Legal Certainty Government Regulation Number: 35 Year 2O2I Work Termination Procedure (PHK Procedure) As Implementing Regulation Law Number: 11 Year 2020 Concerning Job Creation

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Abstract

After Law Number 11 of 2021 concerning Job Creation was passed, this law was rejected by a number of parties, such as students, labor activists, environmental activists, and others. The basis for rejecting this law is that the process of making it is very fast and does not involve public participation. The spirit and purpose of reform is to criticize and at the same time do the antithesis of power politics in the past which were monolithic in nature and then formulate a synthesis in preventing the return of power, authority and opportunities that were misused by the powers that be, either by the government or officials holding power and public authority. Researchers want to answer legal problems about how the omnibus law concept of the Job Creation Law relates to the hierarchy of laws and regulations and legal certainty for unclear provisions, especially Article 8 PP 35 of 2021 concerning Specific Time Work Agreements (PKWT). This research was conducted using normative juridical research methods. The normative juridical research method is defined as a research method on statutory rules, both from the perspective of the statutory hierarchy, namely the 1945 Constitution vertically, as well as the horizontal harmonization of legislation. From the results of the research it can be seen that the problem of constitutionality in the formation of the Job Creation Law is broadly related to; (1) the conditions for loading the Job Creation Bill are not fulfilled in the Prolegnas; (2) the provisions regarding the technique and systematics of making laws are not followed; and; (3) the principles of forming good laws and regulations are not fulfilled according to the provisions of Law Number 12 of 2011 concerning the Formation of Legislation. Keywords: Legal Certainty; Implementing Regulations; Job creation law

Keywords: Legal Certainty, Laws, Job Creation

Abstrak

Setelah disahkan Undang-Undang Nomor 11 Tahun 2021 tentang Cipta Kerja,undang-undang ini mendapat penolakan dari sejumlah pihak seperti mahasiswa, aktivis buruh, aktivis lingkungan, dan lainnya. Dasar penolakan terhadap undang-undang ini ialah proses pembuatannya sangat cepat dan tidak dilibatkannya partisipasi masyarakat. Semangat dan tujuan reformasi ialah mengkritisi sekaligus melakukan antitesis pada politik kekuasaan pada masa lalu yang bersifat monolitik dan selanjutnya merumuskan suatu sintesis dalam mencegah kembalinya kekuasaan, wewenang, dan kesempatan yang disalahgunakannya kekuasaan oleh kekuatan *power that be*, baik oleh pemerintah ataupun pejabat yang memegang kekuasaan dan wewenang publik. Peneliti ingin menjawab problem hukum tentang bagaimana konsep *omnibus law* Undang-Undang Cipta Kerja terhadap hierarki peraturan perundang-undangan dan kepastian hukum atas ketidakjelasan ketentuan khususnya Pasal 8 PP 35 tahun 2021 tentang Perjanjian Kerja Waktu Tertentu (PKWT). Penelitian ini dilakukan menggunakan metode penelitian yuridis normatif. Metode penelitian yuridis normatif diartikan sebagai sebuah metode penelitian atas aturan-aturan perundangan-undangan, baik ditinjau dari sudut hierarki perundang-undangan, yaitu UUD 1945 secara *vertikal*, maupun hubungan harmonisasi perundang-undangan secara *horizontal*. Dari hasil penelitian dapat diketahui bahwa, problem konstitusionalitas pembentukan Undang-Undang Cipta Kerja secara garis besar terkait dengan; (1) tidak terpenuhinya syarat pemuatan RUU Cipta Kerja dalam Prolegnas; (2) tidak dipedomaninya ketentuan mengenai teknik dan sistematika pembuatan undang-undang dan; (3) tidak dipenuhinya asas-asas pembentukan peraturan perundang-undangan yang baik menurut ketentuan Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan. Kata

Kata Kunci : Kepastian Hukum, Undang-undang, Cipta Kerja

A. Introduction

The Omnibus Law or Law Number 11 of 2020 Concerning Job Creation (UU Cipta Kerja) initiated by the government aims to bring in investment which has so far been hampered by regulations that are considered complicated and lengthy. For the government, investment is important in facing global economic competition. Apart from that, the Omnibus Law will also increase standards in licensing processes and fees and strengthen legal certainty for potential investors. Therefore, one of the government's strategies in providing employment is to encourage investment into Indonesia through the Job Creation Omnibus Law. The Omnibus Law on Job Creation revises 79 laws, 1,244 articles with 11 clusters, one of which is the labor cluster

The Job Creation Law was opposed by labor organizations, because they were considered to be detrimental to workers. President of the Confederation of Indonesian Trade Unions (KSPI) Saiq Iqbal, noted there were six reasons for rejection from trade unions regarding the employment cluster Job Creation Law. First, the worst impact directly felt by workers is the loss of the minimum wage. This can be seen from the government's desire to implement an hourly wage system. In other words, workers who work less than 40 hours a week, their wages will automatically be below the minimum wage. In fact, in the rules contained in Law Number 13 of 2003 concerning Manpower, it is stated that no worker may earn wages below the minimum wage. Second, the regulation regarding severance pay in Law Number 13 of 2003 will instead be abolished and replaced with a new term, namely layoff benefits, which are only 6 months' wages. Third, workers reject the term labor market flexibility (outsourcing). This term can be interpreted as the absence of job certainty and the appointment of permanent employees (PKWTT). Fourth, it is feared that the Omnibus Law will remove various strict requirements for foreign workers. Fifth, social security that has the potential to disappear due to a flexible work system. Sixth, workers also reject the discourse of abolishing sanctions for employers who do not grant hunting rights[1].

