

JOB CREATION LAW: HEALTHY INVESTMENT CLIMATE OR INJURED CLIMATE COMMITMENT?

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ABSTRACT

To overcome the problem of overlapping regulations and complexities of investment in Indonesia, on 5th October 2020, the Jokowi government passed Law Number 11 of 2020 concerning Job Creation (“Job Creation Law”), which is still a controversy to this day. This law has drawn broad criticism, particularly regarding the formal law-making and its problematic substances. Critics argue the legal drafting process is not in accordance with the characteristic of good law making aspired by the 1945 Constitution and Law Number 12 Year 2011 concerning the Establishment of Legislation (“Establishment of Legislation Law”). Noting that the academic text of this law does not address the importance of protecting forests and the environment, but only focuses on increasing economic development and investment. The public is faced with a dilemma of trust whether there is a trade between economic growth and environmental sustainability that is hidden by the government. The pro-deforestation articles in this law generate fundamental changes in the framework of protecting Indonesia’s environment which it is feared could open the door to massive deforestation and have a global impact on violating Indonesia’s climate commitment under Paris Agreement. Through this writing, the author questions the consistency of the Indonesian government in carrying out its climate commitments to prevent future deforestation. The authors will identify weakening instruments for environmental protection and forest management under the Job Creation Law as well as their impact to environmental protection efforts and Indonesia’s future climate commitments. At the end of this study, the author found that due to weakening of forest and environmental protection instruments, Indonesia risks failing to meet its climate commitments targeted in the first Nationally Determined Contribution (NDC) to reduce deforestation to below 3.25 million hectares by 2030 or a maximum of 325,000 hectares / year during 2020 to 2030 either on their own or with international assistance.

Keywords: Job Creation Law, Omnibus Law, Nationally Determined Contribution, International Environmental Law

ABSTRAK

Untuk mengatasi masalah tumpang tindih regulasi dan kompleksitas investasi di Indonesia, pada 5 Oktober 2020, pemerintahan Jokowi mengesahkan Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja (“UU Cipta Kerja”) yang masih menjadi kontroversi hingga saat ini. Undang-undang ini telah menuai kritik luas, terutama mengenai pembuatan undang-undang formal dan substansinya yang bermasalah. Kritikus berpendapat bahwa proses penyusunan undang-undang tidak sesuai dengan karakteristik pembuatan undang-undang yang baik yang dicita-citakan oleh UUD 1945 dan Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan (“UU Pembentukan Peraturan Perundang-undangan”). Mencatat bahwa teks akademik undang-undang ini tidak membahas pentingnya menjaga hutan dan lingkungan, tetapi hanya berfokus pada peningkatan pembangunan

ekonomi dan investasi. Publik dihadapkan pada dilema kepercayaan apakah ada trade antara pertumbuhan ekonomi dan kelestarian lingkungan yang disembunyikan oleh pemerintah. Pasal-pasal pro-deforestasi dalam undang-undang ini menghasilkan perubahan mendasar dalam kerangka perlindungan lingkungan Indonesia yang dikhawatirkan dapat membuka pintu deforestasi besar-besaran dan berdampak global pada pelanggaran komitmen iklim Indonesia berdasarkan Perjanjian Paris. Melalui tulisan ini, penulis mempertanyakan konsistensi pemerintah Indonesia dalam menjalankan komitmen iklimnya untuk mencegah deforestasi di masa depan. Penulis akan mengidentifikasi instrumen pelemahan perlindungan lingkungan dan pengelolaan hutan di bawah UU Cipta Kerja serta dampaknya terhadap upaya perlindungan lingkungan dan komitmen iklim Indonesia di masa depan. Di akhir studi ini, penulis menemukan bahwa akibat melemahnya instrumen perlindungan hutan dan lingkungan, Indonesia berisiko gagal memenuhi komitmen iklim yang ditargetkan dalam Kontribusi yang Ditentukan Secara Nasional (NDC) pertama untuk mengurangi deforestasi hingga di bawah 3,25 juta hektar pada tahun 2030 atau maksimal 325.000 hektar/tahun selama tahun 2020 sampai dengan tahun 2030 baik sendiri maupun dengan bantuan internasional.

Kata Kunci: UU Cipta Kerja, Omnibus Law, Kontribusi yang Ditentukan Secara Nasional, Hukum Lingkungan Internasional

INTRODUCTION

Towards the end of 2019, the omnibus law discourse succeeded in attracting attention not only from legal experts and politicians but also from economist, business actors, NGOs and environmental activists. This idea became widely known in Indonesia after President Joko Widodo in his inauguration speech on 20 October 2019, conveyed his priority development goals comprising human resources development, infrastructure development, deregulation through a proposed 'omnibus' law, bureaucratic reform, and economic reform. On this occasion, he introduced two main laws: a law on job creation and a law on small and middle level business. Other proposed laws

were also announced that are intended to use the omnibus method, covering subjects such as taxation and pharmaceuticals.¹

Conceptually, omnibus law is applied in countries with a common law legal system. Meanwhile, Indonesia itself adheres to a civil law system, so the term omnibus law is relatively foreign to the Indonesian legal system. Omnibus law is a legal product concept that consolidates various themes, materials, subjects, and legislation in each sector to become a large and holistic legal product. The concept of the omnibus law is a rule made to cut several rules that are considered overlapping and hinder the growth of the country which is also at while synchronizing to a large legal product, acts as the umbrella law.²

The background for the emergence of the idea of passing omnibus law is to counteract the problem of overlapping regulations and complexities of investment in Indonesia to improve the economic structure so that it is able to achieve Indonesia's economic development target of up to 5.7% - 6% and escape the so-called 'middle income' trap.³ After going through several stages, the proposed omnibus law on job creation was officially passed on October 5, 2020 and has been recorded in the State Gazette as of November 2, 2020 after being signed by President Jokowi, namely Law Number 11 of 2020 concerning Job Creation ("Job Creation Law").

