

Legal Politics Formation of Law Concerning Law Number 9 of 2009 Educational Legal Entities

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Abstract

The research objective is to examine the process of forming the BHP bill in the DPR RI until the ratification of the bill becomes law. analyze the decisions of Constitutional Court Numbers 11-14-21-126 and 136/PUU-VII/2009 NUMBER 11-14-21-126 and 136/PUU-VII/2009 regarding the cancellation of the BHP law. The legal research methods used in this research are normative research methods and empirical legal methods. Normative legal research methods use primary legal materials, secondary legal materials, and tertiary legal materials. Conclusion Based on the BHP Bill which was passed as law number 9 of 2009 concerning Education Legal Entities, the community submitted a judicial review of the BHP law to the Constitutional Court. Based on the fact that the Constitutional Court annulled the BHP law in its entirety because it was deemed contrary to Article 28 D of the 1945 Constitution and Article 31 paragraph (1). The implication is that all tertiary institutions and education practitioners who have implemented the BHP system must change the system back to become state universities so that academic staff and lecturers who were appointed when using the BHP system requested that they be appointed as civil servants. The community and foundation managers are not affected by the negative effects of BHP

Keywords: Legal Politics, Law Concerning, Law Number 9 of 2009

A. Introduction

The legal politics of law formation is a very interesting study because "during the last 200 years, legislative institutions have been key institutions (Key institutions) in the political development of modern countries". its formation spent so much time in its formation, namely from 2007 to 2009 and so many costs have been incurred by the state that if transferred to the community, then it is very useful. The BHP Law was ratified on January 16, 2009, no less than two months to be precise on February 12 2009 this BHP law was submitted for review at the Constitutional Court, and on Wednesday, December 30 2009 this BHP law was annulled in its entirety.

Based on the cancellation of the BHP law that was so fast, it resulted in a lot of implications including for the costs that had been spent in establishing the BHP law and for universities that had implemented the BHP system. In an interview with Kompas Newspaper journalists with the Chairperson of the People's Legislative Council of the Republic of Indonesia (hereinafter referred to as the DPR RI) for the 2004-2009 period, Agung Laksono said: "The discussion of a draft law at the DPR's office requires costs of Rp. 1.1 billion to Rp. 2.4 billion. billion".³ The costs of deliberating a Draft Law (hereinafter referred to as the RUU) are so great, this raises questions

when a law made at a very high cost is ineffective and even becomes a law that has no binding legal force because it has been annulled. Merely deliberating a bill requires huge amounts of money, not to mention other processes.

In an article in the Kompas newspaper, it is explained how much the costs of forming the law in each of its sections are. The costs of the 2006 Legislation are spelled out in the Secretary General of the DPR as follows: (1). Data collection for bill input materials: IDR 1,063 billion (2). Data collection for discussions on RKP, RAPBN, APBN changes, and PAN: IDR 185 million (3). PUU preparation coordination: IDR 6,591 billion (4). Drafting of manuscripts: IDR 1,707 billion (5). Total: IDR 9,536 billion. As for the Legislation Body (1). Domestic official travel (national legislation program): IDR 64,481 billion (2). Legislation agency domestic official travel: IDR 6,578 billion (3). Legislative program overseas official travel: IDR 32.69 billion (4). Legislative agency overseas official travel: IDR 1,633 billion (5). Total: IDR 105,382 billion. Adpun for Discussion of Draft Law (1). Planning and determination: IDR 1,184 billion (2). formation of 33 laws initiated by the DPR IDR 2,458 billion: IDR 81,133 billion (4). Cooperation in the preparation of academic papers for five bills: IDR 625 million (5). discussion of 53 laws initiated by the government 1,355 billion: IDR 71,857 billion (6). Comparative study of 20 bills: IDR 1,491 billion (7). ratification and dissemination of laws: IDR 75 million (8). implementation and duties of the legislative body: IDR 3,716 billion (9). total: IDR 160,083 billion

How big was the budget for the formulation of the law in 2006, this is closely related to the case study raised in this thesis namely Law 9 of 2009 concerning Education Legal Entities. The BHP law is a law whose draft law was drafted from 2006 to 2009. Based on the BHP law which was canceled in December 2009, this shows that the cost of enacting a law is expensive and takes a long time to process, not guarantee that the law will become an effective law.

