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Justification of the Thematic Legislation in Indonesia

Justifikasi Pembentukan Undang-Undang Tematik di Indonesia

Umbu Rauta [1], **Titon Slamet Kurnia** [1], **Freidelino Paixao Ramos Alves de Sousa** [1], **Adérito de Jesus Soares** [2], **Marcelino Ceasar Kishan** [1], **Bernadeta Adriana Sandra Jeconiah** [1],

[1]Center for Regulation Reform for Development, Universitas Kristen Satya Wacana, Salatiga, Indonesia
[2]Independent Consultant and Researcher, Timor Leste

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Corresponding Author:
Umbu Rauta
umburauta@uksw.edu

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Abstract

The use of the omnibus method has been controversial since the enactment of the Job Creation Law due to its cross-sectoral nature, making the resulting legislation difficult for the public to understand. The validity of laws created using the omnibus method does not only depend on the validity of the omnibus method because it has been recognized by law. The paper aims to critique the Omnibus method of Article 64 (1) letter b of the Law on Legislation Making and its application resulting in the Job Creation Law, Law No. 6 of 2023 which is not thematic so it is not easy for the public to understand. The novelty of this article is the idea that the implementation of the omnibus method must also be accompanied by the resulting laws being thematic so that they can be easily understood. Thus we propose the thematic omnibus method. The thematic principle in omnibus method is born from the dictates of the Rule of Law principle, which is regulated in the principle of clarity of purpose and the principle of clarity of formulation, which is a form of the necessity of intelligibility in legislation.

Abstrak

Penggunaan metode omnibus menjadi kontroversi sejak disahkannya UU Cipta Kerja karena bersifat lintas sektoral sehingga undang-undang yang dihasilkan lewat proses ini tidak mudah dipahami oleh publik. Keabsahan undang-undang yang dibentuk menggunakan metode omnibus tidak hanya bergantung pada keabsahan metode omnibus karena sudah diakui oleh undang-undang. Artikel ini bertujuan melakukan kritik terhadap metode Omnibus dalam Pasal 64 (1) huruf b UU tentang Pembentukan Peraturan Perundang-undangan dan penerapannya yang menghasilkan UU Cipta Kerja (UU No. 6 Tahun 2023) yang tidak tematik sehingga tidak mudah dipahami publik. Kebaruan artikel ini adalah gagasan bahwa penerapan metode omnibus juga harus disertai dengan undang-undang yang dihasilkan bersifat tematik sehingga mudah dipahami. Dengan demikian kami mengusulkan metode omnibus tematik. Prinsip tematik dalam metode Omnibus lahir dari perintah asas Negara Hukum yang diatur dalam asas kejelasan tujuan dan asas kejelasan rumusan yang merupakan wujud dari keharusan adanya kejelasan peraturan perundang-undangan.

A. INTRODUCTION

1. Background

This paper aims to criticize Article 64(1) of Law No. 12 of 2011 on Legislation Making, as amended—most recently by Law No. 13 of 2022 on the Second Amendment to Law No. 12 of 2011 on Legislation Making (hereinafter, the Law on Legislation Making). This provision serves as the basis for the legality of using the omnibus method in lawmaking in Indonesia. Article 64(1) of the Law on Legislation Making provides that the method includes: "*(a) containing new substances, (b) amending substances that are interconnected and/or have legal needs regulated in various legislation of the same type and hierarchy, and/or (c) repealing legislation of the same type and hierarchy, by merging them into one legislation to achieve a specific objective*." This provision constitutes the legislature's response to the Constitutional Court of the Republic of Indonesia (hereinafter, MKRI) Decision No. 91/PUU-XVIII/2020 in the formal review of Law No. 11 of 2020 on Job Creation (hereinafter, the Job Creation Law), which was enacted using the omnibus method. The MKRI ordered that: "*a standard legal basis be immediately established to serve as a guideline in the establishment of any laws using the omnibus law method which has a certain specificity*."[1]

Although it was expected to resolve the controversy following MKRI Decision No. 91/PUU-XVIII/2020, Article 64(1) of the Law on Legislation Making—particularly letter b—remains controversial because it is difficult to reconcile with the thematic principle in legislation-making set out in Article 5, which articulates the principle of clarity of purpose. As a corollary of this principle, each law has its own objectives and, therefore, its own "theme." Accordingly, the maxim *lex posterior derogat legi priori* cannot automatically be invoked to justify the modification of the substance of several laws through a single law. Article 64(1) does not directly contradict Article 5; however, in its application it must be construed systematically such that Article 5 operates as a limitation on Article 64(1). On that basis, as a consequence, Law No. 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation (hereinafter, Law No. 6 of 2023) remains controversial despite having followed Article 64(1) letter b of the Law on Legislation Making.

This paper posits the thesis that "the legalization of the omnibus method in Article 64(1) letter b of the Law on Legislation Making is incompatible with the thematic principle as a rule of law in legislation-making, because that provision clearly negates the thematic principle." Article 64(1) letter b of the Law on Legislation Making contains a dangerous loophole because it does not provide specific restrictions on the "*various legislation of the same type and hierarchy*" clause—restrictions that already exist in Article 5, namely the thematic principle. On that basis, the analytical focus now lies in the practice of implementing Article 64(1) letter b of the Law on Legislation Making. We use the Job Creation Law (both

[1] Mahkamah Konstitusi Republik Indonesia, Constitutional Court Decision No. 91/PUU-XVIII/2020 (2020).

Law No. 11 of 2020 and Law No. 6 of 2023) as an example of the implementation of Article 64(1) letter b of the Law on Legislation Making, which transparently contradicts the thematic principle. We do not ignore that the government has legitimate legal needs to be accommodated—such as the need for the Job Creation Law—but this issue must be given an appropriate legal solution, namely within the framework of the thematic principle as a limitation on the provisions stipulated in Article 64(1) of the Law on Legislation Making.

