

**De Jure: Jurnal Hukum dan Syar'iah**

Vol. 14, No. 1, 2022, h. 179-194

ISSN (Print): 2085-1618, ISSN (Online): 2528-1658

DOI: <http://dx.doi.org/10.18860/j-fsh.v14i1.15757>

Available online at <http://ejournal.uin-malang.ac.id/index.php/syariah>

## **The Implementation of Omnibus Law in Indonesia Law Making Process on Philosophy Review**

**Putu Eva Ditayani Antari**

Universitas Pendidikan Nasional

[evaditayaniantari@undiknas.ac.id](mailto:evaditayaniantari@undiknas.ac.id)

### **Abstract:**

The omnibus law is a method of law-making in Indonesia that began to be applied when the creation of the Job Creation Act was established. The adaptation of this method is controversial because in addition to aiming to simplify Indonesian regulations, it also violates the provisions of the formation of laws regulated in the law. The implementation of this omnibus law is the focus of research studies that lead to discourses based on schools of legal philosophy, especially the Positivism and Legal Realism study which lead to contradictory conclusions. In order to answer this question, a juridical literature research will be carried out based on an understanding of the various schools of law based on philosophy, using primary legal materials and secondary legal materials. The results of the study conclude that legal positivism requires omnibus law to be stipulated in law as a method of law formation before it is implemented, so that it can provide legitimacy to its position in Indonesian legislation. Meanwhile, legal realism views that the presence of omnibus law is the will of the community and must be responded to in a responsive manner to overcome the excess regulations that occur in Indonesia and tend to overlap. Thus, it can be seen the urgency of the need for an omnibus law in the formation of legislation in Indonesia as the basis for legalizing its regulation in law.

**Keywords:** omnibus law; philosophy of law; statute.

### **Abstrak:**

Omnibus law merupakan metode pembentukan undang-undang di Indonesia yang mulai diterapkan saat pembentukan Undang-Undang Cipta Kerja. Adaptasi metode ini mengalami polemik karena selain bertujuan menyederhanakan regulasi Indonesia, naum menyalahi ketentuan pembentukan undang-undang yang diatur dalam undang-undang. Implementasi omnibus law ini merupakan fokus kajian penelitian yang mengarahkan pada diskursus berdasarkan aliran-aliran

filosof hukum, khususnya aliran Positivisme dan Realisme Hukum yang mengarahkan pada kesimpulan yang bertolak belakang. Guna menjawab hal tersebut akan dilakukan penelitian secara yuridis kepustakaan berdasarkan pemahaman mengenai ragam aliran hukum berdasarkan filsafat, dengan menggunakan bahan hukum primer dan bahan hukum sekunder. Hasil kajian menyimpulkan positivisme hukum menghendaki omnibus law ditetapkan dalam undang-undang sebagai metode pembentukan undang-undang sebelum diimplementasikan, sehingga dapat memberikan legitimasi kedudukannya dalam perundang-undangan Indonesia. Sementara realisme hukum memandang bahwa kehadiran omnibus law sebagai kehendak masyarakat dan harus ditanggapi secara responsive untuk mengatasi kelebihan regulasi yang terjadi di Indonesia dan cenderung saling tumpang tindih. Dengan demikian dapat diketahui urgensi perlunya omnibus law dalam pembentukan perundang-undangan di Indonesia sebagai dasar legalisasi pengaturannya dalam undang-undang.

**Kata Kunci:** filsafat hukum; omnibus law; undang-undang.

### Introduction

The existence of law in a country is like a necessity, both written and unwritten. Law cannot be separated from the history of a country, because it has been present since the country was formed. Moreover, since the presence of the rule of law, which bases the highest power on a rule of law. The law is seen as a guideline in order to limit the power of the rulers, while at the same time providing protection of human rights for citizens. So that the law is seen as the main means to prevent arbitrary actions from state authorities to their citizens.<sup>1</sup> The teaching of the rule of law requires that what must be made commander in the dynamics of state life is law, not politics or economics. Therefore, the term commonly used in the UK and countries that follow the Common Law legal system to refer to the rule of law principle is "the rule of law, not of man".<sup>2</sup> Law is placed as the highest reference or benchmark in the administration of the state and its government, which is in accordance with the rule of law which places law as a source of sovereignty.

The teaching of the rule of law based on the legal system that developed it is divided into the type of rule of law "Rechtstaat and Rule of Law", where each has its own development history. Conceptually the difference between Rechtstaat and the Rule of Law is that the concept of Rechtstaat was born from a struggle against absolutism, so that it has a revolutionary character. While the Rule of Law was born from jurisprudence and its development is evolutionary.<sup>3</sup> The existence of law in the state was finally realized not only as a rule of rulers, but also regulates every activity of citizens. Therefore, the law always experiences development and renewal that

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<sup>1</sup> N. Kritz, "The Rule of Law in Conflict Management?," in *Leashing the Dogs of War: Conflict Management in a Divided World* (Washington DC: United States Institute for Peace, 2007).

<sup>2</sup> Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia," Jimly.com, 2011, diakses 23 Desember 2021, [http://jimly.com/makalah/namafile/57/Konsep\\_Negara\\_Hukum\\_Indonesia.pdf](http://jimly.com/makalah/namafile/57/Konsep_Negara_Hukum_Indonesia.pdf).