So how should a law be said to be effective? An effective law is a law that responds to the wishes of the people or what is known as responsive law. Mochtar Kusumaatmadja⁵ said "The Republic of Indonesia in its legal policy adheres to the relationship theory," namely the legal policy in the form of establishing laws related to community development. The policy of forming legislation is an important component of the development of Indonesian law because Indonesia adheres to the Continental European legal system. The Continental European legal system places written legal regulations as the main source of its rule system. ⁶ Thus, the law in the Continental European system makes written law in the form of written statutes as its main source of law.

Based on the background mentioned above, it encourages the author to examine more deeply the process of forming laws in Indonesia. This research focused on the formation of effective laws, and the BHP law which had been annulled served as research case study material. The BHP Law in its formation requires a very long time and costs a lot.

B. Research Methods

Research is an application in the application of predetermined methods with very strict requirements based on scientific theory. Based on the background and formulation of the problem, this research is studied in a normative juridical manner, which is complemented by philosophical and empirical juridical studies.

The legal research method used in this research is a normative research method and an empirical legal method. The normative legal research method uses primary legal materials, secondary legal materials, and tertiary legal materials, as legal materials used in studying the formulation of the problem.

In his book Soejono Soekanto & Sri Mamudji, tertiary legal material is divided into two, namely as follows:

- a. Legal materials that guide primary legal materials and secondary legal materials, as reference materials in the field of law. Such as statutes, legal bibliographies, court directories, legal encyclopedias, legal indexes, legal magazines, legal dictionaries, and so on.

- b. Primary, secondary, and tertiary legal materials, outside the field of law, originating from the fields of sociology, economics, political science, philosophy, and so on, can be used to complement and support research.

C. Results and Discussion

1. Background for the Formation of the Education Legal Entity Draft

The Draft Education Legal Entity Bill (hereinafter referred to as the BHP Bill) is a bill originating from a Government initiative (Article 5 paragraph 1 of the 1945 Constitution). The BHP Bill was formed based on Article 53 of Law No. 20 of 2003 concerning the national education system, because the BHP Bill was included in the 2007 National Legislation Program Bill, the initiator, in this case, the Minister of Education, formed an inter-departmental committee, namely the Ministry of National Education and the Ministry of Law and Human Rights. In general, the purpose of the formation of a law is:

- a. Accelerate the process of forming laws and regulations as part of the formation of the national legal system.
- b. Forming laws and regulations as the basis and adhesive for other development fields as well as actualizing legal functions as a means of social engineering/development, instruments for preventing/resolving disputes, regulating the behavior of community members, and means of integrating the nation within the Unitary State of the Republic of Indonesia.
- c. Supporting efforts in the framework of realizing the rule of law, especially the replacement of colonial heritage laws and regulations and national laws that are no longer by the development of society.
- d. Refine the existing laws and regulations but are not by the demands and needs of the community.
- e. Forming new laws and regulations to the demands and legal needs of the community.

The inter-departmental committee that drafted the BHP Bill was led by Satryo S. Brodjonegoro Director General of Higher Education. In the work of this committee, he was assisted by a team of assistants consisting of education experts and law drafting experts, and in the discussion in small and large teams involved many universities. BHMN, then private tertiary institutions such as Trisakti, also participated in the Association of Private Universities which was also invited, and other related agencies. uniqueness possessed by every educational institution, both private and public, it is necessary to establish a national education system based on educational autonomy. In addition, it also mentions the philosophical and juridical basis for the formation of the BHP law.

