



Legal Assurance of Post-Business License Documents Issuance of the Constitutional Court's Decision Number 91/PUU-XVIII/2021

Twotik Lestaringtyas; Shinta Hadiyantina; Dewi Cahyandari

Master of Law Study Program, Postgraduate Faculty of Law Universitas Brawijaya, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v9i5.3792>

Abstract

Basically, the prosecutor's authority as a mediator in conducting penal mediation will overlap Reporting from the News of the Constitutional Court, it was stated that at the same trial, the Court also decided on eleven other cases related to judicial review, namely Case Numbers 87, 101, 103, 105, 107, 108/PUU-XVIII/2020, and Case Number 3, 4, 5, 6, 55/PUU-XIX/2021. All of these cases were declared inadmissible. This is because the Job Creation Law has been declared conditionally unconstitutional as stated in Decision Number 91/PUU-XVIII/2020. So that the judicial review of the law is no longer relevant to continue the examination because of the loss of the object of the application. However, after the decision of the Constitutional Court on November 25, 2021, in practice, business licenses are still issued both at the center and in the regions with the Online Single Submission (OSS) system which is an order from Government Regulation Number 5 of 2021 where Government Regulation Number 5 of 2021 is one of the Implementing Regulations of Law Number 11 of 2020.

Keywords: *Constitutional Court; legal Certainty; Permission*

1. Preliminary

As an effort to harmonize central and regional policies, encourage investment and for ease of doing business, as well as a solution to the complexity of licensing requirements, it inspired the birth of the Job Creation Act and implementing regulations of the Act. Since the Job Creation Law was enacted, namely on November 2, 2020, 45 Government Regulations and 4 Presidential Regulations have been issued as implementing regulations for the Job Creation Act, some of which are Government Regulation Number 5 of 2021 concerning Implementation of Risk-Based Business Licensing.

The provisions of Article 566 of Government Regulation Number 5 of 2021 states that "when this Government Regulation comes into force, the implementing regulations of this Government Regulation must be stipulated no later than 2 (two) months after this Government Regulation is promulgated", and in letter b. that "the implementation of Risk-Based Business Licensing through the OSS System is effective 4 (four) months after the promulgation of this Government Regulation"¹. This Government Regulation

¹ Pasal 556 Peraturan Pemerintah Nomor 5 Tahun 2021 tentang **Penyelenggaraan Perizinan Berusaha Berbasis Risiko**

was enacted on February 2, 2021, so that based on the provisions above the OSS System as an application of Government Regulation Number 5 of 2021 should be enforced on July 2, 2021. However, as per the Circular Letter of the Minister of Investment/Head of BKPM Number 14 of 2021 The OSS system is effective as of August 2, 2021. Before the OSS RBA was applied, business licensing services had used the OSS system based on Government Regulation Number 24 of 2018 concerning Electronically Integrated Business Licensing Services. The difference between the two OSS systems is the parameters used to determine the scale of their business. OSS does not recognize the level of risk, all business licenses must have requirements that must be met in the form of fulfilling commitments, if the commitment has been fulfilled then the business license has become effective. While in OSS RBA, the risk level parameter is used, for low, medium and low risk applicants can take care of their business licensing independently in the OSS RBA system. Meanwhile, for medium to high scale, verification of a standard certificate from the Technical OPD is required, then verified by the DPMPTSP admin, then approved by the Head of the DPMPTSP Service as the holder of OSS Access rights as the attribution authority given by the Regulation of the Head of BKPM Number 3 of 2021 concerning the Integrated Risk-Based Business Licensing System. electronic.

Then on November 25, 2021, the Constitutional Court Decision Number 91/PUU-XVIII/2020 was issued in the case of the Formal Review of Law Number 11 of 2020 concerning Job Creation against the 1945 Constitution of the Republic of Indonesia.