<sup>3</sup> I Dewa Gede Atmadja, *Hukum Konstitusi Problematika Konstitusi Indonesia Sesudah Perubahan UUD 1945* (Malang: Setara Press, 2010), 34.

adapts to the needs of the community (responsive law) undergoes a process of law formation.

One of the laws formed to regulate the behavior of citizens is through a law, the formation of which is the authority of the DPR, and its ratification requires the joint approval of the president. Usually, the law formed by the DPR will only regulate one substantial thing. However, in early 2020, the concept of the formation of Indonesian law began to apply the omnibus law in Law Number 11 of 2020 concerning Job Creation (Law on Job Creation), which subsequently became the pros and cons in society regarding the compliance of the omnibus law with the Indonesian legal system. Although the implementation of the omnibus law is opposed and seems to be declared illegal in the Constitutional Court's decision, the government has again formed a law based on the omnibus law method such as Law Number 7 of 2021 concerning Harmonization of Tax Regulations and Law Number 3 of 2022 concerning Mothers. State City. Moreover, with the enactment of Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Legislation which seems to be a decision for lawmakers to maintain this method and provide legalization.

Omnibus law is a new method of law formation in Indonesia, but has been known for a long time in other countries. Glen S. Krutz, Hitching provides an overview of the application of this omnibus law in the preparation of regulations, which has been practiced since 1970. Omnibus Law is the practice of drafting laws and regulations that are mostly carried out in countries that adhere to the Anglo Saxon system or the common law system such as America, Canada, and the Philippines.<sup>4</sup> Although it has been implemented, the concept of omnibus law itself has not been regulated in Law Number 12 of 2011 concerning the Formation of Legislations (abbreviated as Law Formation of Legislation). Omnibus law grammatically means the rule of law relating to various objects at once, including many things, each of which has various purposes. So the omnibus law is also called the law for all.<sup>5</sup> One example is the Job Creation Law which was recently passed in the plenary session of the DPR, where the law is divided into 11 (eleven) discussion clusters, namely simplification of licensing, investment requirements, employment, convenience, empowerment and protection of MSMEs, convenience business, research and innovation support, government administration, imposition of sanctions, land acquisition, government investment and projects, and economic zones.<sup>6</sup> Seeing the wide scope of regulation of the Job Creation Act, a total of 81 (eighty one) other laws are affected.<sup>7</sup> One of them is Law Number 13 of 2003 concerning Manpower (abbreviated as the Manpower Act) which is affected by the regulation of the labor cluster and becomes a polemic of groups of workers or laborers.

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<sup>4</sup> Ditta Chandra Putri Ahmad Ulil Aedi, Sakti Lazuardi, "Architecture of the Application of Omnibus Law Through National Legal Transplantation Formation of Law," *Jurnal Ilmiah Kebijaksanaan Hukum* 14, no. 1 (2020): 12.

<sup>5</sup> Firman Freaddy Busroh, "Konseptualisasi Omnibus Law Dalam Menyelesaikan Permasalahan Regulasi Pertanahan," *Arena Hukum* 10, no. 2 (2017): 27, <https://doi.org/10.21776/ub.arenahukum.2017.01002.4>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Dewi Nurita, "UU Terdampak Omnibus Law Cipta Lapangan Kerja Bertambah Jadi 81," *Tempo.Co*, 2020, diakses pada 20 Desember 2021, <https://nasional.tempo.co/read/1299382/uu-terdampak-omnibus-law-cipta-lapangan-kerja-bertambah-jadi-81/full&view=ok>.

The support for the idea of omnibus law as a mechanism for the formation of laws by laying the argument that omnibus law can facilitate the process of harmonization of laws and regulations in Indonesia. This will minimize conflicts between existing laws and regulations. Meanwhile, for those who refuse, say that the omnibus law is contrary to the principles of democracy, because the concept of Omnibus Law is considered by some to be anti-democratic.<sup>8</sup> This was also conveyed by Fajar Kurniawan who stated that the work on the Job Creation Act was carried out with a deadline of only 100 days. In addition, the drafting process does not involve many parties, so it is called anti-democratic.<sup>9</sup> Moreover, it is related to the mistakes in the formation of the omnibus law for the first time in Indonesia, including the hasty process of its formation which resulted in errors in the law, such as: 1) Article 6 Chapter III concerning Improvement of the Investment Ecosystem and Business Activities is odd because it refers to Article 5 paragraph (1), even though there are no paragraphs at all in Article 5; and 2) Article 151 in Chapter IX of the Economic Zone which refers to Article 141 letter b, but that article is not in the text of the law.

In order to find answers to the discourse on the implementation of omnibus law in the formation of laws in Indonesia, it is considered relevant to carry out studies related to understanding omnibus law as a new method in the formation of laws in Indonesia. The implementation of omnibus law as an adoption of a law-making method will also be described in the philosophical thought of legal positivism and legal realism, which describes the contradictions of the paradigms of each of these schools. Based on the background description that has been described in the background section, it can be stated that the first problem formulation regarding the nature of the formation of laws using the omnibus law means. After that, the discussion will continue on the application of omnibus law as a means of forming laws in Indonesia based on the perspective of positivism and legal realism.