However, the Job Creation Law remains one of the biggest controversies in recent months and has come under widespread criticism, particularly regarding formal law-making and its substances. Critics have been arguing the legal drafting process is inconsistent with the characteristic of good law law-making red by the 1945 Constitution and Law Number 12 the Year 2011

¹ The Jakarta Post, 'The main thing is not the process, but the result': Jokowi's full inauguration speech, <https://www.thejakartapost.com/news/2019/10/20/the-main-thing-is-not-the-process-but-the-result-jokowis-full-inauguration-speech.html>, accessed on 8 December 2020.

² Antoni Putra, Penerapan Omnibus Law Dalam Upaya Reformasi Regulasi, Jurnal Legislasi Indonesia, Vol 17 No 01 2020, p. 222.

³ CNN Indonesia, Omnibus Law Diklaim Bantu RI Keluar dari Middle Income Trap, <https://www.cnnindonesia.com/ekonomi/20201012121619-532-557323/omnibus-law-diklaim-bantu-ri-keluar-dari-middle-income-trap>, accessed on 08 December 2020.

concerning the Establishment of Legislation (“Establishment of Legislation Law”) because the process is not participatory and not transparent as the government has not involved all stakeholders who will be affected by this law.

Job Creation Law in its current form would have significant impacts on environmental and natural resources issues, considering that this law amends more than seventy applicable laws, including Law Number 32 of 2009 concerning Environmental Protection and Management (“Environmental Protection and Management Law”),⁴ also noting that the academic text of this law does not address the importance of protecting forests and the environment, but only focuses on increasing economic development and investment.⁵ By relying on the logic of investment or a capitalistic economy controlled by the state and corporations, it can be argued that the law will effectively reverse the achievements of the Indonesian government in the past 9 years in protecting its forests which have succeeded in bringing Indonesia to the lowest deforestation rate in 2019 in almost two decades.⁶

Thus, it appears that trade-offs between economic growth and environmental sustainability are very likely to occur. Behind Indonesia's future economic growth achievements, there are negative externalities that occur in its natural environment. Given that Indonesia relies on the use of natural resources as a production factor in producing output. In addition, the use of non-renewable natural resources to facilitate productivity also has a negative impact on environmental conditions, such as a decrease in air and soil quality. Environmental damage also occurs in forest conditions in Indonesia due to deforestation. Not to mention that the existence of industrial estates in

⁴ Esther Samboh, ‘Guide to omnibus bill on job creation: 1,028 pages in 10 minutes’ The Jakarta Post, <https://www.thejakartapost.com/news/2020/02/21/guide-to-omnibus-bill-on-job-creation-1028-pages-in-8-minutes.html>, accessed on 8 December 2020,

⁵ Indonesian Centre for Environmental Law, Predicting Indonesia’s Environmental Protection Direction: What to Expect After the Omnibus Law? <https://icel.or.id/en/issues/predicting-indonesias-environmental-protection-direction-what-to-expect-after-the-omnibus-law/>, accessed on 8 December 2020.

⁶ Phelim Kine, Indonesia’s New Omnibus Law Trades ‘Green Growth’ for Environmental Ruin, <https://thediplomat.com/2020/10/indonesias-new-omnibus-law-trades-green-growth-for-environmental-ruin/>, accessed on 8 December 2020.

Indonesia can make a major contribution to climate change, in the form of air, water and soil pollution due to improper waste treatment, greenhouse gas (GHG) emissions and carbon dioxide (CO₂) polluting gases.

This condition is in stark contrast to Indonesia's success in accessing results-based payment (RBP) funds of US\$ 103.8 million from Green Climate Fund (GCF), which made Indonesia the largest recipient of funds, surpassing Brazil's previous proposal of US\$ 96.5 million. The success of Indonesia in accessing these funds is an indicator of world trust in Indonesia. This fund is given as payment for Indonesia's success in reducing emissions from deforestation and forest degradation in the 2014-2016 period by 20.3 million tCO₂e.

However, Indonesia is not only judged by its success in reducing past deforestation and degradation but also for its consistency in preventing future deforestation.⁷ As a long-term result of Job Creation Law, it will be very difficult for Indonesia to fulfill its commitments to the Paris Agreement as targeted in the Nationally Determined Contribution (NDC) to reduce deforestation to below 3.25 million hectares by 2030 or a maximum of 325,000 hectares/years during 2020 to 2030 by its own effort and with international assistance.⁸

Based on this assessment, the author questions the consistency of the Indonesian government in carrying out its climate commitments to prevent future deforestation. The authors will identify weakening instruments for environmental protection and forest management under the Job Creation Law as well as their impact to environmental protection efforts and Indonesia's future climate commitments. Based on the above background, the author is

⁷ Madani, Membedah Penggunaan Dana Rbp Redd+ dari Green Climate Fund, <https://madaniberkelanjutan.id/2020/10/20/membedah-penggunaan-dana-rbp-redd-dari-green-climate-fund>, accessed on 8 December 2020.

⁸ Greenpeace Southeast Asia, Warning: Omnibus Law is Threatening Indonesia's Sustainable Investment, <https://www.greenpeace.org/southeastasia/press/43752/warning-omnibus-law-is-threatening-indonesias-sustainable-investment/>, accessed on 8 December 2020.

