

# THE POTENTIAL OF JUDICIAL REVIEW AS AN INCREMENTAL BUSINESS STRATEGY

## The Emergence of Sharing Economy and One-Stop Services Application in Indonesia

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### Abstract

The digital economic system has changed the pattern of relationships between service providers and consumers in conducting transactions. Starting from the opportunity given by the Supreme Court to online taxi service providers as part of Micro, Small, and Medium Enterprises (from now on MSMEs), application services such as Go-Jek and Grab are now becoming new spaces for national economic growth. This study will specifically answer how the judicial review process becomes a form of incremental policy, which is very important for business continuity in the industrial era 4.0. This paper can fill the research gap regarding policy alternatives response in supporting the development of the digital economy in Indonesia. This paper will be portrayed using doctrinal research methods and statutory approaches in descriptive and prescriptive styles. As a result, this paper demonstrates that the Supreme Court, as the judiciary institution, plays a central role in responding to changing societal needs. The rationality of business actors in the theory of economic analysis of law has led them to step up and look for responsive policy alternatives. This condition is proven by the judicial

review decision on Case Number 37 P/HUM/2017, which was then able to save MSME actors during the COVID-19 pandemic. The development of an incremental policy model is a form of government response to support national economic growth in the digital era, which demands rapid change.

**Keywords:** Digital Economics, Judicial Review, Incremental Policy, SMEs.

## Introduction

This discourse was conducted to support judicial review as an alternative incremental policy that can provide legal certainty and protect the constitutional rights of citizens amidst the rapid changes in the digital economy era. The analysis was conducted to answer the formulation of the question regarding how the role of judicial review as an alternative incremental policy can protect the constitutional rights of citizens and save the national economy during the COVID-19 pandemic by strengthening Micro, Small, and Medium Enterprises (herein after MSMEs). This argument is based on a normative juridical research process with a conceptual approach and legislation. The theory used in this study includes the idea of incremental policy, the notion of economic analysis of law, and the concept of the Supreme Court's authority as the primary institution. This paper develops research on the impact of the digital economy on MSMEs<sup>1</sup> and the need for an incremental policy model to deal with these challenges.<sup>2</sup>

Globalization, in Giddens' perspective, is a process of unifying aspects of human life as a consequence of technological developments, which are then capable of spurring economic growth.<sup>3</sup> This phenomenon then gave rise to the existence of new boundaries that

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<sup>1</sup> Nugrah Leksono Putri Handayani and Poppy Fitrijanti Soeparan, "Peran Sistem Pembayaran Digital Dalam Revitalisasi UMKM," *Transformasi: Journal of Economics and Business Management* 1, no. 3 (2022).

<sup>2</sup> Sapto Hermawan and Febrian Indar Surya Kusuma, "Discourse on Online Transportation under Posner's Theory: A Comparative Analysis in Indonesia and Brazil," *Revista de Direito Internacional* 20, no. 1 (June 2023), <https://www.publicacoes.uniceub.br/rdi/article/view/8753>.

<sup>3</sup> Martin Albrow, *Advances in Sociological Knowledge*, ed. Nikolai Genov (Wiesbaden: VS Verlag für Sozialwissenschaften, 2004), <http://link.springer.com/10.1007/978-3-663-09215-5>.

transcend the jurisdiction of a country. This territorial expansion began from global trade practices or universal struggle ideas such as human rights and climate change.<sup>4</sup> With the various conveniences offered, the journey of human life is also increasingly widespread in all corners of the world. Castells interpret this condition as a form of human capacity building to carry out their economic activities on a planetary scale.<sup>5</sup> Through the support of the Industrial Revolution 4.0, all aspects of life can now be controlled from our hands.<sup>6</sup>

The impact of the globalization process and the development of Industry 4.0 is also hit in Indonesia.<sup>7</sup> With smartphones and internet networks that have started to provide easy access to data and information systems for their users, various digital application provider platforms have started offering attractive services. One of the main features of this modern era is high mobility. All human activities and life must be carried out quickly, precisely, and efficiently.<sup>8</sup> For this reason, ways have been developed that enable a person to complete much work at once without being hampered by a particular place. A smartphone application later developed this opportunity. Many application providers perceive this phenomenon as a business opportunity to provide a 'one-stop-shop system' to accommodate the entire shopping chain.<sup>9</sup>

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<sup>4</sup> Martin Albrow, *The Global Age: State and Society Beyond Modernity* (Cambridge: Polity Press, 1996).

<sup>5</sup> Mauro F Guillen, "Is Globalization Civilizing, Destructive or Feeble? A Critique of Five Key Debates in the Social Science Literature," *Annual Review of Sociology* 27 (November 2001): 235–260, <http://www.jstor.org/stable/2678621>.

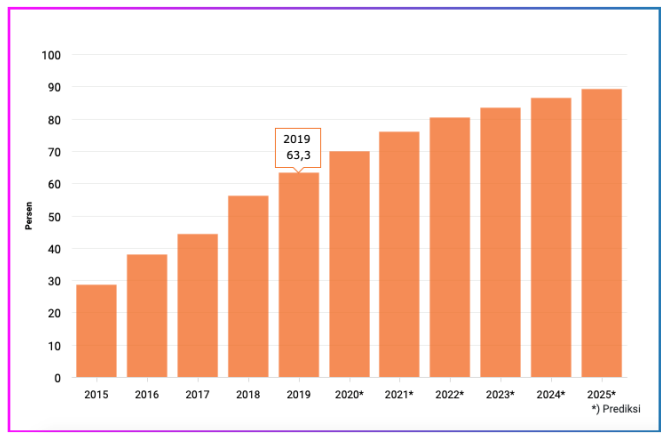
<sup>6</sup> Nabillah Purba Mhd Yahya Nurbaiti, "REVOLUSI INDUSTRI 4.0 : PERAN TEKNOLOGI DALAM EKSISTENSI PENGUASAAN BISNIS DAN IMPLEMENTASINYA," *Jurnal Perilaku Dan Strategi Bisnis* 9, no. 2 (2021).

