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Philosophical Analysis of the Positive Legal Paradigm in Indonesia in Perspective of Article 1 paragraph (3) of the 1945 Constitution

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Article Info

Article History:
Received : 01-10-2022
Revised : 20-11-2022
Accepted : 10-12-2022
Published : 30-12-2022

Keywords:
Criminal act
Money laundering
Digital Age 4.0

Abstract

The concept of human life is inseparable from the law to create an atmosphere that allows humans to be protected and live side by side in peace. As provided in Article 1 (3) of the 1945 Constitution of the Republic of Indonesia states "that the State of Indonesia is a country founded on law." The consequence of the existence of these provisions is that the State of Indonesia must uphold the law and its actions must be based on laws or regulations created in regulating an order within the government including its citizens. Indonesia is based philosophically on the prevailing positive law paradigm. So this is a research study to analyze, what is the philosophical analysis of the positive legal paradigm in Indonesia from the point of view of Article 1 (3) of the 1945 Constitution.

INTRODUCTION

legal thinking always develops following human thinking, because law always accompanies human life, this is under the opinion of a Roman philosopher who stated *Ubi Societas ibi Ius,* meaning where there is society there is the law.[1] Therefore, the role of law is very important for people, in maintaining order, from different societal perspectives. Legal theory, was influenced by legal thinkers whose concepts were based on their common sense. Legal theory is jurisprudence at the abstract level, while at the highest level of abstraction, namely the level of philosophical abstraction, the field of study is called legal philosophy. Besides that, according to Hans Kelsen, it tends to convey a posteriori. contemplating the law. It is the precursor of the birth of a juridical paradigm.[2] The legal paradigm is the way legal

[1] Sri Wardah dan Bambang Sutiyoso, *Hukum Acara Perdata Dan Perkembangannya Di Indonesia*, (Yogyakarta: Gama Media, 2007), 2.
[2] Esmi Warassih, *Pranata Hukum sebuah telaah Sosiologis*, (PT Suryandaru Utama. Maret 2005), 28.

experts perceive or comprehend the law based on their opinions.[3] so that they can scientifically find legal truths.

The enactment of Law Number 11 of 2020 Concerning Job Creation (Work Law) on November 3, 2020, has started to take effect as it should, its decision, the Constitutional Court considered that the creation of the Job Creation Law was not based on a definite, standard and standards, as well as the systematics of forming laws, apart from that there were changes in the writing of several substances after the joint approval of the DPR and the President and contrary to the principles of forming statutory regulations so that the Constitutional Court stated that the process of forming Law No.11 of 2020 did not fulfill the provisions of the 1945 Constitution so that it must be declared as Formally Disabled.[4] The formation of the Job Creation Law is contrary to the 1945 Constitution and does not have conditionally binding legal force as long as it does not mean 'no amendments have been made within 2 (two) years since this decision was pronounced. Declare that the Job Creation Law will remain in effect until repairs are made under the deadline.[5]

In the opinion of the researchers, several problems are the main problem, namely the issue of "regulatory obesity" and the overlap between laws which make the government's reason for using the Omnibus *method Law* which aims to accelerate investment and expand employment in Indonesia, besides that. The Job Creation Law has also issued implementing regulations and has implemented these regulations at a practical level. So with this, the Court thinks that to avoid legal uncertainty and provide a greater impact, Law No. 11 of 2020 is conditionally declared unconstitutional. Then, it is necessary to know, that concept is not recognized in Indonesian positive law.

Based on the provisions of Law Number 13 of 2020 article 27 states "Considerations of Legislation that carry out orders or carry out Legislation using the *omnibus law* simply contain I (one) consideration which contains a brief description regarding the need to implement the provisions of the article or several articles of the Legislation that use the *omnibus law* and/or add other considerations that contain the urgency or purpose of Forming Legislation" whereas

[3] Fathoni, "Paradigma Hukum Berkeadilan Dalam Hak Kekayaan Intelektual Komunal", *Jurnal Cita Hukum* 2, no. 2 (Desember 2014): 293.
[4] https://jdih.maritim.go.id/id/undang-undang-nomor-11-tahun-2020-tentang-cipta-kerja-inkonstitusional-bersyarat, diakses, tanggal 30 November 2022
[5] https://www.mkri.id/index.php?page=web.Berita&id=17816, diakses tanggal 30 November 2022

in the MK's speech it stated that it gave a time limit for legislators to make improvements to the procedures for forming Law No. 11 of 2020 for 2 (two) years since this decision was pronounced. And if within 2 (two) years no corrections are made, then the Constitutional Court declares that Law No. 11 of 2020 becomes permanently unconstitutional.