After the Job Creation Law was passed, in 2021, this law was rejected by a number of parties, such as students, labor activists, environmental activists, and others. It was felt that the process of making this law did not involve public participation and was fast, so it

[1] https://nasional.kompas.com/read/2020/01/20/13152061/mengenal_omnibus-law-aturan-sapu-jagat-yang-ditolak-buruh?, diakses pada 8 Oktober 2022.

became the basis for rejection of the law. Labor activists conducted a Formal Review of Law No. 11 of 2020 concerning Job Creation against the 1945 Constitution. In its decision, the Constitutional Court (MK) ruled that the Job Creation Law was declared conditionally unconstitutional. In their considerations, the MK Panel of Judges considered that the merging method or omnibus law in the Job Creation Law was not clear, whether this method constituted making a new law or revising it. The MK judges also considered that in its formation the Job Creation Law did not adhere to the principle of openness to the public even though it had held several meetings with several parties [2].

The spirit and aim of reform is to criticize as well as do the antithesis of the monolithic power politics of the past and then formulate a synthesis in preventing the return of power, authority, and opportunities that were misused by the powers that be, by the government, officials, or by those in power. public power and authority. The authority to regulate and make rules (regeling) is basically the domain of the legislature's authority based on the principle of sovereignty. The exclusive authority of the legislature as a representative of the sovereign people, to determine a binding regulation and limit the freedom of every individual citizen (presumption of liberty of the sovereign people)*)* [3].

In the 1945 Constitution, the first amendment, in Article 20 paragraph (1) it is stated that the authority to form laws and regulations is the DPR. Furthermore, Article 5 paragraph (1), the President has the right to submit draft laws to the DPR. Thus that, legislative power has shifted from the executive (President) to the legislature (DPR). Furthermore, Article 20 Paragraph (2) of the 1945 Constitution states that, Each draft law is discussed by the DPR and the President for mutual approval. Article 20 Paragraph (3) of the 1945 Constitution states, If the draft law does not receive mutual approval, the draft may not be submitted again at the DPR session at that time. In other words, the position of the DPR is more dominant than the President in the legislative function.

As the initial form of human beings, a sovereign state because of the mandate of the people, the state is given the mandate by the people to regulate, protect and maintain security and property. The state must always embody the general will (general will) [4]. Legislative and executive institutions are a form of crystallization of political elements as a

[2] https://nasional.kompas.com/read/2021/11/26/08002581/mk-putuskan-uu-cipta-kerja-inkonstitusional-bersyarat-apa-dampaknya, diakses pada tanggal 8 oktober 2022.

[3] Rosmery Elsye, *Modul Mata Kuliah Legislasi*, Fakultas Hukum Tata Pemerintahan Institut Pemerintahan Dalam Negeri, Jatinangor, 2019, hal. 1.

[4] Osbin Samosir, *Sistem Perwakilan Politik Di Era Modern*, UKI Press, Jakarta, 2021, hal. 19.

form of representation from citizens in determining regulations that are acceptable to most citizens, in order to lead to a better and harmonious life together..

Political institutions as representative institutions when associated with the factors of law formation, political factors have an influential variable (independent variable) on law, and law is seen as an affected variable (dependent variable) on politics. Law is an abstract rule which is a form of crystallization of interacting and competing political wills. By using the assumption that law is a product of politics, Mahfud MD made a connection between the two (politics and law). that is, law is seen as the dependent variable (affected variable) and politics is placed as an independent variable (influential variable) [5].

In a constitutional state, there are legal objectives that should and should be implemented by the state. The goal of a rule of law is legal certainty, legal justice and legal benefits. Indonesia can be said to be a rule of law country if these three objectives are realized. Ideally, the law should accommodate all three [6]. According to Utrecht, legal certainty contains two meanings, namely; first, the existence of general rules makes individuals know what actions may or may not be done and second, in the form of legal security for individuals from government authority, because with the existence of general rules, individuals can know what can be imposed or done by state to individuals [7].

Legal objectives that are close to realistic are legal certainty and legal benefits. The Positivism emphasizes legal certainty, while the Functionalists prioritize the benefits of law [8]. The legal system that applies in Indonesia is civil law. The main principle that forms the basis of the civil law legal system is that law gains binding force, because it is embodied in the form of statutory regulations and systematically arranged in certain codifications or compilations. [9].

The formation of a law product that is good and acceptable to the community, of course, must go through a process of stages and it is necessary to involve the community as citizens in the role and formation of legislation. Various legal principles have provided limitations as stipulated in Law Number 12 of 2011 concerning the Formation of

[5] Moh. Mahfud MD, *Politik Hukum Di Indonesia*, Edisi Revisi, Cetakan Ke-8, Rajawali Press, Depok, 2018, hal. 10.

[6] Oksidelfa Yanto, *Negara Hukum Kepastian, Keadilan dan Kemanfaatan Hukum dalam Sistem Peradilan Pidana Indonesia,* Pustaka Reka Cipta, Bandung, 2020, hal. 27.

[7] *Ibid*. hal. 27-28.

[8] *Ibid*. hal. 28.

[9] *Ibid*. hal. 33.