<sup>7</sup> Anita Asnawi, "Kesiapan Indonesia Membangun Ekonomi Digital Di Era Revolusi Industri 4.0.," *Syntax Literate: Jurnal Ilmiah Indonesia* 7, no. 1 (2022): 398–413.

<sup>8</sup> Adnan Veysel Veysel Ertemel and Mustafa Emre Civelek, "Analyzing the Effect of One-Stop Shopping on Purchase Intention in E-Commerce," *International Journal of Information Systems in the Service Sector* 14, no. 1 (March 2022): 1–15, <https://services.igi-global.com/resolvedoi/resolve.aspx?doi=10.4018/IJISS.295871>.

<sup>9</sup> Ibid.

Graph 1. Escalation of Smartphone Users in Indonesia <sup>10</sup>



Based on the data from Graph 1, it can be seen that smartphone use in Indonesia is increasing every year. This situation will indeed become an opportunity to support economic growth utilizing information technology. So that later application service providers compete to capture an increasingly broader and more diverse market. One of the best ways to do this is to become a platform for providing various world services and digital payments. The stretching of MSME collaboration in e-commerce is not new. One of the things that has caught the attention of the public and the government is the struggle of online motorcycle taxi drivers to get legality in operating and implementing their business activity.

The great potential of innovative e-hailing application services, a sign of the entry of the gig economy system in Indonesia, has raised pros and cons from various groups. Of course, the most significant rejection comes from conventional transportation service providers who feel disadvantaged by the presence of e-hailing service applications such as Gojek, Grab, Uber, and other digital platforms. Various attempts were made to resolve horizontal conflicts that could threaten national economic growth by involving stakeholders. The rational choice then made the online motorcycle taxi service providers file a

<sup>10</sup> Yosepha Pusparisa, “Penggunaan Smartphone Diperkirakan Mencapai 89% Populasi Pada 2025,” *Databoks*, last modified 2020, <https://databoks.katadata.co.id/datapublish/2020/09/15/pengguna-smartphone-diperkirakan-mencapai-89-populasi-pada-2025>.

judicial review to seek justice and legal certainty that could protect their business.

This research used several theories to see this rationality and its impact on the Indonesian economy. First, using the theory of economic analysis of law,<sup>11</sup> It will be seen that the primary considerations of MSME actors who work as online motorcycle taxi drivers are in determining strategies to unravel horizontal conflicts. Second, the legal system theory<sup>12</sup> explains the authority of the Supreme Court as the Primary Institution in carrying out the judicial review process in Indonesia. Third, the theory of incremental policy<sup>13</sup> will be used as a basis for argumentation about the importance of the choice of strategy for online motorcycle taxi drivers who decide to conduct a judicial review process. This research is an exciting topic of study because the responsive legal umbrella provided to online motorcycle taxi drivers to continue operating under the auspices of application service providers such as Gojek and Grab can positively impact the Indonesian economy in dealing with the COVID-19 Pandemic.

The results of the analysis of these topics are then presented in a descriptive form and divided into several sub-sections. First, the explanation starts by explaining the authority of the Supreme Court in the sub-'Indonesian Supreme Court as a Primary Institution'. Second, the 'Economic Analysis of Law and The Emergence of Sharing Economy in Indonesia' will analyze the rational choices of online motorcycle drivers. Third, the critical role of responsive policies in facing digital economy competition will be discussed in 'The Urgency of Incremental Policy to Strengthen National Economic System in Modern Era.'

## Methods

This paper used normative research based on a conceptual and regulations approach. The basic concept of economic analysis of the law theory will open up space for discussion about the rationality of

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<sup>11</sup> Lewis Kornhauser, "The Economic Analysis of Law," *Stanford Encyclopedia of Philosophy* (2017), <https://plato.stanford.edu/entries/legal-econanalysis/>.

<sup>12</sup> Sean Coyle, "Hart, Raz and the Concept of a Legal System," *Law and Philosophy* 21, no. 3 (2002): 275–304.

<sup>13</sup> Leslie A Pal, "Assessing Incrementalism: Formative Assumptions, Contemporary Realities," *Policy and Society* 30, no. 1 (February 2011): 29–39, <https://academic.oup.com/policyandsociety/article/30/1/29/6422231>.

actors' efforts to seek responsive policies in facing the challenges of the digital economy era. From these problems, the analysis is then continued with a review of the judicial review process carried out by primary institutions as a form of incremental policy. The laws and regulations used as legal materials include: (1) the 1945 Constitution of the Republic of Indonesia; (2) Law Number 20 of 2008 concerning Micro, Small, and Medium Enterprises; (3) Law Number 22 of 2009 concerning Road Traffic and Transportation; (4) Constitutional Court of the Republic of Indonesia Decision Number 78/PUU-XIV/2016; (5) Supreme Court of the Republic of Indonesia Decision Number 37P/HUM/2017; (6) Regulation of the Minister of Transportation Number 32/2016 in conjunction with Regulation of the Minister of Transportation Number 26 of 2017 concerning Organizing the Transportation of People with Public Motorized Vehicles Not on Routes; (7) the Minister of Transportation Decree Number 35 of 2003 concerning Organizing the Transportation of People on Roads by Public Vehicles. The results of the data analysis will be presented in a syllogism explanation.

### **Indonesian Supreme Court as a Primary Institution**

Identification related to the nature of legal theory must be very general and abstract so that it can be used to see all legal systems. Thus, properties that contain particular characteristic values must be ignored because these properties only apply in the context of specific social, economic, and cultural conditions for some legal systems. Furthermore, in analyzing legal system theory, Raz will primarily view the legal system as an institutionalized normative system.<sup>14</sup> Such analysis is part of the analysis of the philosophy of law.

Normative systems are legal systems that already exist because they regulate individual behavior and social organizations.<sup>15</sup> The legal

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<sup>14</sup> J Raz, "THE INSTITUTIONAL NATURE OF LAW 1," *The Modern Law Review* 38, no. 5 (September 1975): 489–503, <https://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1975.tb01426.x>.

