

## Questioning Open Government Principle within the Law-Making Process of Omnibus Law in Indonesia

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### ABSTRACT

The convoluted process of applying for new business permits and day-to-day business operations, due to overlapping regulations, is one reason for the government to publish the Omnibus Law. This law is designed to replace several rules at once. However, suppose that the alternative option through the omnibus law can work as expected. Still, it does not mean that every process will be appropriate with the applicable regulations. Using a qualitative approach, this study aims to analyse the fulfilment of open government principles and open governance initiatives in omnibus law's promulgation process. Our analysis shows that Indonesia's omnibus law-making process in 2020 still ignores the principle of openness mandated under Law Number 12/2011. The government's neglectful attitude, especially concerning open data and open process, indicates that the government did not pay enough attention to the open governance principle. Furthermore, the lack of transparency amid more accessible digital resources and the involvement of non-state actors in the process also illustrates the lack of initiatives for open governance.

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### INTRODUCTION

Change is inevitable when set against globalisation and the rapid development of the digital world. Being open and innovative about the various possibilities that occur is necessary to respond to a problem that will and already exist. Concerning the state's existence, primarily to ensure good state governance, it is essential to see a problem as a starting point for change. Change is expected to lead to the achievement of the common goals set. In the end, the changes that occur must produce a more effective and efficient output.

Joko Widodo, in the initial speech of his second term, touched on a legal concept known as omnibus law to prepare the country in facing such rapid changes. The omnibus law often referred to as the omnibus bill, is a law used to change a law with a broad topic of discussion, which is then elected by parliament to be passed by the executive (Biersbach, 2017). Simply put, the omnibus law is a law that mediates many overlapping laws. This concept is a form of

response from the government regarding the problems that have befallen Indonesia for a long time and must be corrected immediately.

Various convoluted regulations are one of the main reasons for the government to pass the omnibus law to create better ease of doing business. As a result, investment flows into the country also continue to grow. Besides, Indonesia's omnibus law's basic premise is welcoming the demographic bonus predicted to occur in 2045. This aligns with BKKBN (2016) analysis, which states that population growth has a pure transitional effect on economic growth. The acceleration of economic growth due to the dynamics of the workforce amounted to 24.7115%. Therefore, it is hoped that Indonesia is ready with open demands in all matters, be it public sector operations and the availability of public services to produce public policies that can answer all problems that occur.

Although the purpose of enacting the omnibus law in Indonesia through Law No. 11/2020 on Job Creation is good, the enactment has caused polemic. The reason is that the drafting process of the omnibus law is not ideal. Administratively, the drafting is not much different from the draft law in general. The polemic arose because some parties considered drafting these regulations in a closed manner or were not transparent. As a result, there was less public participation, from planning to promulgation. Also, the bill was decided in a time frame that was deemed too fast or too hasty. As is known, the time interval is relatively short, which is approximately one year, starting from the time the president mentioned the idea of the omnibus law on October 20, 2019, to October 5, 2020, when this bill was passed into law in the first session of the 2020 Plenary Meeting of the House of Representatives (DPR).

The process which lacks transparency has created public unrest. The Deputy Director of the Institute for Development of Economics and Finance (INDEF) indicated that the government tends to limit the space for public participation in drafting the bill (Setiawan, 2020). Until after its promulgation, the public still has difficulty accessing the draft. One day after the enactment, there was a demonstration against the omnibus law, which involved many people, including students and workers. Instead of being thought to be able to cause changes, the omnibus law creates new problems. When a public policy creates new issues, it is necessary to evaluate whether the policy should be ratified or whether the policy that caused problems should be revoked or changed (Anomaly, 2015). In this regard, this paper aims to explore the fulfilment of open government principles in the law-making process of Omnibus Law in Indonesia through Law Number 11/2020 concerning Job Creation. The open governance initiative in the process also observed.

