

The Character of Legal Products of the Job Creation Law Related to Licensing Simplification

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Abstract

Simplifying the business licensing process is one of the main focuses in Law No. 11/2020 on Job Creation to boost economic growth and attract investment. However, the implementation of this policy faces various challenges, including overlapping regulations, difficulties in implementing the OSS system, and neglect of environmental protection. This research examines the issue of licensing simplification based on Mahfud MD's political theory of law, which distinguishes between democratic political configuration and responsive legal products. The results of the study show that the Job Creation Law is more inclined towards conservative and elite legal characters, which are more concerned with the ease of investment than environmental impacts and public participation. In addition, the drafting process is considered less transparent and does not adequately involve the community, thus creating a legal product that is not responsive to the needs of the people. The simplification of licensing in the Job Creation Law needs to be improved to be in line with the principles of democracy and social justice that form the basis of the Indonesian state.

Keywords: Legal Product Character, Legal Politics, Job Creation Law.

A. Introduction

Welfare at all levels of society is the goal and aspiration of the Republic of Indonesia. The founders of the Republic of Indonesia aspired to build this country into a state of law based on the principles of democracy and social justice for the community. These thoughts have been clearly listed and contained in the preamble to the Constitution of the Republic of Indonesia which is explained, "A state that protects the entire Indonesian nation and all Indonesian bloodshed based on unity by realizing social justice for all Indonesian people; A country with people's sovereignty, that is, a country based on the people's sovereignty and representative deliberation".

Increasing the country's economic figure is a form of struggle to realize the welfare of the people. The economy has been a very complicated problem. In every general election activity, candidates for political positions compete with each other to sell their vision and mission to solve economic problems. One of them is that in the presidential candidacy in 2019, the couple Joko Widodo and Ma'ruf Amin have a mission of "Productive, Equitable and Competitive Economy". The form of realization of this mission can be seen in 2020 when the

government passed Law number 11 on Job Creation, one of which discusses the simplification of licensing.

There is an urgency to simplify this licensing process to make it easier for investors to invest in business capital or create new businesses in this country. The relationship between investment and the country's economy is very strong. The more and higher the investment that revolves around the economic wheel of a country, the higher the country's economic figure. Likewise, business actors who are trying to build a new business in a country will increase the country's economic level.

So far, the licensing process is considered very difficult for business actors. Business actors are always faced with a very complicated licensing process, starting from the number of permits that must be owned before the start of business activities. This is very influential with the fact that there is a lot of time for business actors and requires a lot of money that also needs to be spent to take care of business activity licensing. This impact is further exacerbated by the existence of corrupt behavior carried out in the licensing process. The many problems that arise at the basis of this licensing process must be solved so that the idea to make regulations or ideas to simplify the licensing process emerges.

From the introduction above and with the passage of Law number 11 of 2020 concerning Job Creation, the author chooses the topic of discussing the problematic issue of simplifying the licensing process in the Job Creation Law which is then associated with the study of Mahfud MD's theory on legal politics with the aim of knowing and determining the character of responsive or conservative legal products.

B. Research Methods

The research method used in this study is a qualitative method with an analytical descriptive approach. This approach aims to identify and analyze the characteristics of legal products contained in Law Number 11 of 2020 concerning Job Creation, especially those related to the simplification of licensing, as well as to explore the relationship between political configurations in the formation of regulations and the character of the legal products produced. This study adopts the legal political theory put forward by Mahfud MD as the basis for analysis to understand the extent to which the legal product is responsive to the needs of society or is conservative.

This type of research is normative legal research that relies on the study of relevant legal documents and theories. The primary data used in this study is the Job Creation Law itself, as well as other documents related to the preparation and implementation of the law, such as Academic Manuscripts and its implementing regulations. In addition, secondary data was obtained from literature that includes law books, scientific articles, and journals that discuss legal politics and licensing simplification. To collect data, the author uses a literature study technique, namely by examining various relevant written sources to explore the legal substance related to the simplification of licensing and the political theories of the law that are the basis of the analysis.

Data analysis was carried out using a content analysis approach, which examines the content of the Job Creation Law and compares it with Mahfud MD's legal political theory. With this approach, this study aims to evaluate the extent to which the political configuration reflected in the process of forming the law can produce legal products that are responsive to the interests of the community or are conservative. In addition, this study also assesses whether the simplification of licensing in the law can have a positive impact on society and the environment or more benefit certain parties. The validity of the data in this study is maintained through triangulation of sources, namely by comparing various literature and analysis results that are relevant to the development of legal and political practice in Indonesia. Based on the analysis conducted, this research is expected to provide a deeper understanding of the character of legal products produced by the Job Creation Law, as well as its impact on the development of the economy, environment, and Indonesian society. The results of this study will conclude whether the Job Creation Law is more responsive or conservative in responding to the needs and challenges faced by the community, as well as how licensing simplification policies can be effectively implemented to support these goals.