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DISCUSSION

1. An Overview: Environmental Law and Sustainability

a. Environmental Protection under Indonesia Environmental Law

The concept of the rule of law as envisioned by the state of Indonesia has provided guarantees to the people for the fulfillment of human rights in the administration of government and its constitutional system.⁹ The right to a clean and healthy environment is a very important and fundamental aspect of the realization of human rights as emphasized in Article 9 paragraph (3) of Indonesia Human Rights Law which states: "Everyone has the right to a good and healthy environment."

As part of human rights, the people of Indonesia have the right to get a good and healthy environment as referred to in letter A of Considering Section of Law Number 32 of 2009 concerning Environmental Protection and Environmental Protection and Management Law ("Environmental Protection and Management Law"), which the initiation is mandated directly by the 1945 Constitution: "a good and healthy environment is a basic right of every citizen of Indonesia. This mandate is emphasized in Article 28H of the 1945 Constitution: "Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care".

Besides having rights, every citizen also has environmental obligations that must be done. These obligations are regulated in Article the 67 of Environmental Protection and Management Law, which states that: "Every person is obliged to maintain the preservation

⁹ Indonesia, The 1945 Constitution of the Republic of Indonesia, Article 1 paragraph (3).

of environmental functions and prevent and overcome environmental pollution and damage". The first obligation is to preserve environmental functions, which can be interpreted as the obligation for every citizen to make meaningful efforts in order to maintain the sustainability of the carrying capacity of the environment. While, the second obligation is to control and overcome pollution and/or environmental damage, which can be understood as an effort to control a direct or indirect change in the physical, chemical/or/ or living environment (the entry of living things, substances, energy, and/or other components into the environment) by human activities that exceed the prescribed environmental quality standards.

The control of human behavior over the environment becomes absolute, acknowledging the environment has all its limitations. This control can be exercised through instruments, mechanisms, and policies, both at the national and international, to achieve a balance that is known as sustainable development. By providing protection of human rights for a good and healthy environment as the duty and responsibility of the state, a mutualistic and harmonious relationship will be built between human to humans and humans to the environment.¹⁰ For this reason, the community must play an active role in overseeing environmental protection and management carried out by the government and other stakeholders.

b. Linking International Environmental Law and Climate Change

The profound environmental changes caused by the increasing scale of human activity have led many observers to conclude that the planet has entered the "Anthropocene", a geological era marked by human impacts on the biosphere. International environmental law is a set of agreements and principles serving as substantive international

¹⁰ Richard V Waas, *Perlindungan Hukum Terhadap Hak Atas Lingkungan Hidup Ditinjau Dari Perspektif Hukum Internasional dan Hukum Nasional Indonesia*, Jurnal Sasi Vol. 20 No.1 Bulan Januari - Juni 2014, p.3.

law and procedural rules that act as a reflect the world's collective efforts to manage the transition to the Anthropocene by solving the most serious environmental problems, with the aim of achieving sustainable development that allows people to have a high quality of life today without sacrificing the quality of life of future generations to meet their own needs. International environmental law is thus critical both for addressing specific environmental threats and for integrating long-term environmental protection into the global economy challenge, including poverty, inequality, climate change, environmental degradation, peace, and justice.¹¹

The United Nations first convened countries to address the global environment at the 1972 UN Conference on the Human Environment in Stockholm. The conference was initiated by Sweden following acid rain and pollution events in Northern Europe caused by increased industrialization. The Stockholm conference highlighted the international aspects of emerging environmental challenges and legitimized the environment as an area for international cooperation. The Stockholm Conference resulted in the adoption of 1) a declaration of 26 principles concerning environment and development (Stockholm Declaration); 2) an action plan with 109 recommendations; and 3) a resolution on institutional and financial arrangement.¹²

Since the 1972 Stockholm Conference, the world has met regularly in a series of major summits aimed at shifting the world generally toward a path of sustainability. The most important by far has been the 1992 UN Conference on Environment and Development (UNCED), also

¹¹ David Hunter, International Environmental Law, https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/international-environmental-law/, accessed on 10 December 2020.

¹² Lexis Nexis, International Environmental Law-Overview, https://www.lexisnexis.com/uk/lexispsl/environment/document/393763/595P-6B81-F18C-13JY-00000-00/International_environmental_law_overview, accessed on 10 December 2020.

known as the Rio "Earth Summit", where the world leaders agreed to three major treaties (addressing climate change, biological diversity and desertification) and a 500-page blueprint for sustainable development (known as Agenda 21). Earth Summit marked the formal acceptance of sustainable development as the goal of a modern economy and of international environmental law. Indeed, since Earth Summit the concept of sustainable development has received nearly universal acceptance among every sector of international society.¹³

After those two major conferences, some of widely known environmental law principles are emerging as customary law (see: e.g., the Rio Declaration on Environment and Development), helping to resolve environmental disputes and guide negotiations of the various environmental treaties. Since that, the countries have embarked on an ambitious schedule of international environmental treaty negotiations that later form the core of international environmental law, which one of that aimed at protecting the global atmosphere, including preventing climate change and ozone depletion.¹⁴

Climate change became one of the most-discussed issues since it was brought to international and global political agenda in the end of 1980s. The potential consequences of climate change include the rise in sea level, changes in weather pattern, impacts on human health (flood, drought and problem on water management system), and decline in overall biodiversity and implications for agriculture and food security.¹⁵ Preventing "dangerous" human interference with the climate system has been a major focus of international environment law since adoption of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) at Rio Earth Summit, which recognized

¹³ David Hunter, *International Environmental Law*, accessed on 10 December 2020.