## **METHODS**

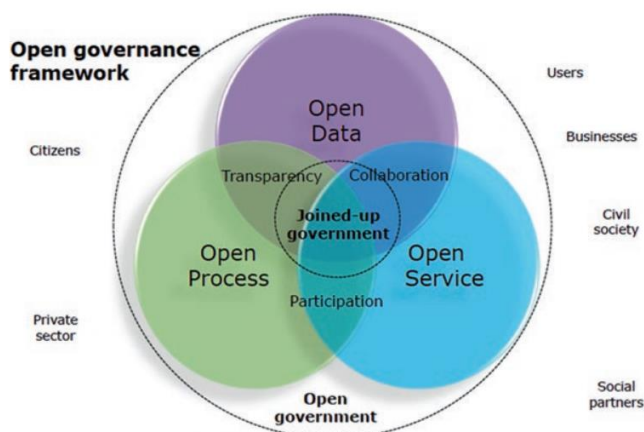
The data collection for this study was carried out by collecting primary data in national online media coverage regarding the omnibus law promulgation mechanism. It was then analysed using the concepts and theories available. The analysis is conducted on open government and open governance in enacting the Omnibus Law by juxtaposing national online media coverage, statutory documents, and some literature studies. Hence, this study uses a qualitative approach based on developing phenomena. The enactment of the omnibus law, which is also known as Job Creation Bill Number 11/2020, has become an interesting discourse, especially when it is

related to the issue of good governance –where in recent years, the Indonesian government has quite aggressively adopted this approach–. According to Krippendorff (2004), discourse analysis is defined as the text above the sentences’ level. It focuses on how particular phenomena are presented. Several theories that we include help to guide our analysis process. A common-sense qualitative approach to content analysis has its roots in literary theory, the social sciences, and critical scholarship (Krippendorff, 2004).

## RESULTS AND DISCUSSION

According to Meijer et al. (2012), open government (o-government) refers to the extent to which citizens can monitor and influence government processes through access to government information and access to the decision-making arena. Meanwhile, in a broader definition, Wirtz and Birkmeyer (2015) state that o-government is a multilateral, political, and social process that includes government and administrative actions in the form of transparency, collaboration, and participation. The initiative for open government, which includes transparency, participatory policies and collaboration, has been a major administrative reform (Piotrowski, 2017). Park et al. (2020) classify transparency, collaboration, and participation as the three pillars of open government. According to them, assigning roles to non-state stakeholders in the three pillars is an initiative for open governance.

The main components of o-government are open assets (including available data), open services, and open process (Millard, 2018). However, according to Millard, o-government is a concept at the actor level. Therefore, to realise it is necessary to have a broader open governance system that reaches many parts and levels of the public sector and other suitable actors outside the government. Millard (2017) also states that the government cannot solve social problems alone. In this regard, the government needs to cooperate in an open, transparent, and participatory manner using Information and Communication Technology (ICT), both within and across the public sector and with legitimate external actors.



Picture 1: Open Governance Framework  
European Strategies for e-Governance to 2020 and Beyond (Millard, 2017, p. 9) [source]

In a more contemporary open governance paradigm, Meijer et al. (2012) argue that openness is no longer something the government provides to society. According to them, citizens also

generate data and, in such a way, match it with Open Government Data (OGD) so that new insights are acquired and added to the knowledge available in the public domain. The development of the new paradigm is evidenced by policymaking through the participation of citizens (citizen experts), news items (citizen journalists), and even scientific knowledge (citizen scientists). In this case, open governance is not only based on openness as a structure but also as a culture.

Concerning the application of o-government and open governance in drafting regulation, Indonesia has adopted these principles. Article 5 letter g Law Number 12/2011 stipulates that statutory regulations must be carried out based on good regulations' principles: transparency. The elucidation section of the article states that what is meant by the "principle of openness" is that in the Formation of Legislation starting from planning, preparation, discussion, ratification or stipulation, and promulgation are transparent and open. Thus, all levels of society have a broader possible opportunity to provide input in the law-making process.

Referring to one of the theories underlying the formulation of public policies, namely the field-force theory by Kurt Lewin (in Gill, 2020), every decision making will inevitably have a social impact, be it positive or negative. Likewise, the enactment of the Job Creation Law in Indonesia has divided the public's response. Some parties support and think that this law will support the impact of changes in a good direction. Still, on the other hand, many parties refuse because they feel disadvantaged by the existence of this law. According to policymakers and rejection reactions from various parties, such conditions are ideal conditions that will occur, especially if there are the affected community's interests when a policy is established.

From the perspective of policymakers, borrowing the Zollschan model of social change (Smith, 1973), the public reaction in rejection is a consequence of the ideal conditions expected, especially for the public interest. The pressure that demands change is one way to reduce those resistant to change, leading to optimal conditions. This kind of reaction will certainly impact changes that lead to an optimal position. Although, in reality, those who support the Job Creation Bill have a strong enough position, it is easy to predict that the impact of the changes that occur is often unsatisfactory for a large group with minimal powers.