Based on Article 31 paragraph (2) of the 1945 Constitution, then gave birth to a Law on education²⁸⁴ namely the first law number 2 of 1989 which was later amended by law number 20 of 2003 concerning the "National Education System". This law then regulates the implementation of education legal entities, namely in Article 53:

- a. Organizers and/or formal education units established by the Government or the public in the form of educational legal entities.
- b. The education legal entity as referred to in paragraph (1) functions to provide educational services to students.
- c. The education legal entity as referred to in paragraph (1) has a non-profit principle and can manage funds independently to advance educational units.
- d. Provisions regarding educational legal entities are regulated by a separate law.

2. Reasons for Forming the Education Legal Entity Draft

The BHP Law is a law that was born through the national education system law, namely

Article 53 paragraph 4. The law stipulates that the Provisions regarding BHP be regulated in a separate law. The reason for forming a draft law is that it must refer to the law above it (Stufentheorie) from Hans Kelsen. 308 What is meant by Stufentheorie is a norm that is considered valid when it refers to a higher norm, as well as a higher norm referring to higher norms up to the basic norms (Grundnorm)³⁰⁹ which are recognized in a country. The basic norm is the highest in a country, while the basic norm that is used as the source of all sources of law in Indonesia is Pancasila which is spelled out in the body of the 1945 Constitution.

The reasons for forming the BHP law are not much different from the reasons for forming laws in general, namely:

- a. It is an order of the 1945 Constitution.
- b. It is an MPR decree.
- c. Related to the implementation of a law, encouraging the acceleration of reform, is a legacy from the previous National Legislation Program which was adapted to current conditions.
- d. Concerning changes to a law that conflicts with other laws.
- e. It is a ratification of an international treaty.
- f. Oriented to the protection of human rights by paying attention to the principles of gender equality and justice.
- g. Supporting the recovery and development of a just populist economy.
- h. Directly touching the interests of the people to restore and improve the social welfare of the community

The book "The Science of Legislation Volume 1" written by Maria Farida Indrati S., explains the function of the law. The function of the law is the basis for the formation of law in Indonesia. The function of the law is as follows.

- a. Carrying out further regulations provisions in the 1945 Constitution which expressly mention it as Article 2 paragraph (1), Article 6 (2), Article 6A paragraph (5), and others.
- b. Further regulations in general are other basic rules in the Body of the 1945 Constitution. The function referred to is the general explanation of the 1945 Constitution paragraph IV. The essence of the general explanation of paragraph IV of the 1945 Constitution is "based on these provisions, if a provision in the Body of the 1945 Constitution does not expressly state that it is stipulated to be regulated by law, the regulation must be made by law.
- c. Further regulation of the provisions in the MPR Decree which expressly mentions it, and
- d. Arrangements in the field of constitutional material, such as: (1). organization, duties, and composition of state (high) institutions (2). reciprocal relationship between the state and citizens/residents.

Based on what has been described, the reasons and functions for forming these laws are to refer to statutory orders or higher laws, even those laws are governed by the Constitution because the Constitution can negatively determine³¹² the contents of the law. In addition to the reason for the formation of the BHP law based on the order of the National Education System law, academic texts also state several reasons for the formation of the BHP law, namely:

- a. BHP functions to provide educational services to students (Article 53 paragraph 2 of the National Education System Law)
- b. BHP has a non-profit principle and can manage funds independently to advance education units (Article 53 paragraph 3 National Education System)
- c. District/city governments manage primary and secondary education, as well as education units based on local excellence (Article 50 paragraph 5 of the National Education System Law)
- d. Management of early childhood education, basic education, and secondary education is carried out based on minimum service standards with the principle of school-based management (Article 51 paragraph 1 of the National Education System Law)

- e. Universities have the autonomy to manage their institutions as centers for organizing higher education, scientific research, and community service (Article 24 paragraph 2 junto Article 50 paragraph 6 of the National Education System Law)
- f. Management of higher education units is carried out based on the principles of autonomy, accountability, quality assurance, and transparent evaluation (Article 51 paragraph 2 of the National Education System Law)
- g. What is meant by higher education autonomy is the independence of tertiary institutions to manage their institutions (explanation of Article 50 paragraph 6 of the National Education System Law.)

