

# Omnibus Law Opportunities And Challenges Towards Entrepreneurs And Labor : Comparative Review law

*by Imam As' Syafei Syafeii*

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## Re-Conceptualizing Workers' Constitutional Rights in the *Cipta Kerja* Bill based on the Indonesian Welfare State Principles

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### Abstract

As an important material in the Preamble of the 1945 Constitution, the welfare state principle become one of the directions of legal development in Indonesia. Therefore, legal development which also done through the formation of statute, must adhere to the principle of advancing public welfare. The formulating process of the *Cipta Kerja* Bill which has arrived at the Parliament's discussion, raises concerns among many people especially workers, because its content considered to threaten their well-being. Based on theoretical and conceptual approach, this article shows that the regulation of constitutional workers rights in the *Cipta Kerja* Bill, is not in line with the principles of the Indonesian welfare state. Substantial adjustments are needed so that workers' rights can be better protected in achieving prosperity. Exceedingly, Indonesia has launched the 2030 SDGs as part of a global action plan to end poverty as well as inequality.

**Keywords:** *Cipta Kerja* Bill, Constitutional Rights, Welfare State, Workers'

### Introduction

The concept of welfare state has become an alternative model for involving the state in the lives of citizens. The model of state involvement in the concept of welfare state run with different variants in practice in the countries. For Indonesia, the main points of the concept of welfare state expressed in the objectives of the Indonesian State at the Preamble of the 1945 Constitution: "...to establish an Indonesian Government that protects all of the Indonesian people and all of Indonesia's blood and to promote public welfare..."

Based on that concept, it can be seen that the formation of the government of the Indonesian state is nothing but for the welfare of its people, overall. So efforts to embody "public welfare" must become the orientation of government actions. It includes government actions that have both direct and indirect effects for the welfare of its people. Leaving aside "public welfare" in governmental action can be interpreted as a betrayal of the Indonesian state goals.

The government's actions to regulate citizens in Indonesia are institutionalized in the issuance of laws/ regulations. Specifically in the case of regulation through laws, the government issues them with the mutual agreement of the House of Representatives, which is preceded by a discussion of the draft law (RUU). A bill that quite important being discussed at the moment is the *Cipta Kerja* (Ciptaker) Bill.

The Ciptaker Bill consists of 15 chapters with 173 articles which amend the provisions of 79 laws. The systematics of the substance of the Ciptaker Bill includes:

- I. General Provisions;
- II. Purpose and objectives;
- III. Increased Investment Ecosystems and Business Activities;
- IV. Employment;
- V. Ease, Protection and Empowerment of Micro, Small and Medium Enterprises and Cooperatives;
- VI. Ease of Doing Business;
- VII. Research and Innovation Support;
- VIII. The land acquisition;
- IX. Economic Zone;
- X. Central Government Investment and Ease of National Strategic Projects;
- XI. The Implementation of Government Administration to Support Working Copyrights;
- XII. Imposition of Sanctions;
- XIII. Other Provisions;
- XIV. Transitional Provisions;
- XV. Closing.

For workers, the provisions stipulated in Chapter IV of the Ciptaker Bill are crucial to determine the level of welfare of their lives. Stated so because Chapter IV was designed by changing, deleting, or stipulating new arrangements for several provisions stipulated in the three Laws, namely:

- a. Law number 13 of 2003 concerning Employment;
- b. UU number 40 of 2004 concerning the National Social Security System; and
- c. UU number 24 of 2011 concerning the Organizing Agency of Social Security.

Any changes, deletions, or new stipulations of the provisions in the three laws above have direct implications on the lives of workers. In the three laws workers' welfare regulated and guaranteed. So the steps to enact a *Ciptaker* Bill that touches on the area of workers' constitutional rights are naturally and actively responded by workers as the key stakeholders.

Not only from labor experts, the wave of rejection occurred since the first time the *Ciptaker* Bill was submitted to the public. Responding to the rejection, on April 24, 2020 President Jokowi decided to postpone the discussion of the *Ciptaker* Bill, especially in the Labor Cluster<sup>17</sup>. The decision to postpone this discussion will certainly give the Government time as the initiator of the *Ciptaker* Bill to explore the aspirations of stakeholders, especially workers, including input from experts.

