

LEGISLATION DRAFTING WITH OMNIBUS LAW METHOD AND THE IMPACT ON INDONESIAN LEGAL REFORM

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ABSTRACT

The Omnibus Law is made to target one big issue enabling to revoke and to amend some legislations at one time to simplify them all. The concept of Omnibus Law is the model of regulation mostly adopted by countries applying Common Law System. The application of the model has raised some pros and cons in Indonesia since the enactment of the Job Creation Act. The result of research concluded that the Omnibus Law has the same legal standing with a legislation. However, when viewing from the method of drafting, this Omnibus Law is yet to be regulated explicitly in the Law No. 12, 2011. Drafting a legislation with Omnibus Law method highly influences the national reformation of Indonesian Law, specifically the reformation on the substance of the law. The development in the drafting technique of the legislation with an omnibus method is only for regulations with dimensions of extensive provisions and multi-sectoral character for bridging the sectoral interest, reducing the potency of disharmonisation, and strengthening the coordination. In addition, the use of omnibus method should take into account international standard of the good regulatory practices.

Keywords: Omnibus, Reformation, Law

INTRODUCTION

The commitment of Indonesia as a law state is written firmly in Article 1 sub (3) of 1945 Constitution, saying that: “the state of Indonesia is a law state.” As the one, Indonesia has national purposes to protect all nation of Indonesia and the land of Indonesia and to advance the general welfare, to educate the nation, and to participate in applying the world order based on the freedom, eternal peace and social justice.¹ With the purpose to advance the general welfare, it can be said that Indonesia is a welfare state.²

Specifically, the law state adopted by Indonesia is Pancasila-Law-State. This is a type of modern law state in which the function of legislation is not merely to shape the manifestation of values and norms living in the society, and it is not only a function of the state to regulate, but also it is one of the methods and effective instruments available to regulate and to direct the life of the society towards expected achievement.³

As the legal basic in the form of legislation, the government has promulgated the Law No. 12, 2011 concerning the Enactment of Legislations. In the regulation, it is stated that Legislation is a written provisions embodying legal norms that generally bind and is shaped and decided by state organ or authorized officilas through procedures run in the regulation (Article 1 figure 2).

In general, Law No. 12, 2011 contains principal materials composed systematically as follows: principle of the promulgation of legislation; the type; hierarchy; and the materials containing

in the regulation; the planning of the regulation; the drafting of the provisions; the technique of legislation drafting; the discussion and the ratification of the bill of legislation; the discussion and the enforcement of the bill of provincial regulation and the bill of municipal law; the enactment of the law; the dissemination the the law; people participation in the promulgation process; and other provisions about the enactment of the Presidential Decree and other state organs.

The stage of planning, promulgation, discussion, ratification and promulgation, and the enactment is the step to be taken in the promulgation process of the law. However, the stage is surely done according to the need or condition and the type and the hierarchy of the legislation.

In Article 7 sub (1) of Law No. 12, 2011, it is determined that the type and the hierarchy of a legislation consists of:

1. 1945 Constitution of the Republic of Indonesia;
2. Resolution of People Consultative Assembly;
3. Legislation/Governmental Regulation in lieu of law;
4. Governmental Regulation;
5. Presidential Regulation;
6. Provincial Regulation; and
7. Municipal Regulation.

In addition, under the Article 8 sub (1) of Law No. 12, 2011 what included in the types of legislation are the regulation passed by the People Consultative Assembly, People Representatives Council, Supreme Court, Constitutional Court, The Audit Board of Republic of Indonesia, Judicial Commission, Bank of Indonesia, Ministers, bodies, organs, or commissions at the same level as ones formed under the legislation or Government by the law, Provincial Council of People Representatives, Governor, Municipal Council of People Representatives, Head of the Village or ones at the same level.

In order to elevate the social welfare, one of which is that work opportunity is necessary, however business actors or the government face some problems held back the efforts. Government thought that inviting investors to create job opportunities was delayed by so many of regulations existing at the central or municipal level that when the problems could not be solved, it surely would delay the national economy considering Indonesia will have demographic bonus in 2030-2034. This certainly will impact specially the manpower sector.

