



# Tracking The Validity Of Coercive Urgency In The Job Creation Act

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**Abstract.** In the event of coercive urgency, the President has the right to issue Government Regulation in Lieu of Act (“Perppu”) and constitutionally is a legal product as stipulated in Article 22 of the 1945 Constitution. The existence of the Job Creation Perppu which has been passed into law by the Parliament, actually only replaces the cover of the Job Creation Act which has been declared conditionally unconstitutional by the Constitutional Court. Claim from the Government in the consideration of Perppu that implement the Constitutional Court Decision Number 91/PUU-XVIII/2020 and the event of coercive urgency should be questioned. This is made the Researcher propose the formulation problem “How is the Government discursive validity regarding the coercive urgency in the issuance of the Job Creation Perppu?”. This study is qualitative research using a mix-method based on Power – Knowledge relation and Deconstruction Theory with the hope that this research will show the government’s crafty strategy which still used the omnibus law method in the Job Creation Perppu. Formal improvements can only be seen by incorporation the omnibus law method into the Law on Formation of Legislation, but material improvements in the Job Creation Perppu which should be carried out in a democratic manner did not seem to provide participatory space for the community. The Government needs to evaluate the Perppu and prioritize public participation throughout the drafting of the Job Creation Law.

**Keywords:** Coercive Urgency, Government Regulation In Lieu Of Act, Job Creation.

## 1. Introduction

The conception of Indonesia as a rule of law state is expressly formulated in Article 1 paragraph 3 of the 1945 Constitution (UUD 1945) which states that "Indonesia is a state of law", so that ideally law becomes commander of chief in the dynamics of state and social life. The president is the executive branch and the House of Representatives (DPR) is the legislature that has the authority to make and stipulate laws and regulations, which are the set of rules that are stipulated form and regulate the course of government to form a constitutional system called the constitution. To guarantee the upholding of the Constitution as the highest basic law, a Constitutional Court was formed which functions as "the guardian" and at the same time "the ultimate interpreter of the Constitution".[1]

According to Article 22 paragraph 1 of the 1945 Constitution, the Perppu can be created by the President in urgent situations. The Perppuis considered a statutory

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regulation that implements the law, which means it was formed to regulate the provisions of the 1945 Constitution in urgent situations. Although it has the same authority as the law, the term "in lieu of law" is used to differentiate it. In summary, the Perppu is a government regulation formed urgently to further regulate the provisions of the 1945 Constitution. [2]

The formation of laws and regulations in general includes the stages of planning, drafting, validating, or stipulating and enacting. The Perppu which was actually formed in a crisis that forced the planning stage to be abolished was not carried out, because the situation was unforeseen and unplanned. If it is linked to the concept of public law where authority is related to power, the President's authority to stipulate a Perppu is an extraordinary authority in the field of legislation. Meanwhile, the authority to participate in forming laws, government regulations, and presidential regulations is an ordinary authority. [3]

The extraordinary authority to stipulate Perppu shown in President Joko Widodo's administration recently was the presence of Perppu No. 2 of 2022 concerning Job Creation ("Job Creation Perppu") was smoothly passed into Law no. 6 of 2023 by the DPR on March 31, 2023.[4] Even though previously there was much rejection from various groups of people because this Perppu changed many laws at once (omnibus law method) and claims from the government that this Perppu is the result of an amendment to the Law Job creation that has been declared conditionally unconstitutional through the Constitutional Court decision no. 91/PUU-XVIII/2020 dated 25 November 2021. The government's reason for issuing the Job Creation Perppu was because of the "coercive urgency" that needed to be questioned again and traced its validation regarding this matter.

Discussion on the Job Creation Perppu has always been an interesting topic to be discussed from various perspectives by academics, such as the journal from Sandy Sulistiono and Widyawati Boediningsih from Narotama University entitled "Formation of the Job Creation Perppu in the Perspective of a Democratic Law State". [5] Where the writings of Sandy Sulistiono and Widyawati Boediningsih examine the benchmarks of matters of coercive urgency in the Perppu with the approach of establishing legislation and the concept of a democratic rule of law based on Pancasila while this paper examines the reasons for the Government contained in the Perppu Cipta Kerja preambles by reading critically and looking for contradictions and paradoxes in the reasons expressed by the Government for continuing to issue the Job Creation Perppu.