3. Purpose of Establishing the Education Legal Entity Draft

As a statutory regulation equivalent to the Act. National Education System, the BHP Bill can regulate differently from the Law. National Education System and these differences become special provisions (*lex specialis*), which must take precedence over general provisions (*lex generalis*) as contained in the law. National Education System. In this case, the principle of *lex specialis derogat legi generalis* applies (special provisions take precedence over general law).

Based on this principle, in the BHP Bill, there are several provisions which are specific provisions of the provisions contained in the Act. National Education System. Among other things, provisions regarding the voluntary nature of BHP for administrators and/or primary and secondary education units organized by the community (private sector), even in the law. BHP National Education System for administrators and/or private secondary education units is imperative. This voluntary arrangement is made for the following reasons:³¹⁷

- a. There are a very large number of private primary and secondary education providers and/or units in Indonesia, so by seriously considering the capacity, feasibility, and appropriateness of the majority of private schools/madrasas in Indonesia, it seems difficult to maintain the stipulation that private schools/madrasas are required to in the form of BHP, as regulated by law. National Education System;
- b. Eliminate the differential treatment of schools/madrasas established by the Government (regional) and schools/madrasas established by the community (private). According to Article 53 paragraph (1) of the Law. National Education System, schools/madrasas established by local governments (districts/cities) are not required to be in the form of BHP like private schools/madrasas. This distinction occurs because the editorial section of Article 53 paragraph (1) of the National Education System Law begins mentioning the term Government with capital letters. According to Article 1 Point 28 of the Law. National Education System, what is meant by the Government is the Central Government so that local governments (districts/cities) are not included in the definition of Government. So, schools/madrasas are established by district/city governments, according to Article 50 paragraph (5) of the Law. The National Education System does not have to be in the form of BHP.

4. Formulation of Academic Papers and Formation of the Education Legal Entity Draft

Before explaining the flow of BHP law formulation, it will explain the general flow of law formation as follows:³¹⁸

- a. Determination of the vision and mission of Prolegnas for five years and annually
- b. Asking for input on the proposed list of bills accompanied by reasons for their urgency and the main materials to be regulated as well as the basis for their preparation to the faction and the Commission (internal DPR) through hearings (RDP) as well as written input.

- c. Ask for input on the proposed list of bills accompanied by reasons for their urgency and the main materials to be regulated as well as the basis for drafting them to the public (stakeholders) through a public hearing (RDPU) or written input.
- d. Conduct discussions at the Baleg Internal Working Committee level to compile the Prolegnas draft by compiling and sorting based on indicators that refer to the Prolegnas vision and mission.
- e. Conduct discussions on the Prolegnas draft with the government, in this case, the Minister of Law and Human Rights, to compare and unify the list of bill proposals originating from the DPR and the government.
- f. Decision-making on the National Legislation Program at the Baleg level with government approval.
- g. Submission of Prolegnas results from Baleg in a plenary meeting to obtain the approval of members of the DPR.
- h. Determination of Prolegnas in DPR Decree.

If adjustments to BHP are carried out in the manner referred to in letter b above, then some of the assets of the organizers (foundations and other similar bodies), are separated into the initial assets of BHP and are regulated in BHP's articles of association with due observance of statutory regulations. The transfer of educators and educational staff with the status of Civil Servants to BHP employees is carried out no later than 9 (nine) years after the Administrator and/or formal education unit concerned is approved as BHP. Further provisions regarding the transfer of the status of educators and education personnel will be regulated by Government Regulation.

5. Harmonization of the Education Legal Entity Draft Law

The concept of harmonization of laws is often also referred to as harmonization of law, which is science, design techniques, art, and application of methods in viewing principles, norms, and legal institutions in statutory regulations. 367 Because harmonization of law is always carried out within the framework of seeing the suitability of a draft law against the provisions in the constitution and other provisions of laws and regulations. The technical term often used is vertical harmonization (upward) means.

The function of harmonization of laws is to detect and eliminate contradictions, overlapping, conflicts, gaps (disparities), and inconsistencies in the text of draft laws with the provisions above them (vertical) and provisions of the same level (horizontal). carried out in the formation of the BHP law is to harmonize it with the Education law, the Foundation law, and the Public Service Agency.