The inertia over the pressure to revise new policies may also be based on consideration of the high costs of legislation. Thus, even amidst the stark evidence of policy failure, policymakers typically adopt a 'policy paradigm' that is highly resistant to change (Arena, 2017). This condition may be in line with other theories concerning the formulation of public policies, namely bounded rationality. This theory is the most effective and realistic model for decision-makers to predict future results (Kalantari, 2010). Moreover, since any policy cannot satisfy all parties, resulting policymaking tends to be rational.

Like the Job Creation Bill's elite approval, the actors who decide have acted according to a limited goal they have agreed upon. Even if, for example, it is assumed that these actions will benefit more than the costs incurred, the interests behind it revolve around a few interests without representing the broader public community interest. Under the pretext of adherence to social distancing rules, it has allowed the elites to speed up the legislative process and push through unpopular measures (Mietzner, 2020). As time goes by, the Pros and Cons appear still

growing along with the law's enactment. Even the elite act to support micro, small and medium enterprises (Saptono & Khozen, 2021), but the public are still questioning these small-scale businesses' ability to compete with those supported by almost unlimited capital.

No	Pros	Cons	Reference
1.	The Omnibus Law can be an instrument for economic recovery, especially in fields that the coronavirus pandemic has negatively impacted.	The Omnibus Law contains various articles that are detrimental to workers.	<a href="https://tirto.id">https://tirto.id</a>
2	The Omnibus Law offers environmental protection and management for corporations in simplifying business licenses	The Omnibus Law ignores negative impacts since the elimination of minimum boundaries for forest areas and watersheds. In addition, environmental Impact Analysis (Amdal) permits were also removed.	<a href="https://news.detik.com">https://news.detik.com</a>
3	The Omnibus Law regulates provisions regarding the establishment of an investment management institution in terms of investment to support convenience	It is deplorable if the Omnibus Law even results in abuse of authority	<a href="https://www.kompas.com">https://www.kompas.com</a>
4	The assurance of protection and ease of business licensing is given to MSMEs	There is no clarity regarding the criteria, and there is no guarantee of a permit being granted	<a href="https://news.detik.com">https://news.detik.com</a>
5	Improvement on the tax clusters.	The new tax regime reduces state revenue from taxation. However, it cannot guarantee the return of funds deposited abroad to return to Indonesia.	<a href="https://news.dtc.co.id">https://news.dtc.co.id</a>
6	The Omnibus Law increases investment funding, encourages taxpayer compliance and voluntary, increases legal certainty, and creates fairness in the domestic business climate.	Economic improvement can be achieved through taxation and requires reforming infrastructure, reforming the bureaucracy, political and legal stability, and others.	<a href="https://katadata.co.id">https://katadata.co.id</a>

Table 1: Overview of the Pros and Cons that arise regarding the Job Creation Bill  
Adapted from national mass media [source]

### **Fulfilment of Open Government principle under Job Creation Bill**

The principle of openness is the most ideal and optimal concept to collaborate between citizens and the government to carry out equitable and transparent national development jointly. Referring to the open government's principles put forward by Meijer, Curtin, and Hillebrandt (2012), citizens have access to information up to the decision-making arena. However, it is unfortunate that this process was not fully accommodated in Indonesia's Job Creation Bill

drafting. As a result, the ideal conditions for open government drafting the Job Creation Bill were not fulfilled. As has often been revealed in much national online news media, the bill's enactment was even carried out a few days ahead of what was scheduled since political actors had presumed that there would be a demonstration against it. The Government seemed to close the space for the public to access information concerning the draft, collaborate in expressing opinions, or participate in the law-making process. The pandemic situation with its social distancing rules has been used very well to reduce the likelihood of significant demonstrations (Mietzner, 2020).

The implementation conditions that are not ideal will hinder open governance in providing efficient public services (Aryani, 2021). According to Aryani (2021), although the omnibus law mechanism can shorten the process of making and discussing legislation products and encouraging harmonisation of regulations, it is necessary to revise the rules related to the preparation of legislation first. In written provisions, Indonesia has adopted the open government principle, namely open data and open processes. Guidelines under Article 5 letter g of Law No. 12/2011 stipulate that the statutory regulations' formulation must be carried out based on sound laws, regulations, and transparency. Besides, community participation is also legally contained in Article 96 of Law no. 12 of 2011. The draft legislation must be easily accessible to the public.