Indonesia is one of the countries enacted many regulations. It is recorded that in 2017, there were 42,000 (fourty two thousand) legislation applied. In terms of economy and investment, the government has mapped about 74 (seventy-four) laws that were potential to slow down the economy and investment. Of the 74 Acts, the government will promulgate 2 (two) large law, which are the Bill of Job Creation Act and Bill of Empowerment of Micro, Small, and Medium-Scale Business to increase the competition and to invite investment in Indonesia.⁴

Besides the large number of the regulation, the overlapping also occurred therefore, to solve one problem would not work only by revising one particular regulation. For example, when there is a problem in forestry sector requiring that the regulation to be amended, the Law No. 41, 1999 should be fixed. However, there are still problems with other beleid, for example the Law no. 32, 2009 concerning the Protection and Management of Environment or Law No. 5, 1960 on the Basic Rules of the Land. If following the pattern of the amendment of a law, President Joko Widodo argued that it will take at least 50 (fifty) years⁵ to revise one regulation at a time. Therefore, the reformation of the legislation in order to develop the law is necessary. Without the reformation and the development of the law that fits the need of the society, it will create imbalance and even it will delay the national development.

Starting from the problem, the government of Indonesia took effort to implement the reformation and the development of the law through the regulation management by applying method/technique of new legislation that is Omnibus Law. With this technique, problems in some laws on economy and investment can be resolved without revising many laws whose substances are related to the permit. It is sufficient to make only on new legislation amending articles in some different laws.

Omnibus Law, naturally, is a method to make regulation or law consisting various subjects or main material for certain objectives to deviate a norm. Omnibus is different from the common bill of law in terms of subject coverage, the number of articles, and the complexity. An omnibus law covers nearly every inter-related matter. An omnibus law reflects an integration, codification of the law that the end-goal is to streamline the application of the law. The legislation technique of omnibus law, theoretically and practically, is not known widely in Indonesia.

Patrick Keyzer argued that Omnibus is a Latin word that means “all” or “for everything”, so an omnibus law is a law that covers a number of diverse or unrelated topics.⁶ Omnibus Law is also acknowledge as Omnibus Bill. Black's Law Dictionary defines the word “Omnibus” with, relating to or dealing with numerous objects or items at once, including many things or having various purposes.⁷

The concept of omnibus law in the legislation is an implementation of Anglo-Saxon tradition whose character is the Common Law system. Some countries such as United States of America, Canada, and Ireland has been using this approach, either omnibus law or omnibus bill. This concept is frequently used by US in making their law. Regulation in this concept is to draft one new law to amend several laws at a time.⁸

Today, some countries have been applying omnibus law such as Canada, USA, Ireland, Vietnam and Philippines. Ireland even enacted an omnibus law revising more than 3,000 laws (Investor.id, 2019). The technique of omnibus is also adopted by several South East Asia countries. In Vietnam, this technique was used to implement the WTO agreement (World Bank, 2006). The application of omnibus law similar to what has done in Indonesia is implemented in Philippines with it's Omnibus Investment Code of 1987 and Foreign Investments Act of 1991.

There are 3 (three), at least, the function of omnibus law; first, to reduce the overlapping among laws. Second, to optimize the amendment or revocation process of the law. Third, to eliminate the sectoral ego contained in several legislations. The concept of omnibus law can be applied in Indonesia to uniform the central policy and the regional ones to support the investment climate. This concept can also the short way to solve the disharmonization among regulations both vertically and horizontally.⁹

The problem occurs is that there has been pros and cons raised in the society since the draft the bill of Job Creation Act was first introduced until it was discussed and passed as Law No. 11. 2020 on Job Creation by the DPR on 5 October 2020 and enacted on 2 November 2020. The long debate focused on both the formal and material parts has been occurred among law scholars and practitioners in Indonesia. People argued that the concept of omnibus law used in the making of this Law No. 11, 2020 concerning Job Creation is conflicting the provisions in the Law No. 12, 2011 on the Enactment of Legislation since the concept is not stated as one of the principles in making law.

It should be understood that omnibus law is only a method in drafting a legislation. This means that the method is only related to the drafting of the law not the making of the law because the making of the law is part of the enactment of a law, as explained above, that are planning, drafting, discussing, passing, or promulgating and enacting. Thus, omnibus law is a method used when drafting the Law No. 11, 2020 on Job Creation which technical rather than the purpose of the law itself that is to invite more investor to create more job opportunities in Indonesia.

