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The Pathway of Adopting Omnibus Law in Indonesia's Legislation: Challenges and Opportunities in Legal Reform

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ABSTRACT: The omnibus law model has become a new method of legislative drafting in Indonesia, first applied to the Job Creation Law and later enacted as Law 11/2020. While there were no implicit guidelines in Legislative Drafting Law 12/2011, this adoption was imported from several countries like the United States and Ireland to simplify regulations before the method was subsequently formalized and included in Legislative Drafting Law 13/2022. This paper explored the pathway and dynamics of the omnibus law adoption in Indonesia's law-making procedure and analyzed its further impacts on whether such a method has fruitfully improved the quality of the enacted regulation in establishing a more friendly investment policy. Through doctrinal method, this study showed that the opportunity to apply the omnibus model in Indonesia depends on the effectiveness, success, and benefits of respective regulations. In contrast, the application of the omnibus law model should respect democratic principles and avoid public harm. As shown in three different countries, i.e., Indonesia, the United States, and Canada, public concerns on lack of participation should be taken seriously to hinder undemocratic ends through "democratic" means. Alternatively, accountability of the drafting process should be considered a priority. In summary, the increasing trend of adopting the omnibus model should be first adopted and promulgated through legislative products whose promulgation must be with a formidable law-making procedure.

KEYWORDS: Legislation, Legislative Drafting, Omnibus Law.

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I. INTRODUCTION

In many developing countries like Indonesia, legislative products play a prominent role in national building and foster governance sustainability. Good laws produced by legislative functions have increasingly become a determinant factor for leveraging more investments in many emerging economies. Simultaneously, Indonesia's experience shows that such products are problematic and hinder more business opportunities.[1] In 2020, the Indonesian government adopted the omnibus law model despite no drafting rules and procedures. However, it has been prevalent that the omnibus law model has been practiced in several countries, like the USA, Canada, and Ireland,[2] with different terms, i.e., omnibus bills, christmas tree bills, portmanteau bills, mosaic laws, and arrangements laws.[3]

Historically, the omnibus law model has been adopted by common law countries such as Australia, Argentina, France, Ireland, and Spain.[4] In

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1 Diani Sadiawati, *Kajian reformasi regulasi di Indonesia: pokok permasalahan dan strategi penanganannya*, cetakan pertama ed (Jakarta: Yayasan Studi Hukum dan Kebijakan Indonesia, 2019).

2 See Johanna M M Goertz, "Omnibus or not: package bills and single-issue bills in a legislative bargaining game" (2011) 36:3-4 Social Choice and Welfare 547–563; Glen S Krutz, "Tactical Maneuvering on Omnibus Bills in Congress" (2001) 45:1 American Journal of Political Science 210–223; Louis Massicotte, "Omnibus Bills in Theory and Practice" (2013) 13 Canadian Parliamentary Review/Spring; Ittai Bar-Siman-Tov, "An Introduction to the Comparative and Multidisciplinary Study of Omnibus Legislation" in Ittai Bar-Siman-Tov, ed, *Comparative Multidisciplinary Perspectives on Omnibus Legislation* Legisprudence Library (Cham: Springer International Publishing, 2021) at 1; Bayu Dwi Anggono, "Omnibus Law Sebagai Teknik Pembentukan Undang-Undang: Peluang Adopsi dan Tantangannya Dalam Sistem Perundang-Undangan Indonesia" (2020) 9:1 Rechtsvinding at 17; Vincent Suriandinata, "Penyusunan Undang-Undang di Bidang Investasi: Kajian Pembentukan Omnibus Law Di Indonesia" (2019) 4:1 Refleksi Hukum: Jurnal Ilmu Hukum; Antoni Putra, "Penerapan Omnibus Law Dalam Upaya Reformasi Regulasi" (2020) 17:1, online: <https://e-jurnal.peraturan.go.id/index.php/jli/article/view/602>; PSHK Indonesia, "Seri Diskusi Omnibus Vol. 9: Preseden Pendekatan Omnibus dalam Reformasi Regulasi", *PSHK Indonesia* (9 Oktober 2020), online: <https://pshk.or.id/aktivitas/seri-diskusi-omnibus-vol-9-preseden-pendekatan-omnibus-dalam-reformasi-regulasi/> (2020).

3 Ittai Bar-Siman-Tov, *supra* note 2.

4 The countries which have adopted omnibus law models are Australia, Argentina, Austria, Belgium, Czech Republic, Chile, Denmark, Finland, France, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Netherlands, New Zealand, Norway,

1988, the Right Honorable Herb Gray stated that omnibus law aimed to unite vast arrays of laws having similar purposes through an amendment.[5] While the model suggests law reform through an amendment of many laws, this measure essentially has a similar primary purpose in which it binds all relevant laws for being unified into one law.[6] This method has been commonly practiced in the common law system and is currently adopted by countries with civil law systems like Indonesia.

O'Brien and Bosc describe omnibus law as an attempt to change or revoke several regulations that share similar characteristics and melt them into a single document.[7] Meanwhile, Barbara Sinclair considers omnibus law a statutory regulation entitled to particular issues.[8] Since the omnibus aims to pack several documents into one, the text contained within is usually long and complicated. Glen S. Kruts concludes some patterns in omnibus law regulating at least three legal issues, having at least ten subtopics, and usually thicker than most non-omnibus law.[9] Law that falls within that pattern can be categorized as an omnibus.

To provide a broader notion of the omnibus drafting method, this study will examine the experience of the United States, Germany, and Canada. The first is the case of the United States. The United States annually promulgated an omnibus spending bill. The problem is that there is no explicit omnibus drafting method in the United States. [10] This results in confusion among parties, either inside or outside the parliament,

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Poland, Portugal, Russia, Spain, Sweden, Switzerland, Thailand, and Indonesia. Antoni Putra, *supra* note 2.

5 Michel Bédard, "Omnibus Bills: Frequently Asked Questions," *Library of Parliament* (October 1, 2012) online: <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201279E>.