<sup>15</sup> David Rönnegard, "The Form of the Firm: A Normative Political Theory of the Corporation, by Abraham Singer. New York: Oxford University Press, 2019. 312 Pp.," *Business Ethics Quarterly* 30, no. 2 (April 2019): 277–279, [https://www.cambridge.org/core/product/identifier/S1052150X2000007X/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1052150X2000007X/type/journal_article).

and normative systems differ in their existence or existence.<sup>16</sup> When we look at the legal system as a system of legislation, we do not just look at the content. Still, we must see whether the rules apply because a legal system is only recognized when the system is in effect in society.<sup>17</sup> These characteristics are not the only elements that make up the legal system, just as a legal system may contain some legal and moral values as derivative forms of its laws. This moral value appears when the law in the system performs a particular role.<sup>18</sup>

As an institutionalized normative system, the legal system must have institutions established to carry out its functions. The legal philosophers agreed to categorize it into 2 (two) types of institutions: norm-making institutions, such as the constitutional assembly parliament, and norm-enforcement agencies, such as courts and police. For Raz, the norm-making institution is no longer an essential part of the modern legal system. In his opinion, the norm enforcement agency is more important to the legal system. To find out which institutions are part of the norm enforcement institutions, Raz prefers to look at them from the perspective of the norms that shape them.<sup>19</sup> In recognizing the identity of an institution, we can refer to the norms that are made to give power to the institution. Furthermore, the identity attached to these institutions should be seen in their inherent duties and functions and in how they perform their functions. All efforts made by public officials to carry out a task or to regulate something are a form of law enforcement. Here, Raz emphasizes that public officials can only make law enforcement efforts. Since these norm enforcement institutions exist in all types of legal systems, identification of these institutions is essential to emphasize. Generally, judiciary institutions do not have the

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<sup>16</sup> Paul T Haaga, "Law as a Normative System in the Philosophy of Joseph Raz," *AMAMIHE: Journal of Applied Philosophy* 18, no. 6 (2020).

<sup>17</sup> Lee A Casey, "Pirate Constitutionalism: An Essay in Self-Government," *JL & Pol* 8, no. 3 (1992).

<sup>18</sup> Joshua Pike, "The Law Does Not Exist to Guide Us," *Jurisprudence* 14, no. 1 (January 2023): 95–112, <https://www.tandfonline.com/doi/full/10.1080/20403313.2022.2141509>.

<sup>19</sup> Ludvig Beckman, "Three Conceptions of Law in Democratic Theory," *Canadian Journal of Law & Jurisprudence* 36, no. 1 (February 2023): 65–82, [https://www.cambridge.org/core/product/identifier/S0841820922000224/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S0841820922000224/type/journal_article).

authority to make norms, but physically, they have the control to apply them.

In the modern legal system, Raz believes that apart from norm enforcement institutions, there are also forms of institutions that can combine the formation of norms and apply norms as part of the norm enforcement institutions. Raz called the institution a primary institution.<sup>20</sup> In its functions, primary institutions focus more on determining power over normative situations according to existing norms, such as the judiciary. The courts and the government can decide the rights and obligations of an individual. Not only because legal entities are equipped with facilities to investigate facts and choose the law that applies thereon, but legal entities also have the power to choose a person's legal situation. The legal system is not only seen from the existence of norms with binding policies, but the legal system must have norms that give institutions the power to issue binding decisions. This situation makes the decisions issued by the judiciary have the critical ability or are binding naturally.

The concept of a primary institution can also be seen in Indonesia. In this case, this authority is owned explicitly by the Constitutional Court and the Supreme Court. Both institutions that are part of the Indonesian judiciary have the authority to carry out a judicial review process through the provisions of Chapter IX, which contains judicial power. In this rule, the authority of the Constitutional Court to carry out a judicial review process is in Article 24 C paragraph (1) of the 1945 Constitution. Meanwhile, the power of the Supreme Court to conduct a judicial review is in Article 24 A paragraph (1) of the 1945 Constitution. The authority of the Indonesian Supreme Court and The Indonesian Constitutional Court to carry out a judicial review is a kind of control that belongs to the primary institution.

Under Raz's criteria, a primary institution is an institution that has the authority to determine the situation of a norm and then enforce it. In this case, the judicial review process in the Supreme Court and the Constitutional Court is a way to determine the position of a norm. Both institutions have the authority to determine whether these norms' values can legally apply. If it is later found that there are deviations in the process of forming norms or the substance of these norms, then the

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<sup>20</sup> Joseph Raz, *THE AUTHORITY OF LAW: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009).

Supreme Court and the Constitutional Court can issue a decision to annul the norm.

Although both have the authority to carry out judicial review procedures, the main difference between the judicial review process by the Supreme Court and the Constitutional Court lies in the reviewed laws and regulations. In Article 24 A paragraph (1) of the 1945 Constitution, the authority of the Supreme Court to carry out a judicial review process is only intended for reviewing statutory regulations which are hierarchically under the Act on the values contained in the Act. Meanwhile, the authority of the Constitutional Court in carrying out the judicial review process as regulated in Article 24 C paragraph (1) of the 1945 Constitution is a reviewing of a law against the Constitution. Based on this authority, decisions made by the Supreme Court and the Constitutional Court through a judicial review process also become part of the issuance of the government policy.

### **Economic Analysis of Law and The Emergence of Sharing Economy in Indonesia**

The market mechanism that works freely to balance the supply and demand curves is the ideal type of capitalist system.<sup>21</sup> In this argument, the government should not play interventions that could disrupt the running of the market balance. The demand for freedom to run a business is not infrequently deepened, as is the case with the *laissez faire-laissez passer*, which requires maximum possible restrictions on government intervention.<sup>22</sup>

On the other hand, an economic view that sees the urgency of the government's role in exercising control over the market has also begun to emerge and develop. Posner's theory of financial analysis of law has this perspective.<sup>23</sup> For Posner, the balance of the supply and demand

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<sup>21</sup> Gerard Delanty, "The Future of Capitalism: Trends, Scenarios and Prospects for the Future," *Journal of Classical Sociology* 19, no. 1 (February 2019): 10–26, <http://journals.sagepub.com/doi/10.1177/1468795X18810569>.