RESEARCH METHODS

This research is legal research with typology of normative law or doctrinal research to produce new arguments, theory or concept as practitioner in solving problems. The method of approach used to answer the legal issue in this research is juridical normative using statute and conceptual approaches¹⁰ which is library materials related to the drafting of legislation using the method of omnibus law and its impact on national law reform. Data were gathered with the technique of document study and interview. Data obtained were analyzed with juridical qualitative method by qualifying and classifying problems systematically and were analyzed qualitatively without using any mathematical and statistical formulation.

RESULT AND DISCUSSION

A. The Drafting of Legislation with Omnibus Law Method Related to The Law No. 12, 2011 on The Enactment of Legislation

Indonesia as a law state that is historically and philosophically more to the term *rechtstaats* is a state with civil law system or European Continental system. It implies that the state is dominant in terms of executive and legislative in the promulgation of the legislation either in the level of regulation, governmental regulation, ministerial regulation up to provincial level of regulation. Some types of regulation are made as the effort to create order and legal

assurance in one particular country for the base in running the country, society, legal entity or business can have groundwork or legal umbrella.¹¹

The concept of omnibus law distincts from one recognized in Indonesia. Model of law that is applied now in Indonesia is principal legislation, organic law, umbrella regulation, and codification or unified law, and also compilation of law. If the omnibus law in this context is a legislation made to connect big issues or to house several aspects of the law that may revoke or amend several laws at the same time to make it simpler, there is certainly difference from the model of law applied in Indonesia. For instance, the principal law in this context is the legislation that is the main or the principle in regulating things (it still needs an implementing regulation)¹², such as Law No. 5, 1960 on The Basic Rules of Land.

The provisions regarding the enactment of regulation in Indonesia refer to the Law No. 12, 2011 on the Enactment of Legislation which was amended with the Law No. 15, 2019. The regulation shows that the concept of omnibus law is yet to be regulated as a method of legislation drafting.

Considering the legal policy condition in Indonesia, the use of omnibus law method is possible, however it requires some adjustments toward the law regulating the drafting of the legislation when it comes to formal procedure.¹³

Novianto Murti Hantoro stated that the application of omnibus law in Indonesia will face some challenges:¹⁴

1. Legislation technique

The enactment of legislation even when counting the format and technique of legislation drafting is rigidly regulated in Law No. 12, 2011 including the annex. One of the principles of the legislation saying that a regulation can be amended and revoked with a levelly higher or equal regulation. Based on that statement, it is possible for a legislation to revoke other regulation that does not regulate similar matters or titles. However, the technique that has not yet or is seldom used is the omission of provisions in dozens of regulations with only a legislation.

2. Implementing the principles

One of the wellknown principles is *lex specialis derogate legi generali*. This principle values that specific provision of law will rule out the general rules. In relation to this, omnibus law will also deal with the principle ruling that the new law will put aside the old law (*lex posterior derogate legi priori*). This means that it is possible that the provisions in the omnibus law to be omitted or revised by some new laws even though the laws are not omnibus. This chaos in law will happen if the law omits and rules out one another.

3. Concern of Recentralization

Omnibus law comes originally from the country that is a federal state. In a unitary state with autonomy system, it enables omnibus law to reduce the authorities assigned to the regional

government through Regional Government Act including regions set as special, or region with special autonomy.

The method of omnibus law applied in Job Creation Act is in 3 situations:¹⁵

1. Regulations that will be amended should directly be related;
2. Laws that will be amended are not directly related;
3. The legislations that will be amended are not related but in practice they are intertwined,

Theory-wise applied in Indonesia, the standing of law with omnibus law concept is yet to be regulated however some rational legitimization can be seen found when we look at the legislation system in Indonesia. if we think that omnibus law is a product of legislation such as regulation, it is actually fine since regulation is included in the hierarchy of legislation regulated in the Law No. 12, 2011 on the Enactment of Legislation.¹⁶

In addition, when viewed from the practice applied in several countries, Jimly Asshiddiqie portrayed the application pattern and technique in drafting an omnibus law in two patterns:¹⁷

1. One particular legislation amends many laws at a time by amending certain parts of the laws without revoking the laws;
2. One particular law integrates many legislations into one unified new law by revoking all the previously applied laws and amending parts of the content in the old laws according to what necessary.