The differences between the decisions that have been pronounced by the Constitutional Court and the overlapping balance between laws, brings the interest of researchers interested in raising research with the title "Philosophical Analysis of the Positive Legal Paradigm in Indonesia in the Perspective of Article 1 paragraph (3) of the Law base 1945"

LAW IS A NORM

Hans Kelsen's main view of this law can be the basis for examining the extent to which Law Number 11 of 2020 concerning Job Creation is considered. It was explained that the formation of the law on job creation is not recognized in law number 13 of 2022 regarding the formation of Indonesian legislation for amendments to Law Number 12 of 2011, this is stated in article 97A namely: " *Material content regulated in Legislation using the omnibus method can only be changed and/or revoked by amending and/or repealing said Legislation."* As a country that has very limited guidelines on positive law which is very constitutionally affirmed in Article 1 paragraph (3) of the 1945 Constitution which states that Indonesia is a country of laws, all actions taken in Indonesia, including the government, must be based on law. As previously explained, the Omnibus Law method is not well-known in positive law in Indonesia. The Omnibus Law itself is part of a method that can revise more than one law at a time. The concept of Omnibus Law has developed in several Common Law countries with an Anglo-Saxon legal system such as America in making regulations. Regulation in this concept is to make a new law to amend several laws at once.[6] The omnibus law method has a good objective in terms of method in terms of ameliorating the problem of overlapping regulations caused by too many regulations (over-regulation) with only one fix.

Thus, in essence, Hans Kelsen said that law is hierarchical in nature, that is, it does not conflict with provisions of a higher degree. 20 This theory is adhered to in Indonesia, changes made to only one law must be under the level of norms (stufenbau theory). which exists, with

[6] https://www.hukumonline.com/berita/a/menimbang-konsep-omnibus-law-bila-diterapkan-di-indonesia-lt58a6fc84b8ec3 , diakses pada tanggal 2 Desember 2022.

regard to the level of standards in Indonesia, it was regulated in article 7 of law number 12 of 2011 regarding the formation of legislation. The hierarchy of norms (legislation) in Indonesia is as follows*:*

a. Constitution of 1945
b. MPR Decree
c. Law's/Government Regulations instead of Law's*;*
d. Local regulation*;*
e. Presidential decree*;*
f. Provincial Regulation*;*
g. Regency/City Regional Regulations.

With the legal basis and legal theory described above, it is clear what was mentioned by John Austin in his theory, one of which states that law is a norm, a system based on requirements (what should be or *das sollen*). this has been seen from the legal reality in Indonesia, especially in this case the establishment and ratification of the Job Creation Law. The government as the party submitting the Job Creation Bill seems to only think that the law they have drafted in such a way is appropriate because they have the authority to form laws, which in this case is to propose the Draft Law as stated in Article 5 paragraph (1) of the 1945 Constitution**.** Moreover, the fact that the enactment of the Job Creation Law is one of the strategic agendas of President Jokowi's government which was conveyed during his inauguration speech before the MPR RI So, in the opinion of researchers, the paradigm used by the Government together with the DPR in matters discussion up to the enactment of Law Number 11 of 2020 Concerning Job Creation is that the law is an order from the state, so it is bold to impose a clear law in terms of the method used which is not known in Indonesian positive law and there is even a lot of opposition from the Indonesian people towards enforceability**.**

With the legal basis and legal theory described above, it is clear what Hans Kelsen mentioned in his theory, one of which states that norms are products of deliberative human thought. Something becomes a norm if it is desired to become a norm, its determination is based on good values. So the considerations that underlie a norm are meta-juridical. Something that is *meta-juridical* in nature *das sollen*, and has not yet become an applicable law that binds society. especially in terms of the formation to ratification of the Job Creation Law. This Job Creation Law can apply (*what the law it is*) and not the law that should apply (*what the law*

ought to be). In this case, it corresponds to Hans Kelsen's Pure Law Theory with the new concept of what is to have a hierarchy of norms that should not overlap with each other, let alone not have a fundamental basis for legal action. In it, there is a separation of *what law it is* (actually) and *what law ought to be* (supposedly).