Research on omnibus law has been a very interesting topic to discuss since the 2019 period, such as the article written by Ahmad Ulil Aedi, Sakti Lazuardi, and Ditta Chandra Putri which describes the application of omnibus law as a transplant of national law in the formation of laws. In addition, there is also a review of the urgency of implementing the omnibus law in order to accelerate regulatory reform which is studied from a progressive legal perspective. This article was written by Eko Noer Kristiyanto who concluded that the implementation of the omnibus law is very applicable in Indonesia as long as public participation is considered in its formulation. This is because the omnibus law does not conflict with the law and is in accordance with the needs of the community, and is in accordance with the concept of progressive law.

Although these two articles have the main object of research regarding the implementation of omnibus law in Indonesia, they have a different paradigm from the author's description in this study that focus on philosophical perspective. In this article, a study on the application of omnibus law in the formation of laws is based on 2 (two) major conflicting teachings of legal philosophy, namely the legal positivism school and the legal realism school. So this article focuses on philosophical studies on omnibus law in Indonesia to arrive at the idea of perfecting regulations in

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<sup>8</sup> Busroh, *Op. Cit.*, 32.

<sup>9</sup> F Kurniawan, "Problematika Pembentukan RUU Cipta Kerja Dengan Konsep Omnibus Law Pada Kluster Ketenagakerjaan Pasal 89 Angka 45 Tentang Pemberian Pesangon Kepada Pekerja Yang Di PHK," *Jurnal Panorama Hukum* 5, no. 1 (2020): 64.

the implementation of omnibus law. This research is a normative legal research or often referred to as doctrinal legal research. It is called so because this study examines legal policies or legislation based on theoretical studies, but does not discuss their implementation. This study discusses the implementation of omnibus law in the formation of laws in Indonesia by using doctrines related to popular legal philosophy schools which contradict each other. Soetandyo Wigyosubroto said that normative legal research is research on law that is conceptualized and developed on the basis of the doctrine adopted by the author or developer.<sup>10</sup>

In order to find the views of philosophical schools and conceptions of omnibus law as a means of forming legislation, 3 (three) types of legal materials are used, namely primary legal materials, secondary legal materials, and tertiary legal materials. The primary legal material used is Law No. 12 of 2011 concerning the Establishment of Legislations as amended by Law No. 15 of 2019 and Law No. 13 of 2022 concerning Amendments to Law No. 12 of 2011 concerning the Establishment of Legislations. While the secondary legal materials used are sourced from books and scientific journal articles that study omnibus law. Finally, tertiary legal materials are articles in print and electronic media that contain discussions on omnibus law. All of these materials were collected using the Mendeley reference application and presented in footnote citations to this study. The legal materials further show that there are different views regarding the application of omnibus law in Indonesian law. In order to guarantee the validity of the legal materials used, the authors only use legal materials sourced from books or legal journals, both printed and online, which discuss omnibus law.

The discourse on omnibus law from various legal materials is the author's guide to conclude the author's final paradigm of law formation using the omnibus law system. Through these legal materials, this research problem is presented with a qualitative juridical analysis method. According to Soerjono Soekanto as quoted by Kamil Ardiansyah, qualitative analysis techniques are by examining theoretical matters concerning legal principles, legal conceptions, law, with views and doctrines of regulations and legal systems using secondary data, including: principles, the rules, norms and rules of law contained in laws and regulations and other regulations, by studying books, laws and regulations and other documents closely related to research.<sup>11</sup>

## **Result and Discussion**

### **Variety of Legislations and the Law Making Process in Indonesia**

Legislation is a word used to describe every regulation in the country as a result of the legislative process, both at the central and regional levels. But apart from that in the *Juridisch Woordenboek*, legislation can also be interpreted as the process of forming or forming regulations within the state, both at the central and regional levels.<sup>12</sup> Meanwhile, Bagir Manan defines legislation into 4 (four) distinctive characteristics, namely: 1) Legislation is any written decision made by an authorized

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<sup>10</sup> Jonaedi Efendi and Johnny Ibrahim, *Metode Penelitian Hukum (Normatif Dan Empiris)* (Jakarta: Prenada Media, 2016), 87.

<sup>11</sup> Mohammad Kamil Ardiansyah, "Legal Reform by The Supreme Court of Indonesia Facing the Legal Vacuum in Civil Procedure Law," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 92.

<sup>12</sup> Maria Farida Indrati Soeprapto, *Ilmu Perundang-Undangan 1 : Jenis, Fungsi Dan Materi Muatan*, Edisi Revi (Yogyakarta: PT. Kanisius, 2020), 127.

official or institution, which contains generally applicable rules of conduct; 2) Legislation are rules of conduct that contain provisions regarding rights, obligations, functions, status, or an order; 3) Legislation is a regulation that has general-abstract characteristics or vice versa-abstract-general, in the sense that it does not regulate or is not intended for a certain object, event or concrete phenomenon; and 4) Legislation in the Dutch literature is commonly referred to as *wet in materiele zin*.<sup>13</sup>