Legislation (UU PPP)[10]. In forming a statutory regulation, emphasized by Burkhard Kremes in the book H. A. Muin Fahmal [11], that in the formation of laws and regulations it must be based on the principles of the formation of laws and regulations which include; (1) arrangement of regulations (form der regelung); (2) method of forming regulations (der ausorbeitung der regelung method): (3) form and content of regulations (inhalt der regelung) and; (4) procedures and processes for forming regulations (verforen der ausarbeitung der regelung).

The development of manpower in Indonesia based on Pancasila and the 1945 Constitution, aims to create prosperity and improve the people's economy. Law Number 13 of 2003 concerning Manpower (Labor Law), has the principle of building a relationship between workers and employers and in protecting the rights and obligations between the two.

In Article 56 of the Labor Law, it is explained that a Specific Time Work Agreement (PKWT) or contract employees are divided into two types namely, first, work agreements are made for a certain time or for an unspecified time and secondly, PKWT is based on; (a) timeframe; or (b) the completion of a particular job. PKWT which is made based on the period of time, may not be made longer than 3 (three) years [12]. If the employer violates these provisions, the juridical consequences will be workers with PKWT status (contract workers), by law changing to an Unspecified Time Work Agreement (PKWTT) or permanent workers. The construction of these norms is in line with the principles of manpower development, one aspect of which is providing legal protection to workers.

The principle of manpower development was then reduced with the emergence of a new norm, namely Law Number 11 of 2020 concerning Job Creation (UU Cipta Kerja) and its implementing regulations, namely Government Regulation Number 35 of 2021 concerning Work Agreements for Specific Time, Outsourcing, Working Time and Rest Time , and Termination of Employment (PP 35/2021). The emergence of this new norm then does not explain the legal consequences if the entrepreneur violates the terms of service in the PKWT based on the time period as stated in Article 56 paragraph (2) letter a. In the end, this resulted in incomplete or unclear norms in Article 8 PP 35 of 2021

[10] Lihat Pasal 5, Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan.

[11] H. A. Muin Fahmal, *Peran Asas-Asas Umum Pemerintahan yang Layak dalam Mewujudkan Pemerintahan yang Bersih*, UII Press, Yogyakarta, 2006, hal. 62-63.

[12] Lihat Pasal 59 Ayat (1) huruf b Undang-Undang Nomor 13 Tahun 2003 tentang Ketenagakerjaan.

concerning Work Agreements for Specific Time, Outsourcing, Working Time and Rest Time, and Termination of Employment.

In this paper, the researcher wants to answer the legal problems that have been described in the introduction above, regarding how the concept of the omnibus law or the Job Creation Law relates to the hierarchy of laws and regulations and legal certainty for unclear provisions, especially Article 8 PP 35 of 2021 concerning Work Agreements for a Specific Time, Outsourcing, Working Time and Rest Time, and Termination of Employment.

B. Focus of Problems

Based on the explanation that has been stated in the introduction above, the author raises the following problem;

1. How does the concept of the omnibus law or the Job Creation Law relate to the hierarchy for the formation of laws and regulations in Indonesia?
2. How is the legal certainty regarding the implementing regulations of Article 8 PP 35 of 2021 concerning Work Agreements for Specific Time, Outsourcing, Working Time and Rest Time, and Termination of Employment?

C. Research Methodology

This research was conducted using normative juridical research methods. The normative juridical research method is defined as a research method on norms or laws and regulations both from the point of view of the hierarchy of legislation, namely the 1945 Constitution vertically, as well as the relationship of harmonization of legislation (horizontally). The legal materials in this study consist of: 1) primary legal materials, namely the 1945 Constitution, Legislation and Decisions of Judicial Institutions; 2) secondary legal materials; namely legal doctrines and legal journals; and 3) tertiary legal materials, namely materials that provide instructions and explanations of primary and secondary legal materials, for example legal dictionaries, encyclopedias, etc[13]. The object of this research is in the form of basic legal principles contained in the 1945 Constitution (vertical) and laws and regulations (horizontal) related to the object under study. Then the data or information obtained is then presented qualitatively with an analytical descriptive approach.

[13] Ishaq, *Metode Penelitian Hukum*, Alfabeta, Bandung, 2017, hal. 50.

D. Finding and Discussion

1. The scope and Definition of Job Creation

Omnibus law comes from the Latin, namely omnibus which means for all. When the word omnibus is combined with the word law, it will form a new meaning, namely law for all [14]. Literally, the word omnibus comes from the Latin omnis which means many. Paulus Aluk Fajar said, in understanding the idea of omnibus law, which relates to and deals with many objects or items at once, as written in the Black Law Dictionary Ninth Edition, Bryan A.Garner mentions omnibus, which is relating to or dealing with numerous objects or items at once; including many things or having various purposes [15].

From a legal point of view, the word omnibus is usually accompanied by the word law or bill which means a regulation made based on the results of a compilation of several rules with different substances and levels. According to Audrey O'Brien, in Paulus Aluk Fajar, an omnibus law is a draft law (bill) which includes more than one aspect which is combined into one law. Meanwhile, Barbara Sinclair, said that the omnibus bill is a process of making regulations that are complex and its completion takes a long time because it contains a lot of material even though the subjects, issues and programs are not always related.[16].

President Jokowi complained about the overlapping laws and regulations that apply in Indonesia [17]. Regarding this problem, President Jokowi proposed to make a law that would revoke and/or change several provisions of the law at once [18]. This aims to simplify regulations and avoid conflicts between laws and regulations. Based on the method of forming laws and regulations, the method of simplifying regulations mentioned by President Jokowi is called the omnibus law method.

