

ANALYSIS
2021, OCTOBER

MENJAGA HUTAN DAN MASYARAKATNYA DARI CACAT LEGISLASI CIPTA KERJA

Saving Forest and Its Communities from Job Creation Flaws

By Refki Saputra

Policy and Law Enforcement Researcher at Auriga Nusantara



Foto: Auriga Nusantara

Mahkamah Konstitusi (MK) akhirnya membacakan putusan uji materiil Undang-Undang No. 11 Tahun 2019 tentang Cipta Kerja pada Kamis, 25 November 2021. MK dengan tegas menyatakan beleid omnibus law itu cacat formil dan berstatus inkonstitusional bersyarat. Pemerintah dilarang melanjutkan kebijakan yang strategis serta berdampak besar dan membuat turunan peraturan pemerintah (PP) berdasarkan undang-undang itu. Jika dalam waktu dua tahun pemerintah tidak memperbaiki undang-undang a quo, pasal-pasal yang dicabut berlaku kembali.

Diabaikannya partisipasi masyarakat dalam proses pembentukan UU Cipta Kerja merupakan salah satu materi yang dipertimbangkan majelis hakim. Selain soal legitimasi, partisipasi masyarakat sangat dibutuhkan untuk menguji alur pikir pembentuk undang-undang. Proses yang begitu cepat dan nyaris tanpa pembacaan kritis masyarakat telah menghasilkan begitu banyak norma yang menabrak kaidah-kaidah filosofis dan empiris.

Apa lacur, UU Cipta Kerja dan PP turunannya yang inkonstitusional bersyarat menurut MK telah digunakan sebagai dasar gugatan terhadap Bupati Sorong terkait keputusan pencabutan Izin

The Constitutional Court has read its ruling of the formal review of Law No. 11 of 2020 concerning Job Creation on Thursday, November 25, 2021. It declared that the Omnibus Law, so it is called, is formally flawed and conditionally unconstitutional. The government is ordered to refrain from carrying out strategic policy which has a broader impact as well as issuing government regulations derived from the law. If within a two years period the government fails to make the rectification to a quo law, the articles that it revoked shall be reinstated.

One of the issues considered by the Court panel of judges is the fact that the process by which the Job Creation was created ignored public participation. Apart from the legitimation issue, public participation is highly needed to examine the way of thinking in the formation of a law. The speedy process and how it was almost without critical reading by the public have brought about many norms that bump into philosophical and empirical principles.

Regrettably, the Job Creation Law and its derivative government regulations that are conditionally unconstitutional according the Court have been used as the basis of lawsuits against Sorong

Lingkungan dan Izin Usaha Perkebunan dari tiga perusahaan perkebunan sawit di Papua Barat, yakni PT Inti Kebun Lestari, PT Sorong Agro Sawitindo, dan PT Papua Lestari Abadi. Gugatan ketiga perusahaan ini kini telah mendekati pembacaan putusan di Pengadilan Tata Usaha Negara (PTUN), Jayapura.

Gugatan yang diajukan mendalilkan sejumlah hal tentang kekeliruan Bupati Sorong dalam menerbitkan keputusan tersebut. Pertama, Pasal 16 dan 18 ayat 2 huruf c Undang-Undang No. 39 Tahun 2014 tentang Perkebunan terkait kewajiban mengusahakan lahan paling sedikit 30 persen bagi pemegang Izin Usaha Perkebunan yang sudah diubah oleh Pasal 29 UU Cipta Kerja, yang tidak lagi mengenakan sanksi pencabutan bagi pelanggarnya. Kedua, Peraturan Pemerintah No. 27 Tahun 2012 tentang Izin Lingkungan telah dicabut oleh Peraturan Pemerintah No. 22 Tahun 2021 tentang Penyelenggaraan Perlindungan dan Pengelolaan Lingkungan Hidup. Ketiga, prosedur pencabutan yang melanggar Peraturan Pemerintah No. 5 Tahun 2021 tentang Penyelenggaraan Perizinan Berusaha Berbasis Risiko.

