorable people, rich people and even people who have power.

Similarly, in the legislative process, the policy made must really adhere to the principles of justice and human benefit, through very careful consideration in the legislative process of forming legislation, which in this case the authority is carried out by the mujtahids or in the context of Indonesia by the people's Representative Council (DPR).

One of the important things that become the foundation of Islamic Tashri' is equitable justice. The fairness of a legislation is not only fixated on its substance, but the process of making a law must also be considered (Wahyuni, 2019), as in the case of the Omnibus Law on Job Creation Law.

3. Principles of Science in the Formulation of Laws

Meaningfully, the definition of legislation there is no agreement among legal experts. The disagreement of Jurists is mostly when it comes to the issue of whether legislation implies the process of making or contains the meaning of the result (product) of making legislation. The term legislation to describe the process and technique of drafting or making overall state regulations, while the term legislation to describe the overall types or kinds of state regulations.

In another sense, legislation is a term used to describe various types (forms) of regulations (written legal products) that have binding force in general made by authorized officials or institutions (Moonti, 2017).

There are 5 (five) stages in the preparation of legislation or legislation in Indonesia, which include (Achien, 2018).

1) Planning, is a process, act or way of planning legislation. Planning is an activity to conceptualize and design legislation that will be made;

2) Preparation, the preparation stage is the stage to compile and make laws and regulations. Preparation of it, starting from the preparation: academic papers; philosophical foundations; juridical foundation; sociological foundations; substance; and cover;

3) Discussion, the discussion stage is to discuss, discuss, debate, criticize and refute the laws and regulations that have been prepared;

4) Ratification, the stage of ratification or determination is the stage to declare, acknowledge, authorize and establish (not change, confirm, and strengthen) the rules of law; and

5) Promulgation, the promulgation stage is the placement stage of legislation in the state gazette of the Republic of Indonesia, supplement to the state gazette of the Republic of Indonesia, state news of the Republic of Indonesia, supplement to the state news of the Republic of Indonesia, regional Gazette, additional regional Gazette, or regional news.

Theoretically in the treasury of legal science, there are several definitions of the term "legislation "or the word" legislation", if using the standard language that refers to In Law No. 12 of 2011 (law no. 12 of 2011) the terminology of legislation is also commonly called *wetgeving, gesetgebung* or legislation. The term legislation (legislation, *wetgeving* or *gesetgebung*) in some libraries has two different meanings, in the general dictionary, the term legislation can be interpreted with legislation and legislator (Soeprapto, 2007).

The definition of *wetgeving* in Juridisch Woordenboek is defined as follows:

a. Legislation is the process of forming or the process of forming state regulations, both at the central level and at the regional level.

b. Legislation is any state regulation, which is the result of the formation of regulations, both at the central and regional levels.

Maria Farida Indrati Soeprapto said that: theoretically, the term "legislation" (legislation), *wetgeving* or *gesetgebung* has two meanings, namely; First, legislation is the process of forming or the process of forming state regulations both at the central and regional levels; Second, legislation is all state regulations that are the result of the formation of regulations both at the central and regional levels. Definition of legislation in the construction of Law No. 12 of 2011, is a written rule that is binding in general and made by the competent authorities through the procedures set out in the legislation anyway.

According to Sajipto Raharjo (2004), legislation has the following characteristics are as follows:

a. Is general and comprehensive which is the opposite of the properties specific and limited

b. Is universal. That is, it is formed to face upcoming events that are not yet clear in concrete form. Therefore, it cannot be formulated to deal with certain events alone.

c. It is common for a legal regulation to include a clause that contains the possibility of judicial review.

According to Burkhardt Krems, that one of the major parts of the science of legislation is the theory of legislation-oriented to seek clarity and clarity of meaning or understanding that is cognitive (Soeprapto, 2007). The process of clarity and clarity of the meaning of a law is influenced by the process of formation of legislation the formation of legislation is one of the processes of legal development, in addition to the application, enforcement, and understanding of the law. As is well known that the development of law that is carried out comprehensively includes legal substances or called the contents of laws and regulations. Therefore, in order for the legislation produced to reflect good quality as a legal product, it is necessary to understand some of the basic foundations of the formation of legislation, including the following.