In the first pattern, one regulation can be made compact to fit the needs. However, the coverage of the matter regulated may include the subject environment stipulated by several applied laws that needs changing at once with one particular legislation. Whilst, in the second pattern, there is similarity with codification form that tries to integrated all products of legislation stipulating one kind of matter in one unitary law.¹⁸ Yet, the difference is that in codification form, no amendment is done toward other regulation's subject of the laws that are codified.

While in omnibus law, the material subject of the regulations integrated is amended as a whole or partly according to the needs.¹⁹

Edmond Makarim claimed that naturally omnibus law is in the form of legislation.²⁰ But some also argued that legislation with omnibus law method can be an umbrella law since it stipulates entirely and has legal binding towards other regulations as argued by Jimmy F. Usfunan.²¹

Maria Farida Indrati understood omnibus law as a new legislation containing or stipulating various substances and subjects to simplify several regulations applied. She claimed that omnibus law is not right to be consider similar with umbrella law (raamwet, basiswet, moederwet) which poses as main law of some other legislations therefore it is at the higher level than other 'inferior' for umbrella law delegates various stipulations further to other laws.²²

Regardless the aboves, since people started to discuss it either as a legal term or legislation, omnibus law indeed is understood as a method or technique in drafting law with the intention to amendment several applied legislations at once. It means that when a bill of law is enacted

as law, the term omnibus law is actually not an importance anylonger or even is no longer needed since the status becomes officially a legislation as same as other regulation in general.²³ It is in line with what A. Ahsin Thohari defined omnibus law as a drafting technique of legislation that it is simply about the choice of method.

The distinction between the legislation technique usually applied in Indonesia and the method of omnibus law are:²⁴

1. Substance regulated

It has been a customary Indonesia for a legislation to contain one particular matter/subject/substance, while omnibus law stipulates various matters/subjects/substances that may even not related one another.

2. Drafting technique

Amending or revoking law in Indonesia has used a method of one proposal to amend or revoke one legislation only and not to alter the subject of other regulation. In the case of omnibus law, it uses technique to amend, revoke, or apply several stipulations in various laws only through one proposal to enact legislation to the parliament.

3. Codification vs Omnibus Law

Indonesia recognizes codification system that puts forward and idealizes the writing and the drafting of legislation in one unity on subject and object stipulated in every transcript of legislation categorized as legislative and executive codification. While omnibus law method emphasizes and idealizes the writing and drafting. It has unitary character and harmonious with various subject of regulation stipulating different subject and object from other legislation at the same time in one unitary system of the highest state law.²⁵

Even though the Enactment of Legislation Act does not recognize the term omnibus law, the stipulation on the application of omnibus law should remain comply with the provisions in the Enactment of Legislation Act either for the legal standing or the subject regulated.

B. The Impact of Drafting Law with Omnibus Law Method on The National Legal Reform of Indonesia

The national legal reform is done through the reformation process of legal substance, structure, culture, and facilities and infrastructure. Therefore, in setting up the grand design of national system of legal reformation, it is necessary to establish development policy on each component of national legal system i.e., legal substance, structure, culture, and development of legal facility and infrastructure.

Based on the above mentioned, legal policy in supporting the national development in 2045 is set through vision and mission of national legal reform in general and then is completed with the indicators of achievement and the arrangement of stages and priorities.

The 2025 vision of national development of the law is the effective, efficient, and innovative implementation of the law to support and to guard the national development for the

accomplishment of Indonesia's 2045 vision. Based on the vision, the National Development of Law are:

- a. Establishing the Pancasila-based legal substance and responsive and anticipative toward the advance of technology and its implementation by lying on international standard of good regulatory practices and the need and characteristic of Indonesia
- b. Building a firm legal structure that can support the effectiveness and efficiency of law.
- c. Establishing a strong legal culture in state apparatus and in the society manifested in the strong legal awareness based on ethic of law and service oriented.
- d. Building legal facility and infrastructure dan can support the development of legal substance that is manifested with the support of information technology of law that is integrated, complete and easy to access by people.