2. Research Questions

The legal issue discussed in this paper is as follows: "Is the legalization of the omnibus method in Article 64(1) of the Law on Legislation Making—particularly letter b—compatible with the thematic principle as a restriction on legislative action grounded in the rule-of-law principle, particularly with respect to clarity of purpose and clarity of formulation?" We answer in the negative, as explained above.

The outline of this paper is as follows. First, the legal framework for legislative action in general—namely the rule-of-law principle—will be elucidated. Within this framework, the principle functions as a constraint on legislative action, thereby implying a rule-of-law framework for legislation-making embodied in the Law on Legislation Making in Indonesia (**section B.1.a**). Secondly, within the context of the rule of law, this paper positions the thematic principle as paramount; with respect to the Law on Legislation Making, this thematic principle is translated into the principles of clarity of purpose and clarity of formulation. On this basis, these principles will be elucidated in their primary function as constraints on legislative action from which deviation is impermissible (**section B.1.b**). Third, as a specific response to the legal issue, this paper argues that Article 64(1) letter b of the Law on Legislation Making is incompatible with the thematic principle as a rule-of-law constraint in legislation-making (**section B.2.a**). Furthermore—and as a constructive contribution rather than mere criticism—this paper also provides a legal solution so that the government's need to undertake law reform can be accommodated within the thematic-principle framework, unlike the approach taken in the Job Creation Law (**section B.2.b**).

B. DISCUSSION/ ANALYSIS

1. The Thematic Principle and the Rule of Law

This section discusses the legal framework for legislative action grounded in the rule-of-law principle. It surveys and interprets theoretical accounts of the rule of law advanced by legal theorists and philosophers, rather than country-specific versions.[2] It then examines

[2] Pietro Costa and Danilo Zolo, eds., *The Rule of Law: History, Theory, and Critisim*, 2007; Paul Tiedemann, "The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now," in *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, ed. James R. Silkenat, James E. Hickey Jr., and Peter D. Bareinboim (London: Springer, 2014), 171–92.

how that framework relates to Indonesia's legislative system. This relationship can be explained as follows. *First*, the rule-of-law principle requires the presence of legislation for its implementation (the principle of legality).[3] While the existence of legislation is a prerequisite for the rule of law to operate, the rule-of-law principle also imposes substantive limits on legislation.[4] *Second*, in Indonesia's legislative system, best practices grounded in sound principles of legislation-making reflect this normativity through the principles of clarity of purpose and clarity of formulation. Accordingly, the form of legislation that best satisfies clarity of purpose and clarity of formulation is legislation-making that adheres to the thematic principle.

a. The Functionality of the Rule of Law

The rule-of-law principle is critically reliant on the role of legislation; this requirement can be met only through legislation.[5] Conceptually, law and legislation are not the same. F. A. Hayek even asserts that "law is older than legislation."[6] He explains: "*Unlike law itself, which has never been 'invented' in the same sense, the invention of legislation came relatively late in the history of mankind*."[7] Legislation is a legal product of the legislative power of a country. Legislation is a legal product of a state's legislative power. Legislation specifically—and statutory law in general—possesses distinctive characteristics: "They are made at a particular time. They express the will of particular, identifiable person or body of persons."[8]

The proposition that the rule of law requires legislation for its operation is implicit in the formal conception of the rule of law advanced by Tamanaha and Peerenboom, commonly referred to as the principle of legality.[9] Explicating legality, Tamanaha states that, at its thinnest formal understanding, the rule of law is the idea that the state manages its affairs by legal means, essentially requiring that every government action be grounded in law.[10] Consequently, the very existence of legislation is vital to the rule of law because it ensures that officials and citizens alike are bound by—and adhere to—the law.[11] Accordingly, the

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3 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

4 Brian Z. Tamanaha, "A Concise Guide to the Rule of LAw," in *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker (Oxford: Hart Publishing, 2009), 3–16; Ermanto Fahamsyah and Ruetaitip Chansrakaeo, "Ius Constituendum of Suistainable Agricultural Policy: The Aftermath of Job Creation Act," *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 3 (2022): 512–22.

5 Ronan Cormacain, *The Form of Legislation and The Rule of Law*, 1st ed. (Oxford: Hart Publishing, 2022), 10–12.

6 Fredrick A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 1998), 72.

7 Hayek, 72.

8 Martin Krygier, "The Traditionality of Statutes," *Ratio Juris* 1, no. 1 (1988): 13.

9 Adriaan Bedner, "An Elementary Approach to the Rule of Law," *Hague Journal on the Rule of Law* 2, no. 1 (2010): 56–57, https://doi.org/10.1017/S1876404510100037; Joseph Raz, *The Authority of Law* (New York: Oxford University Press, 1989), 212.

10 Tamanaha, *On the Rule of Law: History, Politics, Theory*.

11 Tamanaha.

rule of law's primary concern is directed toward legislation, so that legislation can function as the basis for action by the government and the people.[12]

The principle of legality—which explains why the rule of law requires legislation—embodies both an ideal and a negative condition. This point must be understood to guide the subsequent discussion, which explains the rule-of-law principle as a constraint on legislation. Legislation is required because it enables legal subjects to know the law; as Alfred Conard puts it, "*Laws should be written with more emphasis on making readers understand what the law commands*."[13] The importance of the principle of legality can also be grasped by considering the contrasting conditions that would prevail in its absence. Explicating the principle of legality—government by rules—Andrew Altman states: "*government should maintain civil order and peace mainly through a system of general and authoritative rules, specifying whatever sanctions are to be imposed for violations*."[14] Conversely, its opposite signifies the practice of arbitrary government.[15]

The positive—or ideal—meaning of the principle of legality, as Altman's contrasting account above suggests, is that even at the most minimal level the enforcement of law is crucial as a means of protecting individuals' freedom from governmental action. Altman does not explicitly articulate this positive meaning. It is stated explicitly by F. A. Hayek: [16]

> *"stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."*

Here, the protection of freedom means that individuals can plan their lives and avoid potential coercive government action by knowing—through applicable laws—the range of such possibilities (since the government must act in accordance with those laws). This understanding typically applies to public law, such as criminal law and administrative law.