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Based on this, the harmonization of the Draft Law was carried out in earnest by inviting the relevant parties, but in forming the team there was not a legislative expert who criticized the content and substance of the BHP law and whether it had been qualifying as a rule that deserves to be regulated in law. From the statement above, it can be seen that education activists and groups who oppose BHP were not invited. These groups were not used as input in perfecting the material substance of the draft BHP Bill.

Presenting society is important in discussing laws because the society that is regulated is always changing while the legal rules that regulate it are static so they are always left behind. , therefore, public participation in the process of deliberating laws is an effective way to achieve a pattern of relations³⁷² between the government and the public in deliberating draft laws is a good way to produce good laws.

7. Discussion Process of the Education Legal Entity Draft Law

After the Bill submitted by the DPR, Government, and DPD is accepted, the Bill is then recorded in the Decree of the People's Legislative Assembly of the Republic of Indonesia concerning the national legislation program on Priority Draft Laws each year. In the Decree of the People's Representative Council of the Republic of Indonesia No. 08/DPR RI/2005-2006 Article 136 explains, the discussion of the draft law is carried out through two levels of discussion namely:³⁷³

- a. Level I discussions are held at Commission Meetings, Joint Commission Meetings, Legislation Body Meetings, Budget Committee Meetings, or Special Committee Meetings.
- b. Level II discussion, which was conducted at the Plenary Meeting.

Level one talks are talks in the form of meetings held by the DPR RI with related parties in the form of Commission Meetings, Legislation Body Meetings, Budget Committee Meetings, or Special Committee Meetings with the government. ³⁷⁴ In Article 137 it is explained that level one talks include:

- a. 1) the views and opinions of the factions or the views and opinions of the factions and the DPD if the Draft Law is related to the matters referred to in Article 121 paragraph (4), for the draft Law originating from the President. 2) the views or opinions of the President or the views and opinions of the President and the DPD if the Draft Law is related to the matters referred to in Article 121 paragraph (4), for Draft Laws originating from the DPR.
- b. The President's response to the views and opinions as referred to in letter a number 1) or the response from the leadership of the DPR's instruments discussing the Draft Law regarding the views and opinions referred to in letter a number 2).
- c. Discussion of the Draft Law by the DPR and the President based on the Problem Inventory List (DIM).

Apart from that, in the first-level discussions, the DPR can hold a public hearing meeting, and can also invite leaders of other institutions if the material for the Draft Law is related to State institutions or other institutions. The second-level discussion as explained in Article 138, namely the second-level discussion includes decision-making at a plenary meeting which is preceded by a report on the first-level discussion, the final opinion of the factions submitted by its members or if deemed necessary, it can also be accompanied by a note regarding the attitude of the reactant. After the draft law has been revised, it is discussed again and agreed upon with the DPR and the

government, which participates in discussing this bill, then it is submitted by the leadership of the DPR, in this case, the chairman of the DPR, who is sent to the President to be passed into law.

8. Content Material for Regulations on Educational Legal Entities

Based on the description of the mutant material of the law mentioned above, to measure whether the content of the BHP law is by the principles of the content of the law in Indonesia, it can be seen that the BHP law was born from law number 20 of 2003 on the National Education System. in Article 53 paragraph 4 it is stated that "Provisions regarding educational legal entities are regulated by separate laws". There is no problem with the sentence stating that BHP provisions are regulated by law in terms of statutory grammar, but from the content material it contains it should be "the provisions regarding BHP do not need to be regulated by law but are more suitable to be regulated by government regulations (PP).

The purpose of establishing the BHP law is to create autonomy for education in Indonesia so that it can compete with education in other countries. The purpose of setting this BHP during the discussion process in the DPR was rejected by several elements of society, NGOs, and students. the reason for rejecting the BHP law is that it does not fulfill the principle of justice because not all schools, both tertiary institutions, have the same abilities, so if the principle of educational autonomy is applied, universities that are not yet established are afraid that they will extort their students.