Some of the important points of the decision are as follows:

In point 3. *"Stating the establishment of Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) is contrary to the 1945 Constitution of the Republic of Indonesia and has no power the law is conditionally binding as long as it is not interpreted as "no repairs have been made within 2 (two) years since this decision was pronounced"*²

In point 4. *"Stating that Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) remains in effect until corrections are made to the formation in accordance with the predetermined grace period. in this decision."*³

In number 5. *"Orders the legislators to make improvements within a maximum period of 2 (two) years from the date this decision is pronounced and if within that time limit no corrections are made then Law Number 11 of 2020 concerning Job Creation (Gazette The Republic of Indonesia Year 2020 Number 245, Supplement 417 to the State Gazette of the Republic of Indonesia Number 6573) becomes permanently unconstitutional"*⁴

Then at point 6. *"Stating if within a period of 2 (two) years the legislators cannot complete the revision of Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) then the law or articles or material content of the law which has been revoked or amended by Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) declared valid again"*⁵

And at point 7. *"Stating to suspend all strategic and broad-impact actions/policies, and it is also not justified to issue new implementing regulations related to Law Number 11 of 2020 concerning Job*

² Amar Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 Hlm. 416

³ ibid

⁴ ibid

⁵ ibid

Creation (State Gazette of the Republic of Indonesia of 2020 Number 245 , Supplement to the State Gazette of the Republic of Indonesia Number 6573)”.⁶

Reporting from the News of the Constitutional Court, it was stated that at the same trial, the Court also decided on eleven other cases related to judicial review, namely Case Numbers 87, 101, 103, 105, 107, 108/PUU-XVIII/2020, and Case Number 3 , 4, 5, 6, 55/PUU-XIX/2021. All of these cases were declared inadmissible. This is because the Job Creation Law has been declared conditionally unconstitutional as stated in Decision Number 91/PUU-XVIII/2020. So that the judicial review of the Law is no longer relevant for further investigation because of the loss of the object of the application.

However, after the decision of the Constitutional Court on November 25, 2021, in practice, business licenses are still issued both at the center and in the regions with the Online Single Submission (OSS) system which is an order from Government Regulation Number 5 of 2021 where Government Regulation Number 5 of 2021 is one of the Implementing Regulations of Law Number 11 of 2020

Based on the problems in the background above, the writer is interested in conducting research in a thesis entitled " **LEGAL ASSURANCE OF POST-BUSINESS LICENSE DOCUMENTS ISSUANCE OF THE CONSTITUTIONAL COURT'S DECISION NUMBER 91/PUU-XVIII/2021**".

2. Research Methods

The type of research used is normative research, which in this study is the current norm. The research uses a statutory approach, namely by examining all laws and regulations that are related to the problems (legal issues) that are being faced. This study also uses a case approach, namely by examining cases related to the legal issues faced, with the aim of finding the value of truth and the best solution to legal events that occur in accordance with the principles of justice.

3. Results and Discussion

3.1 Constitutional Court Decision Number 91/PUU-XVIII/2020

Judicial review or in Dutch known as Toetsingsrecht is a test of legal products carried out by the judiciary or judiciary. This institution has the authority granted by the constitution to examine legal products formed by the executive agency. The authority to conduct judicial review is also believed to be carried out to carry out the function of checks and balances between institutions holding state power.⁷

The examination of statutory regulations can be interpreted as a process to examine written regulations that contain generally binding legal norms, whether established by state institutions or authorized officials. The object of the test is the object of the legal norm being tested. In general, the legal norm can be in the form of:

- a. Legal decisions as a result of administrative decisions (beschikking)
- b. legal decisions as a result of judicial activities in the form of verdicts by judges
- c. Legal decisions as a result of regulatory activities or what are called regulations, either in the form of legislation in the form of legislative acts or in the form of regulations in the form of executive acts.

By following the opinion of Mahfud MD who concluded that the character of a legal product is determined by the political configuration that gave birth to it, then naturally the character of a legal

⁶ ibid

⁷ Maria Farida dkk, **Teori Perundang-undangan** Universitas Terbuka Banten 2016 Hlm 1.3

product is largely determined by the dominant group based on the principle of the rule of majority. This will open up opportunities for laws and regulations that are not in line or even contrary to the regulations above that provide the delegation. Therefore, the examination of laws and regulations in the rule of law is very important to ensure the implementation of the goals of the rule of law itself, namely the realization of a prosperous state that can guarantee the realization of public welfare.