Moreover, the fact that the enactment of the Job Creation Law is one of the strategic agendas of President Jokowi's government which was conveyed during his inauguration speech before the MPR RI. Law Number 11 of 2020 Concerning Job Creation is that law is an order from the state so it is bold to impose a clear law in terms of the methods used which are not known in Indonesian positive law and there is even a lot of opposition from the Indonesian people towards its application. In response to the Job Creation Law which suppresses civil society participation, some civil society activists consider that the conditional unconstitutional decision in the law is a clear victory for the community. Moreover, one of the points that make the Job Creation Law conditional unconstitutional is the absence of the principles of openness and meaningful public participation by the constitution Article 22A of the 1945 Constitution.[7]

PEOPLE MUST OBEY APPLICABLE REGULATIONS

One of the prominent statements in the statement regarding the promulgation of the Job Creation Law Number 11 of 2020 is that the people must comply with regulations imposed by the state. Indonesia understands the law. The core material of the Job Creation Law contains many aspects of human rights. If you look at the Job Creation Law, the enactment of the Job Creation Law affects many rights, both aspects of work, good and healthy environmental aspects, and access to natural resources. , forced evictions, and the right to obtain justice.[8] However, regardless of what is the problem with the Job Creation Law both materially and procedurally (formally), in fact, the Job Creation Law still applies. Thus, Hans Kelsen's statement stating that the people will be subject to the laws established by the state (government) is true in the current legal reality in Indonesia. Moreover, the government is the holder of the highest sovereignty in the country, namely legitimacy based on applicable laws and legally recognized. [9] Indonesia, in the view of researchers, is still not critical of existing legal developments, this may have something to do with the low level of interest in literacy in

[7] Pada Putusan MK Nomor 91/PUU -XVIII/2020, Hlm. 414
[8] Sigit Riyanto, *et. al.*, *Kertas Kebijakan Catatan Kritis Terhadap UU No 11 Tahun 2020 Tentang Cipta Kerja (Pengesahan Dpr 5 Oktober 2020)*, (Yogyakarta: Fakultas Hukum Universitas Gadjah Mada, 2020), 19.
[9] Ahmad Ali, *Menguak Tabir Hukum*, (Jakarta: Kencana, 2015), 292.

Indonesia. Coupled with the rhetoric delivered by the Government in response to questions raised by all parties involved, it strengthens their legitimacy in enforcing the Job Creation Law. Thus, the people will be subject to the law formed by the state which is true in the current legal reality in Indonesia.

PRIORITIZING FORMAL PRINCIPLES ONLY AND LAW OVERRIDES JUSTICE

A statement from Hans Kelsen in his theory that is relevant hereinafter is that law shifts justice, only prioritizing formal matters. Through the decision of the Constitutional Court Number 91/PUU-XVII/2020 regarding the review of Law Number 11 of 2020 it has been proven that indeed the formation of Law Number 11 of 2020 Concerning Job Creation only prioritizes formal aspects from the perspective of its creator, leaving aside justice. As previously discussed, in the Job Creation Law, many rights are affected by the enactment of the Job Creation Law, namely from the labor aspect, good and healthy environmental aspects, issues of access to Natural Resources, issues of forced evictions, and rights to justice [10]. This has violated the existing value of justice. This is evident from the cancellation of Law Number 11 of 2020 concerning Job Creation through a formal trial at the Constitutional Court (Decision Number 91/PUU-XVII/2020) until now it is still declared unconstitutional. So this is our review. Returning philosophically, because, in a situation like this, legal science cannot answer such a problem. It is time for the legal philosophy that works deep within our minds. The Court explains the reasons for the Job Creation Law being declared.[11]

conditionally unconstitutional. This is because the Court wants to avoid legal uncertainty and the greater impact that may arise. Then, the Court considers that it must balance the conditions for forming a law that must be met as a formal requirement to obtain a law that fulfills the elements of legal certainty, benefit, and justice, and considering the strategic objectives of forming the Job Creation Law. Therefore, in enforcing Law Number 11 of 2020 which has been conditionally declared unconstitutional, it creates juridical consequences for the enforcement of Law Number 11 of 2020, so that the Court provides an opportunity for the legislators to amend Law Number 11 of 2020 based on the procedure for establishing a Law. - Laws that fulfill definite, standard, standard ways and methods in forming the Omnibus Law which must also comply with the fulfillment of the requirements for the forming principles of