### ***Open data***

The digital world's development has transformed from a traditional government system to an electronic-based government system. The application of open governance is a form of institutional manifestation that adapts to the times' demands. Nevertheless, according to Millard (2017), the government cannot solve social problems alone. So it is essential to realise that the government needs to cooperate in an open, transparent, and participatory manner using Information and Communication Technology (ICT), both within and across the public sector and with all legitimate external actors.

One of the principles that can support an open and collaborative governance system is open data. This principle is essential in facilitating collaboration, co-creation, and policymaking. The government acts as a platform that allows collaboration through open data between the government, other actors, and citizens. Several countries have started implementing OGD, in which most of the data is publicly available. The open data aim to encourage a collaborative process and provide citizens easy access to the policymaking process. Although the public sector offers OGD, citizens also generate large amounts of data through interactions with companies and governments.

The closure of public access to the draft bill and the absence of a dialogue process caused a long polemic detrimental to the community. So it is not surprising that the reaction of many people is to reject the ratification of the Job Creation draft into law. Since it does not reflect the principle of open data during the drafting process, there has been a visible distance from the public from the outset. Entrepreneurs dominate the collaborative process. The workers were not sufficiently involved, characterised by their absence of representatives attending the palace invitation. The essence of community involvement is a wide-open space for dialogue between the government as the policymaker and the community.

### ***Open process***

The legislation is not only related to the rules, but it is also an integral part of its law-making process. In this regard, the law referred to must agree with the principles related to its content. An excellent statutory regulation formation refers to establishing statutory rules as guidelines or signposts (Indrati, 2011). Furthermore, the process of drafting legislation requires a concrete public participation mechanism (Aryani, 2021). From an o-government perspective, through Article 5 letter g Law no. 12 of 2011 as amended by Law no. 15 of 2019, Indonesia has adopted a principle called openness in the law-making process.

The principle of openness is an integral part of the law-making process, starting from planning, preparation, discussion, approval or determination, and enacting. The principle of transparency in the whole process demands transparency and openness. In this case, all levels of society should have the broadest possible opportunity to provide input, criticism and convey the aspirations that represent them. Public participation in forming laws and regulations has been regulated through Article 96 of Law no. 12 of 2011. In these provisions, the public, especially individuals or groups of people with interest in the substance of draft Law (“RUU”), have the right to provide input orally or in writing in the Formation of Legislation. Furthermore, the article stipulates that each draft must be easily accessible to the public to convey their aspiration easier.

From the entire law-making process in Indonesia, Firdaus (2020) assesses the intensity of public participation in general as follows:

- a. *planning*. At this stage, the RUU that will be formed is included in the national legislation program “*Prolegnas*”). To get input from the public, the Legislation Body then announces a plan for the preparation of *Prolegnas* to the public through mass media, both printed and electronic; conducting work visits to absorb the community’s aspirations and receive input in Legislation Body meetings. Finally, public input is conveyed directly or by letter to the Legislative Body’s head before discussing the draft of *Prolegnas*.
- b. *preparation*. President or DPR submitted the RUU and must be accompanied by an academic paper. In the drafting or deliberating process, RUU is disseminated to obtain input for revision. However, the committee’s public involvement was limited to legal experts, practitioners, or academics who mastered issues related to the draft law.
- c. *discussion*. During the discussion, the DPR and the government disseminate the RUU to provide information and obtain input from the public and stakeholders through mass media. RUU’s discussion is based on two discussion levels: stage I and stage II (plenary). At stage I, according to the mandate of Article 96, the public can provide input orally and/or in writing to the DPR. However, in stage II plenary talks, public participation has begun to be locked.
- d. *approval or determination*. Public participation at this stage is no longer needed because a bill that has been mutually approved will be submitted to the president to be ratified into law within a maximum period of 7 days from approval.
- e. *promulgation*. Public participation is no longer needed in the enactment stage because it is the government’s full authority.

