

Controversy, Legality and Constitutionality of Online Public Transportation in Indonesia

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Abstract: In this research, the researcher will tell about the phenomenon of online transportation that is currently sweeping the world which in turn has led to the legal need to regulate this online transportation. Indonesia as a country with a population of nearly 260 million is a potential market to use the online transportation application. However, the Indonesian Government has not made maximum efforts to regulate this online transportation so that this has resulted in many online transport drivers filing claims to the Constitutional Court to submit applications for review traffic laws and road transport. In this study, researchers sought to find solutions related to the problem of online transportation in Indonesia so that the Indonesian people, especially drivers of online transportation or consumers of online transportation, are protected by law and constitution so that online transportation can be accepted as viable and safe transportation for Indonesian people.

1 INTRODUCTION

The sad story of clashes between drivers of online transportation and conventional transportation that occurred in several cities in Indonesia is very worrying for all of us as a community. The phenomenon of online transportation raises the pros and cons of the community. For people who use public transport services, the existence of online transportation applications is very profitable. With a price rate that is below conventional public transport and a high level of trust, ultimately online transportation dominates and causes many non-online regular public transport to go bankrupt. (thejakartapost.com, 2016)

Also, the existence of online transportation policies developed by online transportation network providers such as those provided by Uber, GrabCar, and Go-Jek that are similar to those traditionally offered by taxi companies has led to competition between a regular taxi and online transportation companies. (Wahyuningtias, 2016)

We still remember how the demonstrations carried out by taxi drivers and non-online public transport in Jakarta were carried out in March 2016 which eventually ended in clashes and caused significant casualties and losses. (Ichwan Wijayanto,

Imam Sasami, Rino Nugroho, 2018) Of course, this raises anxiety for people using online public transport services. After the tragedy, there was a feeling of worry and fear when using online transportation services, both online cars, and online motorcycle taxis. (thejakartapost.com, 2016)

Now online transportation provider companies are starting to expand to other cities in Indonesia. It is clear on the one hand that there will be a lot of employment opportunities for the community, but on the other hand, it will make conventional transportation such as bus city transportation, taxis, and conventional motorcycle taxis not selling well. Not to mention the chance of clashes that will occur as happened in the City of Bogor and the City of Tangerang between online motorcycle taxi drivers and bus city transportation drivers. The state must anticipate this case, the Government, both the Central Government and the Regional Government. (thejakartapost.com, 2018).

2 RESEARCH METHODOLOGY

This study uses the qualitative method to accumulate and analyze data. Primary and secondary legal

materials are referred to assist the research. For primary sources, the study analyses relevant some Indonesia constitutions, laws, Indonesia constitutional court decision relating to the regulation of online public transportation in Indonesia. It also refers to secondary resources where analysis is made from academic journals, newspaper articles as well as legal textbooks.

Moreover, to enrich to the current development of the notion the study refers to web pages and other online resources where relevant data have been analyzed to find out problem encountered and challenges faced in implementing the rules as well as to propose any possible solution and improvement to solve the online public transportation issue in Indonesia.

3 DISCUSSION AND RESULTS

3.1 State Role in General Transport Management

This matter concerning public transportation has been regulated in Law Number 22 of 2009 concerning Road Traffic and Transportation which was promulgated on June 22, 2009. If we read the Traffic Law carefully, it is obvious that the state must play an active role in providing decent public transportation for the community. Strive to realize security, safety, order, and smooth traffic and road transport to support economic development and regional development and demand the implementation of traffic and road transportation by the development of science and technology, autonomy regions, as well as accountability for state administration.

Also, related to public transportation, the state, in this case, the Government is obliged to provide public transportation needs that are safe, comfortable and affordable. In the Traffic Law, it does not explicitly regulate the procedure of public transportation online, but it does not mean that the Law is out of date, so it is not feasible to use. To further clarify and specify the regulation of online transportation, the Government should make rules under the law that specifically regulate this online public transportation. (Supriono, n.d.)