[10] Sigit Riyanto, *et. al.*, *Loc.Cit.*
[11] Juhaya S. Praja, *Aliran-Aliran Filsafat & Etika*, (Jakarta: Kencana, 2005), 57.

the Law that have been determined.

NORMATIVE LAW IN HANS KELSEN'S THOUGHT

For Hans Kelsen, norms are products of deliberative human thought. Something becomes a norm if it is desired to become a norm, the determination of which is based on morality and good values. So the considerations that underlie a norm are meta-juridical in nature. Something that is meta-juridical in nature is das sollen in nature and has not yet become an applicable law that binds society. In short for Hans Kelsen, legal norms are always created through the will. These norms will become binding on society if these norms are desired to become law and must be outlined in written form, issued by an authorized institution, and containing orders. Hans Kelsen's opinion indicates his mind that legal positivism considers moral talks, values have been completed and final. when it comes to the formation of positive law. Therefore, this is a very famous fragment of Hans Kelsen's words: the law is obeyed not because it is considered good or fair, but because the law has been written and ratified by the authorities. Hans Kelsen's explanation starts from.[12]

Immanuel Kant's way of thinking, more precisely, Hans Kelsen gives content to Immanuel Kant's way of thinking, to later explain legal positivism. Immanuel Kant divides life is divided into 2 (two) areas: the field of fact and the field of should (ideal). The field of facts (real world) contains causal relationships that just happen, and it's bound to happen that way. In this case, it can be exemplified, if people are threatened to hand over something, they will give it. In this realm of fact, it cannot be said that if someone is forced to give up something he should give. Fields that should (ideal fields) originate from thoughts that can be based on values, and teachings.

So in the matter of changes to laws, what will be included in Law Number 11 of 2020. What's more, academic texts and drafts of the work copyright law are not easily accessible by the public. Even though based on Article 96 paragraph (4) of Law 12/2011 access to the law is required to make it easier for the public to provide input orally and/or in writing.

This of course violates the principle of openness, Suhartoyo explained: “In the trial, it

[12] Pemikiran Hans Kelsen sesungguhnya tidak mudah dipelajari, walaupun berisi argumentasi-argumentasi yang sulit untuk dibantah. Pemikiran Hans Kelsen di atas merupakan substansi dari Teori Hukum Murni. Pemikiran yang dipaparkan di atas sebenarnya hanya salah satu pemikirannya yang ada dalam salah satu karyanya, The Pure Theory of Law yang disusun pada tahun 1967. Referensi : Hans Kelsen, 2009, Dasar-Dasar Hukum Normatif ; PrinsipPrinsip Teoretis Untuk Mewujudkan Keadilan Dalam Hukum Dan Politik, Bandung, Nusa Media,hlm 316-322 ; Theo Huijbers, supra no.10, hlm 156-161.

was revealed that the legislators did not provide maximum space for public participation. Even though various meetings have been held with various community groups, the said meeting has not yet discussed the academic text and material for changes to the Job Creation Law."

With the legal basis and legal theory described above, it is clear what was mentioned by Hans Kelsen in his theory, one of which states that something that is supposed to be can become a norm if it is desired jointly as a norm that is adhered to together, which is then outlined in form of binding legal regulations (positive law). Derived from the Transcendental Idealist philosophy of Immanuel Kant, Hans Kelsen's thought from a philosophical perspective came to be known as Idealist Positivism. The ratification of Law Number 11 of 2020 Concerning Job Creation apart from having lots of content creates ambiguous meanings, and there is a lack of transparency and community participation. Indirectly by being declared conditional unconstitutional the Job Creation Law is considered to be formally flawed, it is philosophically contradictory to the ideology of Pancasila. Because Pancasila is the highest source of law in Indonesia.[13]