Another journal article from AA Muhammad Insany Rachman, Evi Dwi Hastri, and Rusfandi entitled "A Review of the Determination of Perpu Number 2 of 2022 Concerning Job Creation in the Perspective of Legal Sociology".[6] This article published by the Journal of Arrows of Justice Vol. 2 No. 1 February 2023 edition, focuses on the perspective of legal sociology where the research results encourage the public to actively participate in escorting before it becomes the Job Creation Law with demonstrations and requests for filing a judicial review, while in this paper focuses on the conception of the President's authority in enacting the Job Creation Perppu by reason of the urgency that forces it to be seen from the theory of Power-Knowledge relations initiated by Michel Foucault and dismantling the discursive structure of the

Government by using the Theory of Deconstruction which was popularized by Jacques Derrida.

Based on the descriptions above, this study aims to trace the Government's discursive validation in issuing the Job Creation Perppu which still uses the omnibus law method amidst rejection from the public, especially after being declared conditionally unconstitutional by the Constitutional Court where only formal improvements are shown but public participation really hidden on the basis of knowledge the Government is in a state of 'coercive urgency'.

## 2. Problems

Based on the introduction, this study intends to convey the formulation of the problem as a research limitation, namely :

- a. How do power-knowledge relations from Michel Foucault and deconstruction theory from Jacques Derrida work?
- b. How is the Government discursive validity regarding the coercive urgency in the issuance of the Job Creation Perppu?

## 3. Method

The purpose of this research is to find out the government's discursive in issuing Job Creation Perppu using normative law research using secondary data consisting of primary legal material, secondary legal material, and tertiary legal material obtained through library research. The data analyzed and presented descriptively-qualitatively. The logical consequence of using this method is by using several approaches including a conceptual approach, a language approach, and a critical approach.[7] The conceptual and language approach tries to provide an analytical point of view of problem-solving seen from the concepts and values contained in normalization of a language in regulation or policy. While the critical approach carried out by reviewing consideration section in Job Creation Perppu.

## 4. Discussion

### 4.1. The Journey Of The Job Creation Act

Originated from the idea of President Joko Widodo (*das sollen*) to use the omnibus law method in drafting laws to support his desire to improve people's welfare through fulfilling citizens' rights to obtain decent work and livelihood by inviting or attracting investors to invest for the purpose create and expand jobs. The idea emerged to use the omnibus law method as an instrument to support the desire to improve people's welfare starting from factual reality (*das sein*), namely the existence of overlapping regulatory or hyperregulated obesity, no harmonization, inconsistent, multiple interpretations, non-operational and lack of guarantees of law certainty.[8]

Therefore on 2 November 2020, Law number 11 of 2020 concerning Job Creation ("Job Creation Law") was enacted. The Job Creation Law consists of 1,187 pages including an Explanation section which is divided into 15 Chapters and changes 78 laws simultaneously using the omnibus law method. Conceptually, the omnibus law as a method is not something new in the formation/composition of regulations. Omnibus law was born, developed, and practiced in countries that adhere to the *Anglo-Saxon* legal system (Common Law System). [9]

Meanwhile, the Indonesian legal system originates from the Continental European legal system (Civil Law System) which prioritizes written law where statutory regulations are the main cornerstone of the legal system. According to Constitutional Court Decision Number 91/PUU/XVII/2020, because of the importance of the written law, which has resulted in the increasing number of statutory regulations being issued, hyper regulation has occurred so this is one of the reasons used by the Indonesian government to use the omnibus law method in drafting the Job Creation Law.

In contrast to the enthusiasm and aim of the government to make this Job Creation Law, the protest turmoil spread to the public because it was considered that government ignore the aspirations of the people in its formation and only benefited foreign investment. As soon as the Job Creation Law was passed, it was immediately sued to the Constitutional Court (MK) to be tested for both formal and material aspects. As a result, the Constitutional Court issued Decision No. 91/PUU-XVIII/2020 ("Decision of the Constitutional Court 91/2020") which was read out on 25 November 2021 regarding the application for a formal review of the Job Creation Law that was filed on 15 October 2020. In the Decision of the Constitutional Court 91/2020 stated that the Job Creation Law was conditionally unconstitutional or the Job Creation Law does not have binding legal force if corrections are not made within a maximum of 2 years after the decision is read.[10]

Furthermore, following up on the Constitutional Court Decision 91/2020, based on the coercive urgency the Government issue Government Regulation in Lieu of Law No. 2 of 2022 concerning Job Creation. According to Mahfud MD, in his interview with *detik.com*, he said that strategic steps were needed by the Government to respond to the Constitutional Court's decision and the heated geopolitical situation in several regions, such as the Russia-Ukraine war, was an urgent reason to immediately anticipate by making strategic steps, namely using the extraordinary authority of President in the form of issuance of Job Creation Perppu.[11]

The statement from Mahfud MD needs to be compared with the considerations contained in the Job Creation Perppu. There are nine substantive considerations where five of them are the same as the considerations at the time the Job Creation Law was formed, the two most recent considerations are substantive in nature and two considerations are to explain that the points included in the considerations have met the parameters as a coercive urgency and authorize the President to issue a Perppu as stipulated in Article 22 paragraph 1 of the 1945 Constitution.