Meanwhile, Attamimi stated that legislation in a more specific sense is the whole regulation that relates to the law and originates from legislative power. Therefore, the laws and regulations are certain in nature and limited in type as long as they are formed based on the attribution authority or delegation authority regulated in the law.<sup>14</sup> Indonesia as a country that inherits the Civil Law legal system, has various types of laws and regulations from the central to the regional levels. However, in the provisions of Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislative Regulations (abbreviated as Laws and Regulations) there are at least 7 (seven) types of laws and regulations whose position is tiered as follows: 1) The 1945 Constitution of the Republic of Indonesia (UUDNRI 1945); 2) Decree of the People's Consultative Assembly (TAP MPR); 3) Law (UU)/Government Regulation in Lieu of Law (PERPPU); 4) Government Regulation (PP); 5) Presidential Regulation (PERPRES); 5) Provincial Regulations (PROVINCE PERDA); and 6) Regency/Municipal Regulations (REGENCY/CITY PERDA)

In addition to the types of legislation mentioned above, there are also other types of legislation as regulated in Article 8 paragraph (1) and paragraph (2) of the Legislative Law established by state institutions, including the People's Consultative Assembly, the People's Consultative Council, People's Representatives, Regional Representatives Council, Supreme Court, Constitutional Court, Supreme Audit Agency, Judicial Commission, Bank Indonesia, Ministers, bodies, institutions, or commissions of the same level established by law or by the Government by order of Law, the House of Representatives Provincial Region, Governor, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or equivalent. Such legislation has binding legal force as long as it is ordered by higher legislation or is formed based on authority. However, it is not determined about the position of the legislation in the hierarchy of legislation in Indonesia.

The existence of provisions regarding the hierarchy of legislation is a form of implementation of the theory of level norms which is termed *Stufenbautheorie* by Hans Kelsen and refined by Hans Nawiasky. The view on the hierarchy of legal norms was actually coined by Hans Kelsen who stated that norms were tiered in layers in a hierarchical arrangement. A legal norm below will apply and originate, and is based on a higher legal norm. On the other hand, higher legal norms are also sourced and based on higher norms and so on until they stop at a highest norm called the Basic Norm (*Grundnorm*) which cannot be traced further.<sup>15</sup> This is concluded by Hans Kelsen based on the view of Adolf Merkel who stated the concept of two faces

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<sup>13</sup> Ibid, 130.

<sup>14</sup> Enny Nurbaningsih, "Hirarkhi Baru Peraturan Perundang-Undangan.Pdf," *Mimbar Hukum* X, no. 48 (2004): 29.

<sup>15</sup> Aziz Syamsudin, *Proses Dan Teknik Penyusunan Undang-Undang*, Cetakan Pe (Jakarta: PT. Sinar Grafika, 2011), 63.

of legal norms (*das Doppelte Rechtsantlitz*),<sup>16</sup> where the law will always be the source of law for the legal norms below it and will always refer to the legal norms above it.

The law is one type of legislation that is strictly regulated in the hierarchy of legislation, which is formed by the DPR with the joint approval of the President. The DPR is a people's representative institution that comes from political parties, which are elected by the people through elections that carry out legislative functions and are manifested as the authority to form laws.<sup>17</sup> The DPR's authority in the formation of laws and regulations is the initiation of the Draft Law (legislative initiation), discussing the bill (law making process), and ratifying the bill (law enactment approval).<sup>18</sup> The law contains further regulatory material from the provisions in the 1945 Constitution of the Republic of Indonesia or is other provisions not previously regulated in the 1945 Constitution of the Republic of Indonesia.

The formation of laws has a privilege compared to other laws at the central level because they can contain criminal sanctions and involve cooperation between the DPR and the President in their preparation, which are often called checks and balances. According to Sunarto, the principle of checks and balances was initially applied in the United States by combining the separation of powers and the principle of checks and balances. Separate state power through the principle of checks and balances will allow for a mechanism to monitor each other so as to create a balance between these separate areas of power.<sup>19</sup> Jimly Asshiddiqie conveyed that the principle of checks and balances is a constitutional principle which requires that the legislative, executive, and judicial powers are equal and mutually control each other. State power can be regulated, restricted, and even controlled as well as possible so that abuse of power by state officials or individuals holding positions in state institutions can be prevented and overcome.<sup>20</sup> Furthermore, the mechanism of checks and balances in a democracy is a natural thing, even very necessary. This is to avoid the abuse of power by a person or an institution, or also to avoid the concentration of power on a person or an institution, because with a mechanism like this, one institution will control or supervise each other, and can even complement each other.<sup>21</sup>

### **Implementation of the Omnibus Law as a Means of Forming Laws**

The formation of laws as described earlier is something that the DPR has always carried out as its attributive authority. Where in the formation of laws, the DPR requires joint approval with the president to ratify the draft law as law. However, it becomes a polemic in the community when the idea arises to carry out law formation by applying the omnibus law method. This method was chosen because historically and philosophically, policy makers in this country do not want to be held hostage by various regulations. The various rules that are made seem to

<sup>16</sup> Mardian Wibowo, "Problem Penemuan Kebenaran Dalam Putusan Mahkamah Konstitusi The Problems of Truth Discovery in Constitutional Court Decision," *Jurnal Konstitusi* 13, no. 1 (2016): 73.

<sup>17</sup> Putu Eva Ditayani Antari, "Implementasi Fugsi Pengawasan Dewan Perwakilan Rakyat Dalam Upaya Memperkuat Sistem Presidensial Di Indonesia," *Refleksi Hukum* 4, no. 2 (2020): 247.