Referring to the vision and mission of national law reform above, the indicators of accomplishment of the vision and mission are:

- a. Realization of Pancasila-based legal substance that responsive and anticipative toward the advance of technology and its implementation by lying on the good regulatory practices and the need and characteristic of Indonesia
- b. Materialization of a firm legal structure that can support the effectiveness and efficiency of law.
- c. Actualization of a strong legal culture in state apparatus and in the society manifested in the strong legal awareness based on ethic of law and service oriented.
- d. Materialization of legal facility and infrastructure dan can support the development of legal substance that is manifested with the support of information technology of law that is integrated, complete and easy to access by people.

The strategi of national legal reform is done toward each component of national legal system i.e., legal substance, structure, culture, and development of legal facility and infrastructure to achieve the vision of national legal reform.

a. Strategy in establishing legal substance

In general, the strategy of legal substance needs to answer the problems dealt with today such as the need to strengthen the Pancasila-based law and a set and contextual legal reform, to ease the tension as a result of pluralism in law that is badly managed, to manage regulations to be more harmonious, not overlapped, inexpensive and functional.

b. Strategy in building legal structure

The problem of public trust toward state organ, mainly toward the law enforcement organs shows that to establish, enforce, apply a strict, professional, effective, and efficient and service-oriented law requires a serious and revolutionary management.

Reformation to be done will firstly be related to the management of the organ to clarify the task, function, and responsibility of each organ to minimize the overlapping of power and to create an orderly coordination and synergy among organs within legal system.

Reformation also needs to be done upon the quality of human resources to create manpower with high moral integrity; professional capability, intellectual maturity, and wisdom.

Development of human resources should be directed toward the capacity to handle legal issue with high technology content and multidimensional. In addition, reformation should also be done toward the financial framework that is rightly targeted and toward the quality improvement of monitoring and also supporting facility and infrastructure.

c. **Strategy in building legal culture**

Building the legal culture will be the focus in the strategy of future national legal reform. In Indonesian context, building culture of law is done in order to achieve three values in legal reform: philosophical, sociological, and juridical values. The philosophical value is stressing on the sense of justice and the truth, the sociological values that is in accordance with the values of culture living in the society, and juridical value that complies with the applied law.

To achieve all of these, strategies are necessary, one of which is mainstreaming the ethics that would be the foundation of the future role of law run by officials with commitment and integrity. Building the culture of law should encourage the creation of strong legal culture withing all components of nation, both the apparatus and the society.

d. **Strategy in building facility and infrastructure of law**

Building the facility and infrastructure of law focuses on the development of technology as part of the legal system. Through technology, legal system is expected to be more transparent, accountable, efficient, and easier to access.

From the Grand Design of National Legal Reform above, we can see that the drafting of law with omnibus law method influenced greatly the national legal reform of Indonesia in particular the reformation in legal substance. The development of drafting technique of the law with omnibus law approach for the legislation with dimension of extensive and multisectoral provisions for connecting the sectoral's interests, reducing potential disharmony and strengthening coordination in the making of legislation. The omnibus approach should consider good regulatory practices that has been an international standard such as public consultancy and the cost and benefit analysis.

Omnibus law is a concept of making the law in which a legislation made to contain some subjects/substances for various regulations related to the stipulation enacted and this law can amend or revoke the previous laws. Omnibus law is also called all- in-one law that can replace the legal norm in several laws.²⁶

Jimly Asshiddiqie claimed the benefit of the making of law with omnibus law approach. First, it is considered efficient in the context of time since it can accommodate the needs of new policies in single process of legislation making²⁷

In Indonesia, there are so many, complicated, and norms-conflicting legislations. The complexity of laws is worsened with the practice of drafting the provisions that only refers to the title of the regulation,²⁸ issues out of the substances that are not reflected in the title cannot be included in the regulation, consequently when some changes required, the bill of the amending legislation cannot also stipulate issues outside the matters under the scope of the title.

