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## Constitutional Court Rules Job-Creation Law Conditionally Unconstitutional and Demands Revision Within Two Years

**The current Job-Creation Law will remain in effect for a two-year grace period, yet no new implementing regulations relating to the Job-Creation Law should be issued**

Indonesia's Constitutional Court recently rendered Decision [No. 91/PUU-XVIII/2020](#) ("**Decision 91/2020**") in relation to a petition for a formal judicial review of Law [No. 11 of 2020](#) on Job Creation ("**Job-Creation Law**"),<sup>[1]</sup> which was originally filed on 15 October 2020 by the following parties (collectively referred to as "**Petitioners**"):<sup>[2]</sup>

1. Hakiimi Irawan Bangkid Pamungkas;
2. Ali Sujito;
3. Muhtar Said, S.H., M.H.;
4. Migrant CARE;
5. Badan Koordinasi Kerapatan Adat Nagari Sumatera Barat; and
6. Mahkamah Adat Alam Minangkabau.

In essence, through the rendering of Decision 91/2020, the Constitutional Court has now ruled as follows:<sup>[3]</sup>

1. That establishment of the Job-Creation Law is in contravention of the 1945 Constitution of the Republic of Indonesia ("**1945 Constitution**") and therefore does not have any binding legal force conditionally until a revision is made by legislators;
2. That this revision should be completed within two years of Decision 91/2020 being rendered (i.e. 25 November 2023), otherwise, the Job-Creation Law will be declared unconditionally unconstitutional, meaning that any laws and provisions set out under various laws that were previously revoked or amended as a result of the Job-Creation Law coming into force will be applicable again;
3. During the two-year period, the Job-Creation Law will remain in force, although the Indonesian Government is required to suspend any strategic and broad-impact measures/policies based on the Job-Creation Law and is also prohibited from issuing any new implementing regulations relating to the Job-Creation Law.

It therefore seems safe to conclude that the current Job-Creation Law will remain in effect for the next two years at least.

Meanwhile, Decision 91/2020 does not specifically address the applicability of the existing implementing regulations to the Job-Creation Law. However, the Indonesia's Coordinating-Minister for Economic Affairs, Airlangga Hartanto, has stated that the existing implementing regulations of Job-Creation Law will continue to be applicable.[4]

### Petitioners' Arguments

In their petition, the Petitioners had argued that the omnibus law method used during the establishment of the Job-Creation Law was not specifically acknowledged under Law No. 12 of 2011 on the Establishment of Laws and Regulations and its amendment ("Law 12/2011"). As a consequence, the Petitioners argued that the application of this method had led to uncertainty and was thus in contravention of Law 12/2011.[5]

In addition, the Petitioners also observed that a number of technical and substantial changes had been made to the substance of the Job-Creation Law after it had already been passed by the House of Representatives and the president. The Petitioners then argued that the establishment of the Job-Creation Law violated the principles that apply in relation to the establishment of laws and regulations, as specifically set out under Law 12/2011. These principles encompass the purpose clarity principle, the usability and effectiveness principles, the formulation clarity principle and the transparency principle.[6]

It should be noted that Law 12/2011 itself is a manifestation of the mandate set under Article 22A of the 1945 Constitution, which requires provisions that address the procedures for the establishment of laws to be regulated under a law. This means that the constitutional authority for the establishment of laws was transferred from the country's 1945 Constitution to Law 12/2011 and that the establishment of any laws in Indonesia, including the Job-Creation Law, must therefore be undertaken in compliance with Law 12/2011.[7] As a result, the Petitioners argued that the establishment of the Job-Creation Law was in contravention of both Law 12/2011 and Article 22A of the 1945 Constitution.[8]

### Constitutional Court's Considerations

The Constitutional Court based its decision on the following considerations:

#### 1. *Regarding the establishment method:*[9]

The title and structure of the Job-Creation Law seem to disguise its framework as a new law, despite the fact that the majority of its content comprises amendments to and revocations of various other laws. However, Law 12/2011 sets different standards for amendments to and revocations of laws and does not acknowledge any standard which allows for the combination of both, as manifested through the omnibus law approach adopted by the Job-Creation Law.

In its defense, the Indonesian Government argued that the omnibus law approach was employed in order to improve existing lawmaking methods, which were believed to be ineffective and inefficient, as they require laws to be amended on a one-by-one basis, ultimately resulting in extremely long processes. Moreover, due to the prevailing situation of so-called, "regulatory obesity," the Indonesian Government decided to aim for a massive restructuring of strategic policies and laws in the hope of attracting more investment to the country, thus creating more employment opportunities across Indonesia.

However, the Constitutional Court has now declared that the abovementioned reasoning and objectives should not have resulted in any violation of Law 12/2011. Instead, the Constitutional Court expects the Indonesian Government to provide a solid legal basis for the establishment of the Job-Creation Law through the substantial revision of Law 12/2011. This revision should address the omnibus law method itself.

#### 2. *Regarding the establishment principles:*[10]

In response to the Petitioners' argument that changes had been made to the content of the Job-Creation Law, the Constitutional Court ultimately did unearth various citation errors along with a number of substantial changes to the content of the Job-Creation Law as it relates to several laws, including: 1) Law No. 22 of 2001 on Oil and Gas; b) Law No. 40 of 2007 on Limited-Liability Companies; and c) Law No. 20 of 2008 on Micro-, Small-, and Medium-Scale Enterprises. These errors and changes have been declared in contravention of the formulation clarity principle.