1) Philosophical Foundation

The philosophical Foundation illustrates that the regulations are formed to consider the outlook on life, consciousness and legal ideals that include the atmosphere of mysticism and the philosophy of the Indonesian nation derived from Pancasila and the Preamble to the Constitution of the Republic of Indonesia in 1945. In its position as the basis and ideology of the Indonesian state, Pancasila should be used as a paradigm (frame of mind, source of values, and orientation) in the development of law including all its renewal efforts (Khozim, 2009). According to Notonegoro, Pancasila values are basic values that must always exist and be inherent in human life. Thus, the values contained in Pancasila are the basic moral values that are always Actual that always surround each other in human actions. As the nation's legal ideals and legal development paradigm, Pancasila has at least four guiding principles that must be used as guidelines in the formation and enforcement of law in Indonesia. First, the law must protect the whole nation and ensure the integrity of the nation and therefore no legal product is allowed to

plant the seeds of disintegration. Second, the law must be able to ensure social justice by providing special protection for the weak so as not to be exploited in free competition against the strong. Third, law must be built democratically while building democracy in line with nomocracy (rule of law). Fourth, the law should not discriminate based on any primordial bond and should encourage the creation of religious tolerance based on humanity and existence. A rule of law is said to have a philosophical foundation (*filosofiche gronslad, filosofisce gelding*), if its formulation or norms get justification (*rechtsvaardiging*) when studied philosophically.

2) Juridical Foundation

Juridical foundation describes that regulations are formed to overcome legal problems or fill legal gaps by considering existing rules, which will be changed, or which will be revoked in order to ensure legal certainty and a sense of Community Justice (Sulaiman, 2017). Formally, the juridical basis that gives authority for institutions to make certain regulations, materially, the juridical basis in terms of content or material as the legal basis for regulating certain things. While from a technical point of view, the juridical basis that gives authority for institutions to form certain regulations regarding the procedure for forming laws (Astomo, 2018). A rule of law can be said to have a juridical basis (*jurdische gronslag, juridische gelding*), if it has a legal basis (*rechtsgrond*) or the main legalitaster on higher legislation so that the legislation was born.

3) Sociological Foundations

The sociological foundation describes that regulations are established to meet the needs of society in various aspects. A law is said to have a sociological basis (*sosiologische gronslag, sosiologische gelding*) if the provisions are in accordance with general beliefs or public awareness. This is important so that the laws and regulations that are made are obeyed by the community and do not become mere dead letters. It is on this sociological basis that it is expected that a law is made acceptable in society reasonably and even spontaneously. Legislation that is reasonably accepted will receive effective force and not so much require institutional mobilization to implement it. In confession theory (*annerken nungstheorie*) it is asserted that the rule of law applies based on the acceptance of the society in which the law applies. He stressed that this social dimension reflects the reality lived in society (Sulaiman, 2017).

Seeing and reviewing the three foundations above gives us the understanding that in lawmaking is not only enough with juridical foundations (laws), but other factors such as examples of philosophical and sociological factors are also important to note. This means that the decision of the Constitutional Court must pay attention to important points in the science of legislation.

If you look at the spirit in the formulation of the formation of Job Creation laws by the government and legislative members, in this case the DPR is based on the spirit of simplification of many laws that overlap one another with the omnibus law method. So, the principle of negating the difficulties and difficulties in the *tashri'iyyah siyasah* appears to be fulfilled in its compilation, but thus the principle of *tashri'iyyah siyasah* must be viewed holistically or accumulatively.