The stipulation of the Minister of Transportation Regulation Number 32 of 2016 concerning the Implementation of Persons with Non-Route Public Motor Vehicles on April 1, 2016, which was revised again on March 31, 2017, with Minister of Transportation Regulation Number 26 of 2017, to help the public transport polemic more or less this

online. The ministerial regulations has been regulated how the technical procedure of online transportation is the existence of cooperation obligations between public transport companies and companies using information system applications. Especially related to technical matters such as payment mechanisms, prohibitions and requirements for both companies, the use of mandatory digital dashboard facilities reported to the Minister of Transportation, Governors, Regents and Mayors as part of efforts to supervise the use of online transportation. (thejakartapost.com, 2018)

In the Ministerial Regulation, it is not yet detailed about what transportation can work with companies using online applications. Is it only a four-wheeled vehicle? Then how to transport online two-wheeled motorized vehicles (motorcycle taxis) which incidentally do not join in transport companies as required and regulated in the Traffic Law and Minister of Transportation Regulation Number 26 of 2017, namely State-Owned Business Entities, Regionally Owned Enterprises, Limited Liability Companies, and Cooperatives. (Indonesia, 2017)

If we look at the number of online transportation currently in Indonesia, online transportation using two-wheeled motorized vehicles (ojek) online is the most, and most of them are people who use their motorbikes to reap a fortune on the road by becoming a driver two-wheeled motorized vehicle (motorcycle taxi) online. The number of clashes between drivers of city public transportation (Angkot) and online motorcycle taxi drivers that occurred in several big cities such as Bogor and Tangerang which caused casualties indeed became a problem that must be resolved immediately by the Government, in this case, the Ministry of Transportation and also the Regional Government.

The Minister of Transportation Regulation which is still dull and not rigid must indeed be specified in the form of a Regional Regulation that can be issued by the Governor, Regent and or Mayor by referring to the Traffic Law and Minister of Transportation Regulation Number 32 Year 2016 in conjunction with Minister of Transportation Regulation Number 26 In 2017.

3.2 Decision of the Constitutional Court on Online Public Transport

That related to the issue of online transportation, there are already people who have submitted a judicial review for the Road Traffic and Transportation Law, namely: (Constitutional Court of Republic Indonesia, n.d.)

1. Aries Rinaldi, in case 78/PUU-XIV/2016.
2. Ety Afyanti Hentihu, in case 97/PUU-XV/2017.
3. Yudi Arianto, in case 41/PUU-XVI/2018.
4. Irfan, in case 23/PUU-XVI/2018

The Petitioners in the three cases are Indonesian citizens who work as Online transport drivers who question the constitutionality of the Road Traffic and Transport Law specifically related to the regulation of online public transport that has not been regulated in the law. The Constitutional Court in its decision provided a kind of guideline for the Government to regulate online transportation in Indonesia for both motorized and four-wheeled vehicles.

3.3 The Decision on Case 78/PUU-XIV/2016 (Mahkamah Konstitusi RI, 2016)

In the petition for judicial review of the Road Traffic and Transportation Act, the Petitioner tested Article 139 paragraph (4) which regulates the provision of public transportation services carried out by state-owned enterprises, regionally owned enterprises, and other legal entities.

The Grab driver assumed that Article 139 paragraph (4) of the Road Traffic and Transportation Law had not accommodated individuals to become executors in transportation service providers who had the potential to harm the Petitioners' constitutional rights and authorities. Even though the Constitutional Court rejected the case submitted by the Grab drivers, the Constitutional Court in the 78/PUU-XIV/2016 verdict read on February 7, 2017, has given consideration that can be a guideline for the Government in its efforts to resolve the online transportation problem.

In its consideration, the Constitutional Court, among other things, argued that the Petitioners as drivers of online transportation services were in fact in the shade of an online transportation company that was also a legal entity, even though the company was not a public transportation company but only an IT Provider company. The Road Traffic and Transportation Law regulates the definition of a legal entity for public transportation service providers wherein referred to as "legal entity". In the explanation of Article 220 paragraph (1) letter c of the Law is a body or association that is recognized as a subject law that can be attached to legal rights and obligations, such as companies, foundations, and institutions. According to the Constitutional Court, a

public transportation service provider application company, even though it only sells online application services for the public, of course, must also be supported by a Public Transport Company that provides transportation services for people and goods with Public Motorized Vehicles.

The existence of a new phenomenon that is currently occurring throughout the world, primarily related to the use of public transport using online applications is a necessity. The method of online-based applications that are within the control of every cell phone user, which was initially considered impossible to realize, along with the development of technology and information, this has now become a reality.