TIDAK BERLAKU SURUT

Perlu dicatat, walaupun Surat Keputusan Bupati Sorong dikeluarkan pada April 2021, pencabutan izin didahului serangkaian kegiatan evaluasi jauh sebelum UU Cipta Kerja dan PP turunannya diterbitkan. Di antara kegiatan-kegiatan ini adalah evaluasi perizinan usaha perkebunan kelapa sawit di Provinsi Papua Barat berdasarkan Surat Keputusan Kepala Dinas Tanaman Pangan Hortikultura dan Perkebunan Provinsi Papua Barat No. 71/520/TPHBUN-PB/2019. Kegiatan evaluasi dilakukan berdasarkan amanat Instruksi Presiden No. 8 Tahun 2018 tentang Penundaan dan Evaluasi Perizinan Perkebunan Kelapa Sawit serta Peningkatan Produktivitas Perkebunan Kelapa Sawit. Kemudian ada Gerakan Nasional Penyelamatan Sumber Daya Alam (GN-PSDA), yang merupakan inisiatif Komisi Pemberantasan Korupsi (KPK); dan Deklarasi Manokwari yang ditandatangani Gubernur Papua

Regent concerning revocation of environmental permits and plantation business permits issued to three plantation companies in West Papua, namely PT Inti Kebun Lestari, PT Sorong Agro Sawitindo, and PT Papua Lestari Abadi. The lawsuits of these companies are closing in on the reading of the ruling at the Jayapura State Administrative Court.

The filed lawsuits put forward several things concerning Sorong Regent culpabilities in issuing the revocation. Firstly, Article 16 and 18 section 2 point c of Law No. 39 of 2014 concerning Plantation, pertaining to the obligation of permit holders to cultivate 30 percent of the land; this provision has been changed through Article 29 of the Job Creation Law that no longer imposes revocation sanction on the offender. Secondly, the Government Regulation No. 27 of 2012 on Environmental Permits has been revoked through the Government Regulation No. 22 of 2021 on the Implementation of Environmental Protection and Management. Thirdly, the revocation procedure violated the Government Regulation No. 5 of 2021 on the Implementation of Risk-based Business Licenses.

RETROACTIVITY NOT APPLIED

Worth noting, although the Decision Letter of Sorong Regent issued in April 2021, the permits' revocation has been preceded by several evaluation activities long before the Job Creation Law and its derivative government regulations were enacted. Among these activities was the evaluation of palm plantation business permits in West Papua according to the Decision Letter of West Papua Office of Food Crops and Plantation Head No. 71/520/TPHBUN-PB/2019. The evaluation was conducted based on the directive of the Presidential Instruction No. 8 of 2018 on Moratorium and Evaluation of Palm Oil Licencing and Increasing Productivity of Palm Oil Plantations. Other activities were the National Movement to Save Natural Resources, an initiative of the Corruption Eradication Commission; and the Manokwari Declaration signed by Papua Governor and West Papua Governor, in which both provinces

serta Papua Barat, yang intinya berisi komitmen pemerintah untuk mempertahankan kawasan hutan serta melakukan konservasi sumber daya alam dan ekosistemnya.

Artinya, tempus kejadian dari serangkaian kegiatan yang berujung pada keluarnya Keputusan Tata Usaha Negara berupa SK Bupati Sorong perihal pencabutan izin tidak didasari UU Cipta Kerja maupun PP turunannya. Oleh sebab itu, sanksi pencabutan izin masih dilakukan berdasarkan rasionalitas norma-norma yang mengikat menurut rezim izin lokasi, izin lingkungan, dan izin usaha perkebunan. Sementara, dalam UU Cipta Kerja dan PP turunannya rezim perizinan sudah berganti menjadi perizinan berusaha yang meletakkan izin lingkungan (yang diubah menjadi persetujuan lingkungan) sebagai satu bagian di dalamnya. Maka, UU Cipta Kerja beserta PP turunannya hanya bisa dikenakan terhadap tindakan evaluasi perizinan yang dilakukan persis setelah regulasi ini diterbitkan.

BUKTI KECACATAN

Regulasi Cipta Kerja secara serampangan menghilangkan esensi izin (toestemming), yang secara filosofis bermakna pembolehan khusus untuk melakukan sesuatu yang secara umum dilarang. Maka, harus disadari bahwa pemberian izin merupakan bentuk kepercayaan pemerintah kepada

committed to preserve their forests as well as to conserve natural resources and its ecosystems.

That means, the tempus of occurrences of the series of activities that ended up with the issuance of state administrative decision in the form of Decision Letter of Sorong Regent concerning the revocation was not based on the Job Creation Law nor its derivative government regulations. Therefore, revocation sanction was still done based on the rationality of binding norms according to the location permits, environmental permits, and plantation business permits regimes. As for the Job Creation Law and its derivative government regulations, the permit regime has been changed to business licenses that put environmental permits as a part of it. Accordingly, the Job Creation Law and its derivative government regulations can only be imposed on permit evaluation conducted right after the regulations were promulgated.