¹⁴ *Ibid.*

¹⁵ Wahyu Yun Santosa, Promoting Smallholders Carbon Project in Indonesia, *Jurnal Hukum Indonesia*, Volume 8 No 3 April 2011, p. 502.

climate change as "a common concern of humankind" and set out a framework for global action to avoid harmful impacts.¹⁶

The UNFCCC signatory states meet at regular intervals so-called called COPs (Conference of the Parties) to agree on further action in climate protection. In 1997, this meeting was held in Kyoto in Japan, during which the "Kyoto Protocol", the first document with legally binding obligations for limits and reductions, was adopted by the ratified countries. The period of applicability was set for the years 2008 to 2012 and 2013 to 2020.¹⁷

In order to be able to maintain the international climate protection process after 2020, a new climate agreement was required. This was adopted in 2015 at the COP in Paris as the "Paris Agreement", with the central aim to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.¹⁸

The Paris Agreement entered into force on 4 November 2016, thirty days after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 % of the total global GHG emissions have deposited their instruments of ratification, acceptance, approval or accession with the Depositary. This agreement requires all Parties to put forward their best efforts through NDCs and to strengthen these efforts in the years ahead. This includes requirements

¹⁶ UNFCCC, What Is the United Nations Framework Convention on Climate Change?, <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>, accessed on 10 December 2020.

¹⁷ My Climate, What Are the Kyoto Protocol and the Paris Agreement? <https://www.myclimate.org/information/faq/faq-detail/what-are-the-kyoto-protocol-and-the-paris-agreement/>, accessed on 10 December 2020.

¹⁸ Ibid.

that all Parties report regularly on their emissions and on their implementation efforts.¹⁹

c. Indonesia's Commitment to Climate Action

Rely on the alarming fact that Indonesia is the world's sixth largest emitter of greenhouse gases and the largest contributor to forest-based emissions (World Resources Institute 2015), the national government of Indonesia has committed to addressing the impact of climate change by setting emissions reduction targets and implementing adaptation measures toward a low-carbon and climate resilient future. At the 2009 Group of 20 (G20) Summit, President Susilo Bambang Yudhoyono announced Indonesia's voluntary goal of reducing its GHG emissions from between 26 percent and 41 percent (with international support) by 2020 compared to a business-as-usual (BAU) scenario. In 2011, that target was submitted as the Government of Indonesia's nationally appropriate mitigation action to the UNFCCC. Indonesia later adopted Presidential Regulation No.61 Year 2011 on its National Action Plan to Reduce Greenhouse Gas Emissions fully committing it to achieve its mitigation goals.²⁰

In 2015, Indonesia joined a global wave of countries that submitted their post-2020 climate pledges to the UNFCCC, known as intended nationally determined contributions (INDCs) Since then, it has signed and ratified the Paris Agreement, and later formally submitted its first nationally NDC in 2016 and restated the target in its nationally determined contribution (NDC) submission to reduce its GHG emissions by 29 percent below its BAU scenario by 2030, unconditionally, and up to 41 percent conditionally, subject to the

¹⁹ United Nations Climate Change, Paris Agreement - Status of Ratification, <https://unfccc.int/process/the-paris-agreement/status-of-ratification>, accessed on 10 December 2020,

²⁰ Arief Wijaya, et al., How Can Indonesia Achieve Its Climate Change Mitigation Goal? An Analysis of Potential Emissions Reductions from Energy and Land-Use Policies, World Resources Institute Working Paper, September 2017, p. 5.

availability of international support for finance, technology transfer, and capacity building.²¹

2. Degradation of Environmental Protection Under Job Creation Law

a. New Risk-Based Approach to Business Permits in Indonesia

The fundamental change in licensing promulgated by this law is a shift in the paradigm of licensing in Indonesia, especially business permits. The change was from a license-based model (licensing approach) to a risk-based license (risk-based approach). This approach allows the government to issue licenses based on the level of risk and threat to the external environment of business activity. The government gives confidence to every business actor to carry out business activities according to the risk standards set by the government.²² The implementation and arrangement of risk-based licensing is regulated in Articles 7-12 of the Job Creation Law.

This new approach was introduced because the government saw the old approach as a burden to business activities which ultimately made business processes ineffective and inefficient as this approach has the consequence that all business activities must have permits. Under the risk-based approach, the number of licenses and permits that are issued by the government will be based on the business risk level that will be determined by the scale of the hazards that a business has the potential to create.

The scale of the potential hazards will be determined by the following four aspects, among others: health, safety, environment, and the utilization and management of natural resources²³, while also considering the criteria, type, and location of the business, any limitations on natural resources, and business volatility risks. The potential hazards will be classified into four categories: unlikely, probable, possible, and likely.

²¹ Ibid., p.8.

²² I Wayan Bhayu Eka Pratama, Model Perizinan Berbasis Resiko yang “Penuh Resiko” dalam UU Cipta Kerja, <https://www.mongabay.co.id/2020/10/10/model-perizinan-berbasis-resiko-yang-penuh-resiko-dalam-uu-cipta-kerja/>, accessed on 9 December 2020.

²³ Indonesia, Law Number 11 of 2020 concerning Job Creation, Article 8 (page 8-9).

Based on the scale of the potential hazards, the government will then categorise new businesses into one of the following three classifications:

- (a) Low risk activities: For activities that are categorized as low risk, the business permit that will be given is a Business Identification Number.
- (b) Medium risk activities: For activities that are categorized as medium risk, the business permit that will be given include a Business Identification Number and a Standard Certificate. The Standard Certificate itself is a statement that the businessperson already meets the standard prior to starting their business.
- (c) High-risk activities: For activities that are categorized as high risk, the business permit that will be given include the Business Identification Number and the permit itself.²⁴

With the risk-based approach, the business permits requirements will follow the business risk classifications that have been mentioned above: the lower the business risk, the simpler the business licensing requirements will be. On its face, this mechanism seems to offer an answer to the complexity of the permit system in Indonesia. Hence, at the practical level, the risk-based approach has consequences on the complexity of their setup and implementation as it has to be regulated in more detail in the Government Regulation which overhauls many existing regulations.