According to the Constitutional Court, the public as users of public transport services benefit from the application. Likewise with online application service providers and drivers who are directly recruited from the community also feel the same benefits. The Law on Traffic and Road Transportation actually can accommodate this online transportation phenomenon. This is also by the purpose of the establishment of the law, namely as an effort to support national development and integration as part of efforts to advance public welfare as mandated by the Indonesian Constitution (UUD 1945).

Also, according to the Constitutional Court, the state must develop and advance a national transportation system that aims to realize security, safety, order, and smooth traffic and road transport to support regional development and economic development. This will follow the development of national and international strategic environments that demand the implementation of traffic and road transportation by the development of science and technology, regional autonomy, and accountability in the administration of the state. In this context, the country, in this case, the Government must immediately resolve the problem of providers of online public transport services in a fair, transparent and coordinated manner by involving all stakeholders to overcome the problem of online public transportation by completing operationally and technically into regulations implementation.

3.4 The Decision on Case 97/PUU-XV/2017 (Mahkamah Konstitusi RI, 2017)

In the petition for judicial review of the Road Traffic and Transportation Act, the Petitioners who are online transportation drivers (Grab and Gojek) review Article 151 letter a of the Road Traffic and

Transportation Act which states, "Public transportation services for public motorized vehicles not in the route referred to in Article 140 letter b consists of: a. People transport by taxi".

According to the Petitioners, the article has caused the violation of the constitutional rights of the Petitioners in particular the constitutional rights to obtain decent work and livelihood as stipulated in Article 28D paragraph (1) of the Indonesian Constitution (UUD 1945) because online transportation is not regulated as part of the existing transportation law. The applicant requested that in Article 151 letters the phrase "and technology-based application taxis or online taxis" be added.

To answer the request, the Constitutional Court in its legal considerations states the following:

- The incomplete regulation of laws or the lack of rules in dealing with the pace of social development does not in itself cause the government to conflict with the constitution. A law cannot regulate everything correctly, especially if it is a development that only exists after the law is made. The bill is a written rule of law, but there are still weaknesses such as not being able to keep up with dynamic times. This does not cause the bill to become unconstitutional insofar as the contents of the law do not conflict with the constitution.
- That related to the occurrence of conditions assessed by the Petitioners as a legal vacuum, the Constitutional Court is not fully authorized to fill them if it involves positive norm formulation which is the authority of the legislators. In this case, the legislators should make changes through the legislative process.
- According to the Constitutional Court, the formulation of the norms of existing articles is clear and does not contain contradictions with other rules that have the potential to cause legal uncertainty. According to the Court Article, 151 letter a of the Road Traffic and Transportation Act does not at all cause a different interpretation when implemented because the purpose of the norm is intended for transportation of people using taxis.
- Also, according to the Constitutional Court, Article 151 does not contain any substance provisions that prevent anyone from working or doing business in the public transport sector. On the contrary, the substance of the provisions of Article 151 opens opportunities for anyone to work and do business in the public transport sector. According to the Constitutional Court, something new indeed will not always be received

smoothly or quickly. There will be dynamics in the world of transportation with the presence of taxis with technology-based applications. In this context, arrangements are needed in such a way that the transportation needs of the community can still be appropriately fulfilled and need to be regulated so that there is a fair competition between existing transportation. Here is the role of the state to control that people's transport is not allowed to run in very free space so that state intervention is needed to regulate it. The regulatory process is the domain or authority of the Government and legislators while the Court could not interfere at all regarding what became the domain of the power of the Government and the legislators.

- Based on all the arguments above, according to the Constitutional Court the existence of Article 151 letter a which does not or does not contain the norm regarding "technology-based application taxis" as desired by the Petitioners, but according to the Constitutional Court, the article does not necessarily contradict Constitution. Because, when a norm does not accommodate the aspirations or development of a society that is so dynamic, the said norms still cannot automatically be considered contrary to the Constitution.

