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# The Problem of the Constitutional Court's Decision in the Formal Test of the Job Creation Law

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## ABSTRACT

One year already after the enactment of Law Number 11 of 2020 concerning Job Creation which was declared conditionally unconstitutional by the Constituency Court through Decision Number 91

/ PUU-XVIII / 2020. In the decision, it is stated that the Job Creation Law contains formal defects in the process of its formation, so that the DPR and the Government must make improvements in accordance with the procedures for the formation of applicable laws and regulations, with a maximum period of 2 years from the time the decision is read by the Constitutional Court. From this writing, the author focuses on discussing the Formal Test of the Job Creation Law After the Constitutional Court Decision and the direction of improvements made by the government after the Constitutional Court Decision on the Job Creation Law. In writing this article, the author uses normative juridical research methods sourced from books and also articles that are in accordance with the theme written. As a result of this study, the author can describe the results of the formal testing of the Job Creation Law which is connected with the Constitutional Court Decision with The Science of Legislation, using a statutory approach and using theories from the views of legal experts through a conceptual approach that is carried out systematically and holistically.

**Keywords:** *Job Creation, Formal Defects, Constitutional Court Decision*

## INTRODUCTION

The provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia affirm that, "*The State of Indonesia is a State of Law*", meaning that the consequence of understanding the state of law is the existence of an obligation to fulfill the principle of legality. This principle of legality means that all government actions must be based on valid and written laws and regulations, so that the applicability of this Principle of Legality is needed in laws and regulations. According to Bagir Manan, explaining that the laws and regulations have internal and external functions. This internal function becomes a subsystem in law that functions in the creation of laws, carries out legal renewal, the integrity of legal pluralism and guarantees legal certainty. In its external function, it is used

as a link between laws and regulations and the place of enactment, namely in the social function of law, the function of change, stability, and convenience.<sup>1</sup>

In the laws and regulations that are the main instruments, namely the Law which normatively regulates further arrangements regarding the provisions of the 1945 Constitution of the Republic of Indonesia, the existence of an order for an Act to be regulated in the Law, ratification of international agreements, follow-up of a Constitutional Court Decision, or the fulfillment of legal needs in society. An example of a case is the history of the<sup>2</sup> *Marbury vs. Madison* case in the United States, where in the ruling there is a judicial review doctrine. Since the 1803 case until now, many countries have had their own Constitutional Courts, including in Indonesia. In Article 24 paragraph (2) of the Constitution of the Republic of Indonesia of 1945 it is stated that: "Judicial power is exercised by a Supreme Court and the judicial bodies subordinate to it in the general judicial environment, the religious judicial environment, the military judicial environment, the state administrative court environment, and by a Constitutional Court". Based on the provisions of the Article of the Constitution, there are two most important things, firstly, namely the judicial institution, namely the Constitutional Court, and the second is about Testing the Law against the Basic Law.<sup>3</sup>

The Constitutional Court has the authority to test the Law against the 1945 Constitution of the Republic of Indonesia, either in substance or material content in the Law, in accordance with the procedure for the formation of laws. In the perspective of legal formation in Indonesia, the authority of the Constitutional Court is a negative legislation because it can cancel provisions that are contrary to the 1945 Constitution of the Republic

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<sup>1</sup> Bayu Dwi Anggono. 2020. *Pokok-Pokok Pemikiran Penataan Peraturan Perundang-Undangan di Indonesia*. Jakarta: Konpress, p. 14; Jazim Hamidi & Kemilau Mutik. 2011. *Legislatif Drafting*. Yogyakarta: Total Media, hlm. 15.

<sup>2</sup> Pasal 10 ayat (1) Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan.

<sup>3</sup> Jimly Asshiddiqie. 2006. *Hukum Acara Pengujian Undang-Undang*, Jakarta: Hukum Acara Pengujian Undang-Undang, p. 50

of Indonesia. The constitutional court's decision to overturn this norm contrary to the Constitution is final and binding. Thus, this nature does not determine any other legal remedies that can be pursued to correct the decision of the Constitutional Court. As a follow-up to the decision, namely positive legislation which is a power possessed by the DPR together with the President.<sup>4</sup> As a follow-up to the ruling is positive legislation which is the power that the DPR has together with the President. The problem that arises is that it turns out that the Constitutional Court's decision did not directly receive a follow-up response by the DPR to make amendments or adjustments to the results of the Constitutional Court's decision. In practice or implementation, the DPR did not immediately follow up on the Constitutional Court's decision, so the execution of the Constitutional Court's decision was not easy. There are two important factors that will influence the attitude of the DPR to conduct legislative review, namely the first is related to the substance of the controversial Constitutional Court ruling. The second is related to the mechanism and system of submitting bills in the DPR which are planned and integrated in the instruments of the national legislation program.