6 *Ibid.*

7 Indonesia Ocean Justice Initiative, "Policy Brief IV IOJI Sistem dan Praktik Omnibus Law di Berbagai Negara dan Analisis RUU Cipta Kerja dari Perspektif Good Legislation Making", (Agustus 2020) online: <https://oceanjusticeinitiative.org/wp-content/uploads/2020/08/Policy-Brief-IV-IOJI-Sistem-dan-Praktik-Omnibus-Law-di-Berbagai-Negara-dan-Analisis-RUU-Cipta-Kerja-dari-Perspektif-Good-Legislation-Making.pdf>.

8 Bayu Dwi Anggono, *Pokok-Pokok Pemikiran Peraturan Perundang-Undangan di Indonesia* (Jakarta: Konstitusi Press, 2020) at 177.

9 Glen S. Krutz, *supra* note 2 at 214.

10 *Ibid.*

demanding one particular law for each subject. [11] In Canada, the omnibus Bill C-38 has sparked controversy. The bill consists of more than 400 pages and amended up to 70 laws. It was passed rapidly without sufficient parliament deliberation. Similar to the United States, Canada does not have a specific law on the omnibus drafting method. As a result, the bill lacks depth and detailed impact analysis, minimum space for the related government agencies, minimum public participation, and causes vast discretionary space for the Central Government. The third is the case of Germany. Unlike Canada and the United States, Germany has its standard of measurement of the omnibus method within the 2008 Legislation Drafting Law.

According to Sinclair and Smith, the omnibus law technique has changed the deliberative process because it is finished in a short time with fewer hearings in parliament. In the end, this short drafting period reduces the accountability of the law-making process.[12] According to Louis Massicotte, the lack of thoroughness and prudence is caused by the many topics that should be discussed in the drafting process. In 1901, the Commonwealth Court of Pennsylvania once raised this issue. The court stated that the discrepancies between the number of subjects in omnibus drafting had confused legislators.[13]

As mentioned earlier, this study aims to examine omnibus implementation in Indonesia. Normatively speaking, the Indonesian drafting method is still unfamiliar with the omnibus. It was not regulated when the Job Creation Law 11/2020 was enacted and later introduced in Legislative Drafting Law 13/2022. As reflected in the United States, Canada, and Indonesia, the omnibus' adoption has raised some concerns regarding the lack of accountability and public participation in the drafting process.[14] Besides

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[11] Denis Kirchhoff & Leonard JS Tsuji, "Reading between the lines of the 'Responsible Resource Development' rhetoric: the use of omnibus bills to 'streamline' Canadian environmental legislation" (2014) 32:2 Impact Assessment and Project Appraisal 108–120 at 115.

[12] Bayu Dwi Anggono, *supra* note 8.

[13] Louis Massicotte, *supra* note 2 at 170.

[14] Indonesia Ocean Justice Initiative, "Policy Brief V IOJI RUU Omnibus Law Cipta Kerja dan Implikasinya terhadap Pembangunan Berkelanjutan di Sektor Kelautan", (Agustus 2020) online: <https://oceanjusticeinitiative.org/wp-content/uploads/2020/

describing the dynamics of the adoption in Indonesia, this study will also explore whether there is a coping mechanism to overcome its drawbacks which will be explained in other sections.

II. METHODS

This research used the doctrinal method. Four approaches were used: statute, conceptual, case approach, and comparative approaches. The statute approach focuses on examining the consistency and compatibility between the principles in the Job Creation Law and the Legislative Drafting. The conceptual approach examines concepts and doctrines related to the omnibus law. The case approach analyses legal considerations of the Constitutional Court Decision No. 91/PUU-XVIII/2020 that formally reviews the Job Creation Law 11/2020. It also adopted a comparative approach by analyzing several countries as a comparison, namely the United States, Canada, and Germany, by paying attention to the weaknesses and strengths of the application of the omnibus law method without limiting the country's system.

III. OMNIBUS LAW TO THE FORMATION OF LEGISLATION IN INDONESIA

On February 13, 2020, the Indonesian government submitted a legislative draft of the Job Creation Law that used the omnibus law method. This draft was officially promulgated on November 2, 2020, to become the Job Creation Law 11/2020. It is a consensus that the omnibus law method is a way to organize legislation and is used as a form of regulatory reformulation strategy by the government so that the arrangement is carried out simultaneously on many laws and regulations. Based on PHK data, it found too many regulations, which resulted in the potential for disharmony between regulations.[15] The number of hyperregulation data produced by

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08/Policy-Brief-V-IOJI-RUU-Omnibus-Law-Cipta-Kerja-dan-Implikasinya-terhadap-Pembangunan-Berkelanjutan-di-Sektor-Kelautan.pdf>.

[15] Diana Sadiawati, *supra* note 1 at 64.

the Central Government in 2014-2018 is described in the following illustrations:

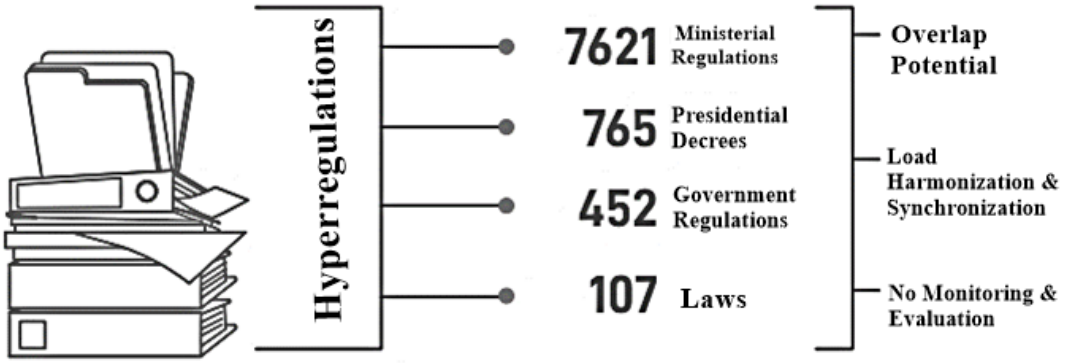

Figure 1. *Hyperregulations by the Central Government in 2014-2018*[16]