In Article 64 paragraph 1b, Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Laws and Regulations, which was passed on June 16 2022, states, the omnibus method is a method

[14] Satjipto Raharjo, *Hukum Masyarakat dan Pembangunan*, Alumni, Bandung, 1981, hal. 29.
[15] Paulus Aluk Fajar, *Memahami Gagasan Omnibus Law***,** dalam Binus University Bussinus Law, 2019.
[16] *Ibid.*
[17] https://www.cnnindonesia.com /ekonomi/ 20171024125609-92 250596 / jokowi sebut 42 ribu aturan hambat ri ikuti perubahan global, diakses pada tanggal 1 November 2022.
[18] https://nasional.kompas.com/read/2020/10/20/06255981/setahun-jokowi-dan-pidatonya-soal-omnibus-law-ruu-cipta-kerja?page=all, diakses pada tanggal 1 November 2022.

of drafting laws and regulations with; (a) loading new content material; (b) change content material that has legal relevance and/or requirements regulated in various Legislations of the same type and hierarchy; and/or (c) revoke Legislation of the same type and hierarchy, by combining them into one Legislation to achieve certain goals.

It can be said that, omnibus law is a method or concept of making rules that combines several rules with different substance and arrangements, to several legal rules so that they are formed in one large regulation or law (many) which functions as a legal umbrella. Simply put, the omnibus law can be translated in the sense that laws and regulations can change several laws at once with the concept of preparation, regulation and content or substance in them, changing and/or repealing several provisions in several laws. This means that the Omnibus has the consequence of being able to revoke several legal regulations as a result of the results of the merger and the substance of the old regulations being declared invalid, either in part or as a whole.

The omnibus law method offers solutions to problems arising from conflicts and overlapping of norms or laws and regulations [19]. *Omnibus Law is commonly used in countries that adhere to the common law system which uses the Anglo Saxon legal system, such as the United States, United Kingdom, Belgium and Canada. The Indonesian legal system which adheres to the civil law system is one of the causes of the unknown concept of the omnibus law. The concept of the omnibus law is needed to fix overlapping laws and regulations, through a process of harmonization of laws and regulations. It is hoped that with the concept of the omnibus law, regulations deemed irrelevant or problematic can be resolved quickly*.

2. Process Forming for the Job Creation Law

In law or legislation, it is recognized that there are several theories or principles that always follow and initiate the formation of statutory regulations, and in general these theories and principles are used as a reference by the legislators. In line with this, Hans Nawiasky in his book Allgemeine Rechtslehre, argues that, a state legal norm is always layered and tiered, that is, the norm below applies, is based on, and originates from a higher norm and so on up to a norm that The highest is called the basic norm. Hans Nawiasky added that, apart from the fact that legal norms are layered and tiered,

[19] Firman Freaddy Busroh, *Konseptualitas Omnibus Law dalam Menyelesaikan Permasalahan Regulasi Pertanahan, Arena Hukum*, Vol.10, No.2, Agustus, 2017, hal. 241.

legal norms are also grouped. Nawiasky groups legal norms into 4 (four) major groups namely; (1) Staatsfundamentalnorm (state fundamental norms); (2) Staatsgrundgezets (basic state rules); (3) Formell Gezetz (formal law); (4) Verordnung and Autonome Satzung (executing rules and autonomous rules). In line with Nawiasky's theory, that in Article 7 of the PPP Law, the type and hierarchy and legal force in laws and regulations consist of: a) the 1945 Constitution of the Republic of Indonesia; b) Decree of the People's Consultative Assembly; c) Laws/Perppu; d) Government Regulations; e) Presidential Regulation; f) Provincial Regulations and; g) Regency/City Regional Regulations [20].

Meanwhile, according to I.C. van der Vlies in his book entitled Handboek Wetgeving as quoted by Backy Krisnayuda, the principles of forming good laws and regulations are divided into two groups, namely, formal principles and material principles. [21].

1. Formal principles, including; (1) the principle of clear objectives, that is, every formulation of laws and regulations must have clear objectives and benefits for what they are made; (2) the principle of the proper organ or institution, that is, each type of statutory regulation must be made by the authorized institution or organ forming the statutory regulation; said statutory regulations can be canceled or null and void, if made by an institution or organ that is not authorized; (3) the principle of urgency to make arrangements; (4) the principle can be implemented, that is, any formation of laws and regulations must be based on the calculation that the laws and regulations that are formed later can apply effectively in society, because they have received support both philosophically, juridically and sociologically since starting from the drafting stage and; (5) the principle of consensus, that any decision must be made through a process of deliberation. The method of making decisions by consensus will bind most of the components that consult in an effort to realize the effectiveness of implementing decisions.
2. While the material principles in the formation of laws and regulations, namely: (1) the principles of correct terminology and systematics, meaning that laws and regulations must be arranged in the correct systematics so that they can be understood and known well by the public who are required to obey the law; (2) the principle of recognisability, this principle emphasizes that, if laws and regulations are not recognized and known by

[20] Pasal 7 Undang-Undang Nomor 12 tahun 2012 Tentang Pembentukan Peraturan Perundang-Undangan.
[21] Backy Krisnayuda, *Pancasila dan Undang-Undang*, Kencana, Jakarta, 2017, hal. 185.

everyone, they will lose direction and purpose as regulations; (3) the principle of equal treatment in law, this principle emphasizes that every citizen has the same status before the law with no exceptions; (4) the principle of legal certainty, meaning that laws and regulations can be implemented in accordance with the principles and norms of applicable law and; (5) the principle of implementing the law in accordance with individual circumstances, this principle intends to provide a special solution for certain matters or circumstances so that laws and regulations can provide solutions for general problems as well as special problems [22].