The aspirations of workers and input are expected to be able to present the formulation of regulations that are more in line with efforts to promote public welfare as mandated in the Preamble to the 1945 Constitution. For this reason it is important to know how the Preamble to the 1945 Constitution defines the principles of Indonesia's welfare state? So that it can be determined how should the *Ciptaker* Bill, especially its Labor Cluster, adjust its regulation to the welfare state principle? So that parts of the *Ciptaker* Bill which

17. On consideration of wanting to explore the substance and accommodate input from stakeholders. See: <https://www.bncindonesia.com/news/20200424161140-4-154291/jokowi-tunda-pembahasan-klaster-ketenagakerjaan-ruu-ciptaker> accessed on June 11, 2020.

still problematic considered by workers, can be harmonized.

## Method of Research

The statute approach also conceptual and theoretical approaches to law are used in the presentation of the review in this article. Sources of data obtained in accordance with normative research methods by elaborating the concepts and principles of welfare state from the manuscript of the Preamble of 1945 Constitution. The results of the study serve as a test tool for the regulation of the *Ciptaker* Bill which is considered by the Workers Association will reduce and eliminate workers' rights in achieving people's prosperity as the purpose of the state.

## Discussion

### 1. Indonesian Welfare State Principles in the Preamble of 1945 Constitution

The Preamble of 1945 Constitution has preserved from the Amendment of 1945 Constitution, by the years 1999-2002, together with the agreement to maintain the concept of Unitary State of Indonesia, emphasizing the presidential system, incorporating Explanation norms into Articles, and the addendum method<sup>18</sup>. The main reason for maintaining the Preamble of 1945 Constitution was because it substantially contained the basis of the state and the objectives of the Republic of Indonesia. The basis of the country is better known as Pancasila, while the objectives of the state are arranged in four ways namely:

1. Protect all Indonesian people and all Indonesian blood spills;
2. Promoting public welfare;
3. Educating the life of the nation; and
4. Carry out world order.

In addition to the concept of "advancing public welfare" as the main welfare state principle for Indonesia, all four ways above are the main activities of the state as well as government guidelines. Thus, every activity of the state through the government designed towards the realization of the four objectives, including in this case the act of regulating citizens through the making of laws. So each law has to be made in harmony and based on the principle of welfare state in the Preamble of 1945 Constitution.

Exceedingly the state life of Indonesia which provides a judicial mechanism to test the material of the Act against the 1945 Constitution, the harmony of the two substances will always be demanded. For this reason, the Preamble of the 1945 Constitution which is an inseparable part of the 1945 Constitution become material source of the Law. As stated by Andy Omara:

*"the Constitution which consists of the Preamble and Article have a legal function. They can be used to review the constitutionality of statutes. In other words, the Preamble has an interpretive function since the Constitution (which consists of the Preamble and articles) becomes the reference in determining the constitutionality of statutes. Whether or not a statute constitutional depends on whether or not it is consistent with the Constitution. In this case, the Preamble and the articles of the Constitution have a legal binding force."*<sup>19</sup>

Thus, the principle of Indonesia's welfare state which is oriented to the realization of "advancing public welfare" should animate the entire law, including in the *Ciptaker* Bill. The process of discussion

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- 20
18. Minutes of the 1999 Ad Hoc Committee meeting in Valina Singka S<sup>12</sup>kti, *Menyusun Konstitusi Transisi*, (Jakarta: PT RajaGrafindo Persada, 128). Juga dalam Tim Penyusun Revisi, *Naskah Konprehensif Perubahan Undang-Undang Dasar NRI Tahun 1945, Buku IV Jilid 10, Edisi Rrevisi*, (Jakarta: Sekjen dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2010).
  19. Andy Omara, "The Functions of the 1945 Constitutional Preamble", *Mimbar Hukum*, Vol. 31 No. 1, Februari 2019.

that continues during the Covid-19 Pandemic period must keep on paying attention to the limitations of the perspective of the welfare of workers, as one of the main stakeholders of the arrangement. So that if later passed into law, the *Ciptaker* Bill will play the role of the realization of the welfare state principle, especially for workers in Indonesia.

## 2. Provisions of the *Ciptaker* Bill which are still Problematic

Since it was announced to the public, the draft *Ciptaker* Bill has drawn opposition from workers with objections to the point of explicitly rejecting the new provisions that will be regulated therein. Based on media reports, it is noted that there are dominant of dozens of Associations or Worker Unions who reject the promulgation of the *Ciptaker* Bill.<sup>20</sup> The most notable rejection includes several provisions, namely:

1. Rules on regency / city minimum wages that are omitted;
2. Provisions for working hours which are exploitative in nature;
3. Employment opportunities for foreign workers without skills, made easy;
4. Ease for employers in terminating work relations for workers;
5. Provisions for old age savings and pension guarantees will be removed;
6. Status of outsourced workers designed to be timeless (for a lifetime); and
7. Removal of criminal sanctions.