The enforcement of omnibus law originated and developed in countries that adhere to the common law system, such as the United States, the United Kingdom, and Canada. The beginning of this conception is to offer improvements regarding the problem of overregulation or too many regulations and overlapping, namely overlapping regulations currently in effect.[17] One of the first countries in the world to implement the omnibus method was the United States. Henry Clay, a senator from the state of Kentucky, passed a series of resolutions on January 29, 1850, and proposed the idea of an omnibus law as a compromise measure for disputes between North and South in the United States.[18] The Omnibus law concerning the Compromise of 1850 was then passed in September 1850 by addressing the main issues concerning slavery and territorial expansion.[19] The Compromise of 1850 is a package of laws consisting of 5 (five) different laws.

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16 *Ibid* at 65.

17 Antonio Putra, *supra* note 2.

18 The United States, "U.S. Senate: Clay's Last Compromise," *United States Senate* (January 29, 1850), online: <https://www.senate.gov/artandhistory/history/minute/Clays_Last_Compromise.htm>.

19 Ken Drexler, "Research Guides: Compromise of 1850: Primary Documents in American History: Introduction", *Library of Congress* (April 5, 2019), online: <https://guides.loc.gov/compromise-1850/introduction>.

Historically, the compromise step through the omnibus law method only lasted a decade. The American civil war broke out in 1861-1865.[20] In Canada, the omnibus law was first enacted in 1888. The concept of the omnibus was used to govern two treaties regarding railways. Although it had been implemented earlier, the term "omnibus bill" was only introduced in 1967. In that year, the Minister of Justice, Pierre Trudeau, proposed regulation regarding the Criminal Law Amendment Bill.[21]

Countries with civil law systems eventually adopted the omnibus law method from common law countries. Germany is a civil law country that has several times issued legislation with the concept of omnibus law. The omnibus law method in Germany does not only make changes to the law but also includes implementing regulations relating to the amended law, such as the Federal Recognition Act of 2012.[22] Based on the history of its formation, the omnibus law method was first implemented in countries that adhere to the common law legal system. At the same time, Indonesia is a country that adheres to a civil law legal system with the characteristics of Pancasila.[23] Since Cicero's time, the difference between legal systems has been seen as a problem that must be overcome.[24] The legal system is at

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[20] Randy Wirayudha, "Omnibus Law dari Masa Lampau", *Historia* (10 Oktober 2020), online: *Historia - Majalah Sejarah Populer Pertama di Indonesia* <https://historia.id/politik/articles/omnibus-law-dari-masa-lampau-DOZww>.

[21] Indonesia Ocean Justice Initiative, *supra* note 7.

[22] Cedefop, "Germany: the new Recognition Act", *Cedefop* (January 17 2013), online: <https://www.cedefop.europa.eu/en/news-and-press/news/germany-new-recognition-act>.

[23] From the Pancasila perspective, there is harmony with the legal dogma of placing humans at the center of various modes of regulation and the purpose of the regulation. However, it has differences from the dogmas of western law. The typical order, according to Pancasila, is that everything related to the people's entity (populist) is carried out by deliberation. The existence of awareness as a human being is believed to be a necessity to create peace in life and social justice; Fitriani Ahlan Sjarif & Sony Maulana Sikumbang, eds, *Aradhana Sang Guru Perundang-undangan Kumpulan Tulisan Memperingati Ulang Tahun Ke-70 Prof. Dr. Maria Farida Indrati, S.H., M.H.* (Depok: Fakultas Hukum Universitas Indonesia, 2019) at 437.

[24] Peter de Cruz, *Perbandingan Sistem Hukum Common Law, Civil Law dan Socialist Law*, (Bandung: Nusa Media, 2017) at 687.

different stages of development, and when combined, a system that develops more slowly can overtake a more mature system.[25]

Going back to the history of the introduction of the omnibus law method in 1988, the Right Honorable Herb Gray, during the debate, stated that the essence of the omnibus bill is to bring together many laws with the same purpose and then amend them. The unification in question is in the form of unification of principles, unification of determination, unification of files, or unification of objectives.[26]Followed by the statement that the essential thing in the procedure for forming an omnibus law is the draft law in question. Although the omnibus law seems to make or amend many different laws, in principle, this law has the same essential purpose and is binding on all proposed laws so that the unified laws in principle have one purpose.[27]According to Barbara Sinclair, the omnibus law has a high and long complexity because it touches on many subjects, issues, and issues that are not significantly related.[28] Meanwhile, O'Brien and Bosc stated that the omnibus law aims to change or revoke some regulations in a single law and has several different issues as unique characteristics but are still interrelated.[29]

Several legal experts also conveyed the conception of omnibus law in Indonesia. A. Ahsin Thohari interprets omnibus law as an integrated law-making technique. Maria Farida defines omnibus law as a simplification step of various laws still in effect. Therefore it contains or regulates several subjects and materials in one new law text.[30]Gunter further said that the omnibus law combines various subjects in one document and has several essential criteria. Meanwhile, Muladi means that the omnibus law is a law

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[25] *Ibid* at 696.

[26] Michel Bédard, *supra* note 5.

[27] *Ibid*.

[28] Glen S Krutz, *Hitching a ride: omnibus legislating in the U.S. Congress*, Parliaments and legislatures series (Columbus: Ohio State University Press, 2001) at 3.

[29] Indonesia Ocean Justice Initiative, *supra* note 7.