In recent years, there have been interesting developments in the judicial review, particularly in the case of decisions handed down by the Constitutional Court. If initially the decision was only in the form of an order granting the application, declaring the application unacceptable, and rejecting the application in part or in whole by declaring a law, article, paragraph or phrase contrary to the 1945 Constitution and declaring that it has no binding legal force (legally null and void). void), as regulated in Article 56 paragraph (3) and Article 57 paragraph (1) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (UU MK). In its development, the Constitutional Court also created variants of decisions, namely conditionally constitutional, conditionally unconstitutional, decisions that delay the enforcement of decisions (limited constitutional), and decisions that formulate new norms.⁸

The Constitutional Court is a Negative Legislature as Article 57 Paragraph (2a) of the Regulation of the Constitutional Court Number 06/PMK/2005 concerning Guidelines for Proceeding in Cases, it is stated that the Decision of the Constitutional Court does not contain:

- a) Amar other than as referred to in paragraph (1)
- b) Orders to legislators; and
- c) Formulation of norms as a substitute for norms from laws that are declared contrary to the 1945 Constitution of the Republic of Indonesia.

Based on the provisions of the article above, it appears that there are restrictions on the Constitutional Court as a judicial institution, namely the voider of norms, and not as the formulator of new norms, where the formulator of new norms is the authority of the legislative body (DPR) together with the executive (President). However, in the development of the Constitutional Court there has been a shift in function where the Court through its decision has become an Institution that is Positive Legislature. The positive legislature content in the Constitutional Court's decision can be seen in the Constitutional Court's decision which states that a paragraph, article, or law being tested is decided by a Conditionally Unconstitutional decision, or Conditionally Constitutional, or makes a new formulation related to the article or paragraph being tested.⁹

Starting from the dissatisfaction of some people with the issuance of Law Number 11 of 2020 concerning Job Creation, which in the process of preparation and stipulation was rushed - and there were several parties who felt disadvantaged by the issuance of the Act, the public submitted a formal submission to the Act. -Law Number 11 of 2020 concerning Job Creation against the 1945 Constitution of the Republic of Indonesia, where the Constitutional Court, which has the authority to hear and decide on this case, gives a verdict as stated in the Decision of the Constitutional Court number 91/PUU-XVIII/2020, which basically says.¹⁰

To declare that the applications of Petitioners I and Petitioners II cannot be accepted, Granting the applications of Petitioners III, Petitioners IV, Petitioners V, and Petitioners VI in part, To declare that the establishment of Law Number 11 of 2020 concerning Job Creation is contrary to the Constitution of the

⁸ Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito dan Syukri Asy'ari **Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru** Jurnal Konstitusi, Volume 12, Nomor 3, September 2015 hlm 633

⁹ Xavier Nugraha, Risdiana Izzaty, Alya Anira **Constitutional Review di Indonesia Pasca Putusan Mahkamah Konstitusi Nomor 48/PUU-IX/2011: dari Negative Legislator Menjadi Positive Legislator**, RechtsIdeo Vo. 15 No. 1 Tahun 2020 Hlm 4

¹⁰ Putusan Mahkamah Konstitusi nomor 91/PUU-XVIII/2020

Republic of Indonesia Year 1945 and states that Law Number 11 of 2020 concerning Job Creation is still valid until repairs are made to the establishment in accordance with the grace period as determined in this decision, which is 2 years.

The decision of the Constitutional Court does not only apply to those who apply for a review, but also to the general public. In this case, the Constitutional Court adheres to the principle of *erga omnes*, namely the decision of the Constitutional Court has binding power not only on one individual but applies and is binding on the entire general public.¹¹

3.2 Business Licensing

In general, licensing can be interpreted as an authorization or approval from the competent authority on something that was previously prohibited, or in simple terms it can be interpreted that a permit is an authorization for something that is prohibited, with terms and conditions that must be fulfilled by the permit applicant himself.