<sup>22</sup> Gareth Dale, "Justificatory Fables of Ordoliberalism: Laissez-Faire and the 'Third Way,'" *Critical Sociology* 45, no. 7–8 (November 2019): 1047–1060, <http://journals.sagepub.com/doi/10.1177/0896920519832638>.

<sup>23</sup> SOPHIE HARNAY and ALAIN MARCIANO, "POSNER, ECONOMICS AND THE LAW: FROM 'LAW AND ECONOMICS' TO AN ECONOMIC ANALYSIS OF LAW," *Journal of the History of Economic Thought* 31, no. 2 (June 2009): 215–232,

curves is not a single indicator of the success of an ongoing business. The mechanism can only reflect internal factors from the macroeconomic conditions of a nation. In Posner's realm of thought, external factors will influence these conditions aside from the inner side. Posner later said this factor was one of influence derived from government policy. With the approaches taken by the government, the community's social needs will also change. This phenomenon will then, directly or indirectly, affect the internal factors of the ongoing market mechanism.

Posner's insight provides an understanding that the economic conditions in a country cannot be separated from the policies made by the government. Even though the government cannot fully regulate the running of the financial system, the government can determine the limits and direction of the economic system.<sup>24</sup> For this reason, the business strategy owned by entrepreneurs must be able to consider both of these factors. To ensure that the market mechanism will work optimally and bring benefits, business actors need to be sensitive to external factors that will affect the supply and demand curves of the business they are engaged in. In this case, Posner emphasizes the importance of the ability of business actors to rely on regulations made by the government to maximize the benefits they get.

Law as an avenue to control social and societal conditions later developed into a market control mechanism. To address this matter, it is then necessary to have a rational choice of business actors so that they can take strategic steps to strengthen the national economic sector. The discussion on the financial industry and its impact on society is wider than the high annual inflation rate, the large number of unemployed, the minimum absorption of the labor force, and distribution problems in the economic chain. More than that, in this context, it is then seen that the financial sector analysis shows an influence from human desires, which causes limited resources. This circumstance then makes

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[https://www.cambridge.org/core/product/identifier/S1053837209090208/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1053837209090208/type/journal_article).

<sup>24</sup> Gary Minda, "The Lawyer- Economist at Chicago: Richard A. Posner and the Economic Analysis of Law," *Ohio State Law Journal* 39, no. 1 (1978): 439–75.

humans run the logic of thinking to achieve maximum results to achieve personal self-satisfaction or 'self-interest.'<sup>25</sup>

Satisfaction or self-interest is not always met with money. Posner echoes that the extent to which satisfaction encompasses a broader range of economic factors and can take the form of an appreciation of commodities. Nevertheless, it cannot be denied that money is indeed a measuring indication of economic activity. Even so, the expected self-interest places more emphasis on the value of a commodity than the price of that commodity. In this case, Posner emphasizes the importance of understanding that value and price are two different things. For this analysis, this argument is a foundation for determining the self-interest being fought for. Satisfaction and long-term profit are benchmarks that can change and adapt to the times.

Attempts to fulfill self-interest must go through several careful considerations. Rational choice in carrying out a strategic move needs to consider various factors that can affect the acquisition of the final result.<sup>26</sup> In this case, Posner also emphasizes that this rational action is a logical response to the satisfaction expected to fulfill self-interest. The steps that become the strategy of these business actors are based on the existence of three basic principles, which are influenced by (a) the law of demand, (b) Opportunity Costs, and (c) the Free flow of resources.<sup>27</sup>

The first consideration that must be paid attention to by business actors is regulation, which will affect the law of demand. As stated in the economic principles, genuine efforts must be made to support increased consumer demand. This factor is the primary determinant of the sustainability of the running of a business. For this reason, the rationality of the business actor will lead him to take action so that consumers want to spend money and effort to achieve something offered.<sup>28</sup> This concept emphasizes the importance of certainty for

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<sup>25</sup> Agus Riyanto, "ECONOMIC ANALYSIS OF LAW TERHADAP KEJAHATAN KORPORASI," *Binus University: Faculty of Humanities*, last modified 2018, <https://business-law.binus.ac.id/2018/12/12/economic-analysis-of-law-terhadap-kejahatan-korporasi/>.

<sup>26</sup> Richard Posner, *Economic Analysis of Law Third Edition* (Wolters Kluwer Law and Business, 1986).

<sup>27</sup> *Ibid.*, 4.

<sup>28</sup> Rohmat Adi Prasetyo and Riris Rismayani, "Studi Karakteristik Dan Faktor-Faktor Downstream User Transportasi Online (Ride Sharing) Di Kota Bandung," *Jurnal Wacana Ekonomi* 18, no. 1 (2018): 34–45.

consumers to believe that whatever is provided is the best choice for them to choose and that what they pay is proportional to the benefits they get. With the guarantee of a sense of security for consumers' rational decisions, the number of requests will increase according to the demand and supply curves.

Opportunity cost is the second consideration that business actors must pay particular attention to. This factor is interpreted as a condition or means of production that is important and must exist, but in the procurement process, no additional cost or effort is needed. This opportunity then does not cause any changes in the calculation of profit and loss from the commodity offered. If business actors can take full advantage of opportunity costs, then this factor can become a key to success that can be utilized to achieve long-term profits. Not infrequently, the ability to recognize opportunity costs becomes a critical ammunition in a trade war. Parties that can take advantage of these factors will have an advantage because they can provide more optimal service. With the exact production costs, businesses can produce innovations and superior products.