Wave of protests from the public seemed meaningless because subsequently the DPR RI officially approved the PERPPU Cipta Kerja into law at the 19th Plenary

Meeting of the 2022-2023 session on March 21, 2023. The Government officially ratified and promulgated PERPPU Job Creation on 31 March 2023, based on Law No. 6 of 2023. This law is now applicable and binding.

#### 4.2. Power-Knowledge Relations

The concept of power-knowledge relations put forward by Michel Foucault is not a function of a class that is based on the level of economic domination or ideological manipulation as stated by Karl Marx nor is it obtained from the charisma possessed as stated by Marx Weber. Power according to Foucault is not a structured institution, not power possessed, but power is a term used to refer to complex strategic situations in society.[12]

According to Foucault, power is spread, not centered on a person or institution. This power spreads in social relations which are disciplined and connected by networks, give structure to activities, are not repressive but productive, and are attached to the will to know. There are five ways how power operates, namely:[13]

- a. Power is not acquired, taken, or distributed, power flows from various points, in a game of unequal relations and is always in motion;
- b. Power is fluid because where there are differences, power relations are opened. Power relations are immanent, meaning that power relations are the direct effect of division, difference, inequality, and imbalance;
- c. Power relations are not in a superstructure position. Power comes from below, meaning that there is no binary opposition between the dominant and the inferior. There are many power relations that are formed and play within the production apparatus, such as in the family, groups, institutions, and the entire social body.
- d. Power relations are intentional. There is no power without a set of goals. The rationality of power is an explicit tactic to a limited degree.
- e. Where there is affirmation of power there is resistance. This resistance does not stem from positions outside power relations. Resistance becomes part of power itself. Power begets anti-power.

Power is like something that encompasses, but produces knowledge, even though the two are interrelated to one another. For Foucault, power and knowledge are like two sides of a coin, like two faces of a coin, inseparable from one another. There is no relation of power that is not related to the formation of a field of knowledge, and there is no knowledge that does not presuppose and at the same time shape the relation of power.

Using the archeology of science, Foucault investigates historical phenomena by tracing historical building elements in the form of discursive events (formations), statements spoken and written in a historical context. This is referred to as the episteme, which is a mature concept of knowledge that is authoritative in the meaning of certain situations in an era. According to Foucault in his book *The Order of Things*:

An Archeology of the Human Sciences, every era has a character that is different from other times, for example, European history in three periods, namely the Renaissance (XVI century), Classical (XVII century) and Modern (XIX century). which shows a process of episteme change that underlies the character of knowledge in each of these periods.[14]

It can be seen that history is not a continuous series but a discontinuity, namely a disconnection where previously a process of distribution of new typologies of knowledge took place. In every changing era there are changes in the underlying episteme. Episteme changes in every era in the concept of discontinuity do not occur radically like turning hands. In this process, the distribution and multiplication of new discursive formations occur. This discursive formation is the most elementary unit for identifying episteme.

Episteme changes in every era which are not direct at all have proven the existence of the spread of discursive formations in society. For this reason, one must also look at the condition of the discourse of truth in society and the pattern of its spread. The process of distribution of discourse will result in a regime of truth that will determine what is considered true and untrue, important and unimportant in history.

### **4.3. Deconstruction Theory**

The French philosopher Jacques Derrida, born in Algeria in 1930 and immersed in the intellectual trends of the 1950s-1970s, is credited with popularizing the term "deconstruction." Initially, deconstruction refers to a method of analysis that involves questioning and dismantling an object composed of multiple elements. This method is considered radical because it challenges established notions and disrupts the order of things that were previously considered correct or glorified.[15]

The practice of deconstruction centers on analyzing small details, which distinguishes it from structuralism and Western philosophy that prioritize the center (logocentrism). Derrida believes that there is always a concealed text that needs to be uncovered. To do so, one must use the method of deconstruction, not to find the truth or the right answer and eradicate the wrong, but to continuously deconstruct without pause.[16]