Specifically regarding the principle of legality and the relationship between the rule of law and legislation in general, Raz discusses the "literal sense of the rule of law." According to Raz:[17]

> *"It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it. As was noted above, it is with the second aspect that we are concerned: the law must be*

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[12] Marcelino Ceasar Kishan, "Pengaturan Tata Cara Perubahan Konstitusi: Perbaikan Kesalahan Majelis Permusyawaratan Rakyat Berdasarkan Tradisi Konstitusi Formal" (Universitas Kristen Satya Wacana, 2024), 32.

[13] Alfred F. Conard, "A Legislative Text New Ways to Write Laws," *Statute Law Review* 6, no. 3 (1985): 83.

[14] Andrew Altman, *Arguing about Law: An Introduction to Legal Philosophy*, 2nd ed. (Sydney: Wadsworth, 2001), 4.

[15] Altman, 4.

[16] Fredrick A. Hayek, *The Road to Serfdom*, 2nd ed. (New York: Routledge Classics, 2006), 33; Raz, *The Authority of Law*, 210.

[17] Raz, *The Authority of Law*, 213–14.

> *capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it."*

Raz's account above is important to ensure that the rule-of-law principle does not become a failed project through non-operability. As a precondition, the principle must be effective in practice. Here lies the ideal meaning of the principle of legality: for the rule of law to operate, the enforcement of law is a prerequisite. The most salient aspect of Raz's account concerns the second point about the condition of the law itself. Because the rule of law starts from the assumption "*that people should be ruled by the law and obey it*," it follows that "*the law must be capable of being obeyed*." Thus, law must not only be enacted to support the operation of the rule-of-law principle (the principle of legality); the laws themselves "*must be capable of guiding the behaviour of its subjects*."

Thus, the theoretical account of the rule of law and legislation comes into clearer focus: the rule-of-law principle cannot be implemented without legislation that meets the preconditions discussed by Raz. Legislation therefore plays a crucial role in the operation of the rule-of-law principle. Accordingly, an ideal legislative design—one disciplined by the rule of law—is necessary, because legislation is a dual-use instrument capable of serving both constructive and destructive purposes. Without restraints on the legislature (and its legislative outputs), the rule of law can easily devolve into *rule by law* with a negative connotation.[18] Absent specific constraints on legislation, to borrow Raz's formulation: "*The law may, for example, institute slavery without violating the rule of law*."[19] At a minimum, for the mission of the rule of law to be realized, legislation must function as the basis for the actions of all legal subjects—both the government and the people.

b. Thematic Principle as a Derivatives Principle

Our subsequent focus is to avert the negative aspects that may arise from applying the principle of legality. Accordingly, this subsection examines the rule of law's function as a constraint on legislation: because legislation is a precondition for the rule of law, its existence must be accompanied by specific ideal qualities designed to forestall abuses of legislation by the authorities and to ensure that the rule of law does not become mere lip service. This concern has long preoccupied legal theorists and philosophers, with Lon Fuller among the earliest to address it.

The most relevant thinking to the legal issue in this study is that of Ronan Cormacain. Cormacain focuses on rule-of-law–based solutions to improve the quality of legislation. He argues that we face a legislative problem—namely, that legislation is "*too hard to understand,*

[18] Tamanaha, *On the Rule of Law: History, Politics, Theory*.
[19] Raz, *The Authority of Law*, 221.

too complex and too voluminous."[20] Drawing on the rule-of-law concept, Cormacain articulates a two-level understanding: "*At one level, the Rule of Law is the basic principle that we are all subject to the law. At another level, the Rule of Law comprises the ideal of the values that a legal system ought to possess*."[21] As an implication of defining the rule of law as an ideal, he then formulates an "operational definition" so that legislation can support the rule-of-law principle—namely, principles for enacting legislation in accordance with the rule of law as follows: (1) accessibility of legislation; (2) prospectivity of legislation; (3) predictability of legislation; (4) intelligibility of legislation; (5) constraints on discretion in legislation; and (6) equality before the law in legislation.[22] Accordingly, the ensuing discussion examines the rule of law as a limitation on legislation so that good—or ideal—legislation can be achieved.

This section focuses on the fourth principle—intelligibility of legislation—because it is most relevant to the legal issue under discussion. With respect to intelligibility, Cormacain states: "*The Rule of Law requires that legislation ought to be intelligible and clear. Intelligible means able to be understood, to be comprehensible. Clear means that something is easy to understand or interpret*." [23] This principle implies that "laws should be intelligible so that individuals can easily know what the law is."[24] It assumes significance for three reasons: "*The first is to do with effectiveness of the law—if we can't understand what the law is, we can't obey it. The second is related: if we don't understand the law, we cannot take advantage of its provisions. The third is a commercial one: commerce is improved if it is regulated by rules that are clear and easy to understand for commercial actors*." These reasons underscore the centrality of intelligibility to legislation's capacity to guide conduct, enable the use of legal provisions, and support commerce.[25]