The last factor that must also be considered in choosing a strategy to ensure the smooth running of the economic chain is the actions that can be used to maintain the free flow of resources. A potential resource can only be exploited to fulfill self-interest when the exchange for obtaining access to its utilization can be legally guaranteed. Permits issued by the government will be the basis for someone to utilize these commodities so that hidden potential can be explored and become an opportunity for voluntary economic chains to exist. Thus, the demand and supply curve will be formed as it should. The angle can be an indicator that shows whether there are obstacles in the implementation of this aspect.

The ability to develop resources into certain activities alone is enough to show benefits. If the prediction does not come true, there is a conical possibility of the appearance of external obstacles. Things that can hinder the flow of these economic flows can arise from several reasons, such as a relatively low standard of living, difficulty accessing the availability of information, and the scarcity of something that has been running for a long time.

These three indicators become essential to the strategic considerations that economic players will choose. In Posner's idea,

norms contained in law can change a person's behavior when carrying out their economic activities. The primary purpose of this logical consideration is to obtain a legal standard that is effective and has value and usefulness (practical, value, and utility). This effort to get a norm that can adequately support economic activity is the main objective of the cross-sectoral analysis proposed by Posner.

By the focus of this investigation, the theory set by Posner can demonstrate the rationales behind the legal steps taken by MSME entrepreneurs who work as online motorcycle taxi drivers. By reflecting on Graph 1, the digital economy will become a fresh gold occupation for business people. Technological advances and the phenomenon of globalization that cannot be stopped will undoubtedly change people's way of life. Various mobile application services that can be accessed via a cell phone are evidence of the trend of changing lifestyles today. Digital platform providers then capture this phenomenon to provide services to the target market.

One of the potential sectors that will become the goal of digital platform development is the field of providing transportation services. Several digital platforms, armed with the modernization of conventional taxi services, then developed an e-hailing service used to call public transportation, such as taxis and motorbike taxis. If conventionally they provide services by waiting for orders to be made by telephone or stopping the fleet on the main road, now this mechanism has transformed into a digital form. A taxi fleet can be ordered via an application installed on the user's smartphone. This application service was introduced by Uber in Indonesia in 2014. This development was followed by Grab, which became accessible in the same year. Only two years later, Gojek emerged as an application known as the result of domestic innovation.

With the various conveniences offered and the relatively cheap price, this e-hailing application has received a positive response from the community. However, conventional taxi drivers started to criticize the online application business travel. Various protests have been filed against the government, which has banned online taxi drivers from operating. Based on this horizontal conflict, the values of capitalism, based on the free-flowing market mechanism, cannot be applied. There needs to be intervention from the government as the party in charge of providing policies so that the conflict does not prolong.

To overcome this problem, the government seeks to provide legal certainty and protection for online motorcycle taxi drivers through the Minister of Transportation Regulation Number 32 of 2016 concerning the Implementation of Transportation of People with Public Motorized Vehicles Not on the Tracks. However, in reality, this regulation was canceled due to the revocation of the law through Minister of Transportation Regulation Number 26 of 2017. Government policies that are not strict provide clear boundaries regarding the legal basis for online motorcycle taxi drivers and then hurt the prevailing market mechanism. Strikes, sweeps, and confiscation of online taxi equipment carried out by unscrupulous conventional taxi drivers affect the demand curve for online taxi services.

The law of demand becomes the first indicator in Posner's theory. The government's policy not to provide a legal umbrella that can specifically be used to protect online motorcycle taxi drivers has led to horizontal conflicts that have affected their income. If we refer to this argument, then this fact can be the basis for the first consideration of the legal steps taken by online motorcycle taxi drivers. However, if there is no consumer demand, then business will stop. For this reason, efforts are needed to be made so that this condition can return to stability.

The stability of the demand and supply curves will then affect the self-interest of business actors, which, in this issue, specifically reaches out to online taxi drivers. Without a legal umbrella that can become the legal basis for their business activities, these drivers will fail to convince consumers that their services are the best option. The ability of digital platform providers to take advantage of technological advances and offer easy access to services provided by taking advantage of the opportunity costs that come from using information technology continues to experience problems when horizontal conflicts arise.

In this point, the details of opportunity costs that digital platform providers and online motorcycle have used taxi drivers include at least (1) smartphones owned by the majority of Indonesian people, (2) free application service access, (3) ease of transaction; (4) cost certainty to be paid by the consumer; (5) safety and transparency of travel routes. However, when confronted with various protests staged by conventional taxi drivers through sweeping and destroying the fleet, the offering of superior products and excellent service remains hampered. As later related to the third indicator, if the predictions of the benefits

obtained are not fulfilled, an indication appears that a situation has hampered the free flow of resources. Based on these rational considerations, the government's policy of allowing online taxi drivers to work without a clear legal umbrella has created an obstacle to obtaining economic benefits.

If this situation is left unchecked, it can cause losses for the country. However, the influence of globalization and economic digitalization is a phenomenon that cannot be avoided. According to Posner's theoretical viewpoint, the government needs to take concrete actions that can become a limit for digital economic activities, especially in this case, which is closely related to the use of digital platform providers in collaboration with MSME actors. As a form of transformation, a strategic step must be developed to realize legal certainty and justice for online taxi drivers.

Through a letter of request for judicial review submitted to the Constitutional Court (from now on referred to as the CC) on August 19, 2016, the national online driver legal advocacy team or TIMAH PANAS requested that the Constitutional Court be able to decide that there is unconstitutionality in Law Number 22/2009 concerning Traffic and Transportation Roads (UU LLAJ). In suit number 78/PUU-XIV/2016, online application transport drivers who act as individuals state that the LLAJ Law has violated their constitutional rights to get decent employment and livelihood.

Similar to what is contained in Article 27 paragraph (1) and Article 28 paragraph (1) of the 1945 Indonesian Constitution, every citizen has the right to the opportunity to be protected through legal certainty and access to a job that they use to fulfill their daily needs. However, this provision was hindered by the coming into force of Article 139 paragraph (4) of the LLAJ Law. In that article, it is explicitly explained that public transportation can only be provided by state-owned enterprises, regional-owned enterprises, or legal entities by the legislation's provisions.