C. Results and Discussion

Laws and Regulations are recognized for their existence and have binding legal force. However, it is often encountered in the practice of the government making policy regulation products (*beleidregel, policy rule*) whose character is different from laws and regulations.¹ This is strengthened because the making of laws and regulations cannot be separated from the political process. It is clear that there is political interference in the process of drafting a regulation because of an interest. Therefore, legal policy began to be introduced. In its implementation, legal politics must remain guided by the goals of the state of the Republic of Indonesia and the applicable legal system as stated in the preamble to the 1945 Constitution, especially in Pancasila which gives birth to legal principles.²

The group of adherents of *the das sollen* concept who have a legal way of thinking as a basis for seeking scientific truth. In this concept, laws are made to create social order. The law must strictly regulate the social components of political activities. Without the rule of law, political activities can turn into tyrants.³ Therefore, this group sees from the perspective that the reality of law is a determining factor for the running of power. It is the law that then influences political activities.⁴

In contrast to the scientific group that adheres to *the das sein* concept which conceptualizes that law is a political product because in fact the law which is referred to as law is made by a legislative institution. In this concept, it can be concluded that law is the

¹ Muhammad Yusrizal Adi Syaputra, "Juridical Studies on the Affirmation of Laws and Regulations in Indonesia in the Perspective of Stufen Theorie," *Mercatoria Journal* 9, no. 2 (2016): 95–103.

² M D Moh Mahfud, "Building Legal Politics," *Enforcing the Constitution*, Jakarta, Rajawali Press, 2012.

³ I Rishan and F H U I I Press, *Law & Politics of Constitutional Affairs* (FH UII, 2020), <https://books.google.co.id/books?id=oRd3zgEACAAJ>.

⁴ Hans Kelsen, *Pure Theory of Law*, 5th ed. (California, United States of America: University of California Pers, 2008).

crystallization, formalization or legislation of many political wills that then compete with each other through political compromise or the domination of the greatest political power.⁵ In determining these two concepts, there is nothing to blame because the truth in this concept of science is very subjective. This is scientifically strengthened that law can be a determinant of politics, and vice versa politics is a determinant of law, so that from a methodological point of view, these two concepts are correct from their respective perspectives.

The science group adhering to *the concept of Sollen Sein* provides another view in which it is explained that law and politics have an interdeterminant relationship. When viewed from this concept, it can be blamed on the previous two concepts. Because in this concept, legal and political relations have a relationship that affects each other and there is no superior. Then came the statement made by Mochtar Kusumaatmadja, that "*politics without law is tyrannical, while law without politics is paralyzed*".

In the study of Mahfud MD's theory, two variables that affect each other emerged, namely political configuration with the character of legal products. Political configuration greatly affects the outcome of legal products later. For example, a democratic political configuration will later give birth to the character of a legal product that is zero responsive. In contrast to an authoritarian political configuration, it will later give birth to legal products that are conservative/elitist in nature (only concerned with the interests of power). Indicators of democratic political consolidation can be seen from three substances, namely:

1. Independent press
2. Strong political parties
3. Executives are neutral

A democratic political configuration then produces a responsive product character with the following indicators :

1. Transparent and Accountable Process
2. Public Participation
3. Clauses of articles are Limiting

The meaning of permission can also be interpreted as a form of dispensation or exemption from a certain prohibition.⁶ The history of permitting in Indonesia began with the regulation of environmental licensing issues which was regulated in the Hinder Ordinate (HO) which is also called the Nuisance Ordinance Stb. 1926 No. 226 with the title *Nieuwe Bepalingen motrent het Oprichten van Inrichtingen, welke Gevaar, Schade of Hinder Kan Veroorzaken* then amended and supplemented by Stb. 1927 No. 449, Stb. 1940 No. 14 and 450.⁷ Permits are currently a preventive juridical government tool that is useful as an administrative instrument to be able to control people's behavior. This permit cannot be separated from the orders and obligations that must be obeyed by the permit holder.⁸

⁵ Moh Mahfud Md, "The Politics of Law in Indonesia," *Rajagrafindo Persada, Jakarta*, 2009.

⁶ Adrian Sutedi, "Licensing Law in the Public Service Sector," 2010.

⁷ Siti Sundari Rangkuti, "Environmental Law and Environmental Policy" (Airlangga Press, Surabaya, 2005).

⁸ Nila Amania, "The Problems of the Environmental Sector Job Creation Law," *Syariati: Journal of Qur'an and Law Studies* 6, no. 02 (2020): 209–20.