Two of the problematic *Ciptaker* Bill formulations from the seven highlighted by Workers Association are illustrated in the following notes:

The formulation of Article 89 of the *Ciptaker* Bill regulates:

I. The Use of Foreign Workers

3 Some provisions in Law Number 13 of 2003 concerning Employment are amended:"

Provisions in Article 45 of Law Number 13 of 2003 which previously regulates:

Article 45 3

- (1) Employers of foreign workers must:
  - a. appointing Indonesian citizens as 6 accompanying foreign workers employed for technology transfer and transfer of expertise from foreign workers; and
  - b. carry out work education and training for Indonesian workers as referred to in letter a in accordance with the qualifications of the position occupied by foreign workers.
- (2) The provisions referred to in paragraph (1) do not apply to foreign workers who occupy the positions of directors and / or commissioners.

Changed into:

Article 45 3

- (1) Employers of foreign workers must:
  - a. appointing Indonesian citizens as accompanying foreign workers employed for technology transfer and transfer of expertise from foreign workers;
  - b. carry out work education and training for Indonesian workers as referred to in letter a in accordance with the qualifications of the position occupied by foreign workers; and

20. "Rejecting the Ciptaker Bill, Trade Unions Threaten National Work Strike", See: <https://nasional.kompas.com/read/2020/03/11/13445531/tolak-ruu-cipta-kerja-serikat-pekerja-ancam-mogok-kerja-nasional?page=all>. Accessed on June 11, 2020.

- c. returning <sup>8</sup> foreign workers to their home countries after their employment relations have ended.

(2) *The provisions referred to in paragraph (1) letter a and letter b do not apply to foreign workers who occupy certain positions.*

Comparison of arrangements: Unlike the aforementioned “does not apply to foreign workers occupying directors’ and/or commissioners’ positions” which provide limits on positions that can waive the requirements, the provisions of the *Ciptaker* Bill which regulate “do not apply to foreign workers occupying certain positions” not clearly defined. So that it can open space for a very broad interpretation. For example, it can be interpreted that the “certain position” in question covers all positions from highest to lowest. With this arrangement, all positions are open for foreign workers to occupy without conditions. Such provisions are of concern to the Workers’ Association which may lead to the fulfillment of job positions by foreign workers, thereby eliminating local workers.

II. Work Agreement for Specific/ Unspecified Times  
Previously regulated in Law Number 13 of 2003:

Article 56

- (1) *A work agreement is made for a certain time or for a specified time.*
- (2) *The work agreement for a certain time referred to in paragraph (1) is based on:*
  - a. *period of time; or*
  - b. *completion of a certain work.*

Amended in the *Ciptaker* Bill:

Article 56

- (1) *A work agreement is made for a certain time or for a specified time.*
- (2) *The work agreement for a certain time referred to in paragraph (1) is based on:*
  - a. *period of time; or*
  - b. *completion of a certain work.*
- (3) *The period or completion of a particular work as referred to in paragraph (2) is determined based on the agreement of the parties.*

Comparison of arrangements: Provisions “based on the agreement of the parties” at a glance provide extensive space for the parties to determine the best in the employment agreement between the two. But fair conditions can only be formed in equal relationships between employers and workers. Whereas relations between employer workers tend to be one degree above workers. This means that the possibility of an agreement in the agreement harming the workers is very open to occur. Especially for workers who do not really consciously and understand the consequences of the agreements made in the work agreement. This provision is of concern that the Workers’ Association can trap workers’ binding in long work agreements without clear welfare guarantees.

### 3. The urgency of *Ciptaker* Bill’s rests on the Welfare State Principles: Legal Harmony within People’s Welfare

The modern state is the personification of the rule of law, which means that the state in all its activities always based on law.<sup>21</sup> The state in this context is commonly referred to the rule of law. For Indonesia,

<sup>21</sup> Soemardi, 2010. *Teori Umum Hukum dan Negara: Dasar-Dasar Ilmu Hukum Normatif Sebagai Ilmu Hukum Deskriptif-Empirik*, Bandung: Bee Media Indonesia.

the concept of a rule of law state that runs in harmony with the goals of the country is the *Welvaarstaat* (welfare state), the opposite of the *nachwachterstaat* (night-watchman state).<sup>22</sup> The perspective of the state which adheres to the principle of welfare state requires the role and responsibility of the state that is so great towards citizens by acting and positioning themselves as “friends” for their citizens.<sup>23</sup>

Although oriented to the welfare of citizens, problems often occur in contemporary welfare state systems. According to Henry Simarmata, among these problems namely:<sup>24</sup> high tax collection, a high level of supervision by the state, the state will blame citizens’ attitudes for an act that is contrary to state rules, and there is no freedom.