Article 139 paragraph (4) of the LLAJ Law is seen as only protecting the interests of corporations and cannot yet reflect the application of the principle of equality before the law. This article can say that online transportation drivers who use the economy-sharing system in providing road transport fleets that are not on this route cannot be accommodated, so this paragraph has values contradictory to

the interests of developing innovations in the field of transportation that rely on online application networks. Nevertheless, the Constitutional Court, through Decision Number 78/PUU-XIV/2016, has stated that it rejected the application. In this lawsuit, the Constitutional Court provides advice for a judicial review application to the Supreme Court so that the implementation of regulations burdensome to online transportation drivers can be tested.

By input from the Constitutional Court, the online transportation drivers then appointed attorneys to submit a request for judicial review of Regulation of the Minister of Transportation Number 26 of 2017 concerning the Organization of the Transport of People with Public Motorized Vehicles Not on Routes to the Supreme Court (from now on abbreviated as SC). In the application's object, the petitioners questioned the legal status of Regulation of the Minister of Transportation 35/2003, which should have been repealed by Regulation of the Minister of Transportation 32/2016. However, the Regulation of the Minister of Transportation 32/2016 has yet to be effectively enacted, but the regulation has been revoked with the Regulation of the Minister of Transportation 26/2017. Apart from that, the material content contained in the Regulation of the Minister of Transportation 26/2017 is similar to what has been stated in the Regulation of the Minister of Transportation 32/2016.

In this case, the applicants act as individuals running micro, small, and medium enterprises (MSMEs). This position is based on the meaning of Article 3, Article 4, and Article 5, letter c of Law number 20/2008 concerning MSMEs, according to Articles 28A, 28 C paragraph (1), 28 D paragraph (1), and paragraph (2) and 28 H paragraph (2) of the 1945 Indonesian Constitution, applicants as MSME actors have the opportunity to gain access to decent jobs to improve their standard of living based on the principle of equality before the law. Their fundamental rights are also protected in Law Number 39/1999, which explains Human Rights, particularly Article 9 paragraph (1), Article 12, and Article 13. With the enactment of the Regulation of the Minister of Transportation 26/2017, rights owned by the petitioners have been forfeited.

Some of the articles that are considered not to support economic development and hinder online transportation drivers from doing business include: Article 5, paragraph (1) letter e, Article 19, paragraph

(2) letter f and paragraph (3) letter e, Article 20, Article 21, Article 27 letter a, Article 30 letter b, Article 35 paragraph (9) letter a number 2 and clause (10) letter a number 3, Article 36 paragraph (4) letter c, Article 37 paragraph (4) letter c, Article 38 paragraph (9) letter a number 2 and paragraph (10) letter a number 3, Article 43 paragraph (3) letter b number 1 sub letter b, Article 44 paragraph (10) letter a number 2 and paragraph (11) letter a number 2, Article 51 paragraph (3) and Article 66 paragraph (4) of the Minister of Transportation 26/2017. The material content of the article is ineffective because the government needs to understand the actual conditions from a business perspective.

These provisions have violated the essence of the MSME Law, in particular, Article 7 paragraph (1) letters b, d, r, and f, Article 9 letters a and b, Article 11, Article 12, and Article 25, which emphasize the simplicity of the licensing procedure so that creating a conducive business climate. Based on these various considerations, the Supreme Court then decided to accept the entirety of the petition filed and declared that the articles being tested no longer had binding legal force by the judgment stated in decision Number 37P/HUM/2017.

The results of the economic analysis of law factors, which indicate the need for a legal umbrella for the legality of online taxi drivers, can be proven by the fact that horizontal conflicts occurred between conventional taxi service providers and online taxis, which only stopped after a request for judicial review against the Regulation of Minister of Transportation 26 /2017 granted. Although the Constitutional Court rejected it, the Supreme Court finally granted the application for a judicial review filed by online taxi drivers. This regulation, which guarantees modern transportation services that are cheaper, more accessible, friendlier, and safer, has become a bridge for conventional and online transportation service providers. Given Posner's theory, legal norms can bind and coerce, affecting the economic sector.<sup>29</sup> Furthermore, the analysis of the influence of a legal norm on economic activity is a way to see how the law can influence the actions of business

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<sup>29</sup> Sholahuddin Al-Fatih, "Economic Analysis Relationship in Determining The Size of Parliamentary Threshold in Indonesia," *Indonesian Journal of Law and Policy Studies* 1, no. 2 (November 2020): 152, <http://jurnal.umt.ac.id/index.php/IJLP/article/view/3176>.

people, in this case, conventional taxi drivers<sup>30</sup>. As evidence, there has been a change in the behavior of conventional transportation drivers compared to before and after the legal umbrella for the provision of application-based transportation services. This application service has embraced both types of transportation service providers: those who have just joined to become partners in providing online transportation fleets as MSME business actors and those who were previously conventional taxi and moto drivers.

### **The Role of Incremental Policy to Strengthen National Economic System in the Modern Era**

The government system within a country must involve various actors and interests. As can also be seen in the trias politica concept in a presidential system, at least there is a division of powers in the executive, legislative and judicial domains.<sup>31</sup> Each branch of power has its duties and authorities. Synergy between institutions in carrying out checks and balances mechanisms is also the central axis for the continuity of the government system carried out by the applicable laws. In general, the legislature has a function to create regulations to construct the laws. Meanwhile, judicial authority is in the jurisdiction of the judicial institution.

In this context, the Supreme Court and the Constitutional Court in Indonesia have the authority to carry out a check and balance mechanism on regulations issued by the judiciary and executive institutions through their authority to conduct a judicial review process. Raz later interprets this authority as part of the primary institution authority. Through this procedure, the Supreme Court and the Constitutional Court can use their judicial institutions to examine requests for judicial review and issue decisions that contain the position of a norm. Thus, even though the Supreme Court and the Constitutional Court do not have the authority as legislative bodies or institutions under executive power that are capable of making new

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<sup>30</sup> Louis Kaplow and Steven Shavell, "Chapter 25 - Economic Analysis of Law," ed. Alan J Auerbach and Martin B T - Handbook of Public Economics Feldstein, vol. 3 (Elsevier, 2002), 1661–1784, <https://www.sciencedirect.com/science/article/pii/S1573442002800295>.