In addition, Law Number 12 of 2011 concerning the Establishment of Legislation (UU PPP), reminds legislators to always pay attention to the principles of forming good laws and regulations and the principle of content, as stipulated in Article 5 of the PPP Law. [23], which covers:

1. The principle of clarity of purpose, that every formulation of laws and regulations must have clear objectives to be achieved;
2. The principle of proper institution or forming official, that each type of statutory regulation must be made by a state institution or authorized official forming statutory regulations. These laws and regulations can be canceled or null and void if they are made by state institutions or officials who are not authorized;
3. The principle of conformity between types, hierarchies and content material, that in the formation of laws and regulations must really pay attention to the appropriate content materials in accordance with the types and hierarchies of laws and regulations;
4. The principle can be implemented, that every formation of laws and regulations must take into account the effectiveness of these laws and regulations in society, both philosophically, sociologically, and juridically;
5. The principle of usability and effectiveness, that every statutory regulation is made because it is really needed and useful in regulating the life of society, nation and state;
6. The principle of clarity of formulation, that every law and regulation must meet the technical requirements for the preparation of laws and regulations, systematics, choice of words or terms, as well as clear and easy-to-understand legal language so as not to give rise to various kinds of interpretation in its implementation;

[22] https://zalirais.wordpress....., *Op.Cit.*

[23] Lihat Pasal 5 Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan.

7. The principle of openness, that in the formation of laws and regulations starting from planning, drafting, discussing, ratifying or stipulating, and promulgation is transparent and open[24].

The above principles serve as a basis for forming statutory regulations and as policy makers in forming statutory regulations. Therefore, all of the above principles must be "inscribed" in the policy makers who will form laws and regulations. In addition, the definition of forming laws and regulations is explained in the provisions of Article 1 point 1 of the PPP Law which reads: Formation of laws and regulations is the making of laws and regulations which includes the stages of planning, drafting, discussing, validating or stipulating, and enacting. Thus that every formation of new laws and regulations must go through the stages and mechanisms as mandated in Article 1 point 1 of the PPP Law.

3. Planning Stage

Arrangements regarding the making of laws at the planning stage are regulated in Articles 16 to 23 of the PPP Law [25]. Regarding more technical rules regarding the stages of preparing and establishing the National Legislation Program, it is regulated in the House of Representatives Regulation Number 2 of 2019 concerning Procedures for Compiling the National Legislation Program (PDPR Prolegnas). PDPR Prolegnas is a DPR Regulation that was promulgated and took effect on December 31, 2019, before finally being revoked and declared invalid by PDPR Number 2 of 2020 concerning the Formation of Laws (PDPR PUU), which was promulgated on June 26, 2020 and declared retroactive since April 2, 2020[26].

The definition of Prolegnas is as stated in the provisions of Article 1 point 9 of the PPP Law in conjunction with Article 1 point 1 PDPR Prolegnas, that is, the National Legislation Program is a planning instrument for the formation of laws that are prepared in a planned, integrated and systematic manner. Prolegnas is the priority scale of the law-making program as stated in Article 17 of the PPP Law which reads, Prolegnas as referred to in Article 16 is the priority scale of the law-making program in the context of creating a national legal system. In the elucidation of Article 17 of the PPP Law, what is meant by the national legal system is a legal system that applies in Indonesia with all its

[24] Backy Krisnayuda, *Op. Cit*, hal. 185-195.
[25] Lihat Pasal 16 s/d 23 Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan.
[26] Peraturan DPR Nomor 2 Tahun 2020 tentang Pembentukan Undang-Undang.

elements and mutually supports one another in order to anticipate and overcome problems that arise in the life of the nation, state and society based on Pancasila and 1945 Constitution[27].

In preparing the National Legislation Program, as Article 18 of the PPP Law reads, 8 (eight) reasons were determined as the basis for compiling the list of bills in the National Legislation Program, namely; 1) Orders of the 1945 Constitution; 2) Order of the Decree of the People's Consultative Assembly; 3) Other Law Orders; 4) National Development Planning System; 5) National Long Term Development Plan; 6) Medium Term Development Plan; 7) Government Work Plan and DPR Strategic Plan; and 8) Community Legal Aspirations and Needs [28].

Thus that in the plan to form a new law, it must be in accordance with and in line with the national legal system, starting from the planning stage, compiling a list of bills, there must be 8 (eight) underlying reasons, up to the determination in the National Legislation Program.

4. Preparation Stage

At the stage of drafting laws and regulations it is regulated in Article 43 to Article 51 of the PPP Law [29]. In relation to the formation at the drafting stage, there are also regulations regarding the techniques for drafting laws mentioned in Article 64 of the PPP Law. As previously described, based on the provisions of Article 5 paragraph (1) of the 1945 Constitution, the President has the authority to propose a Bill to the DPR. The bill submitted by the President to the DPR must be accompanied by an Academic Paper (NA), as stated in Article 43 paragraph (3) of the PPP Law juncto Article 2 paragraph (1) of the PDPR Bill which reads, Draft laws originating from the DPR, the President , or the DPD must be accompanied by an Academic Paper.

This means that in drafting a bill, the President is obliged to follow the techniques for drafting laws as ordered by Article 64 of the PPP Law, namely; (1) Preparation of Draft Legislation is carried out in accordance with the techniques for preparing statutory regulations. (2) Provisions regarding the techniques for drafting laws and regulations as

[27] Penjelasan Pasal 17 Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan.