[30] Wanda Ayu, "Tiga Guru Besar UI Ini Beri Masukan Soal Omnibus Law", *Universitas Indonesia* (13 February 2020), online: <https://www.ui.ac.id/tiga-guru-besar-ui-ini-beri-masukan-soal-omnibus-law/>.

containing many topics that are not even related to each other, so it needs to be consolidated and synchronized.[31]

Jimly Asshiddiqie believes that the correct use of the term is the omnibus bill, not the omnibus law. However, in practice, the use of the two terms is often mixed up even though they have the same meaning. The omnibus law is a law-making technique carried out by changing or combining several regulations derived from several laws, interrelated and united in one law.[32] Rio Christiawan also conveyed a similar opinion, which defines omnibus law as a form of legal product carried out with the mechanism of revising and several legal rules. These rules are then used as a form of legal basis because, hierarchically, their position is higher than the simplified legal rules.[33] Therefore, the technique of forming an omnibus law is not only reducing or simplifying a statutory rule but also structuring the relevant authorities.[34]

The discourse on the formation of the omnibus law has several substantial issues, primarily if it is enforced in Indonesia. It is essential to note the differences between the omnibus law and the ordinary law that has so far been formed. Bayu Dwi Anggono mentioned several fundamental differences in the formation of the two laws, among others: first, the substance of the law. Indonesia recognizes one material/substance/subject of laws, while the omnibus contains several different materials/ substances/ subjects that are not even related to each other in one legal text; second, the formation technique. In general, if there is a change or revocation, the method proposes a change or revocation of only one law without changing other substances. Whereas in the omnibus law, the technique of changing or revoking several provisions in various laws is only enough to be done with one proposal for the formation of law; third, the difference in the meaning of the concept of the codification law. Indonesia is familiar with

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[31] Muladi, "RKUHP sebagai "Omnibus Law"", *Kompas.id* (27 November 2019), online: <https://kompas.id/baca/utama/2019/11/27/rkuhp-sebagai-omnibus-law/>.

[32] Jimly Asshiddiqie, *Omnibus Law Dan Penerapannya Di Indonesia* (Jakarta: Konstitusi Press, 2020) at 7.

[33] Rio Christiawan, *Omnibus Law, Teori dan Penerapannya* (Jakarta: Sinar Grafika, 2021) at 8.

[34] *Ibid.*

legal codification, while the omnibus concept is a method of merging law. However, the two concepts have a significant difference: legal codification is legal bookkeeping with the same material in one set of laws. In contrast to omnibus law, which collects or combines material and provisions from many laws,[35]

Rousseau explained that the law results from the work of the *volonte generale* whose address is always general, and the things adopted are always abstract. Rousseau argues that an individual arrangement is not a law but a determination, *beschikking*, or decree.[36] It is different from P. Laband, who argues that understanding the law is an understanding of the rule of law in general. Law is a decision and statement of the rule of law (*ausspruch eines rechtsstatzes*). Such an understanding thrives in constitutionalism. In contrast to Rousseau, Laband views the general nature of the law as a sign of order (*naturale*), not one without essence (*esssentiale*). Furthermore, Laband distinguishes the contents of the law (*gesetzesinhalt*) and statutory orders (*gesetzebefehl*). Thus, this makes the moment of command more critical than the content. According to him, the main point is the confirmation or ratification of a law (*die sanktion*).[37]

As the experts view above, the understanding of formal law refers to the law as a decision of the legislators according to the procedures stipulated in the constitution, regardless of its content and material. On the other hand, the understanding of material law argues that law is a regulation with a specific and certain content, which, therefore, must be formed according to certain procedures so that the content of certain laws is limited in scope and nature.

The content of laws and regulations is one of the crucial factors in the legal development process in Indonesia. Therefore, the improvement of the material is always sought. The reform of legal materials aims to create an orderly statutory regulation by considering the level of regulations, local

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[35] Bayu Dwi Anggono, *supra* note 8 at 179.

[36] Maria Farida Indrati, *Kumpulan Tulisan A. Hamid Attamimi: Gesetzgebungswissenschaft sebagai Salah Satu Upaya Menanggulangi Hutan Belantara Peraturan Perundang-Undangan* (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2021) at 86.

[37] *Ibid.*

wisdom, revitalization of customary law, and jurisprudence repositioning related to national law reform.[38] The level of legislation is the implementation of the hierarchical Indonesian legal system. It aims to determine the degree of each rule with the consequence that the conflicting regulation should be ignored against the higher regulation.[39]

The formation of laws and regulations must take into account several elements in order to be effective. Lawrence M. Friedman describes three elements that must be considered based on structure, substance, and legal culture. The legal structure is a legal system that is constantly changing. The speed of system change has differences, is not the same as one another, and has a long-term sustainable pattern and pattern. The substance of the law is a rule, norm, and pattern of community behaviors in the system.[40] Abeer Bashier and Eid Ahmad Al-Huban provide views regarding the need for certain guiding principles in forming the legislation. On the other hand, the laws formed must not conflict with the principle of hierarchy or the rule of law in force.[41] Roscoe Pound believes that the law must be stable but cannot stand still.[42] Therefore, changes in the law cannot be avoided even though the previous law has been considered the most recent. Things that need to be considered regarding the adoption of legal methods from countries and even different legal systems include misuse of legal combinations and only following the current law, legal closure, isolationism, or xenophobia to lead to legal alienation, and the need for adaptation to legal adjustments.[43]

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[38] Badan Pembinaan Hukum dan Hak Asasi Manusia, "Naskah Akademik Perubahan Undang-Undang Nomor 10 Tahun 2004", *Badan Pembinaan Hukum dan Hak Asasi Manusia,* online: <https://bphn.go.id/data/documents/na_perbh_uu_10_2004.pdf>.

[39] Tanto Lailam, "Analisis Praktik Penguman Formil Undang-Undang Terhadap Undang-Undang Dasar 1945" (2011) 6:2 Pranata Hukum, online: <http://jurnal.ubl.ac.id/index.php/PH/article/view/161>.