<sup>31</sup> Christiani Junita Umboh, "PENERAPAN KONSEP TRIAS POLITICA DALAM SISTEM PEMERINTAHAN REPUBLIK INDONESIA," *Lex Administratum* 8, no. 1 (2020): 131–142.

norms, the two judicial institutions are equipped with the authority to revoke some or all of the values of a norm that has been in effect.

Eventually, the executive power is a branch of power that includes a president's authority. In this investigation, executive power is interpreted more broadly because it also considers all legal products issued by institutions under the auspices of executive power. In the context of this examination, legal products issued by the president, both presidential and government decrees, as well as legal products issued by ministries, must comply with the provisions of Law Number 12 of 2011 in conjunction with Law Number 15 of 2019 in conjunction with Law Number 13 of 2022 concerning the Formulation of Legislation. Thus, it becomes evident that these three institutions have an essential role as actors in determining the policies implemented in the Indonesian governmental system.<sup>32</sup>

Decision-making related to legal products that state institutions will deliver as public policy outcomes becomes an agenda that must be considered carefully. For this rationale, various theories related to decision-making models are also continuously being developed to operate as a compass for the government in dealing with situations that arise in society. The easiest way to find a description of the policy-making method is based on a comprehensive rational theory and an incremental theory. Policy as an action taken to solve a problem is not a single decision that can be taken by an actor alone. The decision-making process needs to consider various actors and interrelated interests among one another.

For adherents of a policy-making model based on comprehensive rational considerations, policymakers must have sufficient information on the actual conditions and various alternative policies to accurately predict the consequences of each step they take. The choice made by the government must be based on a calculation of the cost-benefit principle and various interrelated issues. In addition, this approach also emphasizes that policymakers must carefully consider each available option so that there is a priority scale for these policy alternatives. In

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<sup>32</sup> Evi; Yulistyowati, Endah; Pujiastuti, and Tri Mulyani, "PENERAPAN KONSEP TRIAS POLITICA DALAM SISTEM PEMERINTAHAN REPUBLIK INDONESIA: STUDI KOMPARATIF ATAS UNDANG UNDANG DASAR TAHUN 1945 SEBELUM DAN SESUDAH AMANDEMEN," *Jurnal Dinamika Sosial Budaya* 18, no. 2 (2016).

practice, this decision-making model is challenging to implement in developing countries. The availability of adequate access channels for information systems is one of the principal challenges that must be encountered.

Another challenge that must be faced is the results of research on alternative solutions that are so broad. Best practices for a policy model obtained from other countries' experience may not be fully adopted later due to country background and ideology differences. Lastly, bureaucracies in developing countries also tend to commit corrupt acts, which can affect their decision-making rationality. For this reason, the thought of Charles E. Lindblom was born in 1965, resulting in an incremental theory of policy-making models. As the antithesis of the comprehensive rational approach, incremental theory seeks to minimize the number of policy alternatives that decision-makers must consider. This model was later developed to serve as a reference in government decision-making.

The incremental policy-making model is carried out by modifying the activities, programs, and policies that the government has taken. The previous policies then became the basis for them to gradually determine the focus in efforts to increase or decrease the activity agenda. This option is seen as providing an overview of the consequences rather than considering all options that have never been done before as a model of comprehensive rational decision-making. Successive limited comparisons are carried out to simplify the decision-making process. In this theory, Lindblom also emphasizes that policy will only work perfectly after a period of time to solve a problem. Problem-solving should be done in stages. Thus, the government can adjust alternative solutions to the development of the issues that arise.

Specifically, this theory was introduced by Lindblom in *The Science of Muddling Through* to glimpse the actual practice of public policy-making in Western countries. According to Lindblom, when the government adopts political policies that are not much different from the previous ones, the government will benefit because this can also minimize the political conflicts that arise. The government also doesn't need to be bothered with a complex analysis process of all new alternative policy options. The modifications made by the government are sufficiently focused on improving the criticisms or suggestions given on the policies that have been created. Thus, policy-making can be

carried out effectively and efficiently, reduce the costs required, and save time.

As a compromise to the criticism submitted to the government, this policy allows for mutual adjustments between actors interested in the issue. Each stage of policy modification can become a path for the government to accommodate broader interests. In this pathway, even though the government must make continuous improvements, the results obtained are more optimal because it can focus on solving the problems it faces so that the goals aspired to make the policy can be met. In essence, this policy-making model has the following characteristics. First, there is a process of selecting objectives/targets and analyzing empirical facts to achieve the expected goals.

Second, unlike comprehensive rational decision-making models that consider all alternative policy options, incremental policies only need to consider solution options for solving the central issue. If there are other alternatives, they will only have marginal or incremental differences. Third, the causes and effects of each successful limited comparison are evaluated slightly. Fourth, decision-makers must be able to define each problem regularly; then, analysis is carried out on the issues successfully identified. This analysis is needed to provide considerations and adjustments to the objectives and means required to overcome possible negative impacts.

Fifth, Lindblom emphasized that no most appropriate public policy formulation exists to solve a problem. The accuracy of the stakeholder's decisions results from the actors' agreement in the analysis conducted on the issues they face. Lastly, this decision is made based on a process of improving existing policies and is a policy that has yet to be introduced recently.

Referring to the consideration of the incremental policy model, it can be stated that the choice of a strategy to strengthen the legal umbrella carried out by online transportation drivers through a judicial review process also received support from the government. Even though the Constitutional Court rejected the application submitted by online transportation drivers, its ruling still suggested carrying out a judicial review through the Supreme Court. The judicial review process took place relatively quickly. From the petition registered on May 2, 2017, the applicants could receive the decision on June 20, 2017.