[28] Pasal 18 Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan.

[29] Lihat Pasal 43-51 Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan.

referred to in paragraph (1) are listed in Appendix II which is an integral part of this law. (3) Provisions regarding changes to the technique for drafting statutory regulations as referred to in paragraph (2) are regulated by a Presidential Regulation [30]. Furthermore, the bill submitted by the President must be submitted through a Presidential Letter (Surpres) to the DPR as stipulated in Article 50 paragraph (1) of the PPP Law, namely, a bill from the President is submitted by a Presidential Letter to the leadership of the DPR.

Furthermore, arrangements regarding the dissemination stage of the National Legislation Program, Bills, and Laws are regulated in Articles 88 to Article 91 of the PPP Law. Article 88 of the PPP Law states that: (1) Dissemination is carried out by the DPR and the Government from the drafting of the National Legislation Program, the preparation of the Draft Bill, the deliberation of the Draft Bill, to the promulgation of the Act. (2) Dissemination as referred to in paragraph (1) is carried out to provide information and/or obtain input from the community and stakeholders.

One of the principles in the formation of laws and regulations is the principle of openness, which means that every formation of laws and regulations must take into account the effectiveness of these laws and regulations in society. Community involvement and participation in the process of making laws and regulations, for example, academics, activists of Community Social Institutions (NGOs) and other private parties, is a form of embodiment of community participation as citizens, so that the resulting laws and regulations will later be in accordance with national legal system and community life, which not only has effectiveness but also has efficiency. However, in the discussion of the Job Creation Bill, in fact, it was only discussed at the level of the government itself (the President and DPR). After the draft has been discussed by the government and then submitted to the DPR, then the government invites parties outside the government and submits the draft of the Job Creation Bill

5. Juridicial Basis

As previously described, at the planning stage of forming a law, there is a stipulation that determines that a Draft Law (RUU) must first be stipulated in the Prolegnas as a planning instrument for its formation (Article 1 point 9 UU PPP Jo. Article 1 point 1 PDPR Prolegnas). Whereas in the drafting of the National Legislation Program, the preparation of a list of bills was based on 8 (eight) reasons sequentially as

[30] Lihat Lampiran II Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan.

stated in Article 18 of the PPP Law Jo. Article 5 PDPR Prolegnas, namely, a list of draft laws in the mid-term Prolegnas for the previous DPR membership period and the results of monitoring and review of laws carried out by the DPR, DPD, and the Government. This reason can be interpreted as a requirement that must be met if a bill is to be enacted in the Prolegnas.

To assess whether the Job Creation Law is legal to be enacted in the 2020 National Legislation Program, therefore, the Job Creation Law must fulfill at least the eight basic reasons or requirements referred to in Article 18 of the PPP Law and the two conditions specified by Article 5 PDPR No. 2 of 2020 concerning the Formation of Laws. Therefore, according to the author, the publication of the Job Creation Bill is not included in the National Legislation Program and is not based on orders from the 1945 Constitution, not based on the Decree of the People's Consultative Assembly (TAP MPR), nor is it based on orders from other laws, nor is it based on the government's work plans and strategic plans of the DPR and the aspirations and legal needs of the community.

Thus the publication of the Job Creation Law has absolutely no foundation or basis as required by Article 18 and the provisions of Article 5 of the PPP Law concerning the principles for forming good laws and regulations, so that the formation of the Job Creation Law is horizontally contrary to the PPP Law. Furthermore, referring to the Constitutional Court Decision Number 49/PUU-IX/2011, if one law conflicts with another law, then this means that it is contrary to fair legal certainty.

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6. Legal Capacity

According to Zainal Arifin Mochtar, there are principles of constitutionality that are not only formal, but also material. According to Sherry Arnstein, as quoted by Zainal Arifin Mochtar, often in the formation of laws and regulations that occur only fulfill the formal aspects. Issues of substance, constitutional morality and others were put aside. Zainal described violations in the formation of the Job Creation Law and violations of the rules of the game in its formation. According to Zainal, the proposal for the Job Creation Law had existed long before and the omnibus method had been discussed long before. But according to Zainal, when the DPR changed Law no. 12 of 2011 in October 2019, the omnibus method is not included. Even though when there was a change in Law

No. 12 of 2011 became Law no. 15 of 2019, ideas, proposals, concepts for the Omnibus Law already exist [31]. Only in 2022 was the promulgation of Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning Formation of Legislation, which was ratified on June 16 2022, in Article 64 1b it states that the omnibus method is a method of preparing Legislation with; (a) loading new content material; (b) change content material that has legal relevance and/or requirements regulated in various Legislations of the same type and hierarchy; and/or (c) revoke Legislation of the same type and hierarchy, by combining them into one Legislation to achieve certain goals.

The problem with the constitutionality of the formation of the Job Creation Law is broadly related to: 1) the requirements for the publication of the Job Creation Bill in the National Legislation Program are not met; 2) the provisions regarding the techniques and systematics of making laws are not followed; and; 3) non-compliance with the principles of forming statutory regulations according to the provisions of the PPP Law. The constitution provides direction for how state power is exercised, bearing in mind the position of the constitution as the highest law (supreme law or fundamental law) in the state. [32].