[40] Lawrence M Friedman & Grant M Hayden, *American Law: An Introduction*, third edition ed (Oxford: Oxford University Press, 2017) at 5.

[41] Bayu Dwi Anggono, *Perkembangan Pembentukan Undang-Undang Di Indonesia* (Jakarta: Konstitusi Press, 2014) at 47.

[42] Roscoe Pound, *Interpretations of Legal History*, (Cambridge: Cambridge University Press, 2013) at 1.

[43] Darius Whelan, *The Comparative Method and Law Reform* (Thesis, University College Dublin, 1988) at 26.

The use of the omnibus method adopted from other legal systems as a form of legal reform is something that cannot be avoided. However, there is an immaturity in the concept of making the law. The omnibus law is only defined as the concept of "*containing various subjects and materials*" by heeding the signs regarding the principles and principles of establishing good laws and regulations in Indonesia. Formally, it does not follow the principles adopted in forming the legislation.

Jimly Asshiddiqie divides omnibus law into two patterns based on its application in several countries, among others: first, a law whose existence can change many laws at once without revoking or changing parts of the relevant laws; second, a law that contains many laws that become one unit, the existence of the new law changes the material to revoke the old law.[44]The second pattern is similar to the technique of codifying legislation.[45]The reality of the existence of the omnibus law method, which does not automatically produce legal certainty, makes this method must first meet several requirements if adopted in Indonesia.[46]The adoption of related methods must meet the philosophical, sociological, and juridical foundations of the inception of a law. The philosophical element is the certainty that the laws refer to awareness and legal ideals sourced from Pancasila and the 1945 Constitution.[47]

The omnibus law method in forming laws and regulations in Indonesia is a form of legal reform that cannot be avoided. The Constitutional Court Decision 91/PUU-XVIII/2020 mentioned that the simplification mechanism or method to be carried out could be used as long as its formation is carried out according to the technique and standard as regulated and determined. Indonesia is a state of law, so everything must be certain to create legal order related to forming laws and regulations. Furthermore, for the sake of creating benefits, justice, and legal certainty, it is necessary to have a standard basis as a guide for the formation of laws

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[44] Jimly Asshiddiqie, *supra* note 32 at 222.

[45] *Ibid*.

[46] Presentation at the seminar organized by the Djokosoetono Research Center and the Department of State Administrative Law Studies, University of Indonesia, Depok, February 6, 2020. In Bayu Dwi Anggono, *supra* note 7 at 192.

[47] *Ibid* at 190.

with this method. However, it must still fulfill every principle of forming laws and regulations to achieve practical and reasonable regulations.

IV. THE APPLICATION OF OMNIBUS LAW IN INDONESIA'S LEGISLATION

Indonesia, as a modern country, is based on law and democracy. It is a form of achieving prosperity for the people of Indonesia. In order to carry out the development of national law, two main foundations must be considered, including:[48]first, the ideal basis as a fundamental norm, namely law with the characteristics of Pancasila; and second, the operational basis by implementing laws that are just, democratic, and protect human rights. This foundation is a manifestation of the implementation of national legal politics as a determinant of the direction of national development policies. Legal politics is a source of legal thought as the basis for state intervention through legal creation. The government creates law as a form of the state's obligation to uphold justice and public order; Second, the law's implementation.[49] The state must form state equipment to implement and enforce the law in society; third, legal developments. Law was born based on public legal awareness. For the state to be able to influence the development of law, the state needs to influence the development of legal awareness in society.

The opportunity to apply the omnibus method in forming laws and regulations in Indonesia depends on the relevant laws' effectiveness, success, and benefits. It is a so-called legal transplant because it adapted to the law's strengths and ideas. Frederick Schauer introduced the concept of legal transplantation as a process when laws and legal institutions developed in one country are adopted by another.[50] Laws adopted or spread across

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[48] Pusanev Bphn, "Dokumen Pembangunan Hukum Nasional Tahun 2019" 417 at 56.

[49] *Ibid* at 67.

[50] Frederick Schauer, "The Politics and Incentives of Legal Transplantation" (2000) CID Working Paper Series, online: <https://dash.harvard.edu/handle/1/39526299> at 1.

countries depend highly on the ideas and powers in the law rather than on political and symbolic factors.[51]

On the other hand, the urgency of regulating the omnibus law method, which is currently being discussed in the Draft Law on Amendments to the Formation of Legislation, is an implication of the Constitutional Court Decision No. 91/PUU-XVIII/2020. In the decision, the Job Creation Law that used the omnibus method was contrary to the 1945 Constitution of the Republic of Indonesia and did not have conditionally binding legal force as long as it meant "no repairs were made within two years from this decision pronounced.[52]Such a decision refers to the Job Creation Law whose arrangement did not have a standard and binding legal basis. Therefore, it is necessary to make improvements to Legislative Drafting Law 12/2011, especially those relating to the omnibus model.[53]The Constitutional Court Decision No. 91/PUU-XVIII/2020 has indirectly pushed back the discourse of changes and improvements to Law 12/2011. It is motivated by the reality that the constitutional court's decision has juridical implications for Indonesia's system of laws and regulations.[54]

Constitutional Court Decision No. 91/PUU-XVIII/2020 relates to the Job Creation Law 11/2020. The main problem is adopting the omnibus law method in drafting this law. Juridically, the omnibus method has not been adopted in Legislative Drafting Laws to form the laws and regulations. The Constitutional Court ruled that the Law on Job Creation is conditional. The basis for the judge's considerations to decide conditionally

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[51] *Ibid* at 2.

[52] Mahkamah Konstitusi, "Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020", *Mahkamah Konstitusi* online: <https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_8240_1637826598.pdf> at 416.

[53] PSHK Indonesia, "Naskah Akademik dan Draf RUU Perubahan Kedua Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan", *PSHK Indonesia* (2 February 2022), online: <https://pshk.or.id/publikasi/ naskah-akademik-dan-draf-ruu-perubahan-kedua-undang-undang-nomor-12-tahun-2011-tentang-pembentukan-peraturan-perundang-undangan/> at 71.