According to experts, licensing is the granting of legality to a person or business actor or certain activity, either in the form of a license or a business registration certificate. Permits are one of the most widely used instruments in administrative law, to guide the behavior of citizens.¹²

1. a ban
2. an obligation
3. an agreement
4. are provisions related to the permit itself

Licensing documents are a form of state administrative decisions (KTUN).

In its development, licensing is divided into 2 types, namely business licenses and non-business licenses where the definition of business licensing is the legality given to business actors to start and run their businesses and/or activities. In fact, the term business licensing began to be known in 2018 with the issuance of Government Regulation Number 24 of 2018 concerning Electronically Integrated Business Licensing, where business licensing is defined as registration given to Business Actors to start and run a business and/or activity and is given in the form of approval. which is stated in the form of a letter/decision or fulfillment of requirements and/or commitments. This business license in its application uses the OSS system (online single submission), then all forms of licensing outside the OSS system mechanism are called non-business licensing.

3.3 Strategic and broad-impact actions/policies.

The strategic policies referred to in the Job Creation Law include (Article 4 of the Job Creation Law) :¹³

1. improvement of the investment ecosystem and business activities;
2. employment;
3. convenience, protection, and empowerment of cooperatives and MSEs;
4. ease of doing business;
5. research and innovation support;
6. land acquisition;
7. economic area;
8. Central Government investment and acceleration of national strategic projects;

¹¹ Encik Muhammad Fauzan *op. cit.* hlm 109

¹² Philipus M. Hadjon, **Pengantar Hukum Perizinan**, (Yuridika, Surabaya: 1993). Hal. 2.

¹³ Pasal 1 angka 4 Peraturan Pemerintah Nomor 24 Tahun 2018 tentang Perizinan Berusaha Terintegrasi Secara Elektronik

9. implementation of government administration; and
10. imposition of sanctions.

Ima Mayasari, a law expert at the University of Indonesia, said that there are many strategic issues (the Job Creation Law), how to carry out risk-based business licensing reform, simplify business licensing, and simplify investment requirements.¹⁴

3.4 Theory of Legislation

According to Law Number 12 of 2011 concerning the Establishment of Legislations, Legislations are defined as written regulations that contain legally binding norms in general and are established or determined by state institutions or authorized officials through the procedures stipulated in the Legislation. Invitation.¹⁵

based on the explanation of Article 1 point 2 of Law Number 5 of 1986 concerning the State Administrative Court, statutory regulations are all regulations that are binding in general issued by the People's Representative Council with the government both at the central and regional levels, as well as all decisions of the National Legislative Council. or State Administration Officials, both at the central level and at the regional level which are also binding on the general public.¹⁶

Legislations can also be defined as written regulations containing legal norms that are binding on the public, either set by the regulator or by law-implementing institutions that have delegated authority from the law to establish certain laws and regulations according to the law. applicable regulation.¹⁷

Conclusion

Reporting from the Warta MK, it was stated that in the same trial, the MK also decided on eleven other cases related to the judicial review, namely Case Numbers 87, 101, 103, 105, 107, 108/PUU-XVIII/2020, and Case Numbers 3, 4, 5, 6, 55/PUU-XIX/2021. All of these cases were declared inadmissible. This is because the Job Creation Law has been declared conditionally unconstitutional as stated in Decision Number 91/PUU-XVIII/2020. So that the review of the law is no longer relevant for further examination due to the loss of the object of the application.

However, after the decision of the Constitutional Court on November 25, 2021, in practice, business permits are still issued both at the center and in the regions with the Online Single Submission (OSS) system which is an order from Government Regulation Number 5 of 2021 where Government Regulation Number 5 of 2021 is one of the Implementing Regulations of Law Number 11 of 2020.

Thank-You Note

The author would like to thank those who have contributed to this writing, especially those in institutions including those who individually helped, including in improving the writing of articles such as: Advisory Lecturers, Funding Institutions, Proof-readers, and other parties. deemed to have contributed.