Based on the description regarding the constitutional procedures for forming the law above, in general it shows that the Job Creation Law is formally flawed as stipulated in Article 5 of the PPP Law or procedurally flawed because it was formed in ways and procedures that deviate from the arrangements or provisions stipulated in Article 6 paragraph (1) letters i and j of the PPP Law and the 1945 Constitution Article 22A as delegates for the formation of statutory regulations.

7. Implementing Regulations With Government Regulation Number: 35 of 2021

Implementing Regulations are regulations that function as executors of laws or constitute delegated legislation as subordinate legislation. Referred to as delegated legislation, because the authority to determine it comes from the authority delegated from the law by the legislature (legislature)[33]. The principle of delegation of authority regulates in principle subject to doctrine or legal maxim or what is known as delegatus non potest delegare, which means a delegate may not sub-delegate his or her power. This

[31] https://www.mkri.id, Zainal Arifin Mochtar, *Pelanggaran dalam Pembentukan UU Cipta Kerja*, diakses tanggal 2 November 2022.

[32] Bachtiar, *Politik Hukum Konstitusi Pertanggungjawaban Konstitusional Presiden*, Suluh Media, Yogyakarta, 2018, hal. 5.

[33] Jimly Asshiddiqie, *Perihal Undang-Undang*, Konstitusi Press, Jakarta, 2006, hal. 275.

means that the official or institution that was given the delegation of authority may no longer delegate the authority to regulate it to other, lower institutions. However, in practice, sometimes, law enforcement agencies are also authorized by law to delegate authority again to lower institutions. In order to grant a sub-delegation of authority, it must be required that this matter must have been determined explicitly or explicitly in the main law (principle legislation) [34].

It can be understood that, implementing regulations are regulations that are formed on the basis of delegation or orders from the existing statutory regulations to regulate certain matters explicitly. Provisions related to the procedure for delegating authority from a higher statutory regulation to a lower statutory regulation are clearly regulated in Appendix II, Law No. 12 of 2011 concerning Formation of Legislation, in CHAPTER II (p. special matters) letter A, regarding the Delegation of Authority.

After the enactment of Government Regulation Number 35 of 2021 concerning Work Agreements for Specific Time, Outsourcing, Working Time and Rest Time, and Termination of Employment (PHK) as implementing regulations on February 2, 2021. Maria Farida Indrati said that, the enactment of a law Invitation is based on formal validity. This validity is also known as validity. The effectiveness of a statutory regulation exists if a norm is formed by a higher norm and formed by an institution that has the authorized to form [35].

Apart from requiring practicality, laws and regulations also require usability related to the effectiveness of a norm to apply in society. Laws that do not yet have implementing regulations are not fully effective. Whereas practicality and usability should go hand in hand, because usability is closely related to the benefits of formulating a law that will be a solution to the problems and legal needs of society. [36]. If it is related to the condition of the Job Creation Law after the Constitutional Court's Decision, then this condition can be said that the Job Creation Law continues to apply even though the condition of the norms is not effective effectively [37].

On the other hand, the Constitutional Court's decision on the Job Creation Law still has a multi-interpretative side because in point 7 the Constitutional Court's decision does not provide clarity on the meaning of actions/policies that are strategic in nature and

[34] *Ibid.*
[35] Maria Farida Indrati S, *Ilmu Perundang-undangan*, Kanisius, Yogyakarta, 2007, hal. 39.
[36] Tjondro Tirtamulia, *Peraturan Perundang-undangan dalam Sistem Hukum Nasional*, Universitas Surabaya, Surabaya, 2016, hal. 32-34.
[37] *Ibid.*

have broad implications. This of course will cause confusion for the government that wants to implement the Job Creation Law and society in general. There is no further explanation regarding the actual meaning in determining what is included in the action/policy that is classified as strategic and has broad impact [38]. At first glance it may seem abstract, but the real purpose of law has been codified in Indonesian laws and regulations as the basis of reference for the nation and state.

In Article 28D paragraph (1) of the 1945 Constitution (2nd amendment), it states that "Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law". This article is a form that explains the hierarchical structure of legislation as an effort to create social order and balance, by providing the right to be recognized, guaranteed protection, and legal certainty. Furthermore, in Article 28D paragraph (2), it states that "Everyone has the right to work and receive fair and proper compensation and treatment in a work relationship". This article explains that in the context of the employment relationship between workers and employers, that the objective of establishing statutory regulations and their implementing regulations can be concretized to be, that everyone has the right to seek and obtain decent work and receive fair wages, and be treated fairly in their work environment. so as to create legal certainty for the workers

8. Legal Capacity PP No. 25 in 2021

Juridically, the position of workers is free and balanced. However, in practice, the positions of employers and workers are often in an unequal state. There are several obstacles to the problem still being found, including regulatory factors, cultural factors of workers, employers or employers. Even though theoretically employers and recipients of work are equal in position, in practice they are very different, one of the main factors is the company's ability to fulfill workers' rights cannot be in harmony with the laws and regulations that regulate it..

The solution to the problem of legal vacuum and legal consequences for violating the terms of employment for PKWT based on a certain period of time (contract) is to restore the existing provisions, namely Article 59 Paragraph (7) of Law no. 13 of 2003 concerning Manpower (Labor Law), which says that if the PKWT is not in accordance with the provisions in Article 59, then for the sake of law PKWT changes to PKWTT

[38] Zainal Arifin Mochtar dalam Diskusi *Constitutional Law Society* Fakultas Hukum Universitas Gadjah Mada. *Membaca Arah Putusan Mahkamah Konstitusi dalam Uji Formil UU Cipta Kerja*, Bagaimana Selanjutnya? pada Minggu, 5 Desember 2021.