[54] Indonesian Center of Legislative Drafting, "Catatan Kritis Indonesian Center of Legislative Drafting (ICLD)," *Indonesian Center of Legislative Drafting* (February 11, 2022), online: <https://icldrafting.id/catatan-kritis-indonesian-center-of-legislative-drafting-icld/>.

unconstitutional in the law is as follows: (1) The Job Creation Law does not comply with the technique of drafting laws and regulations as contained in Attachment II to Legislative Drafting Law; (2) It was revealed in the trial that there were differences or changes in content and substance between the draft laws before and after they were approved into law; (3) The fact that the process of law formation does not maximize meaningful participation or does not provide maximum space for public participation.

Based on the facts and the various rationale of the ruling in the Constitutional Court Decision No. 91/PUU-XVIII/2020, there are two main points important enumerated as follows: (1) The Court declares that the Job Creation Law remains valid as long as legislative branch improves in the legislative drafting procedures; (2) The Court reserves two years for the legislative branch to revise the Legislative Drafting Laws. While the decision has not been adressed, this Job Creation Law will be permanently unconstitutional after two years; (3) In the future, if the Job Creation Law is permanently unconstitutional, it means that this law will be and the previous provisions amended by the Job Creation Law will be re-applicable.

The ruling does not order any revisions or changes to Law 11/2020. However, in the ratio decidendi point 3.18.2.2 the Constitutional Court Decision No. 91/PUU-XVIII/2020, it is stated:[55] "That apart from the definition of the omnibus law, it is important for the court to emphasize that whatever technique or lawmakers will use method to simplify laws, eliminate various overlapping laws, or accelerate the process of forming laws, is not a matter of constitutionality as long as the choice of the method is carried out in the corridor of definite, standardized and standardized guidelines and first stated in the technique of drafting laws and regulations so that they can be used as guidelines for the formation of laws that will use these techniques or methods. The need for clear and standard procedures in forming laws and regulations is, in principle, a constitutional mandate in regulating the design of the formation of laws. This method cannot be used as long as it has not been adopted in the law on forming statutory regulations." Such considerations ultimately have implications for drafting amendments to Law 12/2011.

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[55] Mahkamah Konstitusi, *supra* note 52 at 403–404.

The new amendment to Legislative Drafting Law has become a draft law on the initiative of the DPR, which was approved at the plenary session on January 8, 2022.[56]Some of the inputs on the material for regulating the draft law that was discussed included: first, the dictum "considering" letter b: "...adding, among other things, the regulation regarding omnibus..."; second, Article 1 point 2a concerning the Definition of Omnibus; third, changes to number 3 (seventh part); Fourth, Article 42A: "The use of the Omnibus Method in the preparation of a draft Legislation as referred to in Article 7 paragraph (1) and Article 8 paragraph (1) must be stipulated in the planning document"; Fifth, Amendment to number five against Article 64(3) and (4); Sixth, Amendment to number 6 to Article 72; Seventh, amendment to number 8 to Article 96; Eighth, Amendments to the provisions of Article 97A.[57]

The scope of the contents of the Draft Law on Amendments to the Law on the Proposed Expertise Board of the DPR, namely: (a)The general provisions provide a general definition of the omnibus method; (b) The provisions on the principle of the formation of good laws and regulations are not changed, but the explanation of the principle of openness is changed to accommodate meaningful public participation; (c) The planning of laws and regulations using the omnibus method is regulated in a separate section which states that in the preparation of draft legislation such as laws, government regulations, presidential regulations, provincial regulations, or district/city regional regulations and/or other types of regulations must be specified in the planning document; (d) the drafting of laws and regulations is carried out per the technique of drafting laws and regulations and may use the omnibus method. Provisions regarding the technique of drafting laws and regulations are listed in Appendix II, which is an integral part of this law; (e) the community has the right to provide input verbally and/or in writing online and/or offline in each stage of the

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[56] Sekretariat Jenderal DPR RI, "Paripurna DPR Setujui RUU Nomor 12 Tahun 2011 Jadi RUU Inisiatif DPR", *Sekretariat Jenderal DPR RI* (8 Februari 2022), online: <http://www.dpr.go.id/berita/detail/id/37506>.

[57] The material was delivered by Fendi Setyawan as speaker in Secretariat General of the DPR RI Channel, Setjen DPR RI Channel, *Live Streaming - Konsultasi Publik RUU Pembentukan Peraturan Perundang-Undangan* (2022).

formation of laws and regulations. The results of public consultation activities are used as material for consideration and planning for the preparation and discussion of laws and regulations, and the legislators can explain to the public verbally and/or in writing online and/or offline regarding the results of the discussion on input from the community; (f) Content material regulated in laws and regulations using the omnibus method can only be changed and/or revoked by changing and/or revoking the said laws and regulations; (g) the formation of laws and regulations can be done on an electronic basis.[58]

By referring to the consideration of the Constitutional Court's decision and is associated with the omnibus law method, several important points can be used as references in the formation of laws. First, the formation of laws must be based on the procedures and standard standards in the Act. -Law concerning the Establishment of Legislation. In the case of a new method being implemented, such as the omnibus law method, it must not override the provisions or rules contained in the law. In addition, the revision of the Legislative Drafting Law in advance by adding the new method such as the omnibus one will result in legal certainty. Second, the principles in Article 5 of Legislative Drafting Law are an integral part that must be fulfilled in legislative drafting. Therefore, legislators must implement the principles described in the law, and one principle cannot be ruled out. While in a condition to neglect one of the principles, this has injured the formal process and reduced the quality of the law. Third, the principle of openness is one of the essential principles in forming laws. This is related to forming good laws and meaningful participation or maximum and meaningful public participation.

