

NEWSLETTER

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CONSTITUTIONAL COURT DECLARES THE OMNIBUS LAW TO BE CONDITIONALLY UNCONSTITUTIONAL: WHAT'S NEXT?

An Overview

*On 25 November 2021, the Constitutional Court rendered Decision No. 91/PUU-XVIII/2020 (**Decision 91**), the long-awaited decision that judicially reviewed the validity of Law No. 11 of 2020 on Job Creation, or infamously referred to as the **Omnibus Law**. While the decision does not necessarily revoke the Omnibus Law yet, it requires the Government to “fix” certain aspects regarding the issuance of the Omnibus Law within a 2-year period since the decision was read, or else, the Omnibus Law will be permanently deemed unconstitutional, losing all of its legal binding power.*

The most controversial part is of course the Constitutional Court's order that the Government must: (i) refrain from performing any acts/policies that are strategic and have broad impacts relating to the Omnibus Law, and (ii) halt the issuance of new implementing regulations under the Omnibus Law. Such decision leaves us with two big questions. First, does the Constitutional Court have the authority to interfere the Government's authority in issuing laws and regulations? Second, what measures should be taken by the Government as a response to this highly questionable decision?

Background

There are a high number of cases of judicial review related to the Omnibus Law that are filed with the Constitutional Court, be it concerning the aspects of legal substance or legal formality. In this case, Decision 91 deals with the latter.



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The petition for Omnibus Law's judicial review as stated in Decision 91 was brought by 6 petitioners from various backgrounds, including a worker, a university student, a lecturer, a non-governmental institution, and two institutions relating to *adat* communities.

Merits of the Case

In essence, the petitioners argued that the enactment of the Omnibus Law contradicts with 4 principles necessary for making and passing laws and regulations as laid out under Article 22A of the 1945 Constitution and Article 5 of Law No. 12 of 2011 on Enactment of Laws and Regulations, as amended by Law No. 15 of 2019 (collectively referred to as **Law 12/2011**), namely: (i) clarity of purposes; (ii) usability and expediency; (iii) clarity of formulation; and (iv) transparency.

Vagueness of the Law

The petitioners first argued that given that the Omnibus Law was drafted using the omnibus method (which has not been specifically recognized under Indonesian legal system), it creates vagueness on the type of Law (*Undang-Undang*) that is established via such method, namely, whether the Omnibus Law is classified as a new Law, an amendment to an existing Law, or a revocation of an existing Law. Such vague method is deemed by the petitioners as contradictory with Law 12/2011.

In this case, the Constitutional Court found that the Omnibus Law addresses 77 amendments and 1 revocation. Unfortunately, the designation of these amendments and revocation under the Omnibus Law is not in line with the standard format for enactment of laws and regulations set out in Appendix to Law 12/2011. Therefore, the Constitutional Court's judges deemed that this technical default means that the Omnibus Law fails to conform with the principle of clarity of formulation.

Omnibus Method is Not Yet Legally Recognized

Next, the petitioners claimed that the omnibus method is not recognized under Law 12/2011. Therefore, they asserted that the establishment of the Omnibus Law, which uses the omnibus method, is formally invalid.

Responding to this accusation, the majority of Constitutional Court's judges did not see any specific issue whether a Law is formulated using the omnibus method or any other kind of method for creating new laws and regulations as long as such method is in line with the prevailing standards for establishment of laws and regulations. Given that the omnibus method has not been formally incorporated into Law 12/2011, the Constitutional Court concluded that Law 12/2011 should have been amended before the omnibus method could be implemented.

Substantial Changes After Enactment

During the last minutes before it was passed, there were so many versions of the Omnibus Law that were widely circulated within the public discourse. Therefore, the petitioners highlighted that there are substantial changes to the draft of the Omnibus Law between the enacted version (as agreed by both the President and House of Representatives) and the final version as published in the State Gazette.

Based on their review, the Constitutional Court found that there are at least 9 inconsistencies between the enacted version and promulgated version of the Omnibus Law, varying from the vanishing of one whole Article under the Oil-and-Gas Law section, missing words, changes of terms, and mistaken references. Eventually, the Constitutional Court decided that these changes are clearly not in conformity with the principle of clarity of formulation of Law as required under Law 12/2011.

Lack of Public Participation

Although it was only slightly touched in Decision 91, the Constitutional Court spotlighted the lack of public participation during the enactment of the Omnibus Law. The Court recognizes that the Government had organized hearings with various community groups, but they concluded that such hearings did not focus on the academic script and amended provisions of the Omnibus Law. As such, in the future, Constitutional Court requested the Government to have meaningful public participation before any new Laws are issued.

The 2-Year Period

Based on the above considerations, the Constitutional Court deemed that the establishment of the Omnibus Law fails to meet the formal-validity requirement as set out in the Constitution and Law 12/2011. However, the nail is not yet hammered in the coffin, because the Government is given a 2-year period by the Constitutional Court to fix the Omnibus Law to be in conformity with the decision. If the decision is ignored by the Government, the Omnibus Law will be deemed unconstitutional and consequently, the Laws that were previously amended or revoked by the Omnibus Law will be automatically resurrected and legally binding again after the expiration of such 2-year period.

Unfortunately, the Constitutional Court did not give any hints on specific measures that must be taken by the Government to “fix” the Omnibus Law. For instance, with respect to the lack of public participation, does this mean that the Government must organize another public hearing on the Omnibus Law? Or, on the fact that there are certain changes of words in the final version of the Omnibus Law, should the Government and House of Representatives formally amend the Omnibus Law?