<sup>18</sup> Risdiana Izzaty, "Urgensi Ketentuan Carry-Over dalam Pembentukan Undnag-Undang di Indonesia (The Urgency of Carry-Over Provision in Law-Making in Indonesia)," *Jurnal HAM* 11, no. 1 (2020): 91.

<sup>19</sup> Sunarto, "Prinsip Checks and Balances Dalam Sistem Ketatanegaraan Indonesia," *Masalah-Masalah Hukum* 45, no. 2 (2016): 157.

<sup>20</sup> Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia* (Jakarta: Sinar Grafika, 2010), 86.

<sup>21</sup> Affan Gahar, *Politik Indonesia: Transisi Menuju Demokrasi* (Yogyakarta: Pustaka Pelajar, 2006), 67.

hinder many good things instead of making it easier and useful for life. Therefore, it is necessary to make a breakthrough and maneuver against the law itself, but of course it must still be carried out through constitutional means.<sup>22</sup>

This is of course a new thing and a breakthrough in the formation of laws in Indonesia, giving rise to various pro and contra views regarding the implementation of the omnibus law. The discussion on the omnibus law itself can be studied from 3 (three) perspectives, namely:<sup>23</sup> 1) in relation to its implementation, omnibus law is a concept for the formation of legislation that is not yet popular in Indonesia; 3) with regard to methods, omnibus law is a mechanism used to revoke and/or replace several legal materials scattered in various laws; and 4) With regard to consequences, the omnibus law does not result in the existing law being invalidated only for the amended articles, unless the replaced article is the essence of the law as a whole.

The omnibus law is projected as a law that regulates thoroughly and has power over other rules. The Indonesian legal system only recognizes general law and special law in legislation, and when applied with omnibus law it will lead to its classification as general law. Thus the position of the omnibus law will be weak because it is subject to the principle of preference "lex specialis derogate legi generalis" (special laws will override general laws). So, if the omnibus law contradicts the rules contained in the special law, then the omnibus law will be set aside. Indonesia as a state of law that recognizes the existence of a hierarchy of legal norms, must attach importance to the hierarchy of legislation in the formation of legislation, especially the constitution as the highest law. In the formation of laws and regulations in Indonesia, the following points must be guided: First is the nation's ideology, namely the ideal of Indonesian law, which is none other than Pancasila. The second is the State Fundamental Norms which are none other than Pancasila. The third is the principles of the state based on law and the principles of government based on the constitution.<sup>24</sup>

Pancasila, based on the theory of level norms (stufenbautheorie) proposed by Hans Kelsen, is referred to as staats fundamentalnorm (basic norms/fundamental state) which is the highest legal norm in the hierarchy of laws and regulations. Pancasila is also known as legal ideals (rechtsidee), namely ideas, feelings, creations, thoughts regarding the formation of state law.<sup>25</sup> Thus, the values of Pancasila are the source and basic guidelines for the enforcement of the 1945 Constitution of the Republic of Indonesia and other laws and regulations. In addition to being guided by the values of Pancasila, the formation of laws must also be in accordance with the 1945 Constitution of the Republic of Indonesia which contains the values of Pancasila. Every law that is deemed to be in conflict with the 1945 Constitution of the Republic of Indonesia can be petitioned for review, both formal and material, to the Constitutional Court, which has the function of guarding the constitution so that it is implemented, understood and interpreted accordingly.

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<sup>22</sup> Eko Noer Kristiyanto, "Urgensi Omnibus Law Dalam Percepatan Reformasi Regulasi Dalam Perspektif Hukum Progresif," *Jurnal Penelitian Hukum De Jure* 20, no. 2 (2020): 45.

<sup>23</sup> Muhammad Insa Ansari, "Omnibus Law Untuk Menata Regulasi Penanaman Modal," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 9, no. 1 (2020): 71.

<sup>24</sup> Ferry Irawan Febriansyah, "Konsep Pembentukan Peraturan Perundang-Undangan Di Indonesia," *Perspektif* 21, no. 3 (2016): 32.

<sup>25</sup> Maria Farida Indrati Soeprapto, *Ilmu Perundang-Undangan (Proses Dan Teknik Pembentukannya)* (Jakarta: Kanisius, 2020), 43.



In addition to complying with Pancasila and the 1945 Constitution of the Republic of Indonesia, the formation of laws is also obliged to comply with the principles of the formation of laws and regulations. Principles are the basis or foundation in determining attitudes and behavior, so that the principles of the formation of laws and regulations are the basis for the formation of laws and regulations and policy makers in forming laws and regulations.<sup>26</sup> I.C. Van Der Vlies and A. Hamid S. Attamimi are divided into 2 (two) classifications, namely formal principles and material principles. Formal principles include:<sup>27</sup> 1) the principle of clear goals or *beginsel van duidelijke doelstelling*; 2) the principle of the right organ/institution or *beginsel van het juiste organ*; 3) the principle of the need for regulation or *het noodzakelijkheids beginsel*; 4) the principle of can be implemented or *het beginsel van uitvoerbaarheid*; 5) the principle of consensus or *het beginsel van consensus*.