The licensing process is a form of government business in environmental management and charges business actors to overcome environmental pollution caused by business activities.⁹ The definition of permits is one of the efforts to prevent environmental damage through the environmental licensing system policy.¹⁰ Environmental licensing in a broad sense is a form of preventive environmental protection and management instrument in the context of controlling environmental impacts, while in a narrow sense it is the use of environmental resources.¹¹ The government's efforts to protect the environment are carried out by administrative means, one of which is through environmental licensing must be preventive, the purpose of which is to prevent and minimize an impact on the environment.¹² Therefore, it can be concluded that the function of permits as an instrument that overcomes environmental problems caused by human activities.

The beginning of the idea of simplifying licensing in the Job Creation Law was to simplify the investment process carried out by both foreign and domestic investors. In addition, it is hoped that there will be no overlapping regulations in the licensing process and also in the post-licensing process (ongoing business). The emergence of a new OSS (Online Single Submission) system in the licensing process is a breakthrough to minimize obstacles to the implementation of business activities. However, problems arise in the implementation of the OSS system, one of which is regulations that still overlap because they have not been directly integrated with the Central Ministry system or also with Regional Institutions. This problem results in the OSS system in its implementation cannot be carried out optimally.

The implementation of risk-based business licensing as stipulated in the Copyright Law is carried out based on the determination of the risk of business activities. The next problem is the implementation of risk-based business licensing, which in this process depends on the scale of business activities, based on the assessment of the level of danger and potential level of danger. With the amendment to Article 34, it is carried out on the grounds that the classification of businesses and/or activities based on the risk of impact on the environment is carried out by the central government, taking into account input from local governments, both provincial and regency/city, as explained in the Academic Text of the Job Creation Law. Therefore, it can be concluded that small risk business licenses no longer need to manage permits due to minimal risk of natural damage.

The implementation of risk-based business licensing listed in the Job Creation Law cannot be implemented in Indonesia. This is because risk-based regulation is carried out to improve regulatory efficiency by giving priority to things that are considered high risk, in accordance with the objectives of regulation which is in accordance with the theory of risk-

⁹ Journal of Law of Riau, "The Position of Environmental Permits in the Licensing System in Indonesia," *Journal of Law of Riau* 2, no. 02 (n.d.): 9115.

¹⁰ H Rhiti and Y Sri Pudyatmoko, "Environmental Licensing Policy in the Special Region of Yogyakarta," *Mimbar Hukum - Faculty of Law, Gadjah Mada University* 28, no. 2 (2016): 263-76.

¹¹ Cahyaningrum, "Environmental Licensing System in Efforts to Develop Environmentally Friendly Infrastructure" 2 (2019).

¹² Evan Devara, Maret Priyanta, and Yulinda Adharani, "Innovation of a Risk-Based Approach in Environmental Approval Based on the Job Creation Act," *LITRA: Journal of Environmental, Spatial Planning, and Agrarian Law* 1, no. 1 (2021): 101-16.

based licensing in carrying out regulations, regulators must pay attention to the following¹³:

1. Clearly define the purpose of the regulation and can detect risks that may arise
2. Analyze acceptable and unacceptable risks (*risk appetite*)
3. Alerting to risks based on *likeness* and severity
4. Allocating natural resources according to their risk ratings

So it can be concluded that the purpose of bringing in or opening up investment as widely as possible is very contrary to the goal of environmental protection, has a different direction and is irrelevant. Because the application of the Job Creation Law in this licensing process opens up investments that can have an impact on environmental pollution without looking at environmental protection aspects. The government can only define risks after knowing that there is a regulatory purpose, if investment is the purpose of the regulation, then strict environmental rules will be considered difficult. However, if the purpose of the regulation is environmental protection, then the expected investment in a place cannot necessarily be realized. The changes made only make it easier for entrepreneurs to be given environmental approvals. This environmental permit will later be included in the permit that functions as a law enforcement enforcement.¹⁴ The management, use and utilization of natural resources must be balanced with the environment, so a comprehensive national environmental management policy is needed.¹⁵ This concept is in accordance with environmental studies that specialize in legal science, with the legal object being the level of environmental protection and management as a necessity of life.¹⁶

The theory of polyvivity risk in its application has a certain phase where it does not appear or give birth to the consequences of environmental pollution directly after the business process is carried out. But after the next few years with environmental change and climate change, it is possible to have a very severe environmental damage impact. This happens in some failures of risk-based approaches when what is considered a small risk then turns out to be large because it has never been supervised. The theory of volatile risk is a risk that can change, which was high and then became low and vice versa.¹⁷ For example, in pollution in the sewer system. The dangers posed by this pollution vary greatly depending on the season. This is in accordance with the opinion conveyed by Black and Baldwin, namely:

risk may be relatively stable with respect to either quantum of potential harm or probability of occurrence over a defined period of time, or it may be subject to change. In

¹³ Robert Baldwin, Martin Cave, and Martin Lodge, *UNDERSTANDING REGULATION 2E P: Theory, Strategy, and Practice* (Oxford university press, 2011).