More specifically, the quality of intelligibility essentially rests on form, whereas clarity derives from the meaning of words within legislation. Concretely, the role of form as the basis of intelligibility can be seen in Cormacain's discussion of "*why is legislation sometimes not intelligible?*" Cormacain outlines five conditions under which legislation is not intelligible; three of them are:

1. **Exhaustiveness/Comprehensiveness.** This condition arises when rules contain excessively detailed norms. Drawing on John Ubena's insights, Cormacain explains that although detailed rules aim to secure legal certainty, they often result in over-particularization, rendering the legislation difficult to comprehend.[26]
2. **Complex Policy.** This occurs when a single legislative instrument bundles numerous policies. Such complexity often reflects a blurring of the functional boundary between

[20] Cormacain, *The Form of Legislation and The Rule of Law*, 1.
[21] Cormacain, 7.
[22] Cormacain, 3–5.
[23] Cormacain, 141.
[24] Cormacain, 142.
[25] Cormacain, 142.
[26] Cormacain, 145.

law as a legal product and law as a political product: the adoption of a complex policy framework is a political decision, not a legal mandate.[27] Because complexity inherently impedes intelligibility, legislative stakeholders should evaluate whether such breadth is genuinely warranted.[28]

3. **Complexity Masking a Lack of Direction.** This is both a symptom and a cause of the first two conditions, whereby exhaustiveness and complex policy are employed to conceal the legislature's lack of clear intent.[29]

The issue is how Cormacain's view resonates within Indonesian law. Article 5 of the Law on Legislation Making stipulates the principles for the formation of good legislation. Semantically, the drive to maintain clarity is reflected in two principles that explicitly invoke "clarity": the principles of clarity of purpose and clarity of formulation. The principle of clarity of purpose requires that every instance of legislation-making have a clear objective to be achieved. By contrast, the principle of clarity of formulation requires that every law meet technical drafting requirements, be systematically organised, use precise terms, and employ clear, readily understood legal language to avoid divergent interpretations in its application. We examine both principles to determine whether, taken together, they constitute a spectrum that necessitates the intelligibility of legislation, in Cormacain's sense, within Indonesia's legislation-making. Although the principle of clarity of purpose is listed first in Article 5 of the Law on Legislation Making, we begin with the principle of clarity of formulation because intelligibility in formulation implies—and enables—intelligibility in the principle of clarity of purpose.

In Indonesian law, intelligibility is governed by the principle of clarity of formulation. This reading becomes apparent in the elucidation of Article 5 letter (f) of the Law on Legislation Making, which specifies the objects that must be satisfied: *first*, compliance with technical drafting requirements so that the legislation is clear and comprehensible; *second*, a clear systematic structure; *third*, the use of words or terms that are clear and easy to understand; and *fourth*, the use of legal language that is clear and easy to understand. Read together, these requirements show that ensuring clarity through technical preparation and systematics ties the principle of clarity of formulation not only to linguistic rationality but also to legal-formal rationality. Accordingly, the principle of clarity of formulation operates beyond mere wording choices by demanding formal structure and drafting discipline that secure intelligibility. Thus, the obligation embedded in the principle of clarity of formulation aligns with Cormacain's notion of the intelligibility of legislation.

The rationality of form within the principle of clarity of formulation implies a systematic relationship with the principle of clarity of purpose. In Cormacain's view, an unclear form can be used to conceal the legislature's lack of clarity of purpose in legislation-making.

[27] Cormacain, 147.
[28] Cormacain, 147.
[29] Cormacain, 148.

Conversely, an unclear form can itself obscure a purpose that ought otherwise to be clear. This aligns with Maria Farida Indrati's view that each item of legislation must be identifiable by examining the framework—its outer form (*kenvorm*)—of the statute or regulation.[30]

The principles of clarity of formulation and clarity of purpose are manifestations of the intelligibility of legislation. The implication is that the conditions that negate the intelligibility of legislation are the very conditions that negate the principles of clarity of formulation and clarity of purpose. Accordingly, the principles for the formation of good legislation must also be viewed as material principles for the Law on Legislation Making. Treating the principles for the formation of good legislation as material principles for the Law on Legislation Making entails that the Law on Legislation Making must contain substantive provisions that adhere to those principles. This can be achieved by examining the compatibility of the substantive content to be regulated in the Law on Legislation Making with the principles for the formation of good legislation. Upon closer examination, this is essentially the practice undertaken in this paper, albeit by way of review. This examination practice aligns with the concept of *bewährte Standards*, a legislative technique associated with Peter Noll; *bewährte Standards* denotes techniques that have proved accurate and appropriate and are therefore applied and accepted as standard guidelines.[31]

Referring back to intelligibility, two of the five conditions under which legislation is not intelligible, as outlined by Cormacain, relate to the scope of legislative material: *exhaustiveness* and *complex policy*. As a civil-law jurisdiction, the issue of exhaustiveness can also be understood as a characteristic of the nature of legislation. Our previous study on the Draft Law on the National Education System (Draft 2022) highlighted the urgency of completeness to prevent normative gaps.[32] Accordingly, we do not examine how to prevent exhaustiveness and instead focus on preventing complex policy.

The pivotal concern in Cormacain's account of complex policy is the policy content embedded in a legislative instrument. He does not treat complexity as a matter of the number of policies; rather, it arises from the intermixing of policy types: "Complex policy is about creating policy distinctions between different cases when the law would work (from a legal perspective) without those different policy distinctions … complex law will seek to introduce different rules for different circumstances."[33] A similar characterization is offered by Roman Senninger, who suggests that complex policy occurs in two forms: "I

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30 Maria Farida Indrati S., *Ilmu Perundang-Undangan 1: Jenis, Fungsi, Dan Materi Muatan*, Revision (Yogyakarta: Kanisius, 2013), 93.