Meanwhile, material principles include: 1) the principle of correct terminology and systematics or *het beginsel van duidelijke terminologi en duidelijke systematiek*; 2) the principle of being recognizable or *het beginsel van de kenbaarheid*; 3) the principle of equal treatment in law or *het rechtsgelijkheidsbeginsel*; 4) the principle of legal certainty or *het rechtszekerheids beginsel*; 5) the principle of implementing the law according to individual circumstances or *het beginsel van de individuele rechtbedeling*. Meanwhile Hasymzoem Yusnani et al., stated that there are several legal principles that must be considered and guided in forming legislation. The guidelines were obtained based on the general principles of law, namely:<sup>28</sup> 1) *lex superior derogate legi inferiori*, namely laws and regulations which are at a higher level in the hierarchy of legal norms whose validity takes precedence over legislation having a position below them; 2) *lex specialis derogate legi generalis*, meaning that a special law will be enacted first when compared to general legislation; 3) *lex posterior derogate legi inferiori*, ie the new laws and regulations will take effect before the previously stipulated laws and regulations; 4) *lex neminem cogit ad impossibilia*, meaning that laws and regulations may not force someone to do things that are impossible to implement. This principle is often referred to as the principle of propriety; 5) *lex perfecta*, namely the statutory regulations not only contain the prohibition of an action, but also state that the prohibited action is null and void; and 5) non-retroactive, that the laws and regulations cannot be applied to events that occurred previously (retroactively) solely with the consideration of legal certainty.

Meanwhile, in the Legislation Law, which is a rule of law on the mechanism of forming legislation (including laws), there are also provisions on the basis for the formation of laws in Article 5 and Article 6 of the Legislation. The principles of the establishment of good legislation as stated in Article 5 of the Legislation are: a) clarity of purpose; b) the right institutional or shaping office; c) compatibility between types, hierarchies, and cargo materials; d) feasible; f) usability and productivity; g) clarity of formulation; and h) openness. Furthermore, in Article 6 of the Legislation, it is also mentioned that the content of the legislation prepared should follow the ten principles, namely protection, humanity, nationality, family, sovereignty, diversity, justice, equality of position in law and government, order and certainty, balance,

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<sup>26</sup> Irawan Febriansyah, *Op. Cit.*, 33"

<sup>27</sup> Irawan Febriansyah, *Loc. Cit.*

<sup>28</sup> Hasymzoem Yusnani et al., *Hukum Pemerintahan Daerah* (Jakarta: Rajawali Press, 2017), 74.

compatibility, and coherence. This aims not to eliminate the characteristics of Indonesian law with Pancasila as the legal ideal (*recht idee*) of Indonesia.

### **Paradigm of Positivism and Legal Realism on the Implementation of Omnibus Law in the Formation of Laws in Indonesia**

Omnibus law is a law that applies to everything that is developed and widely applied in the formation of law by countries that adhere to the common law system. However, the omnibus law was chosen as a new breakthrough in the formation of laws in Indonesia which was discussed from the perspective of legal philosophy. The establishment of an omnibus law through the establishment of the Job Creation Law, contains at least 11 topics/clusters.<sup>29</sup> As a result, there are 81 (eighty one) laws that are affected by the presence of these laws.<sup>30</sup> For those who support the omnibus law, it is believed that this will be able to overcome all forms of regulatory obstacles that are being experienced in Indonesia, as emphasized by President Joko Widodo. In addition, the omnibus law can also simplify regulations so that it is able to bypass and reduce the number of laws in Indonesia.<sup>31</sup> In fact, Gilang Ramadhan responded to this reason by saying that it is solely for the purpose of simplification that the formation of an omnibus law as a solution is pragmatic (practical).<sup>32</sup>

Meanwhile, Maria Farida said that the omnibus law was a method of law formation that became popular in Indonesia at the end of 2019. Previously, this omnibus law had never been discussed, discussed, and implemented in the formation of law in Indonesia. This is due to the difference between the civil law system implemented in Indonesia and the common law system which developed the omnibus law itself. If later applied in the formation of laws, especially laws in Indonesia, Maria Farida conveyed several criticisms related to the implementation of the omnibus law, namely: 1) that the formation of laws through the omnibus law must still be based on the principles of the formation of statutory regulations, as well as on philosophical, juridical, and sociological foundations which of course differ from one law to another; 2) that the omnibus law will cause problems related to the enactment of the law, some of which have been amended by the omnibus law. Each law will usually have a different content and subject matter from one law to another.<sup>33</sup>

Apart from Maria Farida who expressed a critical view regarding the implementation of omnibus law in Indonesia, Eko Noer Kristiyanto also quoted a statement that the formation of laws by means of omnibus law has not been regulated in the Legislative Law. So that before it is applied in forming laws, it is better to make changes to the Legislative Law that can provide legitimacy for the implementation of the omnibus law.<sup>34</sup> In the absence of this regulation, the omnibus law can be applied in the formation of laws in Indonesia, but the position of this omnibus law compared to the amended law needs to be emphasized. Jimly Asshidiqqie said

<sup>29</sup> Gora Kunjana, "11 Klaster Omnibus Law Ciptaker," *Investor Daily*, 2020, <https://investor.id/business/11-klaster-omnibus-law-ciptaker>, diakses pada 17 Desember 2021.