Other than that, the risk grouping in the Job Creation Bill also raises several problems, namely:²⁵

- 1.) Risk assessment is closely related to the subjectivity of the assessor to determine the level of risk, inflexible, and do not have definite criteria. The factors to determine the risk are also too narrow, only covering aspects of health, safety, environment and/or resource utilization.
- 2.) It is unclear to what extent the indicators are taken into account in each risk assessment factor. There is also no adequate environmental

²⁴ Indonesia, Law Number 11 of 2020 concerning Job Creation Article 8–11 (page 8–11).

²⁵ ICEL, *Pelemahan Instrumen Perlindungan dan Pengelolaan Lingkungan Hidup dalam Ruu Cipta Kerja*, (s.l.: s.n., 2020), p.3.

inventory and comprehensive data related to the carrying capacity of the environment to further determine the environmental risk.

- 3.) The calculation of the risk level has the potential to ignore businesses or activities that have an impact on environmental changes. As a consequence, some businesses that should have entered a high-risk level have the potential to fall into the medium or even low-risk category.

b. The Abolition of Environmental Permit

As a result of the systematic shift from a regulatory-based approach to a risk-based approach, one of the biggest issues of the Job Creation Law lies in the major changes in the permit regime in Indonesia. In the spirit of simplification, this law tries to eliminate a range of types of permits, including the environmental permit, and convert all permits to one type, namely the business permit.²⁶ By integrating an environmental permit into a business permit, the government hoped that this can simplify the permit system while strengthening law enforcement. If a violation occurs, for example in terms of environmental management standards and procedures, the consequence is the main permit, namely a business permit.²⁷

Based on Article 22 of the Job Creation Law on Amendments to the Environmental Protection and Management Law in particular Article 1 number 35 and Article 36, the environmental permit was removed and replaced with an environmental approval. The current environmental permit would be transformed into an environmental approval, which would then become a pre-requisite for a business permit, along with other approvals, for instance, the spatial planning approval and the building approval.²⁸

²⁶ Indonesia, Law Number 11 of 2020 concerning Job Creation, Article 14 (page 12).

²⁷ Anih Sri Suryani, Perizinan Lingkungan dalam Undang-Undang Cipta Kerja dan Dampaknya terhadap Kelestarian Lingkungan, *Info Singkat* Vol. XII, No. 20/II/Puslit/Oktober/2020, p.15.

²⁸ Indonesia, Law Number 11 of 2020 concerning Job Creation, Article 14 (page 12).

This practice actually downgrades the essence of environmental consideration from a 'permit' regime into an 'approval' regime as historically, environmental permits were established as an instrument to control the deterioration of environmental quality by human activities. An old idea of the old regime of Indonesia's previous environmental law (Law Number 23 the Year 1997 concerning the Management of Environment) was brought back to the table. However, this approach has been shown as not capable of preventing damage to the environment from business activities. This is because the business permit was regarded as the main permit, while the other components (including the environmental approval) were seen as supporting instruments. When there is a violation of the environmental requirements, it becomes doubtful whether it will not automatically affect the business permit, since the business permit comprises many supporting approvals and the environmental approval is only one of them.²⁹

The end result is that the environmental permit is no longer a governmental instrument to determine the legally binding requirements concerning any activity that may have a significant impact on the environment.³⁰ For the above-mentioned reasons, the author argues that environmental permits should stand independently.

c. Amputation of Public Participation in Monitoring Environmental Impact Assessment (EIA)

Through the amendment to Article 26 of Environmental Protection and Management Law, the Job Creation Law significantly reduces the role of public engagement during EIA making and appraisal processes. During these years, public engagement is seen as an essential effort

²⁹ Raynaldo Sembiring, Isna Fatimah, Grita Anindarini Widyaningsih, Indonesia's Omnibus Bill on Job Creation: A Setback for Environmental Law? *Chinese Journal of Environmental Law* 4 (2020), p. 104.

³⁰ *Ibid.*

during the process, since the communities will become the affected party of the projects, and it becomes important to mitigate the impacts from the very early stage. However, under the Job Creation Law, the EIA Assessment Commission will be removed and the government will form an expanded assessment team that consists of central and provincial government officials, as well as certified experts. The elimination of this commission basically eliminates the opportunity for people from all categories to be able to participate in making decisions.

The Job Creation Law limits the scope of the 'public' that will be informed and consulted during the process to only directly impacted community. The law has put aside environmental organizations and any party that is influenced by all decisions in the EIA process from being informed and consulted. In many cases, the involvement of environmental organizations is not only as representative of nature but also to empower communities in the EIA's process. Hence, the deletion of environmental organizations involved in the EIA process will eliminate the chance for public empowerment.³¹

Therefore, there are two important implications of this change in provisions. First, the loss of the community's right to reject and object the EIA document, and second, the loss of environmental rights and the rights of environmental organizations to represent nature and empower communities in the EIA process. Apart from not supporting the principles of transparency and accountability in the process of involving the community in determining environmental feasibility, this is certainly contrary to the mandate of the constitution in Article 28 I of the 1945 Constitution, namely the right to a good and healthy environment, which is supported by three pillars: access to information, public participation, and access to justice.