Based on the decision of Supreme Court Number 37 P/HUM/2017, several articles contained in the Minister of Transportation Regulation Number 26 of 2017 were declared to no longer be binding. This decision was taken considering that online application-based special charter transportation is a logical consequence of the development of information technology and modes of transportation. For this rationale, this phenomenon needs to be accommodated by the government. The various advantages these service providers offer must be welcomed as a turning point for the conventional transportation business, which many large companies have monopolized. By understanding that globalization and digitalization of the economy will potentially strengthen the national economic system, the government must protect and empower online transportation drivers as part of MSME players.

The Supreme Court decision as an incremental policy issued by the primary institution seems to be the beginning of strengthening the national economy. Responsiveness in dealing with the gig economy model then became the beginning of developing a digital e-hailing platform that could support the economy during the pandemic. The Gojek and Grab applications initially only provided online transportation services when the legal protection test for drivers was carried out. Consequently, the digital application will die if the Supreme Court does not pass the legal umbrella. However, because their leading service has received legality from the government, it does not take long for the e-hailing digital platform to continue to develop its services.

Exploring the world of transportation, which is not only provided for passengers, the Gojek and Grab applications also provide services for sending goods and food. With these services, many MSME traders can compete with multinational fast-food restaurants. If previously food delivery methods were only offered by several large companies such as KFC, McD, or Pizza Hut, street vendors and home catering service providers can now offer food delivery facilities without employing a special courier. The food purchasing service provided by the Gojek and Grab applications is much more easily accessible to various groups at a lower cost because no telephone fees are charged. The ease of data access at a low price that digital applications can provide via smartphone is an opportunity cost that is the primary basis for services in the modern era.

It doesn't just cease there; the development of the e-hailing application can now also be a means of making payments for various bills for daily markets. Apart from that, the provider is also developing its application to become a digital wallet that can be used to make payments at various shopping merchants and educational service institutions.

Graph 2. Impact of the Covid-19 Pandemic on Economic Growth in Indonesia<sup>33</sup>



The positive impact of this incremental policy was also felt very strongly in the face of the COVID-19 pandemic, which paralyzed various sectors of the national economy. Government policy, which prohibits direct interaction in shopping centers, has forced multinational companies to withdraw and close their outlets. The information in Graph 2 illustrates that the peak of the COVID-19 pandemic, which occurred in 2020, has caused a decline in national economic growth.

<sup>33</sup> R B Menpan, "Ekonomi Indonesia Tahun 2022 Tumbuh 5,31%." News. Kementerian Pendayagunaan Aparatur Negara Dan Reformasi Birokrasi," <https://www.menpan.go.id/site/berita-terkini/berita-daerah/ekonomi-indonesia-tahun-2022-tumbuh-5-31-persen>.

Figure 1. Impact of the Pandemic on Employment in Indonesia<sup>34</sup>



As a result, many employees were forced to undergo layoffs (see Figure 1) because they suffered from COVID-19, or their companies had to downsize their staff to survive. Some of the impacts directly felt by workers in Indonesia can be seen in Figure 2.

Figure 2. Impact of the Covid-19 Pandemic on workers in Indonesia<sup>35</sup>



The exposure of the work system for online transportation drivers provided by Gojek and Grab through the sharing economy and gig economy mechanisms has sufficient flexibility to deal with the pandemic. Moreover, service innovations provided by utilizing opportunity costs obtained from the progress of Industry 4.0 have provided alternative space to help MSMEs continue to operate during the pandemic. As depicted in Figure 3, the Online Food Delivery

<sup>34</sup> TNP2K, “Expansion of Social Assistance for Workers Amid the Covid-19 Pandemic, Is It Effective?,” TNP2K, last modified 2020, <https://www.tnp2k.go.id/articles/expansion-of-social-assistance-for-workers-amid-the-covid19-pandemic-is-it-effective>.

<sup>35</sup> Ibid.

(OFD) service has positively contributed during the pandemic. According to research outcomes from the demographic research institute of the UI Faculty of Business Economics, the contribution of Gojek partners to the national economy during 2020 alone has reached a value of IDR 104.6 trillion. This figure has increased quite sharply because, in the previous year, the contribution of Gojek partners was only in the range of Rp. 44.2 - Rp. 55 trillion.<sup>36</sup> The contribution of Gojek partners during the pandemic has contributed at least 1% of the national GDP value in 2020. Without the incremental policies taken by the Supreme Court through a judicial review process for online transportation drivers, various innovations and collaborations have now been developed by Gojek, and Grab will not be able to support the strengthening of the national economy.

Figure 3. The Role of OFD in the National Economy during the Covid-19 Pandemic<sup>37</sup>



## Conclusion

From the previous exposition, globalization and the digitalization of the economy have provided new space for more comprehensive business competition and better service. For this rationale, business actors must consider external factors influencing the supply and

<sup>36</sup> Media Digital, *Riset UI: 90% Mitra UMKM Gojek Optimistis Bisa Pulih Dari Pandemi*, 2020, <https://ekonomi.bisnis.com/read/20200805/98/1275264/riset-ui-90-mitra-umkm-gojek-optimistis-bisa-pulih-dari-pandemi>.

<sup>37</sup> Ibid.

demand curve balance to maximize the expected profits. The government has a central role in determining economic policies that can indirectly affect the sustainability of a business unit. Responsive alternative policy-making patterns need to be developed in the face of globalization, which demands the existence of practical legal norms that have value and are helpful. The research results show that the authority of the Supreme Court as a primary institution in conducting judicial reviews of the legal umbrella for online transportation drivers is a form of incremental policy that significantly impacts national economic growth. The responsive reaction given by the Supreme Court to protect online transportation drivers as part of MSMEs has provided space for digital platforms to develop e-hailing applications, which can now strengthen the national economy and empower MSMEs, primarily during the pandemic. Further research can then be generated by reflecting on this evidence, which focuses on discussing the development of other alternative models of incremental policy. This investigation will significantly contribute to filling the research gap in the face of progress in an era that requires everything to dash precisely and efficiently.

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