¹⁴ Roni Sulistyanto Luhukay, "The Function of the Omnibus Law on Job Creation in Accelerating Economic Growth," *Journal of Meta Juridis* 3, no. 1 (2020): 38–52.

¹⁵ Satria Sukananda and Danang Adi Nugraha, "The Urgency of the Implementation of Environmental Impact Analysis (EIA) as Environmental Impact Control in Indonesia," *Journal of Law Enforcement and Justice* 1, no. 2 (2020).

¹⁶ St. Danusaputro, *Environmental Law*, 1st ed. (Bandung: Bina Cipta, 1998).

¹⁷ Explanation of Article 7 paragraph (5) letter e of the UUCK which states that "what is meant by "volatility risk" is a risk that has a tendency to be volatile." The term should be "volatile" not "volatility"

the case of water pollution, for instance, the level of a potential harm may vary with climatic conditions or water levels. Alternatively, the managerial team that controls a risk may be liable to change, altering the probability of harm occurring, and constituting a matter of key concern for “net” risk assessments.¹⁸

The Job Creation Law cannot detect and overcome problems that are likely to arise. The Job Creation Law only focuses on opening up the largest investment without thinking about the impact that occurs in the future. The Job Creation Act also does not address volatile risk assessments in detail. Details regarding the assessment and preparation of volatile risk ratings will be carried out through Government Regulation (PP).¹⁹ The Academic Paper also does not discuss in detail the types of risks that are easily changed. If the assessment and preparation of risk ratings are contained in the PP, it is necessary to change it/amend the PP. Such a mechanism actually makes changing the type of volatile risk rigid because PP is classified as a law and regulation that is difficult to change. In addition, it can endanger the public interest if there is a risk that shifts from low to high.

The problem of socializing community involvement in the process of risk-based adultery impact study and environmental feasibility decisions is not carried out as it should. Which in public announcements is carried out by electronic media or other means set by the government. This is then felt to make it difficult for the public to reach information so that it has an impact on the lack of public understanding to know the risks and impacts of business activities later. Community involvement in the decision-making process of whether or not a business/partnership is environmentally feasible is important for several reasons, including:²⁰

1. means so that the decision products made are decisions that receive support from the community so as to facilitate the process of supervising compliance and law enforcement
2. to become a means of political education so that the community feels belonging, to foster a sense of moral responsibility for the impact and potential impact of development-related decisions for the present and future generations
3. means of deepening policymakers' understanding of the actual problems that grow in society.

The responsibility for handling environmental management lies with the government, which means that in this case it is not passed on to individual citizens or becomes civil law. The responsibility for environmental management lies with the government, which has an impact on the institution and is the authority of the government to manage the environment

¹⁸ Julia Black and Robert Baldwin, “When Risk-based Regulation Aims Low: Approaches and Challenges,” *Regulation & Governance* 6, no. 1 (2012): 2–22.

¹⁹ Article 13 of the UUCK reads: “Further provisions for risk-based Business Licensing as referred to in Article 7, Article 8, Article 9, and Article 10, as well as supervision procedures as referred to in Article 11 are regulated in Government Regulations.”

²⁰ Environmental Law and Policy in the Process of Accelerating Investment: Notes on the Discourse of the Omnibus Law on Job Creation.

which is part of the administrative law.²¹ The simplification of licensing is in the Job Creation Law which influences, amends and deletes several articles of licensing provisions in Law No. 32 of 2009 concerning Environmental Management Protection. Part of the article that made it, the feasibility test of community business licensing is very limited and is felt to be less concerned about the environment. The community can no longer file objections, supervise and evaluate business activities because there is no longer community participation given. This is not in accordance with Suparto Wijoyo's opinion, that the relationship with integrated environmental licensing should be in accordance with the principles of administrative procedures for environmental licensing according to "good environmental governance".²² This is considered not in line with the spirit of democracy which places society (civil society) on the pillar of democracy.

D. Conclusions and Recommendations

Observing the above discussion, it can be concluded that the character of legal products in the Job Creation Law related to the Simplification of Licensing includes Conservative and Elitish. Simplification of licensing only focuses on investment which is opened as widely as possible which then only benefits or enriches certain parties without giving importance to the impact on the environment and society. In the process of drafting this Licensing Simplification is also considered very hasty and undemocratic which does not pay attention to public partition or community participation. So that the legal products produced are far from responsive characters.

²¹ Muhammad Hadin Muhjad, *Environmental Law An Introduction to the Indonesian Context*, 2015.

²² Suparto Wijoyo, *Environmental Dispute Resolution* (Airlangga University Press, 1999).

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