Based on the Indonesian parliament’s official website, the Bill on Job Creation (Omnibus Law) is included in the 2020 priority program. The bill with proposals from the government was stipulated in a plenary meeting on January 22, 2020. However, according to the CNN Indonesia

report (10/09/2020), the Advocacy Team for Democracy assesses violations of the procedures and substance of drafting the government's draft law. According to the report, the draft Job Creation Bill was not made after the academic manuscript was completed but was made simultaneously. Although proving the information's correctness still needs to wait for the lawsuit's results in the Constitutional Court, the Job Creation Bill can be considered legally flawed if such information can be proven later.

Regarding public engagement represented by legal experts, practitioners, or academics who master the draft law's issues, drafting the Job Creation Bill's academic draft accommodates this. Based on a report from the National Legal Development Agency (BPHN) of the Ministry of Law and Human Rights of the Republic of Indonesia (11/22/2019), the government has held a Focus Group Discussion (FGD) of the Omnibus Law for the preparation of Academic Texts and Draft Law on Job Creation and Empowerment of MSMEs. Among those who attended the FGD were experts in the field of business law, namely Prof. Ridwan Khairandy, several high-ranking middle and Pratama leaders in the Ministry of Law and Human Rights, as well as participants from various elements such as the Yogyakarta Provincial Government Service, District or City Government Service of Yogyakarta Province, academics, practitioners or business actors, and Designers of Legislation. However, the relevant experts' engagement guarantees that the resulting academic paper will reach the public on time. Suppose the experts involved can even represent the public's voice. In that case, this needs to be supported by the principle of openness through academic texts not to create the impression that the process is closed.

In the discussion stage, up to January 29, 2020, the Job Creation Bill draft was not accessible yet to the public. The draft has not yet appeared to the public after one week since the plenary session. When the draft was spread, which was later criticised, the Coordinating Ministry for the Economic argued that the community's draft was not a text from the Government. Confusions have surfaced; one criticism of the government is the lack of public participation in the discussion process (Hukumonline.com, 2020). The lack of public involvement has led to various controversies regarding the Job Creation Law. BBC Indonesia summarises the Job Creation Bill's established process and the public response as under Table 2.

Date	Events
December 16, 2019	The government formed an omnibus law task force led by the General Chair of the Chamber of Commerce and Industry, Rosan Roeslani.
January 13, 2020	Demonstration by groups of labour against the Job Creation Bill.
January 15, 2020	President Jokowi wants the academic paper for the omnibus law Cipta Kerja to be completed before the 100-day working period of his second period Cabinet.
January 20, 2020	Tens of thousands of workers demonstrate against the omnibus law at the DPR building.
January 22, 2020	Parliament passes the Job Creation Bill as part of the 2020 priority National Legislation Program.
February 7, 2020	The government submits the draft Omnibus Law to the DPR. The name of the bill changed to Job Creation.



Date	Events
March 4, 2020	Many civil society organisations rejected the Presidential Staff Office's invitation to discuss the Job Creation Bill. Furthermore, students rallied at the DPR building and in several areas.
March 9, 2020	Students hold a demonstration against the omnibus law on Jalan Gejayan, Yogyakarta.
April 2, 2020	DPR approves the discussion of the Job Creation Bill in the plenary session.
April 14, 2020	The Government and DPR hold their first meeting.
April 22, 2020	Three leaders of trade union organisations meet President Jokowi at the State Palace.
April 24, 2020	President Jokowi decided to postpone the discussion of the labour cluster.
April 24 through October 10, 2020	DPR held 64 meetings to discuss this bill.
August 2, 2020	A tripartite technical team consisting of elements from the government, trade unions, and employers formed by the Ministry of Manpower finalises the labour cluster discussion.
October 3, 2020	The government and the DPR agreed to bring the Job Creation Bill to the plenary session of October 8, 2020.
October 5, 2020	The plenary session of the DPR is advanced. The Job Creation Law was passed. A 905-page thick manuscript is circulating.
October 6-8, 2020	Tens of thousands of workers, students, and civil society rallied against the Job Creation Law.
October 7, 2020	The DPR Legislation Body tweaked several articles.
October 8, 2020	The DPR Legislation Body is still amending several articles.
October 9, 2020	President Jokowi responds to the omnibus law's ratification and asks those who are not satisfied to sue the Constitutional Court.
October 12, 2020	The omnibus law manuscript is circulating twice, 1,035 pages and 812 pages thick.
October 13, 2020	The Secretary-General of the DPR confirms that the Job Creation Bill's final text is 812 pages long. As a result, the demonstration against the Job Creation Bill ended in chaos.
October 14, 2020	The Secretary-General of the DPR sent the Job Creation Bill's final 812 pages to the Palace.