31 Nurfaqih Irfani, "Omnibus Law: Antara Metode Dan Teknik Perundang- Undangan Serta 'Best Practice' Di Jerman Sebagai Perbandingan," in *Monograf Dekonstruksi Perundang-Undangan Indonesia: Menggapai Cita-Cita Ideal Pembentukan Peraturan Perundang-Undangan*, ed. Efraim Jordi Kastanya, Muhammad Hamzah, and Nadhifa Marsaa (Malang: Fakultas Hukum Universitas Brawijaya, 2022), 24.

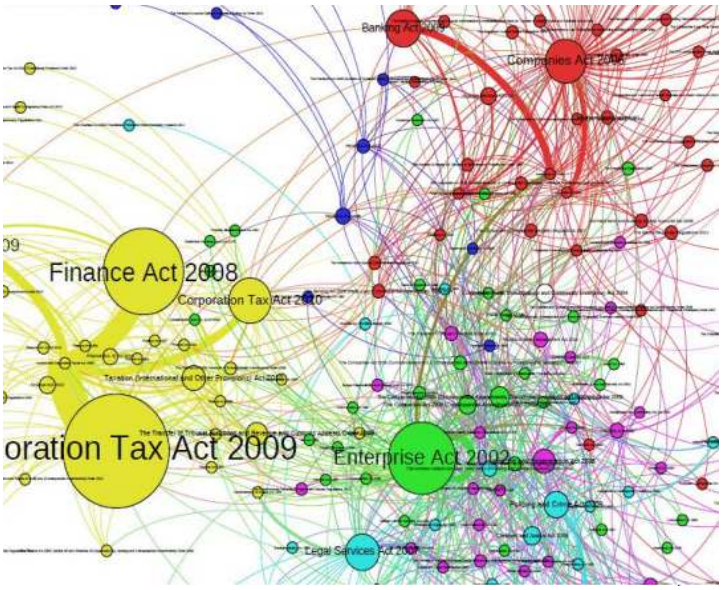
32 Umbu Rauta et al., "Policy Brief Rancangan Undang-Undang Tentang Sistem Pendidikan Nasional: Penggabungan Undang-Undang Sistem Pendidikan Nasional, Undang-Undang Guru Dan Dosen, Dan Undang-Undang Pendidikan Tinggi" (Salatiga, 2023), 91.

33 Cormacain, *The Form of Legislation and The Rule of Law*, 147.

define complex policies as those that have a high level of textual sophistication and a large number of ties to other policies [emphasis added]."[34] Senninger locates the problem primarily in the second feature—cross-references from one regulation to another—observing that "a process of policy layering or policy accumulation is increasingly common."[35]

Empirical support for Senninger's view can be found in the Office of the Parliamentary Counsel's report titled *When Laws Become Too Complex*, which Cormacain also cites. Senninger's study essentially mirrors the perception of disproportionate complexity as a component of complex legislation: "*Regulation emanating from different sources sometimes overlaps and commencement can be difficult to follow*."[36] In greater detail, the report includes a diagram that visualizes the interconnectedness of laws:

Figure 1. Interconnectedness of the laws due to cross-referencing[37]



The implication of mixing policies in a legislative program also entails cross-referencing. Cross-referencing undermines clarity for the public because understanding one policy requires understanding other, related policies as well.[38] Jeffrey A. Lasky reaches a similar conclusion regarding the readability of the Internal Revenue Code of the United States: "*The presence of Scope cross-references embedded in the statutory text will strongly degrade readability and application accuracy*."[39] To rationalize legislative form consistent with the principles of clarity of formulation and clarity of purpose, it is imperative to avoid cross-

[34] Roman Senninger, "What Makes Policy Complex?," *Political Science Research and Methods* 3988 (2023): 2.
[35] Senninger, 2.
[36] Office of the Parliamentary Counsel, "When Laws Become Too Complex: A Review into the Causes of Complex Legislation" (London, 2013), 14.
[37] Office of the Parliamentary Counsel, 14.
[38] Senninger, "What Makes Policy Complex?," 3.
[39] Jeffrey A. Lasky, "The Impact of Cross-References on the Readability of the U.S. Internal Revenue Code" (Nova Southeastern University, 2019), 124.

referential drafting. Two indicators highlighted above of problematic cross-referencing are the mixing of policies and interconnections across different pieces of legislation. To avoid this, legislation should emphasize thematic interconnectedness within the regulated scope. The core prescription for preventing cross-referencing is the consolidation, within a single legislative instrument, of policies that are directly related, so as to make it easier for the public to understand the law. Thematic legislative instruments will better facilitate the public when such instruments form part of a broader body of law. This, in turn, is the form that achieves the principles of clarity of formulation and clarity of purpose.

2. Incompatibility of the Omnibus Method in Law on Legislation Making and the Thematic Principle

This section presents a critique of the omnibus method as incorporated into the Law on Legislation Making following the MKRI Decision No. 91/PUU-XVIII/2020. First, it explains the failure of the omnibus method to comply with the thematic principle as evidenced by its application in the Job Creation Law (Section **2.a**). Second, it proposes solutions to ensure that the thematic principle functions as a limitation on lawmakers when the omnibus method is used (Section **2.b**).

a. Failure of the Omnibus Method to Comply with the Thematic Principle through the Job Creation Law