3.5 The Decision of Case 41/PUU-XVI/2018 (Mahkamah Konstitusi RI, 2018)

In this case, the Petitioners who applied were drivers of motorized vehicles (Gojek) online, which numbered in the thousands. The Petitioners in their petition review Article 47 paragraph (3) of the Road Traffic and Transportation Act which does not regulate motorbikes as motorized vehicles, either individual motorized vehicles or public motorized vehicles, which are contrary to Article 27 paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the Constitution.

Also, with the rise of online transportation where motor vehicles become one of the transport used, has caused motor vehicle drivers online (Gojek) not to get legal protection and even in some provinces the presence of online transportation, especially Gojek, has been rejected. To answer the issue of the constitutionality of the article in the law, the Constitutional Court stated in its legal considerations as follows:

- That the philosophical basis of traffic laws and road transport aims to support national development and integration to advance public

welfare, therefore as a national transportation system, road transport must provide security and safety. Based on the matters above, the criteria for the type of road transport as referred to in Article 47 paragraph (3) are stipulated, namely individual motorized vehicles and public motorized vehicles. According to the general provisions of the law Article 1, number 10 gives the understanding that a public motorized vehicle is any vehicle used to transport goods and people with a fee. With a basic philosophical construction of Considerancy Considering the letter b then connected with Article 47 paragraph (3), the type of public motorized vehicle must realize security and safety, especially those transported are people.

- Article 47 paragraph (3) of the traffic law is a legal norm that functions to carry out social engineering so that citizens use road transport that prioritizes security and safety, both individual motorized vehicles and public motorized vehicles. While Article 27 paragraph (1) of the Constitution has nothing to do with motorized vehicles because Article 27 paragraph (1) of the Constitution is related to the same position of every citizen when there is a violation of law, it must be treated equally there is no difference and equal position for every citizen country when they will sit in Government. So that the Petitioners' arguments stating that motorbikes were not included in Article 47 paragraph (3) of the law contradict Article 27 paragraph (1) of the Constitution are unlawful according to law. Article 47 paragraph (3) protects every citizen when using road transport, both road transportation with public and individual types of motorized vehicles.
- Also, according to the Constitutional Court Article 47 paragraph (3) does not prevent the Petitioners from obtaining employment and decent livelihoods, because motorbike motorbikes continue to operate even though Article 47 paragraph (3) of traffic laws and road transport does not regulate motorcycle in the article. Such arrangements are intended to realize safe and secure road transport for drivers, passengers, and road users. In other words, motorbikes are not road transport intended for transporting goods and people in the context related to Article 47 paragraph (3) Road Traffic and Transportation Law.
- The Court does not turn a blind eye to the phenomenon of motorcycle taxis. But this has nothing to do with constitutional or unconstitutional norms of Article 47 paragraph (3) Road Traffic and Transportation Law because

online applications that provide motorcycle taxi services do not yet exist or are available as when this, motorcycle taxis continue to run without being disturbed by the existence of Article 47 paragraph (3).

- The arguments of the Petitioners which explained the existence of different treatment between motorbikes and other motorized vehicles were incorrect because motorbikes were not regulated in the law, but when talking road transport carrying goods and people with payment, hence criteria are needed that can provide safety and security. Standards for motorized vehicles destined to transport goods and people have also been determined in the law. According to the Constitutional Court, different treatment is when treating different things for the same thing and treating the same for different things. In the context of the Petitioners' questioning it is indeed a different matter between motorbike vehicles and public motorized vehicles to transport goods and people so that when the Court treats the same for various issues, the Court violates the Constitution, especially Article 28I paragraph (2).

3.6 The Decision on Case 23 / PUU-XVI / 2018 (Mahkamah Konstitusi RI, 2019)

In this case, the Applicant who works as an Online Driver issues the phrase "using the telephone" contained in the Elucidation of Article 106 paragraph (1) and the phrase "doing other activities or influenced by a situation that results in a concentration disturbance in driving on Road" contained in Article 283 Law 22/2009. The sound of the article is as follows: Explanation of Article 106 paragraph (1) of Law 22/2009. "What is meant by" full concentration "is that everyone who drives a motorized vehicle attentively and uninterrupted because of illness, fatigue, sleepiness, using a telephone, or watching television or video mounted on a vehicle or drinking drinks containing alcohol or drugs that affect the ability to drive a vehicle. Article 283 of Law 22/2009: "Anyone who drives a motorized vehicle on the road is improper and conducts other activities or is influenced by a situation that results in a concentration disturbance in driving on the road as referred to in Article 106 paragraph (1) punished with the most imprisonment 3 (three) months old or a maximum fine of Rp. 750,000.00 (seven hundred fifty thousand rupiahs) ".