Then the principle gradually in setting in *siyasah tasyri'iyyah* in the preparation of the law on job creation that drew a lot of criticism from the civil society so that in turn the Constitutional Court ruled that the formal preparation of the law on job creation seemed rushed so that it was set as a product of unconstitutional conditional law which the Constitutional Court, if within that time period it does not also get improvements from the House of Representatives with the government, then by itself the job creation law is declared unconstitutional. At this point it can be seen that the government and the DPR seem to be in a hurry and cut many procedures so that they are formally flawed because in the method of drafting Law Number 12 of 2011 on the establishment of legislation before there is a change when it is decided that the Constitutional Court does not recognize the omnibus law method.

Making a law also in *siyasah tasyri'iyyah* must prioritize human benefit and be able to realize equitable justice. The last two things must be one breath and in line as stated above that the principles of *siyasah tashri'iyyah* in drawing up a regulation must be holistic and accumulative without negating one another. Looking at the lawsuit from the civil society, labor groups and the statements of experts who viewed the lack of security in the formulation of the job creation law, there were several formal and material defects, including the lack of public participation in the discussion of the law and according to the Constitutional Court, there were several things that made it decided as unconstitutional conditional, namely First, the compilers of the job creation law did not follow the technique of drafting the rules in Appendix II of Law No. 1. No. 12 of 2011 on the establishment of legislation (PPP law). In this case, the Constitutional Court judge emphasized that the legislators did not follow the standard techniques stipulated in the PPP law. Starting from the title, How to repeal the law, there are general provisions, principles and objectives in the job creation law, these three things still exist even in the old law that has been revised, these three things can cause ambiguity and multiple interpretations of the job creation law differences in the implementation and legal format.

Second, during the trial, it turned out that the content or textual substance of the job creation bill that had been agreed upon by the DPR and the president was changed before it was passed and promulgated as a law. Third, the trial revealed the fact that the framers of the job creation law failed to provide community involvement in the process of its formation. Therefore, it can be seen that the principle of equitable benefit and justice should be questioned from the formulation of the government together with the House of Representatives in this case the creation of Job Creation law by the method of drafting omnibus law.

According to the principles of law, there are three principles that must be contained in the formulation of laws, namely philosophical, juridical and sociological foundations. The first principle of philosophical foundation means that the law must protect all Indonesian blood to ensure the integrity of the nation, the second law must ensure social justice in the sense of protecting vulnerable groups from being oppressed by stronger groups of society and the third law must be built democratically and nomocratically. At this point the decision of the Constitutional Court which states that the conditional

unconstitutional job creation law is appropriate because it will shortly be passed in the plenary session of the House of Representatives there were changes outside the agreement.

Then the juridical basis means that the formulation of laws aims to fill the legal void by considering existing laws both formally and materially and ensuring legal certainty for the community, therefore the formation of new laws requires a legal basis for their manufacture. Judging from the decision of the Constitutional Court which states that the job creation law with the omnibus law formulation method is appropriate because at the time of its drafting it does not have a legal basis and is also not filling a legal void because this law only collects from many regulations that are interspersed with a little composition, and the latter is a sociological foundation which means that the formulation of the law is to meet the needs of various aspects of society. Because a formulation of the law will have direct implications in the social life of everyday people. The decision of the Constitutional Court which concluded that there was a lack of participation in the creation of the job creation law was the reason why this law was declared conditionally unconstitutional.

D. CONCLUSIONS

Proceeding from the above, it can be concluded that the decision of the Constitutional Court No. 6/PUU-XIX/2021 on Law No. 11 of 2020 on job creation by the conditional unconstitutional omnibus law method is not without reason and can be justified if viewed from the view of *siyasah tashri'iyyah* and the science of legislation that it is true that the first principle of *siyasah tashri'iyyah* simplifies, but this must be viewed holistically from the side of the principle of gradually, in line with human benefit, realizing equitable justice the job creation law cannot be said to be ideal so it needs improvement. Even if it is examined with philosophical, juridical and sociological foundations, the job creation law does not meet the aspects of public participation, does not have a legal basis in making it at the time of the exit of the Constitutional Court decision and does not reflect the basic needs of society.

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