The right of all citizens to receive the same education⁴⁵⁹ is the hope outlined in Pancasila and the body of the 1945 Constitution, but this is contrary to the spirit exhaled by the BHP law. The BHP Law wants the creation of educational autonomy so that educational institutions can compete and develop themselves quickly. Based on the spirit of educational autonomy, contrary to the spirit of the 1945 Constitution, because with the enactment of educational autonomy in educational institutions, the government has indirectly disengaged from education, thereby creating special classes within an educational institution, such as special schools for the rich and children of officials, and there are also schools for the children of the poor whose quality of education is far from the standard of the rich people's schools. If something like that happens, then our education will return to the education of the colonial era.

D. Conclusions and Suggestions

1. Conclusion

Based on the findings and discussion of the Legal Politics of the Formation of Laws, conclusions can be drawn which include the following:

- a. The formation/formulation of the BHP Bill is included in the Prolegnas Bill on the initiative of the Government so that the President appoints the Minister of National Education and the Minister of Law and Human Rights as the formulators of the academic papers and the BHP Bill. The government was assisted by a small team and a large team in the preparation of the Academic Paper and the formulation of the BHP Bill. The two teams conducted library research and field research related to educational legal entities. Judging from the content material and the legal basis for the formation of the BHP Bill, the formation of the BHP Bill is an order from the law on the national education system, namely article 53 paragraph (4). The aim of establishing the BHP Bill is to create educational autonomy that is transparent and uniform so that it can improve the quality of national education. The discussion on the BHP Bill was carried out jointly between the government, represented by the Minister of National Education and the Minister of Law and Human Rights, and the DPR RI represented by Commission X.
- b. Before starting to discuss the BHP Bill, the DPR, and the Government invited various community groups to hear their opinions regarding the BHP Bill that would be formed. During the hearing, it turned out that the BHP Bill received a lot of rejection, and criticism,

from community groups both within the DPR and outside the DPR. Of the many who refused, some supported and even asked that the BHP be resolved immediately, namely those from large and well-known PTN officials. Even though there were so many objections from the public, the DPR and the Government continued to discuss this BHP Bill, so that at the end of 2008 the BHP Bill was mutually agreed between the DPR and the Government to be ratified by the President.

- c. After the BHP Bill was ratified by the President as law number 9 of 2009 concerning Education Legal Entities, no less than two months after being ratified, on February 12, 2009, five community groups filed a judicial review of the BHP law to the Constitutional Court. After hearing and seeing the facts, the Constitutional Court finally annulled the BHP law in its entirety because it was deemed contrary to Article 28 D of the 1945 Constitution and Article 31 paragraph (1). The implications of this cancellation caused all tertiary institutions that had implemented the BHP system to change the system back to normal state universities so that employees and lecturers who were appointed when using the BHP system requested that they be appointed as civil servants. Another implication is that the community and foundation management are no longer worried about the negative effects of BHP.
- d. Seeing the fact that the formation of laws is so expensive and takes so much time, it is not in line with expectations that the laws that are formed will provide benefits, are valid for a long time, and achieve their goals. Based on these facts, the authors examine the formation of good laws based on Philippe Nonet & Philip Selznick's theory, namely response law, and Lawrence M. Friedman's theory of legal development with three elements, namely Legal Culture, Legal Structure, and Legal Substance. The legal formation is responsive through legal political configurations that are not democratic. will not work if it is not by external aspects such as legal culture, legal structure, and good legal substance

2. Suggestion

Based on the discussion and conclusions on the Legal Politics of Forming Laws, it can be recommended in the form of suggestions, namely as follows:

- a. For regulations and principles for the formation of good legislation, the law that will be formed is truly democratic in favor of the interests of the people at large, which is regulated, and adheres to Pancasila as the philosophy of the Indonesian nation and the Constitution as the basis of law.
- b. For legislators, it should be better to produce a few laws but be effective and systematic than to produce a lot of laws but be in vain because they can't.
- c. For legal practitioners to continue to struggle to carry out existing legal corridors that have been formulated together and continue to socialize these laws so that people are law literate and law-abiding

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