³¹ Ibid.

d. The Weakening of Spatial Planning Instrument

Spatial planning become an essential instrument to protect the environment. As set under Environmental Protection and Management Law, spatial planning serves as a prevention of environmental pollution and degradation instrument, bearing in mind that this problem must be resolved immediately, even from the upstream process, namely the planning process. Therefore, integration of Strategic Environmental Assessment is a must during the spatial planning drafting and evaluation. However, the strategic essence of spatial planning has been weakened under the Job Creation Law as it could be adjustable over national strategic policies.³²

Further, the Job Creation Law added one article in the amendment of Law Number 26 of 2007 concerning Spatial Planning (“Spatial Planning Law”), which stated that when there are changes in strategic national policies that are not in line with the spatial plans, such policies can still be implemented with a recommendation letter from the central government (Article 34A in the amendment of Spatial Plan Law under the Job Creation Law). This provision clearly means that spatial plan is no longer seen as the prevention instrument. In addition, this provision also deviates from the hierarchy of statutory regulations, because it is clear that a letter of recommendation which is a decision of the central government can beat regulations which at the same time indicates the amount of discretionary space the central government has. This may lead or rise the inter-governmental conflict as well as give legal uncertainty.³³

e. De-orientation of the Strict Liability Concept

Article 88 of Environmental Protection and Management Law regulates the concept/principle of strict liability, which states: “every

³² Ibid.

³³ Ibid.

person whose actions, business, and / or activities use B3, produce and / or manage B3 waste, and / or who threaten a serious threat to the environment, are absolutely responsible (strict liability) for the losses incurred without the need to prove the element of error". As for the Elucidation of the article, it is further explained that what is meant by absolute responsibility is that the element of error does not need to be proven by the plaintiff as the basis for paying compensation. However, Article 88 is amended by means of the Job Creation Law so that it reads "Any person whose actions, business and/or activities use B3, produce anand/oranage B3 waste, and / or threaten the environment is absolutely responsible for the losses arising from business and / or activity".

This principle is the commitment of the international community regarding proof of environmental crime. When an event has an impact on environmental damage, there is no need to prove the element of error. The provisions of this paragraph constitute *lex specialis* in a lawsuit regarding acts of violating the law in general, as a form of legal protection for victims who, in general, will experience difficulties in proving because of asymmetrical access to information in the causes of environmental pollution and / or damage.³⁴

The provision of strict liability not only change for the Environmental Management and Protection Law but also for the Forestry Law. The Job Creation Law revises article 49 of Forestry Law: "The permit holder shall be responsible for the occurrence of forest fires in it working area". The provision changes from 'being responsible' to 'shall prevent and control' forest fires. This alteration has the effect of absolutely eliminating strict liability, since the 'responsible' terminology has been deleted and changed into 'shall

³⁴ Wahyu Yun Santoso, Anotasi Hukum UU Cipta Kerja Aspek Lingkungan Hidup, (s.l.: s.n., s.a.), p.7.

prevent and control'. Although the strict liability principle in Environment Management and Protection Law is not removed unlike in the Forestry Law, it will cause confusion in the orientation of understanding of this principle.

f. Weaker Forest Protection

The most crucial issues under the Job Creation Law is the weakening of forest protection provision. There are many articles in the Job Creation Law that can accelerate deforestation. This condition can be seen from the amendment to Article 18 paragraph 2 of Law Number 41 of 1999 concerning Forestry ("Forestry Law") in the Job Creation Law. The paragraph which reads 'the area of forest that must be maintained as referred to in paragraph (1) is at least 30% of the area of river basins and / or islands with a proportional distribution' is experiencing significant changes. The minimum limit of 30% of the forest area is removed in the Job Creation Law.³⁵

The potential for massive forest area conversion is also evident from the amendment to Article 19 paragraph 1 of Forestry Law which in the Job Creation Law states that changes in the designation and function of forest areas are determined by the central government by considering the results of integrated research. The word "considering" here is a change from the word "based". This change is not just diction but in fact weaken the article as a whole.³⁶

The stipulation on the minimum forest area limit of 30% actually exists in Article 17 paragraph 5 of Spatial Planning Law. This paragraph reads, "in the framework of environmental preservation as referred to in paragraph (4), in the regional spatial planning arrangement a forest area is determined at least 30% of the area of the river basin." In the

³⁵ Richaldo Hariandja, Mengapa Lingkungan Hidup Terancam dengan Ada Omnibus Law? <https://www.mongabay.co.id/2020/10/21/mengapa-lingkungan-hidup-terancam-dengan-ada-omnibus-law/>, accessed on 9 December 2020.

³⁶ Ibid.

Job Creation Law, the provision of at least 30% of the forest area in this paragraph has the same fate as Article 18 paragraph 2 of Forestry Law. Removing the minimum boundary has the potential to increase the function of forest areas in the spatial planning process.³⁷ The deletion of the 30% minimum target aims to give ease for land procurement and national projects.³⁸

This minimum target is replaced by a more general terminology “Central government determine the forest area that must be maintained the assessments of local bio-geophysical and geographical of water catchment area”. This clause gives greater room of discretion for the central government in determining the forest area without any check and balances mechanism. There is also no room for local government to involve in this determining process, even though the check and balances mechanism is very essential during the determination process.³⁹

Other than that, the Job Creation Law also includes several provisions that benefit the coal industry, mostly notably removing royalties for coal destined for certain domestic use, such as gasification. It also promotes domestic use of palm oil-based biofuels, a crop that has been connected to deforestation and showing little to no climate benefit.⁴⁰

³⁷ Ibid.

³⁸ Indonesia, Academic Paper of Law Number 11 of 2020 concerning Job Creation, p. 118-119.

³⁹ Richaldo Hariandja, Mengapa Lingkungan Hidup Terancam dengan Ada Omnibus Law? Accessed on 9 December 2020.