Regardless of the lack of specific instructions from the Constitutional Court, as the first step, the Government and House of Representatives should amend Law 12/2011, especially its Appendix, to clearly accommodate the omnibus method. While we respect the arguments made by the majority of Constitutional Court judges in Decision 91, we take the view that it is permissible to use the omnibus method without amending Law 12/2011 (as also agreed by the dissenting opinion in Decision 91) given that the Constitution does not restrict the ways for issuing new Laws and the fact that being a Law that has the same power with Law 12/2011, it is entirely possible for the Omnibus Law to stipulates its method of establishment within its own provisions (and the Omnibus Law did explain the reasoning for using the omnibus method instead of the conventional one).

Nevertheless, from a pragmatic point of view, an amendment to Law 12/2011 will settle the procedural issues related to the Omnibus Law. Once the necessary amendments have been made to cater the

Constitutional Court's request, the Omnibus Law may be further amended to conform with new standards for establishment of laws and regulations under the amended version of Law 12/2011 (which, for clarity purposes, should include confirmation that the Omnibus Law will still be deemed valid as of the date of its original issuance) and to fix some of the typos and mistaken references existing at the moment in the Omnibus Law.

Questionable Authority

It should be noted that Decision 91 is part of a series of Constitutional Courts decisions whose validity are highly questionable. First, there was no legal basis under the Constitution for the Constitutional Court to render "conditional constitutional" or "conditional unconstitutional" decisions. Indeed, before being deemed unconstitutional via another controversial decision of the Constitutional Court back in 2011, Law No. 24 of 2003 as amended by Law No. 8 of 2011 on Constitutional Court specifically restricted the Constitutional Court decision to issue this type of "conditional" decisions! Please refer to this [link](#)¹ for further information on this particular issue.

Furthermore, through Decision 91, the Constitutional Court also rendered another verdict that should raise eyebrows as they restrict the Government from: (i) performing acts/policies that are strategic and have broad impacts under the Omnibus Law; and (ii) issuing new implementing regulations under the Omnibus Law.

As for the first restriction, the first question that comes to mind is: what is the scope of "policies that have strategic and broad impacts" that would be suspended? The decision is regrettably silent on this matter and in fact, it does not mention whether this order will remain in force if the Omnibus Law has been "fixed" by the Government. Since the Constitutional Court does not have any enforcement power, in practice, this order is an empty one, a version of paper tiger, allowing the

¹ Pramudya A. Oktavinanda (2018), "Is The Conditionally Constitutional Doctrine Constitutional?", *Indonesia Law Review*: Vol. 8: No. 1, Article 1, <https://umbra.law/2018/05/22/indonesia-law-review/>.

Government to be creative in interpreting whatever it means, if not directly ignoring such decision.

More importantly, does the Constitutional Court even have the authority to restrict the Government's act? If we carefully read Article 24C of the Constitution, the Constitutional Court is bestowed with the authority to perform judicial review of a Law against the Constitution, but we will not find any provision that mentions the Court's authority to prevent the Government from issuing any implementing regulations to any Laws and making broad policies as the Government deems fit. Indeed, under the Constitution and Law 12/2011, such rights are exclusively reserved for the Government. Surely the Constitutional Court cannot issue any order that is strictly in violation of clear provisions of our Constitution!

In short, while the Constitutional Court may issue whatever they want in their decision, it is advisable for the Government to stick with the Constitution and ignore orders that are not authorized and made in line with clear provisions of the Constitution, being the supreme law of our nation.

Impact to Implementing Regulations

Another important legal question that must be settled is the status of Omnibus Law's implementing regulations. Are they still valid? The answer is a resounding yes. First of all, the Constitutional Court already declares that the Omnibus Law is still valid (at least for the next 2 years, pending some fixes to be made by the Government and House of Representatives).

Second, it is clear under Article 24A (1) of the Constitution that the authority to make judicial review against any regulations that are lower in hierarchy than the Law lies within the Supreme Court and not the Constitutional Court.

Third, referring to Law 12/2011 and the general legal principles applicable in Indonesia, any implementing regulations of a Law cannot be deemed annulled without a final and binding decision from the

Supreme Court. This means that these implementing regulations will remain valid unless deemed otherwise by the Supreme Court.

Indeed, implementing regulations are crucial in ensuring the proper implementation of the Omnibus Law to avoid unnecessary legal uncertainties. If the Government is prevented from issuing implementing regulations as mandated by the Omnibus Law while existing implementing regulations are deemed void by operation of law, the adverse consequences to our legal certainties are unimaginable.

Conclusion

While the establishment of the Omnibus Law was far from perfect and the Government clearly needs to do their homework in fixing the formalities necessary to ensure that the Omnibus Law is issued properly, it does not necessarily mean that we should adhere to court decisions that are not made in line with the Constitution and existing Laws of Indonesia.

A wise man once said that a good compromise would leave each party equally dissatisfied, and we think that such quote might explain why the Constitutional Court issued Decision 91 in such a convoluted way. Nevertheless, from strict legal perspective, this is actually a huge win for the Government and House of Representatives. Why?

The answer is simple, the Government and House of Representatives would have enough time in 2 years to fix the formal aspects of Omnibus Law, ensuring that it will be “cleanly” constitutional by the end of the day, while the Constitutional Court’s order that the Government should not issue any new strategic policies and implementing regulations is not enforceable because: (i) such order is not in line with the decision of the Constitutional Court that the Omnibus Law is still valid for the next 2 years (if a Law is deemed valid, it does not make any sense if its provisions cannot be implemented; as such, the Constitutional Court is making a paradoxical order that cannot be enforced), and more importantly, (ii) the Constitutional Court does not have any authority to prevent the Government from implementing those new policies/regulations nor do they have any power to enforce such unauthorized order if the Government does not comply with it.

We will closely review the Government's official response to Decision 91.
Stay tune for our next updates on the Omnibus Law saga!

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