¹⁴ <https://www.liputan6.com/news/read/4384509/pakar-banyak-hal-strategis-dalam-uu-cipta-kerja> Liputan6.com 16 Okt 2020, 19:47 WIB

¹⁵ Pasal 1 Angka 2 Undang-Undang Nomor 12 Tahun 2011 tentang **Pembentukan Peraturan Perundang-undangan**

¹⁶ Penjelasan Pasal 1 Undang-Undang Nomor 5 Tahun 1986 tentang **Peradilan Tata Usaha Negara**

¹⁷ Encik Muhammad Fauzan **Dasar-Dasar Perundang-undangan di Indonesia** Setara Pres Malang 2020 Hal. 13

References

Book

- Encik Muhammad Fauzan S.H., LL.M Dasar-Dasar Perundang-undangan di Indonesia Setara Pres Malang 2020
- Eko NAM Sihombing, Ali Marwan Ilmu Perundang-undangan PT. Cita Instans Selaras Malang 2021
- Irwansyah, Penelitian Hukum Pilihan Metode dan Praktik Penulisan Artikel, Mirra Buana Media Sleman Yogyakarta 2021
- Dr. Ridwan HR Hukum Administrasi Negara Rajawali Pers Depok 2020
- Lutfil Anshori, Pengujian Peraturan Perundang-undangan Setara Pres Malang 2018
- SF. Marbun dan Mahfud MD Pokok-Pokok Hukum Administrasi Liberty Yogyakarta 1987
- Hans Kelsen dalam Peter Mahmud Marzuki, Pengantar Ilmu Hukum, Kencana, Jakarta, 2008
- Philipus M. Hadjon, Pengantar Hukum Perizinan Yuridika, Surabaya: 1993
- Peter Marzuki Penelitian Hukum Prenamedia Group jakarta 2005
- <http://kbbi.web.id/wenang>, diakses pada tanggal 22 November 2017
- Gustav Radbruch dalam Dwika, "Keadilan dari Dimensi Sistem Hukum", <http://hukum.kompasiana.com>. (02/04/2011), diak ses pada 24 Januari 2016)
- Jimly Assiddiqie Konsolidasi Naskah UUD 1945 Setelah Perubahan Keempat, Jakarta: Puat Studi Hukum Tata Negara, Fakultas Hukum UI, 2002, hlm

Journal

- R. Tony Prayogo, jurnal berjudul Penerapan Asas Kepastian Hukum dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 tentang Hak Uji MAterial dan dalam Peraturan Mahkamah Konstitusi Nomor 06/PMK/2005 tentang Pedoman Beracara dalam Pengujian Undang-Undang
- Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito dan Syukri Asy'ariTindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma BaruJurnal Konstitusi, Volume 12, Nomor 3, September 2015
- Mario Julyanto, Aditya Yuli Sulistyawan Pemahaman terhadap Asas Kepastian Hukum melalui Konstruksi Penalaran Positivisme Hukum, jurnal Crepido Universitas Diponegoro Volume 01 Nomor 01 Juli 2019 Hal 15
- Muhammad Insa Ansari Omnibus Law untuk Menata Regulasi Penanaman Modal, Jurnal Rechtsvinding Volume 9 No. 1 Tahun 2020
- Desi Arianing Arrum Kepastian Hukum dalam Perizinan Berusaha Terintegrasi Secara Elektronik (Online Single Submission) di Indonesia Jurist-Diction Vol. 2 No. 5 Tahun 2019
- Xavier Nugraha, Risdiana Izzaty, Alya Anira Constitutonal Review di Indonesia Pasca Putusan Mahkamah Konstitusi Nomor 48/PUU-IX/2011: dari Negative Legislator Menjadi Positive Legislator, RechtIdee Vo. 15 No. 1 Tahun 2020
- Febriansyah Ramadhan, Deny Noer Wahid, Ahmad Bilaldzy Hak Pengelolaan Sejak Putusan Mahkamah Konstitusi 91/ PUU-XVIII/2020 Jurnal Kawruh Abiyasa Vol 1 No 2 (2021) Hlm. 184

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).