⁴⁰ Nithin Coca, Does Indonesia's job creation law miss the mark on environment? <https://www.devex.com/news/does-indonesia-s-job-creation-law-miss-the-mark-on-environment-98626>, accessed on 9 December 2020,

A Setback in Indonesian Environmental Law and Broken Climate Commitment

a. Neglection of the Non-Regression Principle

Non-regression is a well-established principle in international law, probably most commonly associated with human rights. This principle is increasingly acknowledged as a key parameter in environmental decision-making as reflected by its inclusion in the proposed United Nations (UN) Global Pact for the Environment.⁴¹ This principle has been understood as an aspect of the constitutional right to a healthy environment, recognized in at least 147 constitutions around the world and has also received significant support in several important non-binding instruments of international environmental law.⁴²

In complying with this principle, the rules, standards and practices that are already adopted by States cannot be changed if this means that environmental standards will be weakened. This is an important safeguard for nearly every aspect of environmental protection, to ensure that ambitious action on climate change and protection of nature is carried out at a clear and legal level.

Based on the previous discussion result (on section 2 letter a-e), it clearly shows that we are facing a major setback in Indonesian environmental safeguards. In the ideals of improving the national economy, the government is not strong enough to base its actions on the 1945 Constitution. The most fundamental problem of the Job Creation Law lies in the impact it causes on the fulfillment of everyone's right to a good and healthy environment. The law ignores the principle of non-regression where a country may not apply regulations that will discriminate against

⁴¹ Scottish Wildlife Trust, Never Go Back - Why We Need Non-Regression To Be Embedded in Scots Law, <https://scottishwildlifetrust.org.uk/2019/03/never-go-back-why-we-need-non-regression-to-be-embedded-in-scots-law/>, accessed on 9 December 2020,

⁴² Taylor & Francis Group, Essential Concepts of Global Environmental Governance, <https://www.taylorfrancis.com/books/e/9780367816681/chapters/10.4324/9780367816681-83>, accessed on 9 December 2020,

the right to a good and healthy environment, as well as control and prevent environmental impacts.

Failure in adopting these principles risks leaving Indonesia behind other countries undermining Indonesia's ability to meet its international commitments, particularly towards the SDGs and NDCs. This will also have clear implications for the future of the Indonesian investment climate as this law will prevent investors from pursuing global compliance under international social and environmental standards.

b. Indonesia's Achievement in Environment Protection in the Past Several Years

Intergovernmental Panel for the United Nations Climate Change (IPCC) issued a special report entitled 'Climate Change and Land' which emphasises forest protection and reforestation as the key to curb climate change so that the temperature of the Earth does not rise more than 2 degrees Celsius. The report shows that throughout history, land use by humans accounted for more than 70% of global GHG emissions. Reflecting on these data, the IPCC recommends all countries, including Indonesia, to reduce deforestation, protect peat, mangroves, and restore ecosystems. The report also recommends that the world reduce 30 gigatons of carbon emissions per year by 2030. Based on the IPCC report, it is said that the most effective way to reduce emissions is to stop deforestation, reforestation, and protect important ecosystems, such as peat and mangroves.⁴³

When compared with other tropical countries, Indonesia is considered to have shown great progress in reducing deforestation in recent years. Official government data shows that the rate of deforestation has continued to decline and has tended to stabilize in recent years. The highest rate of deforestation was 3.5 million hectares in the 1996-2000

⁴³ ICEL in the News, Forest Protection Becomes a Base, accessed on 9 December 2020, <https://icel.or.id/en/news/icel-in-the-news/forest-protection-becomes-a-base/>.

period. This rate of deforestation continues to decline every year. During 2015-2016 the rate of deforestation reached 1.09 million hectares due to forest fires and in the 2017-2018 period the deforestation rate dropped dramatically to only 0.44 million hectares.⁴⁴

Global Forest Watch data also states that Indonesia has reduced deforestation in primary forests by 40% in 2018 when compared to the average annual loss rate in 2002-2016. The World Resources Institute (WRI) Indonesia report states that the reduction in the rate of deforestation is inseparable from the effectiveness of government policies carried out in the form of a permanent moratorium on primary natural forest and peatland permits, control of forest and land fires, control of peat damage, and climate change control that have been signed by President Jokowi.⁴⁵

Since 2011, the government has temporarily stopped new permits in primary forests and peatlands to protect natural forests. This effort was followed by a moratorium on new permits for palm oil, evaluation of existing permits, supported by policies to maintain High Conservation Forest Value (HCFV) and increase productivity of palm oil plantations in accordance with Indonesian Sustainable Palm Oil (ISPO), and control of forest fires.⁴⁶

A number of sustainable policies from the forest and land sector contribute to Indonesia's emissions reduction achievements. Since 2017, deforestation in the country has declined from one million acres a year to fewer than 250,000 acres a year. As of 2017, Indonesia had succeeded in reducing emissions by around 24% from the target of 29% according to the NDC. The achievement of reducing emissions was shot up from 10.7% in 2016. In addition to protect forests through policy interventions, achievements in reducing emissions have also contributed to the decline in

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

peatland fires. In 2016, emissions from peat fires reached 90.2 million tons of CO₂, while in 2017 emissions were only around 12.3 million tons of CO₂.⁴⁷

c. Predicting Indonesia's Success in Addressing Deforestation After the Passage of Job Creation Law

While it is apparent that environmental regulation is a minor part of the whole law, the changed norms of environmental law in the Bill nevertheless pose significant changes to the core of current environmental safeguards. The law brings fundamental changes to the environmental protection framework of Indonesia.

The repeal of the current regulation requiring at least 30% of forest area to be conserved for each watershed area or island. This removal opens the door for massive deforestation and can exacerbate the effects of natural disasters in a country already prone to floods, droughts and earthquakes. The law also eases the requirements for businesses to carry out environmental impact assessments as a precondition to obtaining a business license and limits public consultation to only those who are directly affected by the specific project. Ultimately, this can lead to the issuance of business permits to companies that neglect the environment. It also prevents environmental organizations and members of the community that are more aware of the environmental impact from objecting to the project, since they may not be directly impacted.⁴⁸

Another significant amendment is the removal of the strict liability principle from the Forestry Law and Environmental Protection and Management Law, which makes it more difficult to prove and prosecute companies that set fire to their land in order to clear it for commercial purposes. According to Greenpeace, such practices, especially for palm oil

⁴⁷ Ibid.