The Constitutional Court also found that the country's legislators had not provided adequate forums and opportunities for public participation and input regarding the Job-Creation Law. Meetings were in fact held with various community groups, however, these meetings did not discuss the relevant academic texts (*naskah akademis*) and materials that addressed the changes to the relevant prevailing laws. In addition, the academic texts and draft of the Job-Creation Law were not easily accessible to the public, as mandated by Law 12/2011. These findings indicate a breach of the transparency principle.

### Follow-Ups

As mentioned above, the Constitutional Court has now ordered the following:

1. A revision, to be completed by 25 November 2023; and
2. Suspension of all strategic and broad-impact measures/policies based on the Job-Creation Law and a prohibition of the issuance of any new implementing regulations to the Job-Creation Law.

However, it should be noted that these orders themselves may ultimately result in a lack of clarity in certain instances.

In relation to the order outlined in point (1) above, it is now clear that the Indonesian Government is required to revise Law 12/2011 in order to provide a firm legal basis for the application of the new method of omnibus law, that is currently adopted by the Job-Creation Law. However, the following matters remain unclear:

1. Whether the revisions that are now required through the handing down of Decision 91/2020 also mean that the Indonesian Government will have to repeat the entire legislative process for the establishment of the Job-Creation Law, including the public-hearing process; and
2. How the revised processes will be implemented if the establishment of the law has to be repeated in its entirety.

Nevertheless, the Constitutional Court has stated that it has yet decided on the petitions for material judicial review of the Job-Creation Law and that the two-year grace period should be seen by the legislators as an opportunity to review the substances of the Job-Creation Law and the problems contained therein which led to the petitions for the material judicial review of the Job-Creation Law to be filed in the first place.<sup>[11]</sup>

Meanwhile, in relation to the order outlined in point (2) above, Decision 91/2020 remains silent on the scope, criteria and limitations that will apply to, "strategic and broad-impact measures/policies based on the Job-Creation Law". In addition, it also remains unclear if the "implementing regulations" stated under Decision 91/2020 refer to:

1. Certain regulations that are explicitly mandated to be promulgated under the Job-Creation Law,<sup>[12]</sup> all of which should have been promulgated by now since Article 185 of the Job-Creation Law required said regulations to be promulgated within three months of 2 November 2020; or
2. All regulations that implement and elaborate upon provisions set out under the Job-Creation Law, whether they are explicitly mandated under the Job-Creation Law, required by the types of regulations outlined in point (1) above, or simply relate to the Job-Creation Law.<sup>[13]</sup>

It should be noted that Maria Farida Indrati S., a former Constitutional Court judge, has explained in one of her publications that was issued long before the rendering of Decision 91/2020, that implementing regulations (*verordung*) derive from the delegation authority, which refers to the delegation of authority to establish laws and regulations, as implemented from higher-level laws and regulations to lower-level laws and regulations, whether said delegation is explicitly stated or not.<sup>[14]</sup> This explanation is in line with the interpretation of "implementing regulations" in point (2) above.

Decision 91/2020 was rendered on 25 November 2021. <sup>(AA)</sup>

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[1] The Job-Creation Law was briefly discussed in ILB No. 3995.

[2] Paragraph 2.1, p. 3, Decision 91/2020.

[3] Section 5, p. 416, Decision 91/2020.

[4] Bisnis Indonesia, "Pemerintah Tak Akan Terbitkan Aturan Turunan UU Cipta Kerja", as accessed through: <https://bisnisindonesia.id/article/pemerintah-tak-akan-terbitkan-aturan-turunan-uu-cipta-kerja>, on 26 November 2021.

[5] Paragraph 3.12, p. 382, Decision 91/2020.

[6] *Ibid.*

[7] Paragraph 2.1., p. 28, Decision 91/2020.

[8] Paragraph 3.12, p. 382, Decision 91/2020.

[9] Paragraphs 3.18.1.4 - 3.18.1.8 and Paragraph 3.20.1, pp. 394 - 402 and 413, Decision 91/2020.

[10] Paragraphs 3.18.3.1, 3.18.3.2 and 3.18.4, pp. 408 - 412, Decision 91/2020.

[11] Paragraph 3.21, p. 414, Decision 91/2020.

[12] Examples of these regulations include the following: 1) Regulation of the Government [No. 5 of 2021](#) on the Organization of Risk-Based Business Licensing ("**Regulation 5/2021**"); 2) Regulation of the President [No. 12 of 2021](#) on the Amendment to Regulation of the President [No. 16 of 2018](#) on Government's Procurement of Goods/Services; and 3) Regulation of the Minister of Finance [No. 18/PMK.03/2021](#) on the Implementation of Law [No. 11 of 2020](#) on Job Creation Law in the Field of Income Tax, Value-Added Tax and Luxury-Goods Sales Tax, as well as General Taxation Provisions and Procedures.

[13] Examples of these regulations include: 1) Regulation of the Investment Coordinating Board [No. 4 of 2021](#) on Guidelines and Procedures for Risk-Based Business Licensing Services and Investment Facilities, which was issued to implement the mandate under Regulation 5/2021; 2) Regulation of the Government [No. 96 of 2021](#) on the Organization of Mineral and Coal-Mining Business Activities ("**Regulation 96/2021**"), which was issued to implement the mandates under various articles under Law [No. 4 of 2009](#) on Minerals and Coal Mining ("**Mining Law**") and its amendments (i.e., Law [No. 3 of 2020](#) and the Job-Creation Law). While Mining Law has been amended by the Job-Creation Law, the provisions under Regulation 96/2021 makes no reference to Mining Law articles addressed under the Job Creation Law (i.e., Articles 128A and 162) and only elaborate matters that are addressed under Law [No. 3 of 2020](#).

[14] Maria Farida Indrati S., Ilmu Perundang-Undangan (1), (Yogyakarta: Kanisius, 2007), pp. 55 - 56.

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