These problems can be mediated by laws and regulations governing the life of the state. Therefore, legislation as a law, bridges citizens to prosperity, while keeping them from being restrained. The function of law in such a welfare state must always be maintained.

Especially in the current conditions, the industrial revolution is disrupting human life, especially workers who are threatened with their welfare because they have been replaced by technology. For the Indonesian law state, this condition is important to be addressed by continuing to base regulatory arrangements with the objectives of the welfare state and the development goals (SDGs). So that the regulation of the lives of workers remains based on a welfare perspective, not vice versa.

For this reason, Indonesia, which is currently in the formulation of *Ciptaker* Bill, states that the welfare state principle in the country’s goals must be relied upon. Moreover, the development objectives summarized in the Indonesian SDGs have also been emphasized. So it is the right direction for the regulation on the Employment Bill to place the objective of creating employment and investment as well as the welfare of workers.

Such legal roles, according to Mochtar Kusumaatmadja’s theory, are means of development. Kusumaatmadja emphasized that the law should not only be a tool, as Roscoe Pound’s theory was, but also as a means to build society.<sup>25</sup>

The basic elements of development law theory include: order and regularity in development and renewal efforts. It is hoped that legal norms can direct human activities in the direction desired by development and renewal.

Referring to the legal relationship and development framework, the legal product in the form of laws and regulations is one of the inputs in the development planning and implementation. The legal product that cannot be separated from the political discussion process, becomes the operational foundation in the implementation of development. This political perspective is at the same time the upstream of the development plan document in the form of legal products.

The omnibus law document in the form of a *Ciptaker* Bill that has entered the discussion stage in the House of Representative cannot be separated from the necessity to identify the problem. The problems that can be caused by the existence of these regulations, especially related to the constitutional rights of citizens, should be well anticipated. Thus the legal objectives to support development do not eliminate the urgency

22. Zulkarnain Ridlwan, 2011. “Negara Hukum Indonesia Kebalikan Nachwachterstaat”, *Fiat Justisia*, Vol. 5 No. 2.

23. Francis Alappatt, 2005. *Mahatma Gandhi (prinsip hidup, pemikiran politik, dan konsep ekonomi)*, Terj. S. Farida, Bandung: Penerbit Nusamedia.

24. Henry T. Simarmata, 2008. *Negara Kesejahteraan dan Globalisasi: Pengembangan Kebijakan dan Perbandingan Pengalaman*. Jakarta: PSIK Universitas Paramadina.

25. Lili Rasjidi dan Wyasa Putra, 2003. *Hukum Sebagai Suatu Sistem*, Mandar Maju, Bandung. Also see: Soetandyo Wignjosoebroto, 2013. *Pergeseran Paradigma dalam Kajian-Kajian Sosial dan Hukum*, Setara Press, Malang.

of fulfilling the rights of affected stakeholders.

In the Ian Loveland concept, the government as a regulator must be aware of the implications of making a rule, because the more fundamental the influence (including the rights of citizens), the more difficult it is to implement.<sup>26</sup> If workers' constitutional rights are not well protected in the *Ciptaker* Bill, the implications will be large. Because for workers, the issue of guarantees of welfare through income and proper treatment for their lives is fundamental.<sup>27</sup>

#### Conclusion

The Labor Cluster Arrangement in the *Ciptaker* Bill considered by the Workers Association to keep away from the welfare of workers' lives. Whereas the welfare of Indonesian people mandated by the Preamble to the 1945 Constitution as a state goal as well as the principle of Indonesia's welfare state. For this reason, it is necessary to re-conceptualize a number of points, namely: First, the rules regarding regency/municipal minimum wages must remain in place so that the closer determination of welfare measures; Second, the provisions of working hours which are considered exploitable must be adjusted to the ability of workers; Third, employment opportunities for foreign workers without skills should be reconsidered, because the availability of local workers with a minimum skills classification is available; Fourth, the termination of employment by employers for workers must be regulated by a strict mechanism in order to better guarantee the certainty of workers' welfare; Fifth, old age savings and pension guarantees must still be provided by employers with a monthly allowance for workers' income as savings that workers can take after retirement or stop working; Sixth, the status of outsourced workers must be designed to be limited in time, because if it is not limited in time, it can eliminate the opportunity for workers to get a career path which also means closing workers' opportunities to improve welfare; and Finally, the provisions of criminal sanctions for violators of the law must remain available in order to support the effectiveness of their effectiveness. Without sanctions, violations of the welfare benefits of workers are at stake in the hands of employers who do not comply with the provisions of the Act.

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