Our initial focus is Constitutional Court (MKRI) Decision No. 91/PUU-XVIII/2020 reviewing the constitutionality of Law No. 11 of 2020, which applied the omnibus method. In principle, the MKRI adopted a legalistic approach in assessing the constitutionality of Law No. 11 of 2020. The law was considered unconstitutional because it lacked a legal basis in the Law on Legislation Making; the MKRI stated: "*this method cannot be used as long as it has not been adopted in the Law on Legislation Making*."[40] On that basis, to rectify the fundamental error in the application of the omnibus method in Law No. 11 of 2020, the MKRI ordered the legislature "*to immediately form a standard legal basis to be a guide in the formation of legislation using the method of omnibus law that has the nature of such specialty, and further make amendments to Law 11/2020 in accordance with the said legal basis*."[41]

An important point not addressed in the MKRI's judicial opinion in Decision No. 91/PUU-XVIII/2020 is the specific legal limitation that should govern the adoption of the omnibus method into the Law on Legislation Making. The limitation we propose—the thematic principle—is particularly relevant to Law No. 11 of 2020.[42] The most salient problem with Law No. 11 of 2020 concerns its substance: non-thematic content. As an omnibus statute, it incorporates amendments to 78 laws, grouped into 11 clusters without a unifying theme.

[40] Mahkamah Konstitusi Republik Indonesia, Constitutional Court Decision No. 91/PUU-XVIII/2020 at 404.
[41] Mahkamah Konstitusi Republik Indonesia, Constitutional Court Decision No. 91/PUU-XVIII/2020 at 413–14.
[42] See supra Section **B.1.b**.

This feature has essentially perpetuated the polemics surrounding Law No. 11 of 2020. Among the resulting problems is cross-referencing, which undermines intelligibility. The same problem in Law No. 11 of 2020 carries over into Law No. 6 of 2023, which retains cross-thematic—i.e., non-thematic—content. By "non-thematic" we mean that the statute's content lacks internal interconnectedness.

The non-thematic issue in Law No. 11 of 2020 surfaces explicitly in MKRI Decision No. 6/PUU-XIX/2021. The Applicants challenging the constitutionality of Law No. 11 of 2020 advanced, inter alia, the following ground for their objection: "*that according to the Applicants, at the stage of drafting, there were dozens of laws amended with one amendment law named the Job Creation Law. In fact, none of the amended laws have the name 'Job Creation'*."[43] The MKRI did not address this point because the constitutionality of Law No. 11 of 2020 had already been decided in Decision No. 91/PUU-XVIII/2020, to which the Court adhered. Meanwhile, the legislature's effort to adopt the omnibus method into the Law on Legislation Making—as ordered by the MKRI—appeared narrowly oriented toward validating the Job Creation Law. The outcome of that process is Article 64(1) of the Law on Legislation Making, specifically Article 64(1) letter (b), which is the object of this paper's critique.

Our review indicates that the legislature's primary legislative intent was efficiency in the legislative process, particularly when numerous statutes could be amended at once.[44] This intent is highly pragmatic and rests on a simple yet fallacy-prone logic, offering little substantive justification beyond procedural expediency. In addition, the technique of amending many laws through a single legislative process is often defended as formally valid by reference to the maxim *lex posterior derogat legi priori*. Consistent with our previous claim, however, such reliance is at odds with the thematic principle. Read in light of Article 5 of the Law on Legislation Making, the thematic principle requires legislative coherence and focus. Accordingly, the efficiency-driven approach—and the appeal to *lex posterior derogat legi priori*—conflicts with Article 5's requirements, particularly the principles of clarity of purpose and clarity of formulation. For these reasons, the legislature's efficiency rationale does not satisfy the thematic constraints that should discipline the use of the omnibus method.

An interesting development in response to the non-compliance with the thematic principle in the re-enactment of Law No. 11 of 2020—the enactment of Law No. 6 of 2023—is MKRI Decision No. 54/PUU-XXI/2023. The key point of this decision, however, appears only in the dissenting opinion of Justices Saldi Isra and Enny Nurbaningsih: [45]

[43] Mahkamah Konstitusi Republik Indonesia, Constitutional Court Decision No. 6/PUU-XIX/2021 (2021).
[44] Badan Keahlian Dewan Perwakilan Rakyat, *Naskah Akademik Rancangan Undang-Undang Tentang Perubahan Kedua Atas Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undanga* (Jakarta, 2022), 70–73.
[45] Mahkamah Konstitusi Republik Indonesia, Constitutional Court Decision No. 54/PUU-XXI/2023 (2023).

> *"Although the Court has affirmed that the technique or method of making a law does not constitute a question of constitutionality, the legislature needs to consider definite standards in its formation. In the future, the legislature, in using the omnibus method, should no longer amend the law by combining so many sectors or clusters with different regulatory themes into a single law. The use of the omnibus method is supposed to be used to amend multiple laws of one sector of the same kind only. Thus, there will be no randomness in understanding the laws formed by using the omnibus method. In this case, the legislature could have followed up on improving the Job Creation Law by redistributing it in similar clusters"*

This lack of thematic coherence is evident in Law No. 6 of 2023, which fails to adhere to the principles of clarity of formulation and clarity of purpose. *First*, we argue that the use of the omnibus method in Law No. 6 of 2023 is inconsistent with the principle of clarity of formulation; the inconsistency appears in the statute's complex-policy character. In particular, Law No. 6 of 2023 carries forward numerous unconnected amendments introduced by Law No. 11 of 2020. Our conclusion aligns with concerns raised by scholars about the Job Creation Law. Zainal Arifin Mochtar and Idul Rishan, quoting Louis Massicotte's discussion in *Commonwealth v. Barnett*, state: "*Bills, popularly called omnibus law, became crying evil, not only form the confusion [emphasis added] and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by facility they afforded to corrupt combinations of minorities with different interest to force the passage of bills with provisions which could never succed if they stood on their separate merits*."[46] In short, the presence of cross-referencing in a statute indicates complex policy and breeds confusion.