⁴⁸ Laura Castelo Sant, The Indonesia Omnibus Law: Prioritising Economic Growth at the Expense of the Environment, <https://earth.org/the-indonesia-omnibus-law/>, accessed on 9 December 2020.

plantations, have already burned 4.4 million hectares between 2015 and 2019 in Indonesia. This may ultimately lead to an increase in the conversion of rainforest to plantations, regional risk of haze from plantation fires, GHG emissions, and endangerment of biodiversity.⁴⁹

The substance of the Job Creation Law is not only unclear and endangers Indonesia's remaining rainforests, but also directly contradicts the Jokowi administration's explicit approach to a "green growth" economic development model premised on "healthier, more productive ecosystems," which hinges on "the belief that economic growth and environmental sustainability are not merely compatible objectives...[but] essential for the future of humankind". Other than that, the chance to better protect natural forests by strengthening the permanent moratorium policy on forest clearing for timber and plantation development that helped reduce deforestation in Indonesia in 2019 to its lowest levels in almost two decades is threatened to never materialize due to the enactment of the Job Creation Law.⁵⁰

Based on the above-mentioned discussion, the author predicts that the Job Creation Law will effectively reverse the Indonesian government's achievements in recent years in protecting its forests and reduce Indonesia's potential in tackling the problem of deforestation. As we know, one of the main impacts of deforestation is a decrease in the quality of the atmosphere, which in turn contributes to an increase in GHG concentrations and global temperatures.

Under its first NDC, Indonesia has a target reduction of deforestation to below 3.25 million hectares by 2030 or a maximum of 325,000 hectares / year during 2020 to 2030 by its own efforts and with international assistance. However due to weakening forests and environmental protection instruments, it seems that Indonesia cannot reach the target

⁴⁹ Ibid.

⁵⁰ Phelim Kine, Indonesia's New Omnibus Law Trades 'Green Growth' for Environmental Ruin, accessed on 9 December 2020.

based on the average calculation of deforestation rate in Indonesia for the period 2006-2018 was 688,844.52 hectares / year. From this projection, it is calculated that Indonesia will exceed its deforestation quota of 2030 NDC target by 2025.⁵¹

3. CLOSING

1. Conclusion

The Job Creation Law was prepared using the omnibus law drafting technique by collecting and integrating various types of laws from different sectors, with the aim to simplify the business licensing system. It is expected by this simplification will have a positive impact on employment creation and economic growth through investment in Indonesia.

This new law brings fundamental changes to the environmental protection framework of Indonesia. There are two laws that are most affected by the enactment of the law, namely Environmental Protection and Management Law and Forestry Law. In general, the amendment and elimination of several articles in these laws will have a negative impact on both laws in the later implementation process. There are at least six aspects that affected by the new law, namely: risk-based business permit, environmental licensing (environmental permits and EIA), access to information and public participation, supervision and law enforcement (absolute responsibility/strict liability principle), and most importantly, the weakening of forest protection and management. The above problems show that the government's hopes of increasing economic growth are closely related to the possibility of environmental damage which in turn has a bad impact and extends to the global problem of climate change.

⁵¹ Madani, Omnibus Law on Job Creation: Injuring Climate Commitment, Accelerating Forest Loss, Perpetuating Disasters, <https://madaniberkelanjutan.id/2020/10/13/omnibus-law-job-creation-injuring-climate-commitment-accelerating-forest-loss-perpetuating-disasters>, accessed on 9 December 2020.

This law not only ignores the principle of non-regression but also other important environmental principles. In fact, since its formation, the Job Creation Law is procedurally flawed and incompatible with the characteristics of good law-making as stipulated in the Law on Establishment of Legislation and in no way reflects democratic principles. The formation and ratification of this law is carried out in a closed manner and seems hasty, does not follow legal procedures and does not involve the community as parties who will be directly affected by the enactment of this law.

This law can be said as an injury to Indonesia's climate commitment and forest protection efforts that have been carried out for several past years and has the potential to more perpetuate Indonesia's deforestation. Since standards of laws and regulations for the protection will be weakened and will bring Indonesian environmental and social safeguards even further than the generally accepted global standards in financing sustainable development. Indonesia risks failing to achieve climate commitments as targeted in its first NDC to reduce deforestation to below 3.25 million hectares by 2030 or a maximum of 325,000 hectares / year during 2020 to 2030.

2. Recommendation

1. If a conflict of norms is found which is deemed to be detrimental to the constitutional rights of the community, judicial review can be submitted to the Constitutional Court. Although this legal mechanism requires a long process and time to complete and the possibility of decisions does not meet expectations: rejected or unacceptable, this mechanism is expected to be able to accommodate the interests of all levels of society who are the highest enforcer of sovereignty in a country.
2. The government can address that error by formulating the new law's specific implementing regulations in close consultation with

environmental and civil society organizations to mitigate its malign implications for the country's forests.

3. The government must actively introduce the commitment of “no deforestation, no new development on peatland, no exploitation of people and local communities” (NDPE) policy to a number of parties, such as farmers, especially farmers who experience land conflicts with companies, students, environmental NGOs, legal NGOs, and wider society. The collaboration between those parties are a must to supervise the commitment of NDPE policies expressed by companies to surpass and reduce conflicts, crimes and environmental damage committed by companies, especially oil palm companies.

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