(still) [39]. With the existence of transitional provisions from PKWT to PKWTT, legally it can provide legal certainty for workers regarding their work. Also, the provisions for the transition from PKWT to PKWTT have been able to provide legal protection for workers for their work. However, with the existence of implementing regulations, namely, Article 8 PP 35/2021, which regulates PKWT, which was originally from 2 years and can then be extended for 1 year [40], in PP 35/2021 Article 8, changed to 5 years and also does not explain the legal consequences if the regulation is not implemented, as previously regulated in Article 59 paragraph (7) of the Labor Law.

Thus, the above, in the end raises quite a complicated problem, namely, when there is a violation of the terms of the PKWT working period, between the two rules, then in this case which norms/rules must be applied, so that the legal certainty of the workers becomes neglected and co-opted with the interests of entrepreneurs. As with the principle of "lex superior derogat legi inferiori", that lower regulations may not conflict with higher regulations. This principle applies to two regulations that are hierarchically unequal and contradict each other. That is, higher regulations will override lower regulations.

Furthermore, in Article 176 of the Manpower Law, it has mandated to carry out labor inspection that has competence and independence for companies to ensure the enforcement of laws and regulations governing labor matters. [41]. For this reason, the task of the labor inspectorate is to carry out the oversight functions assigned to resolve industrial relations problems, in the event of a dispute between workers and employers, in this case it is stipulated in a regulation of the Minister of Manpower.

Regarding the results of the inspection conducted by the labor inspector, the form is an inspection note. As happened in the field, when an employer commits a violation of the law against a PKWT, the inspection note does not have a positive effect on the worker, and the employer is not immediately able to carry out the decision, because the inspection note does not have an executorial nature. Decision of the Constitutional Court Number 7/PUU-XII/2014 states that in order for the inspection note to have binding legal force, workers can request ratification of the inspection note for the labor inspector to the local District Court with the following conditions: a) bipartite negotiations have been carried out but bipartite negotiations it does not reach an agreement or one of the parties

[39] Lihat Pasal 59 Undang-Undang Nomor 13 Tahun 2003 tentang Ketenagakerjaan.
[40] Lihat Pasal 59 ayat (4) Undang-Undang Nomor 13 Tahun 2003 tentang Ketenagakerjaan.
[41] Lihat Pasal 176 Undang-Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan.

refuses to negotiate, and; b) has been subject to inspection by labor inspectors based on statutory regulations.

In the opinion of the author, not all court products have executive power, except for; (1) court decisions that are final and binding; (2) deed for the sake of justice based on belief in one and only God; (3) arbitration award and; (4) agreements determined by law. This means that the Constitutional Court's decision still does not provide legal certainty for workers. Because the District Court's ratification of the labor inspector's inspection note does not include the four points above, the ratification has no executorial power and still leaves issues related to the absence of legal consequences if the employer continues to violate the terms of service for PKWT based on the term. Therefore, the most effective way to resolve the issue regarding the legal consequences of violating the PKWT terms of service based on the time period is to make provisions in laws and regulations that return the authority to resolve the case to the Industrial Relations Court, not to the District Court.

the authority to try industrial relations is returned to Law no. 2 of 2004 concerning the Settlement of Industrial Relations Disputes, as Article 1 number 17 reads, namely, the Industrial Relations Court is a special court established within the district court which has the authority to examine, hear and make decisions on industrial relations disputes. So according to the author, regarding disputes over rights between workers and employers, provisions should be made in advance regarding formal conditions that will be submitted as evidence of workers in filing a lawsuit. For example, specifying an inspection note from a labor inspector as evidence of a violation of the term limit provisions for PKWT based on the time period.

Due to the authority to adjudicate Industrial Relations Disputes (PHI) in cases related to the provisions of legal consequences for violations of the work period limit in PKWT based on the time period, the output result is in the form of a decision of the Industrial Relations Court. Because it is a decision, then the decision can be requested for execution. Thus, workers' legal certainty regarding their work is guaranteed and can provide legal protection for themselves

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E. **Conclusion and Recommendation**.

Based on the analysis that has been put forward, the researchers found that the

problem of constitutionality in the formation of the Job Creation Law is broadly related to; (1) the conditions for loading the Job Creation Bill are not fulfilled in the Prolegnas; (2) the provisions regarding the technique and systematics of making laws are not followed; and; (3) the principles of forming laws and regulations are not fulfilled according to the provisions of Law Number 12 of 2011 concerning the Formation of Legislation, because they are formed in ways and procedures that deviate from the provisions stipulated in Article 6 paragraph (1) letter i and j Law Number 12 of 2011 concerning Formation of Laws and Regulations and Article 22A of the 1945 Constitution as delegates for the formation of laws and regulations.

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The suggestions made in this research are; it is necessary to make improvements to the Job Creation Law by referring to the provisions regarding techniques and systematics and the fulfillment of the principles in the formation of laws and regulations as stipulated in the good PPP Law, as mandated in Article 22A of the 1945 Constitution as a delegate for the formation of regulations legislation. Furthermore, in order to create legal certainty for workers, it is necessary to regulate a norm that guarantees workers' rights from the arbitrariness of employers in employing PKWT (contract) workers on an ongoing basis, and providing opportunities for workers to become permanent workers (PKWTT) so that every workers can enjoy their rights as mandated in Article 28D paragraph (1) and paragraph (2) of the 1945 Constitution.

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