Related to the issue of the constitutionality of the article, the Constitutional Court in its legal considerations stated the following:

- That using cellular telephones in which there are various features including satellite-based navigation system applications commonly called GPS when driving, within reasonable reasoning includes things that can interfere with traffic concentrations that can have an impact on traffic accidents. In other words, the use of GPS can be justified as long as it does not disturb the driver's concentration in traffic. That is, not every driver who uses GPS can immediately be judged to interfere with driving concentration which endangers other road users who can be judged to violate the law, so that its application must be viewed casually. Therefore, there is no question of unconstitutionality related to the Elucidation of Article 106 paragraph (1) of Law 22/2009. Thus the Petitioners' arguments have no legal grounds.
- That what is meant by "full concentration" is that everyone who drives a motorized vehicle attentively and uninterrupted because of illness, fatigue, sleepiness, using a telephone or watching television or video mounted on a vehicle, or drinking beverages are containing alcohol or drugs -treatment that affects the ability to drive a vehicle. As with the Court's legal considerations in the paragraph above, the main essence that is intended to be explained in Article 106 paragraph (1) of Law 22/2009 is regarding the mandatory driver's full concentration when driving a vehicle or driving. Therefore the driver may not carry out other activities if other activities can interfere with his concentration in driving. Based on the description above. The Court believes that the arguments of the Petitioners regarding the phrase "doing other activities or being influenced by a situation that results in a disruption of concentration in driving on the Road". It's contained in article 283 of Law 22/2009 contrary to the 1945 Constitution as long as it is not "excluded the use of satellite-based navigation system applications commonly called the Global Positioning System (GPS) contained in smartphones (smartphones) "is unreasonable according to law.

3.7 Government Regulation Post the Constitutional Court Decision

After the decision of the Constitutional Court, the Ministry of Transportation has made the Ministry of Transportation Regulation Number 108 of 2017

which is a revision of the Ministry of Transportation Regulation Number 32 of 2016 concerning the Implementation of People Transportation with Public Vehicles Not in Route.

In the regulation of the transportation ministry, the Government is trying to equalize the rights and obligations between conventional public transport companies and online transportation. One of the provisions of the department of transportation regulation is that online transport providers cooperate with conventional public transport companies and are not allowed by individuals to use existing online applications.

However, the regulation of the transportation ministry, because it was felt to be detrimental to individual drivers who used online applications, was finally put on a judicial review to the Supreme Court.

The Supreme Court in its legal considerations stated that the Ministry of Transportation Regulation above was contrary to Article 3, Article 4, Article 5, and Article 7 of Law Number 20 of 2008 concerning Micro, Small and Medium Enterprises. Because it does not grow and develop a business to build a national economy based on just economic democracy and the principle of empowering micro, small and medium enterprises. (Detik.com, 2018) The cancellation of the regulations of the transportation ministry causes online public transport to have no legal provisions. So the Government must re-attempt to make rules to regulate online transportation in Indonesia. (kompas.com, 2018) So far, the Indonesian Central Government has not been able to provide the best solutions to these problems related to online transportation. This is different from what is happening in the United States where the government is seriously trying to find solutions to regulating the existence of online transportation services.(Tony Dutzik and Travis Madsen, 2013)

4 CONCLUSION

The decision of the Constitutional Court regarding the issue of online transportation can undoubtedly be a guideline for the Central Government and Regional Governments in making appropriate and fair regulations and the management of online transportation. But unfortunately, the Government has not made the Constitutional Court's consideration regarding the issue of online transportation as a benchmark in making rules under the law.

We need to wait for the Government's concrete steps in anticipating the problem of online transportation so that clashes between online

motorcycle taxi drivers and public transportation drivers do not happen again as the online transportation company expands which is currently incessantly opening new branches in all cities in Indonesia.

Of course, we hope that the Government can make regulations and regulations that are truly fair, transparent and accountable for the community, especially for conventional transport drivers and online transportation drivers so that the constitutional rights of all citizens can be fulfilled.

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