The practice developed from time to time, in which the law that has been amended twice or three times should write its title long to accommodate the title of the previous amended laws. For example, “Law concerning The Fifth Amendment of Law No. ... Year ... that has amended with Law No. ..., Year ..., last amended with Law No. ..., Year ...” and so on. This practice is considered good for it focuses its stipulation in one integrated draft of legislation. Whereas in its application, it is always found that the normative relation among the interconnected fields either directly or indirectly.²⁹

In practice, it is also found that there are two or three legislations that do not regulate issues that are related at all, however, some time, in some particular place, there is one case involving conflicting norms coming from two laws that do not regulate related issues. These cases should naturally be the basis to amend provisions in various related laws through omnibus legislative technique approach.³⁰ Second, regulations can be managed to be harmonious because in every opportunity to amend with one law, the substances contained in many regulations can be put in one integrated new law.³¹ The law becomes more so harmonious and integrated that is easier to disseminate and for people to understand. In its implementation, such law certainly is so simpler to implement that the system of legal norm developed can really be effectively implemented to secure assurance, justice, and benefit.³² Third, with omnibus law method, the state and government policy is binding since it is officially made in the form of legislation can be easier to be implemented or applied in practice.³³

When comparing to a policy in which the provisions are stated in many laws, for those who are not familiar with the science of the legislation can be difficult to read so many laws only to tackle certain concrete problem plus when the laws are conflicting one another and to have to determine which law to follow. With omnibus law approach, this problem will be solved for those different laws are put in one harmonious and integrated transcript of legislation.³⁴

In addition, Louis Massicotte also argued about 2 (two) benefit in adopting omnibus law method in drafting the law:³⁵

1. The omnibus law will save time and shorten the process of legislation because we do not have to make amendment toward so many laws but make only one bill of law containing many amending subjects of various laws.
2. It makes the minority opposing and majority party in parliament to have equal opportunity.

Glen S. Krutz claimed that omnibus law is an advantage in preventing uncertainty of law raising post enactment of a law containing one particular subject resulting in a potential contradiction

with other laws. It can also increase the productivity in making the legislation for it can accommodate so many interests.³⁶

Back to what Jimly Asshiddiqie argued, in addition to some advantages of the practice of law making with omnibus law approach, there are also some flaws in applying the method. The omnibus law method can harm the process of democracy and law state, especially when it comes to the principle of due process of law making.³⁷ Negative impacts of the omnibus law practice are:³⁸

1. The hearing process in parliamentary forum in terms of technical is decreasing in quality and lowering the level of trust;
2. The quality of public participation is low;
3. The quality of substantial debate in parliamentary forum for each issue of policy related to the public interest is also decreasing;
4. Public debate through public discourses is out of focus and pointless.

Where the role of media and political and academic forums is crucial as the medium of socialization and education for people. These are the factors setting up the process of democracy developed from a mere formalistic and procedural to a more qualified and integrated substantive democracy.

Aaron Wherry argued that omnibus law is a practice of law that is pragmatical and less democratic since it replaces and amends the norms in several laws with different political initiatives.³⁹

With so many laws and various topics contained in an omnibus law, it is possible for incorrectness and flaws to occur when drafting the legislation. The Commonwealth Court of Pennsylvania in one of its judgments in 1901 ruled about the danger of the use of omnibus law method i.e., the result of the mix of different and many subjects in one omnibus legislation can create confusion and misleading for some legislatures because in many occasion the subjects are not irrelevant.⁴⁰

CONCLUSION

Regulation with omnibus law method when viewed from legislation system in Indonesia as stipulated in the Law No. 12, 2011 concerning the Enactment of Legislation shows that the legal standing of the law in the hierarchy of legislation is the same level with a Legislation. However, if observed from the drafting method, legislation with this method is not yet explicitly stipulated in the Law No. 12, 2011. It is because omnibus legislation is a law to target one extensive issue that can revoke or amend several laws at a time to simplify them. The implementation of omnibus law concept in legislation is more about the Anglo-Saxon tradition with characteristic of Common Law system as applied in USA and Canada. Therefore, an omnibus law can be interpreted as the solution for various provisions into one legislation.

The making of law with omnibus method influences greatly the National Law Reform in Indonesia, especially the legal substance reform. The drafting technique of regulation with omnibus method is developed for laws with extensive and multisectoral dimension of stipulations in order to connect the sectoral interests, to reduce disharmony potential, and to strengthen the coordination in making the law. In practice, the use of the method should follow the good regulatory practices that is international standard. Today, implementing the concept of omnibus law in Indonesian legal system will face some obstacles such as no legal basis to implement, difficulties to formulate the general provisions, conflict with the principle of *lex specialis derogat legi generali*, recentralization of power in the administration. Therefore, some preparation should be arranged to set up the regulation for the omnibus model, in this case, legal basis and guidance including the process of regulation making with omnibus model that is more transparent and democratic.

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