CONCLUSION

In Hans Kelsen's opinion, the law is a norm. This view of law is perhaps most evident from the Amar statement which states that Law Number 11 of 2020 concerning Job Creation, which was declared unconstitutional, is conditional on the formation of the Job Creation Law, which is formally flawed but is declared to remain valid until corrected in a period of 2 years from the decision, an opinion arises, if it is formally flawed, the Job Creation Law should be declared 'unconstitutional'. Point. No frills 'conditional'. The Job Creation Law should have been declared conditionally constitutional. This decision is also said to deviate from the Constitutional Court Law. If it is proven that the formation of a law does not comply with the provisions for its formation based on the 1945 Constitution, the law should no longer be binding. How could it not be, it is clear that the formation of the Job Creation Law, namely the Omnibus Law method, is not recognized in Law Number 13 of 2022 concerning the Formation of Legislation in Indonesia. Through this decision, the Constitutional Court is declaring that the norm (in) the law being reviewed remains conditionally unconstitutional, as long as the conditions determined by the Constitutional Court are fulfilled. In other words, there is a

[13] Vani Wirawan, "Pancasila Sebagai Sumber Tertib Hukum Tertinggi (Suatu Kajian Filsafat): Pemahaman Bagi Mahasiswa UNJAYA, UNIMUGO dan UMK", *Artikel Pada Jurnal Abdi Masyarakat* 4, no. 1 (Juni 2022), 15.

dimension of conditional unconstitutionality that is to be maintained from the norm being tested by embedding certain terms of meaning. Based on observations from researchers, it is undeniable that the Constitutional Court as the party that legalized this decision raised suspicions that this decision was like a mini parliament. In a sense, in certain cases, the Constitutional Court is required to shift its orbit from negative to the positive legislature. This statement is often used as a comparison for experts, one of whom is Hans Kelsen the architect of the first constitutional court in the world (Austrian Constitutional Court) did not agree with this, which was originally Negative legislators become positive legislators.

The people will be subject to the rules in force. One of the visible statements from the enactment of Law Number 11 of 2020 Concerning Job Creation is that the people will be subject to the laws established by the state. It is clear legally that there is a flaw in the formation of the Job Creation Law, a decision that tolerates the enactment of UU norms that have been declared contrary to the Constitution until a certain time limit (limited constitutional). This proves that the Constitutional Court's decision which declared the law norms unconstitutional had a major impact. One of the impacts is on the pattern of relations between the legislators and the Constitutional Court. In several countries, the Constitutional Court's decision to annul laws often triggers 'tension' or conflicts between the two institutions. Such decisions are accused of limiting autonomy and intervening in the authority of legislators. As a result, confrontational relations are created. In that reality, several MKs took a way to avoid confrontation by establishing conditional decisions. This statement from Hans Kelsen is most visible from the implementation of the Job Creation Law which is flawed procedurally (formally) to its implementation which is still ambiguous.

The law shifts justice, only prioritizing the formal. A statement from John Austin in his theory that is relevant next is that the law shifts justice, only prioritizing formality, several reasons reinforce how the Constitutional Court modifies this decision, first, the practice of the Constitutional Court as a constitutional court assesses its decisions as a legal solution while at the same time fulfilling demands for justice. deliver justice, special wail to the applicant. By the Constitutional Court, three types of injunctions were deemed insufficient to provide a legal solution. This is the reason why the Constitutional Court has a view of proving that law is not only for law, but the law for (benefit of) humans.

Law is a system that is fixed, logical, and closed. The law contained in the Job Creation Law can be said to be a fixed, logical, and closed matter. It remains to be said because that law

has been in force and has been implemented during society. It is said to be logical because the provisions contained in the Job Creation Law are legally logical (although there are some editorial errors) and are closed, because regardless of the public's reaction to the Job Creation Law, like it or not it is still enforced with the same conditions. This is enforced because it prevents a legal vacuum. If the Constitutional Court fixates on the three types of verdicts, likely, the decisions will dig up empty voids in the rule of law which will lead to legal disorder (legal disorder). In anticipation, the Constitutional Court will decide with the necessary prerequisites and/or provide a new meaning to the norm being tested.

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