Second, we argue that the use of the omnibus method in Law No. 6 of 2023 is inconsistent with the principle of clarity of purpose. In the preceding section, this condition was described as complexity masking a lack of direction, which arises as an implication of a statute's complex-policy character. In this regard, Cormacain underscores the effect of cross-referencing, stating, "*The more cross references that are needed to understand a provision, the more jumps that are necessary across the statute book, the less intelligible (and navigable) that statute is*."[47] This means that when a law exhibits cross-referencing, the drafters' intent is not easily understood and the statute becomes less navigable. As noted, Law No. 11 of 2020 displays cross-referencing due to the mishmash of legislative content, yielding a complex-policy nature; consequently, the legislative purpose carried forward into Law No. 6 of 2023 is not clearly delineated. For example, although Law No. 11 of 2020 aims to facilitate investment, the drafters also included the Hospital Law as legislative content, thereby obscuring whether the law's purpose is to improve the investment climate or public health. Had the drafters intended to facilitate investment and create jobs through Law No. 11 of 2020, its content should have been confined to investment and employment.

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[46] Zainal Arifin Mochtar and Idul Rishan, "Autocratic Legalism: The Making of Indonesian Omnibus Law," *Yustisia* 11, no. 1 (2022): 33.

[47] Cormacain, *The Form of Legislation and The Rule of Law*, 169.

Regarding the omnibus method in Law No. 11 of 2020, Mochtar and Rishan stated that, "*This method is not simple, but tends to be confusing ... Due to its wide-ranging clusters ...*"[48]

The government should have read the MKRI decision as support for the policy of using the omnibus method in legislation-making. The government's enactment of Law No. 6 of 2023 was, in that sense, appropriate; however, the repeated error lay in non-compliance with the thematic principle. This is evidenced by the substantive content of Law No. 11 of 2020 being, *mutatis mutandis*, incorporated into Law No. 6 of 2023. Law No. 6 of 2023 itself functions as another instrument for the President to continue steering the implementation of economic-development policies. As with Law No. 11 of 2020, Law No. 6 of 2023 amends 75 statutes with cross-thematic content. Accordingly, Law No. 6 of 2023 suffers from the same defects as Law No. 11 of 2020—namely, the failure to apply a thematic omnibus method consistent with the principles of clarity of purpose and clarity of formulation. A thematic approach would have confined the statute's scope to a coherent subject-matter domain, avoiding cross-referential drafting and improving intelligibility.

b. Adoption of the Thematic Omnibus Method into Law on Legislation Making

The problem that the omnibus method, when applied in a way that eliminates intelligibility, *per se* contradicts the principles of clarity of formulation and clarity of purpose can be addressed through a thematic omnibus approach. A thematic omnibus method will not generate problems arising from the absence of the thematic principle—such as the complex-policy character and the phenomenon of complexity masking a lack of direction—described earlier. *First*, the thematic omnibus method prioritizes limiting the content or topics regulated within a single statute, thereby preventing the inclusion of disparate subjects, even under the pretext of legislative simplification. Accordingly, it is logical that the overarching principle of intelligibility, which encompasses the principles of clarity of formulation and clarity of purpose, can be achieved. *Second*, the issue of complex policy is often associated with the sheer number of provisions in a statute. In this regard, Cormacain notes that "*a large number of statutes is indeed unavoidable*."[49] Furthermore, quantitative complexity cannot be avoided given the nature of the omnibus method itself, which consolidates multiple laws into a single law. To address this, Cormacain argues that "*complexity leads to reduced intelligibility*." In other words, the quantity of provisions in a statute is not problematic so long as the law remains intelligible and understandable to the public.

To assess the extent to which a thematic omnibus method can address the issues encountered with non-thematic omnibus legislation, we compare it with best practices. In Belgium, as Patricia Popelier notes, the non-thematic omnibus method has drawn criticism because it leads to errors, inaccuracies in policy assessment, and the need for rapid

[48] Mochtar and Rishan, "Autocratic Legalism: The Making of Indonesian Omnibus Law," 34.
[49] Cormacain, *The Form of Legislation and The Rule of Law*, 30.

corrective legislation.[50] Belgian practice shows that non-thematic omnibus techniques do not, in fact, solve legislative problems. By contrast, in the United States, a limited omnibus method with specific, single-topic content has been used successfully, thereby avoiding non-thematicity. The United States employs a single-theme approach—also known as the single-subject rule—in its legislative process.[51]

A thematic omnibus method will not generate problems arising from the absence of the thematic principle—such as the complex-policy character and the phenomenon of complexity masking a lack of direction—discussed above. It prioritizes limiting the content or topics regulated within a single statute, thereby preventing the inclusion of disparate subjects, even under the pretext of legislative simplification. Accordingly, it follows that the overarching principle of intelligibility—which encompasses the principles of clarity of formulation and clarity of purpose—can be achieved. Second, the issue of complex policy is often associated with the sheer number of provisions in a statute. In this regard, Cormacain notes that a large number of statutes is indeed unavoidable: "*there is no irrefutable logic that there must be a large volume of statutes, but in practice the year-on-year increase in statutes does seem inexorable … citing volume as a cause of complexity in legislation*." Furthermore, quantitative complexity cannot be avoided given the nature of the omnibus law itself, which consolidates multiple laws into a single law. To address this issue, Cormacain argues that "*complexity leads to reduced intelligibility*." In other words, the number of provisions in a statute is not problematic so long as the law remains intelligible and understandable to the public.