The primary aspects that need to be analyzed in forming laws and regulations are the theories and methods to be applied. These components are believed to create a law that can concretely achieve goals and resolve problems or issues at hand. The Institutional Legislative Theory and Methodology (ILTAM) method is one universally recognized standard for forming laws and regulations. Ann Seidman and Robert B. Seidman pioneered this method to provide guidelines expected to efficiently and

[58] Bayu Dwi Anggono delivered the material as the speaker in *ibid*.

effectively help the government achieve the desired goals in forming laws. ILTAM provides four essential stages in the formation of laws, among others.[59]

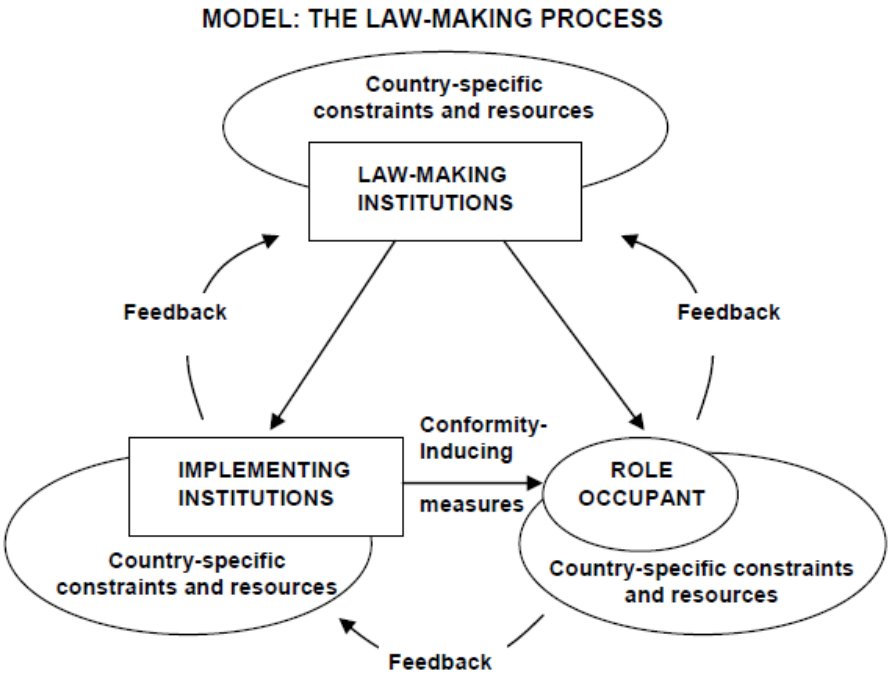

Figure 2. *Legal Formation Process Model*[60]

In the context of the law formation model proposed in ILTAM, the substance that must be considered is law-making institutions, namely institutions that form legislation; role occupants or subject of statutory regulations; and implementing institutions or institutions authorized to implement the laws that have been made and stipulated. For a draft law to be evaluated effectively, it must prove legal and social issues and the relevant implementing agencies. The social issue is a problem that the enactment of related laws will handle.[61] Furthermore, this mechanism should establish criteria for gathering the evidence needed to assess whether the draft law has been effectively enacted. Monitoring and evaluation procedures must be proven to be transparent and accountable. It

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[59] Ann Seidman & Robert B Seidman, "Instrumentalism 2.0: Legislative Drafting for Democratic Social Change" (2011) 5:1 Legisprudence 95–142 at 451.

[60] *Ibid* at 453.

[61] *Ibid* at 452.

is necessary to ensure that everyone affected, especially the poor and vulnerable, has the opportunity to provide input and feedback from relevant evidence regarding the legal impact on people's lives. In short, a monitoring and evaluation process is paramount to prove that the relevant laws have been running according to the predictions outlined by the legislators.[62]

Based on the comparative law theory expressed by Jhering, Zweigert, and Kötz. Explains that "Acceptance of foreign legal concepts is not a matter of nationality, but the usefulness and necessity of the relevant law. No one bothers to take something from afar when he has better or better at home, but only a fool would reject quinine just because it does not grow in his back garden."[63] Such a concept is the view of the adherents of the function theory, which is currently growing. Based on this theory, legislators can propose and apply legal policies that have been previously enforced in other places or countries as long as the implementation of the relevant law has been able to prove its success in the country concerned.[64]

Zweigert and Kötz introduced the theory of functionality. Concepts that are emphasized in the introduced functionality are related to the transferability of institutions, solutions, legal texts, and legislative techniques. This theory believes that if the concepts and laws of foreign legal systems can be presented following the needs of society or the state, then the origin of transparency can be ruled out,[65] as long as the legal transparency can be adequately presented under the community's legal needs.

One of the application materials to the Constitutional Court is regarding several draft laws whose discussion is not carried out openly and the limited involvement of the community. In comparison, one of the principles that need to be implemented in forming legislation is the principle of openness

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[62] *Ibid* at 456.

[63] Constantin Stefanou & Helen Xanthaki, *Drafting Legislation: A Modern Approach* (Ashgate Publishing, Ltd., 2013) at 3.

[64] *Ibid*.

[65] Shaohong Zhuang, "Legal Transplantation in the People's Republic of China: A Response to Alan Watson" (2005) 7 European Journal of Law Reform 215-236, online: <https://www.semanticscholar.org/paper/Legal-Transplantation-in-the-People%27s-Republic-of-A-Zhuang/d4e8c7dbdf055801ddafdf441949d03bb9841c4e> at 223.

and public participation. Society participation that has not been optimal is the implication of Article 96 of Law 12/2011, which does not regulate the obligations of legislators regarding responding to input from the community.[66] The absorption of people's aspirations is one of the crucial factors determining the quality of a policy.[67]Today, as an effort to strengthen meaningful participation, it has been stated in Law 13/2022 on the second amendment to Legislative Drafting Law 12/2011.

The participation is not only in the form of consultations or socialization that is procedural and quasi-procedural but needs to involve partnerships with the power of civil society and academics so that it is appropriate and has dimensions of community needs.[68] Participation is divided by Sherry Arnstein into eight levels or known as "Eight rungs on the ladder of citizen participation."