Deconstruction is the idea that binary oppositions, such as body and soul, masculine and feminine, or day and night, are not static and can be influenced by outside factors. In these oppositions, one side tends to have more power and influence over the other. However, there can be alternate interpretations of the less powerful side that can reveal deeper meanings. For example, in a government system, the dominant authority creates rules while the marginalized people follow them. By changing our perspective and considering alternate interpretations, we can better understand the true nature of these oppositions and their meanings.[17]

By using the deconstruction method, we aim to uncover hidden agendas and expose the weaknesses and inequalities behind texts. This method reveals the systematic privilege given to certain terms over others, and by identifying

oppositional hierarchies, we can better understand these imbalances. The deconstruction process involves reversing these oppositions to reveal the interdependence between the opposites, leading to the introduction of new terms and ideas that cannot be contained within the old oppositional framework. This approach differs from traditional reading methods, which focus on determining the true meaning of a text. Instead, deconstruction reading seeks to identify the incompleteness or failure of a text to capture a single meaning or truth.

#### **4.4. The Validity Of Discursive Coercive Urgency In The Job Creation Perppu**

According to Constitutional Court Decision 91/2020, the Job Creation Law must be formally and materially reformed within two years of the reading of the decision. However, the government claims to already made improvements by enacting Law Number 13 of 2022 regarding Formation of Legislation (“PPP Law”), which includes the omnibus method in section seven of Article 42A, Article 64A, and Article 97A of the PPP Law. Additionally, changes have been made to Article 96 paragraph 1 of PPP Law to ensure that the public has the right to provide input verbally or in writing at every stage of the Formation of Legislation.

The peculiarities of the Government are starting to be seen from the amendments to the PPP Law which have introduced the omnibus method into it because instead of improving the material of the Job Creation Law or making new laws involving public participation in every stage of the formation of laws and regulations, instead the Government issuing Perppu which suppresses participation public for drafting this law. The inclusion of the omnibus method that comes from the knowledge of the authorities shows the position of dominance and the government's actions to avoid drafting laws by making the Perppu eliminate the meaningful participation that should exist in the law.

Article 22 Paragraph 1 of the 1945 Constitution grants the President the authority to issue Government Regulations in Lieu of Law (Perppu) in situations of compelling urgency. However, the Constitution does not provide a clear definition of what constitutes "coercive urgency." In Constitutional Court Decision Number 138/PUU-VII/2009, it was established that while the issuance of Perppu is within the President's authority, their subjective assessment must be based on objective conditions. These objective conditions can be classified into three parameters, which is:

- a. There is an urgent need to quickly resolve legal issues based on the law;
- b. The required law either does not exist or is insufficient, leaving a legal vacuum;
- c. This legal vacuum cannot be resolved through the usual process of creating new laws, as it would take too much time and the situation requires immediate resolution.

The President's subjective assessment of the urgency condition gave him the authority to deploy discursive formations within the framework of establishing a regime of the power of truth. If we look at the Government's discursiveness to issue

the Job Creation Perppu in the consideration section, there are two substantive considerations that were not previously in the Job Creation Law, namely:

- a. In order to implement the Constitutional Court Decision No. 91/PUU-XVIII/2020, it is necessary to make improvements by replacing the Job Creation Law;
- b. The world economy has been affected by increasing energy and food prices, climate change, and supply chain disruptions. As a result, there has been a decline in economic growth and an increase in inflation, which will have a significant impact on the national economy. To address this, policy mix standards are needed to improve national competitiveness and attract investment. These standards are contained in the Job Creation Law, which aims to achieve economic transformation.

It is felt that the Government's efforts to include discursive discourses in preambles are not included in the category of urgent legal needs that must be met immediately by forming a Perppu. This is because the five preambles and content material in the Job Creation Law are still the same as the Job Creation Perppu. The government claims that it has followed up on the Constitutional Court Ruling also only by establishing the omnibus law method as the method for forming laws and regulations in Indonesia as well as correcting technical errors such as incomplete letters, inaccurate references to articles or paragraphs, typographical errors and/or titles or numbers or sequence of chapters, sections, paragraphs, articles, or points that are not appropriate, which are not substantial. This shows that the improvements made by the Government are only limited to formal improvements without paying further attention to the material contents of the Job Creation Law.