Table 2: The incidents that arose as the promulgation of the Omnibus Law  
 Adapted from BBC Indonesia [source]

### **Job Creation Bill from an open governance perspective**

Although it has been known for more than 120 years in administrative science literature, governance is a newcomer from a paradigm perspective (Tuhumury & Wance, 2020). The evolution concept of good governance includes open government (Andhika, 2017), where according to Park et al. (2020), consists of three: transparency, collaboration, and participation. Governance is an integral part of the decision-making process and the implementation of these decisions. Therefore governance analysis then focuses on formal and informal actors involved in decision making and implementation (Adhinata et al., 2020). Meanwhile, Open governance (OG) is a concept in which citizens can access information and participation (Park et al., 2020).

OG is also usually marked by government institutions or policies that encourage transparency, accountability, and participation. Appropriate investment tools are made to enable this OG policy to run. Through OG, residents are guaranteed to have an environment that allows them to participate. Citizens' participation in public policies and processes means that citizens can hold the relevant authorities accountable.

Concerning the enactment of the Job Creation Bill, another thing other than the law's content that causes controversy is the openness issue, which impacts public participation. Explicitly, Article 28F of the 1945 Constitution places information as a basic right in personal development and the social environment. Information in the draft law is essential because it relates to the life of the wider community. Suppose the state is committed to development that promotes good and open governance. In that case, the state should initiate information disclosure to encourage public participation. The executive and legislature, which the people have directly elected, should provide adequate public space to express their views regarding the government and the DPR regulations.

Suppose we reconsider the OG framework developed by Millard (2017). In that case, there needs to be significant public participation in forming an o-government to achieve OG. Actors outside of government that need to be involved include citizens, services, businesses, civil society, social partners, and the private sector. Of these non-state actors, many national mass media reports show that business and private actors' representation surpasses other actors. For example, suppose the public is suspicious of the business interests behind why the Job Creation Bill is speeding up. In that case, it is natural since more than half (318/575) members of parliament are entrepreneurs (Liputan6.com, 2020; Tempo, 2019).

By upholding openness, OG can become a governance culture (Meijer et al., 2012). In a more advanced OG paradigm, according to Meijer et al., policymaking can be more developed through the participation of citizens (citizen experts), news items (citizen journalists), even scientific knowledge (citizen scientists). The openness of the information faucet since the reformation era in 1998, which then increasingly developed in the current information and technology era, has significantly impacted the wider community's role in directing public policy. However, the closure of information related to the Omnibus Law, which changes 79 other laws, actually hinders the process of matching information generated by residents with OGD. Here it appears that the new paradigm of OG by Meijer et al. (2012) is still challenging to realise in Indonesia.

## **CONCLUSION**

The impact of globalisation and advances in information technology requires governance to shift to a system that supports openness. One of the governance concepts that support open government (o-government) is open governance (OG). OG in the form of government systems application encourages adopting the principles of open data, open services, and open processes to encourage participation or involvement and collaboration with other parties, especially from non-state actors. Implementing OG aims to produce an effective, fair, transparent, and accountable governance system. However, the fact that the government is ambitious enough to solve the problem of ease of doing business by streamlining around 79 laws through the

omnibus law of Job Creation Bill in an unusual period, causing many groups of society to doubt that those who are pro with this policy still consider a critical issue regarding OG. This study regrets that the bill's drafting still lacks the principle of open government as mandated by Article 5 and Article 96 of Law Number 12/2011. The three pillars of open government, namely transparency, collaboration, and participation, are mostly ignored.

Article 5 letter g of Law Number 12/2011 has required that the law-making process be carried out openly, starting from planning, preparation, discussion, approval or determination, and promulgation stage. Of the five processes, public non-government participation can be found in the first three stages. The Job Creation Bill has generated many controversies, including the lack of public involvement in the three stages. Thus, the Job Creation Bill's enactment process sparked various protests and demonstrations that led to anarchism. The government's lack of openness shows the low quality of o-government from the Indonesian government, of course, in the Job Creation Bill context. Furthermore, the government's inability to provide sufficient open government data ultimately hinders citizens' participation to cross-match data with their information or interests. Consequently, of the three main pillars of o-government, namely transparency, participation and collaboration, the law-making process of the Job Creation Bill still leaves problems in all of its pillars.

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