The reason a thematic omnibus method can solve legislative problems in Indonesia is that its content focuses on a single major theme with internal interconnectedness. Accordingly, regulation should specify what content is appropriate when the thematic omnibus method is used in legislation-making. Based on current practice, one practical way to facilitate a thematic legislative design is to anchor it in the statutory division of government affairs. *Government affairs* refers to areas of authority explicitly classified in statute. Under Law No. 23 of 2014 on Regional Government, government affairs are governmental authorities that fall under the President's authority, the implementation of which is carried out by state ministries and regional governments to protect, serve, empower, and promote public welfare. [52] Government affairs are classified into absolute government affairs, concurrent government affairs, and general government affairs. To simplify matters, when legislation is to be formed in one government-affairs domain, all closely related aspects of that domain should be regulated in a single statute using the thematic omnibus method.

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[50] Patricia Popelier, "The Practice of Omnibus Laws in Belgium: An Empirical Test," in *Comparative Multidisciplinary Perspectives on Omnibus Legislation*, ed. Ittai Bar-Siman-Tov (Cham: Springer, 2021), 286.

[51] Bayu Dwi Anggono and Fahmi Ramadhan Firdaus, "Omnibus Law in Indonesia: A Comparison to the United States and Ireland," *Lentera Hukum* 7, no. 3 (2020): 328.

[52] Republik Indonesia, Article 1 number 5 of Law 23/2014 on Local Government.

To give this solution legal effect, we urge an amendment to the Law on Legislation Making, particularly the provisions related to the omnibus method. *First*, amend Article 64(1)(a) and 64(1)(b) of the Law on Legislation Making by replacing the term "omnibus" with "thematic omnibus," thereby emphasizing that only interrelated laws may be governed by the thematic omnibus method and that the content of legislation enacted using the omnibus method should employ the government-affairs formulation:

Pasal 64

(1a) Penyusunan Rancangan Peraturan Perundang-undangan sebagaimana dimaksud pada ayat (1) dapat menggunakan metode omnibus tematik.

(1b) Metode omnibus tematik sebagaimana dimaksud pada ayat (1a) merupakan metode penyusunan Peraturan Perundang-undangan dengan:

a. memuat materi muatan baru yang berkaitan berdasarkan urusan pemerintahan;

b. mengubah materi muatan yang memiliki keterkaitan berdasarkan urusan pemerintahan yang diatur dalam berbagai Peraturan Perundang-undangan yang jenis dan hierarkinya sama; dan/atau

c. mencabut Peraturan Perundang-undangan berkaitan berdasarkan urusan pemerintahan yang jenis dan hierarkinya sama, dengan menggabungkannya ke dalam satu Peraturan Perundang-undangan untuk mencapai tujuan tertentu.

Article 64

(1a) The preparation of Draft Laws and Regulations as referred to in paragraph (1) may use a thematic omnibus method.

(1b) The thematic omnibus method as referred to in paragraph (1a) is a method of drafting legislation that:

a. incorporates new substantive provisions that are related on the basis of governmental affairs;

b. amends substantive provisions that are interrelated on the basis of governmental affairs and regulated across various laws and regulations of the same type and hierarchical level; and/or

c. repeals laws and regulations that are related on the basis of governmental affairs and of the same type and hierarchical level, by consolidating them into a single legislative instrument to achieve specific objectives.

Second, amend the drafting technique—currently very difficult for the public to read—by revising Annex II to the Law on Legislation Making as follows:

*111.b Buku, bab, bagian, dan/atau paragraf dalam materi pokok Peraturan Perundang-Undangan yang menggunakan metode **omnibus tematik** dibagi dalam pasal yang mengatur materi muatan pokok yang **memiliki keterkaitan materi satu sama lain** yang terdiri atas:*

111.b Books, Chapters, Parts, and/or Paragraphs within the principal subject matter of legislation employing the thematic omnibus method shall be divided into Articles that govern core substantive provisions which are substantively interrelated with one another, consisting of:

Third, regulate the procedure for legislation-making using the thematic omnibus method. The procedure is set out in Annex II, number 3a, which governs the naming of legislation enacted using the omnibus method. In essence, this rule creates confusion in nomenclature. In this regard, Erskine May states, "*the short title must describe the content of the bill in a straightforwardly factual manner*." This observation underscores the need for alignment between the title of legislation and its substance. The consequences of this provision appeared in Law No. 11 of 2020. Semantically, a title such as the Job Creation Law suggests that the statute regulates matters related to creating or opening employment opportunities. However, the technique in Annex II, number 3a, can generate confusion because the title may not correspond to the statute's content. This provision needs to be amended so that the thematic omnibus method reflects the substance and intent of the regulation, thereby aligning with the principles of clarity of formulation and clarity of purpose:

> *3a. Peraturan Perundang-undangan yang menggunakan* ***metode omnibus tematik menggunakan nama baru yang secara esensial maknanya telah dan mencerminkan isi Peraturan Perundang-undangan yang menggunakan metode omnibus tematik.***
>
> *3a. Legislation employing the thematic omnibus method shall bear a new title whose essential meaning clearly reflects the content of the legislation employing the thematic omnibus method.*

C. CONCLUSIONS

This paper advances three principal conclusions regarding the omnibus method. *First*, it does not dispute the presence of the omnibus method in the Law on Legislation Making. *Second*, it identifies problems in the method's implementation in Law No. 11 of 2020 that also recur in Law No. 6 of 2023; the core difficulty is non-compliance with the principles of clarity of formulation and clarity of purpose, which stems from the method's cross-referential character and makes Law No. 6 of 2023 difficult for the public to understand. *Third*, the paper maintains that the omnibus method may still be used, provided it is thematic. To ensure consistent use of a thematic omnibus approach, amendments to the Law on Legislation Making are needed to shift the paradigm from a general omnibus technique to a thematic one.

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