<sup>30</sup> Nurita, *Op. Cit.*

<sup>31</sup> Bayu Dwi Anggono, "Omnibus Law Sebagai Teknik Pembentukan Undang-Undang: Peluang Adopsi Dan Tantangannya Dalam Sistem Perundang-Undangan Indonesia," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 9, no. 1 (2020): 17.

<sup>32</sup> Gilang Ramadhan, "Omnibus Law sebagai Sarana Utama Penataan Regulasi", *Yurispruden* 3, no. 2 (2020): 91.

<sup>33</sup> Anggono, *Op. Cit.*, 19."

<sup>34</sup> Kristiyanto, *Loc. Cit.*"

that the practice of omnibus law can be used in three circumstances, namely the law that will be changed is directly related; the law to be amended is not directly related; and the laws to be amended are not related, but in practice intersect. The omnibus law is a format for the formation of a law that is comprehensive in nature by participating in regulating the material of other laws that are interrelated with the substance regulated by the amended or formed Law.<sup>35</sup>

The advantage of the omnibus law method as a means of law formation, according to Ahmad Redi, lies in its effectiveness and efficiency in making improvements to problematic regulations. In the preparation of an omnibus law, it is possible to carry out the preparation of a new law as well as to amend several laws that need to be corrected. It was further stated that the omnibus law could be a solution between the overlapping rules that often occur in Indonesia, both horizontally and vertically. However, the omnibus law has weaknesses related to the high cost and the uncomplicated process in drafting the omnibus law, considering that the regulated content is very broad and cross-sectoral. Therefore, an omnibus law usually contains a very large number of articles in its body.<sup>36</sup>

The flow of positive law was developed by John Austin through the idea of analytical jurisprudence. This view stems from the reality that shows the power to give orders on the one hand and on the other hand there are groups who obey these orders. People's obedience to orders is not important to debate, because it is influenced by various things, including one of them because of sanctions if they do not obey these orders. At least an order to be called a law must fulfill 4 (four) elements, namely it is determined by the authorities (sovereignty), is an order (command), there is an obligation to obey (duty) and there are sanctions given to disobedience (sanctions).<sup>37</sup> These four elements are used by John Austin to classify the rules in society as law properly so called or rules that apply as law but do not have the meaning of law improperly so called.<sup>38</sup>

The flow of positive law is known for the separation between law and morals as the essence in understanding law. Positivism distinguishes what makes a norm exist as a valid legal standard and what makes a norm exist as a valid moral standard. Even a cruel legal norm can still be accepted as a law as long as it can meet the criteria as a law.<sup>39</sup> Meanwhile, another figure who also adheres to the flow of positivism is Hans Kelsen who postulates that law is a coercive order of human behavior (law is a coercive order of human behavior). Law is the primary rule that stipulates sanctions (it is the primary norm when it stipulates the sanctions). In the concept of pure law (*reine rechlehre*, the pure theory of law) Kelsen views that the law must be cleaned of non-legal elements, such as cultural, political, sociological, and so on.<sup>40</sup>

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<sup>35</sup> Adhi Setyo Prabowo, Andhika Nugraha Triputra, and Yoyok Junaidi, "Politik Hukum Omnibus Law Di Indonesia," *Pamator Journal* 13, no. 1 (2020): 4.

<sup>36</sup> Hukum Online, "Menelusuri Asal-Usul Konsep Omnibus Law," [hukumonline.com](https://www.hukumonline.com/berita/baca/lt5e2c1e4de971a/menelusuri-asal-usul-konsep-omnibus-law), 2020, diakses pada 17 Desember 2021, <https://www.hukumonline.com/berita/baca/lt5e2c1e4de971a/menelusuri-asal-usul-konsep-omnibus-law>.

<sup>37</sup> John Austin, "John Austin's Province of Jurisprudence.Pdf" (London: John Murray, 1832), 137.

<sup>38</sup> Suri Ratnapala, *Jurisprudence* (New York: Cambridge University Press, 2009), 89.

<sup>39</sup> Achmad Ali, *Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicialprudence)* (Jakarta: Kencana Prenada Group, 2009), 230.

<sup>40</sup> Sudyana Sudyana and Suswoto Suswoto, "Kajian Kritis Terhadap Teori Positivisme Hukum Dalam Mencari Keadilan Substantif," *Qistie* 11, no. 1 (2018): 40.

In addition, there is also HLA Hart who conveys his views on law based on the belief of legal positivism.<sup>41</sup> Hart stated that the law must be something concrete, so there must be a party who writes it, namely certain officials or institutions that have the authority to write and publish it. Hart also provides 2 (two) guidelines regarding the law, namely:<sup>42</sup> 1) law (which has been concretized in the form of positive law) must contain orders; 2) There is no necessary connection between law and morals or law as it ought to be.