It is suspected that the prolonged Russia-Ukraine war could have an impact on Indonesia, starting from rising prices for food, crude oil, and fertilizers, to the loss of export potential. Based on data from the Central Bureau of Statistics, fertilizers are the three main commodities that Indonesia imports from Russia besides iron and steel, and mineral fuels. In 2021, Indonesia imported USD 326.1 million worth of fertilizer from Russia while in January-February 2022 it was USD 95.6 million.[18]

According to Gajah Mada University economist Eddy Junarsin, the impact of the Russian-Ukrainian war on Indonesia was in the form of a decrease in the Rupiah exchange rate, a decline in the capital market, loss of income due to falling exports, the impact of rising oil prices on the State Budget and an increase in wheat imported commodities.[19] The government's knowledge of the existence of a war between Russia and Ukraine became one of the considerations for issuing a Perppu even though the distance between Russia-Ukraine and Indonesia is thousands of kilometers apart.

The implementation of the authority to make Perppu based on the knowledge that the President believes creates a reciprocal relationship between power and knowledge. Making people who are under the control of government power try to agree on the truth so as to create a distribution of power in every sector. Knowledge of global dynamics due to the Russian-Ukrainian war which caused an increase in energy prices, food prices, and an increase in inflation which had an impact on the



national economy was only the reason for the Government's justification for perpetuating its power in issuing the Job Creation Perppu.

The validity of this Job Creation Perppu has not been traced, even though in terms of language and structural norms, because everything is the same as the previous Job Creation Law. Claims from the government that there is a compelling crisis also deserve to be questioned again and must be re-examined in depth. The condition of a legal vacuum cannot even be a valid reason because previously there was the Job Creation Law which the Government should have corrected first, both formally and materially. So the establishment of a government regulation in lieu of law should not be a part of outsmarting previous defeats (decided conditionally unconstitutional by the Constitutional Court). [20]

The Job Creation Perppu cannot be justified by the discursive of legal vacuum. This is because the Perppu on Job Creation contains the same content as the Job Creation Law, which has been declared conditionally unconstitutional by the Constitutional Court. Therefore, the content of the law can be debated through the standard law-making process, rather than urgently requiring a Perppu. The government's efforts to create discursive in order to create an episteme in society that the country is in a state of emergency that requires extraordinary measures to make it easier for investment to enter Indonesia at the expense of employment welfare as stipulated in the Job Creation Perppu.

The many weaknesses and inequalities in the preambles of the Job Creation Perppu further reveal that there is a hidden agenda that make this rule take effect immediately in society without the need for meaningful public participation. The binary opposition created between the Government as the holder of the dominant position and the people who are marginalized because this Perppu implies that from the start the Government did not want any re-discussions from the DPR. The issuance of Perppu Cipta Kerja is the Government's way of avoiding conflicts with affected stakeholders in this law.

Basically, the issuance of this Job Creation Perppu is only to replace the cover of the Job Creation Law which has been declared conditionally unconstitutional by the Constitutional Court because materially the contents are not much different from the Job Creation Law. The lack of public participation in Job Creation Perppu seems to be repeating the Government's mistakes when forming the Job Creation Law. This shows the dominance of the Government which does not want policy discussions to be carried out in a democratic manner through meaningful participation as ordered by the Constitutional Court. Public opinion and meaningful participation are increasingly being ignored, the President is increasingly showing that power is in his own hands in the issuance of Job Creation Perppu, thus degrading the principle of the rule of law that Indonesia has so far adhered to.

## 5. Conclusion

The Government's discursive on Job Creation Perppu that Indonesia is in a precarious and urgent state and it is necessary to resolve legal issues quickly and there is a legal vacuum that requires a Perppu, cannot be accepted with logic and common sense so that it creates a lot of rejection from various affected groups of this rule. There is a hidden agenda from the Government that is forcing the will of the Job Creation Law to remain in force by using the President's authority to issue a Perppu even though previously it had been declared conditionally unconstitutional by the Constitutional Court.

The Government's refusal to re-discuss the contents of the Job Creation Law widened the gap in binary opposition between regulators and the people regulated in the Law. The amendment to the PPP Law which the Government claimed was a remedial measure for the Constitutional Court Decision 91/2020 turned out only to include the omnibus law method and ultimately prevented public participation by issuing a Perppu instead of creating a new law. The presence of the Job Creation Perppu is not only solving problems or filling an urgent legal vacuum but a strategy from the government to avoid implementing the Constitutional Court's decision. The Government needs to thoroughly evaluate the Job Creation Perppu and prioritize transparency by allowing public participation throughout the drafting and improvement process of the Job Creation Law.

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