FLAW EVIDENCE

Job Creation regulation gratuitously omits the essence of permit (toestemming), philosophically means special entitlement to do something that is generally illegal. For that reason, it has to be realized that permit issuance is a manifestation of trust from the government to the permit holder, and consequently



pemegang izin, dan karenanya tanggung jawab pelaksanaan izin itu harus dipegang teguh. Hal ini berbeda dengan persetujuan lingkungan yang hanya merupakan bentuk kesanggupan saja dari pelaku usaha. Akibatnya, izin, yang sebelumnya merupakan instrumen pengendalian, berubah menjadi instrumen pemanfaatan semata (Pratama, et.al, 2021:35).

Putusan MK secara tepat menyatakan UU Cipta Kerja inkonstitusional bersyarat karena menyalahi tata cara dan substansi pembentukan peraturan perundang-undangan. Dalam pertimbangannya, Mahkamah menilai adanya fakta hukum bahwa tata cara pembentukan UU 11/2020 tidak memenuhi asas kejelasan tujuan dan asas kejelasan rumusan. Kemudian, berkenaan dengan asas keterbukaan, dalam persidangan terungkap fakta pembentuk undang-undang tidak memberikan ruang partisipasi kepada masyarakat secara maksimal. Terlebih lagi naskah akademik dan rancangan UU Cipta Kerja tidak dapat diakses dengan mudah oleh masyarakat. Mahkamah Konstitusi berkesimpulan bahwa tata cara pembentukan UU 11/2020 tidak didasarkan pada cara dan metode yang pasti, baku, dan standar, serta sistematika pembentukan undang-undang; terjadinya perubahan penulisan beberapa substansi pasca-persetujuan bersama DPR dan Presiden; dan bertentangan dengan asas-asas pembentukan peraturan perundang-undangan. Mahkamah berpendapat proses pembentukan UU 11/2020 tidak memenuhi ketentuan berdasarkan UUD 1945, sehingga harus dinyatakan cacat formil.

Jika dilihat cermat, sejumlah pengaturan dalam UU Cipta Kerja banyak menghapus beberapa kewenangan pemerintah daerah dan menciptakan norma-norma baru dalam perizinan yang tidak benar-benar dilakukan sinkronisasi. Hal ini menimbulkan sejumlah tumpang tindih dan kebingungan aparat pada saat pemberlakuannya di lapangan. Dengan demikian, demi menjunjung tinggi asas kepastian hukum, pemberlakuan UU Cipta Kerja mesti ditangguhkan, terlebih yang berkaitan dengan perlindungan masyarakat dan lingkungan yang bersifat strategis dan berdampak luas.

the responsibility of its implementation shall be firmly held. This is in contrast to the environmental permit as it is only a form of businessmen's capabilities. As a result, permit, which previously was an instrument of control, has simply become an instrument of utilization (Pratama, et. al., 2015: 35).

The Court ruling precisely states that the Job Creation Law is conditionally unconstitutional because it has violated procedures and substances of the formation of legislation. In its considerations, the Court assessed that there is a legal fact that the creation procedures of Law No. 11 of 2020 did not meet the fundamental principles of objective clarity as well as coherency formulation. Subsequently, with regard to the fundamental principle of openness, it was revealed during the hearing that the creator of the law did not give opportunities for the public to offer maximum participation. Moreover, the academic paper and the draft of the law weren't easily accessible by the public. The Court had as a conclusion that the procedures of the creation of Law No. 11 of 2020 weren't based on assuredly, settled, and standardized method as well as the formation of law systematic; there has been some changing on the writing of substances after the mutual agreement between the House of Representatives (DPR) and the President; and has violated the fundamental principles of legislation formation. The Court decided that the creation process of Law No. 11 of 2020 did not comply with the provisions based on the 1945 Constitution and declared it formally flawed.

If looked closely, there are several provisions in the Job Creation Law that repealed local government authority and established new norms in the permit issuance to which the need of synchronization is ignored. This has caused overlappings and confusion among apparatus by the time the law is enacted. As a consequence, in order to strongly uphold the fundamental principle of legal certainty, the enactment of Job Creation Law should be postponed, particularly in relation to the strategic protection of communities and the environment, which has a broader impact.

©2022 Gakkum SDA

Penulis /Written:

Refki Saputra

Auriga Nusantara
auriga.or.id