Referring to the view expressed by H.L.A Hart, Asep Bambang Hermanto stated that Hart has the same perspective as John Austin regarding the law. A rule of law must contain orders, obligations, and sanctions. Regarding orders, there are 2 (conditions) that must be fulfilled, namely they must be general in nature and ordered by political groups that have such authority in society, whether in positions of authority or a political institution.<sup>43</sup> Contrary to the flow of legal positivism which emphasizes the separation of law and morals in society, the flow of legal realism is the antithesis. The flow of legal realism views that law cannot be separated from society, including relating to moral values that exist in society. Llewellyn said that law and society are constantly changing. Legal changes become a necessity when there are changes in society, including changes in moral values. The purpose of the law must be adapted to the goals of the society in which the law exists. So that judges are not only tasked with carrying out the law alone, but have a role as lawmakers through court decisions based on the rationality of judges not solely based on the rule of law.<sup>44</sup>

The contradiction between positivism and legal realism was also presented frontally by Karl Olivecrona, who loudly stated that law is a set of social facts, rejecting that law is an order or expression of the will of the state. The will of the state is in the form of laws or regulations issued by state constitutional institutions and from time to time influences the thinking of judges to the level of decision-making for him is a legal coercion. Judges must be given the freedom to make decisions based on personal morals and efforts to realize justice as a legal axiological value. A judge is not allowed to just stick to the rules, but the judge is obliged to explore, understand and see clearly the social facts that are happening so that they are able to make laws in their decisions.<sup>45</sup> Brian Z. Tamanaha in his book entitled "A Realistic of Law" conveys a view based on the flow of legal realism. Tamanaha said that the law is influenced by historical and social factors in which the law is present. The law can not only be seen as an order from the ruler or a rule that comes from morality, but the law is a reflection of the ideas, values, culture and traditions of a society which is often called the mirror theory (Mirror Thesis).<sup>46</sup>

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<sup>41</sup> H.L.A. Hart, *The Concept of Law*, Second Edi (New York: Oxford University Press Inc., 1961), 127.

<sup>42</sup> Teguh Prasetyo and Abdul Hakim Barkatullah, *Ilmu Hukum Dan Filsafat Hukum* (Yogyakarta: Pustaka Pelajar, 2007), 38.

<sup>43</sup> A B Hermanto, "Ajaran Positivisme Hukum Di Indonesia: Kritik Dan Alternatif Solusinya," *Jurnal Hukum Dan Bisnis (Selisik)* 2, no. 4 (2016): 25.

<sup>44</sup> Nadir and Win Yuli Wardani, "Percikan Pemikiran Tiga Aliran Hukum: Sejarah Hukum, Sociological Jurisprudence, dan Legal Realisme dalam Khasanah Hukum Indonesia," *Yustisia* 20, no. 1 (2019): 47.

<sup>45</sup> Arief Budiono and Wafda Vivid Izziyana, "Theistic Legal Realism (Suatu Pilihan Radikal Bagi Pengembangan Hukum)," in *Hukum Rasendental Pengembangan Dan Penegakan Hukum Indonesia*, 2018, 87.

<sup>46</sup> Brian Z. Tamanaha, *A Realistic Theory of Law, A Realistic Theory of Law* (New York: Cambridge University Press, 2017), 186.

Tamanaha stated that there are 3 (three) indicators to identify the law, namely those relating to basic rules in social relations, the legal system instituted by authorized and coercive institutions, and regarding justice, equality, and rights. Thus the understanding of law is not only limited to the moral values of the law or the authorized institutions that form it, but is related to what the community views as worthy of being called law and implemented by the community as law.<sup>47</sup> Based on the two schools of legal philosophy, the implementation of omnibus law in the formation of laws in Indonesia will show contradictions. From the perspective of positive law, the application of omnibus law cannot be implemented before it is regulated as a legal norm. The loading of these provisions is expected to be able to provide legal certainty to the acceptance of the omnibus law and its position in the Indonesian legal system.

Meanwhile, if it is based on the perspective of legal realism, then omnibus law is a method of law formation in accordance with current conditions in the life of society, nation and state. Legal realism states that it is proper for the law to continue to develop following changes in society. Thus, the application of omnibus law in the formation of law in Indonesia is an effort to adjust the development of society which overcomes hyper regulation and overlapping rules. Of course, the omnibus law method adopted from the practice of law formation in the common law country must still be adapted to the historical and social factors of the Indonesian people. Besides also adjusting so that the formation of the omnibus law law is in accordance with the formal principles of law formation, as well as the idea of Pancasila as the legal ideal of the Indonesian nation which is reflected in the material content of the law.

### **Conclusion**

What can be concluded from the description of the discussion that has been presented is that the formation of laws through omnibus law is essentially aimed at simplifying regulations. The method of law formation through omnibus law is seen as more effective and efficient in preventing hyper regulation and overlapping of existing regulations. However, the formation of laws through the omnibus law method is unregulated, so that it has not provided legal certainty. In terms of legal positivism and legal realism, there are contradictory views on the implementation of omnibus law as a method of law formation. Legal positivism will view the urgency of written rules through laws before the omnibus law is tried, namely through changes to the Legislative Law. On the other hand, in the legal realism paradigm, the formation of an omnibus law is a demand in following changes in society in order to overcome the problems of hyper regulation and overlapping rules. In relation to the conclusions presented, suggestions can be made are amendment to the Legislative Law by formulating an article that regulates the omnibus law as a special method of law formation. Also to ensure that the formation of the omnibus law is subject to Pancasila, the 1945 Constitution of the Republic of Indonesia, as well as the formal and material principles for the formation of laws in Indonesia.

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