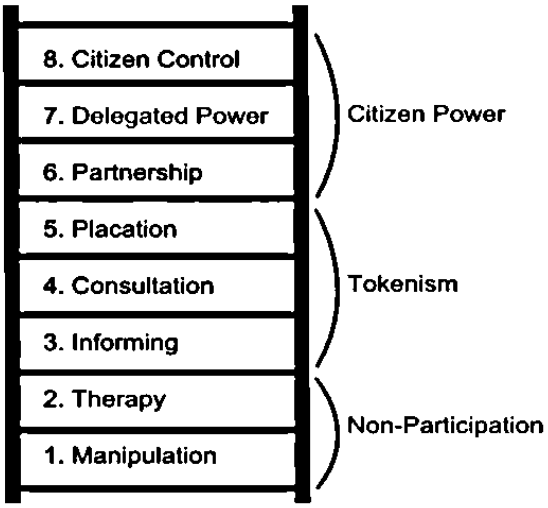

Figure 3. *Citizens' Participation Rate*[69]

The eight levels of the participation ladder categorized by Sherry Arnstein are divided into three groups, from the lowest level, namely the non-participation group, to the highest level, community power or citizen

[66] PSHK Indonesia, *Menggagas Arah Kebijakan Reformasi Regulasi di Indonesia: Prosiding Forum Akademik Kebijakan Reformasi Regulasi 2019* at 346.
[67] *Ibid* at 372.
[68] *Ibid* at 376.
[69] Sherry R Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 Journal of the American Institute of Planners 216–224 at 217.

power. Certain standards as a framework for participation levels include:[70] (1) Everyone must be notified and consulted in drafting laws; (2) Community participation may be limited in the case of special working groups. The selection of members for the group should be done openly and based on predetermined criteria to ensure the credibility and legitimacy of the process; (3) Participation should be open to different groups (minorities, persons with disabilities, women). Appropriate methods should be chosen to help facilitate and encourage the involvement of these groups; (4) community institutions can play an essential role in this process, namely by facilitating public participation, representing the interests of members and stakeholders, and keeping the process and results informed; (5) While all laws and implementing regulations must be drafted in a participatory manner, certain conditions may require limitations in the process (e.g., natural disasters, conflicts). The cases should be clearly defined to ensure clarity and certainty when participation may be restricted.

Furthermore, some countries impose minimum standards that must be respected in such situations; (6) Some countries require that clear, concise, and comprehensive information be provided to help interested parties understand the problem better and make a more meaningful contribution. For the same reason, the public should be able to gain access to draft documents at an early stage of their development; (7) The time limit allocated for comments or participation in public meetings should be determined based on several factors, including the type of document, the issue raised, its length, expertise available, the size of the target group affected; (8) Provide feedback to the consulted parties to increase trust and strengthen cooperation. It also encourages communities to be more committed to and take part in future processes; (9) Some countries are planning participatory process assessments – this can help improve future processes and share experiences for creative models to use; (10) Different tools and methods can be used to support participation at all stages of the drafting and implementation process. The decision on which method to choose can be made based on several factors, but the decision must be made

[70] OSCE, *Transparency and Public Participation In Law Making Processes: Comparative overview and assessment of the situation in Macedonia* (Organization for Security and Co-operation in Europe, 2010) at 5-7.

early in the process to ensure that the most appropriate method is selected and will bring about the desired results; (11) Several actions can be taken to help prepare the participatory process and ensure that the process will be implemented effectively; (12) Different means or tools should be used to ensure that information about the launch process is distributed as widely as possible (e.g., websites, newspapers, TV); (13) Government agencies use their websites to facilitate the consultation process. The website generally contains information about the drafting process and has space for comments, contact persons, and other related materials. However, the decision must be made early to ensure that the most appropriate method is chosen and will bring the desired results.

Participation in the decision-making process allows citizens, civil society organizations, and other interested parties to influence the development of policies and laws to be enacted. In particular, participation has several benefits in law-making including: creating fair policies/laws that reflect real needs enriched with additional experience and expertise; facilitating cross-sectoral dialogue and reaching consensus; adopting more advanced and outward-looking solutions; ensuring the legitimacy of the proposed regulations and compliance; reduce costs, as parties can contribute with their resources; increase partnership, sense of ownership and responsibility in its implementation; strengthen democracy,

The principles that must be adhered to in the participation process include, among others, the existence of a commitment; recognition of rights and obligations; access and clarity of information; continuity; proper structure (coordination); publicity; transparency; openness, and consideration; objectivity and equal treatment; resource; enough time; accountability for processes and results; and acknowledgment and feedback; evaluation. The basic values at the core of public participation are: (1) Based on the belief that those who are affected by a decision have the right to be involved in the decision-making process; (2) Includes the promise that public contributions will influence decisions; (3) Promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision-makers; (4) Seeks and facilitates the involvement of people who are potentially affected by or interested in a decision; (5) Seeks

input from the public in designing how they participate; (6) Makes the community as a party that participates in a meaningful way; (7) Communicates to the public about inputs that can influence decisions.[71]

V. CONCLUSION

Omnibus law is the new model of legislative formation in Indonesia, whereas it should refer to the Legislative Drafting Law 12/2011. Considering Constitutional Court Decision No. 91/PUU-XVIII/2020, the omnibus law method has been implemented to form new laws. However, it does not consistently follow the common procedures stated in the Legislative Drafting Law. Hence, this model should first be adopted, regulated, or promulgated systematically and concretely in the Legislative Drafting Law to ensure its certainty and maintain consistency. Simultaneously, the application of the omnibus law will impact on quality improvement of legislative drafting in Indonesia. In addition, legislative drafts with the omnibus method will be weak unless it encourages democratic social change without injuring the formal and material processes.

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[71] *Transparency and Public Participation In Law Making Processes* at 13.

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