Indonesia has now reached the point where the law is an instrument in national development, which has a very large role in determining the direction of the development of the Indonesian nation in all aspects. This point is concerned with the start of a new decade filled with all sorts of new threats, challenges, obstacles and many distractions. This can arise from anywhere and from anyone, it can be externally or internally. From this symptom, humans can easily judge and observe, as currently the public is busy with new challenges initiated by the agenda of the Advanced Indonesian Cabinet Government by placing a Draft Law on Job Creation which is included in the National Legislation Program (PROGLEGNAS). The government in this case issued Law Number 11 of 2020 concerning Job Creation. The objectives of the establishment of the Job Creation Law are as follows: (1) creating and increasing employment by providing

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<sup>4</sup> Jurnal Legislasi Nasional, Vol 6 No 3, September 2009, p. 3

convenience, protection and empowerment of cooperatives and UMK-M as well as national industry and trade so that they can homogenize the Indonesian workforce as widely as possible, while still paying attention to the balance and progress between regions in the national economy: (2) guaranteeing to every citizen who gets a job, in order to receive fair and proper remuneration and treatment in the employment relationship: (3) make adjustments to several regulatory aspects related to partiality, strengthening, and protection for members of cooperatives and UMK-M and national industries; and (4) make adjustments from various regulatory aspects related to increasing the value of investment, facilitating and accelerating national strategic projects with an orientation to national interests based on the Pancasila Ideology.<sup>5</sup>

This Job Creation Law was formed by the omnibus law method by simplifying 81 laws with a total of 1,244 articles into one law. This omnibus law method is commonly used in countries that use the common law legal system, such as America. According to Maria Farida Indrati who stated that the Omnibus Law is one of the Laws that contains and regulates various kinds of substances and subjects as a step of simplification of various applicable laws. In the implementation of the issuance of the Job Creation Law, it received a lot of opposition from the public, because the process was assessed very quickly and in its preparation, there was no participation from the public, so there were many errors in the content of the article which were considered very detrimental to the community. Normatively, if a law is considered contrary to higher laws and regulations, it can be tested to the Constitutional Court based on the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that: "The Constitutional Court has the authority to adjudicate at the first and last level whose decision is final, to test the Law against the Basic Law". Therefore, the Constitutional Court granted the application for a formal

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<sup>5</sup> Pasal 3 Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja.

<sup>7</sup> Maria Farida Indrati, "Omnibus Law, UU Sapu Jagat?", dalam *Harian Kompas*, 4 Januari 2020, p. 6.

test of the Job Creation Law. The Constitutional Assembly affirmed that Law Number 11 of 2020 concerning Job Creation was considered formally flawed, so the Court declared that the Job Creation Law was conditionally unconstitutional.<sup>6</sup>

The decision of the Constituent Court on the formal testing of Law Number 11 of 2020 concerning Job Creation continues to be a polemic and public discussion. Of the 12 applications that will be tested both formally and materially, only 1 application has been granted, namely in the Constitutional Court Decision No. 91/PUU-XVIII/2020 which states that the Job Creation Law is unconstitutional conditional. The Constitutional Court explained that the reason why the Job Creation Law was declared unconstitutional, this is because the Constitutional Court wants to avoid legal uncertainty and the great impact that will be caused, therefore the Court must consider and balance the formal requirements in creating the Law. In its 448-page ruling, the Constitutional Court also ordered the framers of the Act to make improvements for a period of not more than 2 years, from the time the judgment was pronounced. If no improvement is made during the grace period, then this Job Creation Law is declared permanently unconstitutional. On the contrary, the consequences of articles or materials containing a number of laws that have been repealed and amended, the Job Creation Law can be re-enacted. The Constitutional Court also ordered the Government to affirm all actions or policies that are strategic and have a broad impact, and not to issue new implementing regulations related to the Job Creation Law.

Based on the background that has been described, the author in this study will examine: (1) How to Test the Formal Implementation of the Job Creation Law After the Constitutional Court Decision; and (2) What is the Direction of Improvement that will be carried out by the Government in the management system of the Establishment of Laws and Regulations after the decision. The purpose of this study is as follows: (1) In order to analyze the Formal Testing of the Job Creation Law after the Decision of

the Constitutional Court; and (2) In order to analyze the direction of improvements made by the Government to the system in the management of the Establishment of Laws and Regulations after the Decision of the Constitutional Court that has been issued.

## METHOD

This research uses research methods with the type of normative juridical research, where the research is used to find coherence between legal rules and norms, legal norms with legal principles, and actions with legal norms or principles. Mukti Fajar and Yulianto Ahmad in their book explained that this normative legal research is a study that places the law as a building in a system of norms consisting of principles, norms, rule of laws and regulations, agreements, and doctrines (teachings) applied. As a result of this study, the author can describe the results of the formal testing of the Job Creation Law which is connected with the Constitutional Court Decision with The Science of Legislation, using a statutory approach and using theories from the views of legal experts through a conceptual approach that is carried out systematically and holistically. The data used in this study also used secondary data, which was obtained through literature studies and secondary data through the collection of materials both primary, secondary, and tertiary. Then all these data are processed and arranged into one systematically and logically, by providing a prescription or solution that should be able to solve the problem at hand.<sup>7</sup>

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<sup>7</sup> Peter Mahmud Marzuki. 2019. *Penelitian Hukum, Edisi Revisi*, Cetakan ke-14. Jakarta: Prenada Media Group, hlm. 47.

## RESULT & DISCUSSION

### I. FORMAL TESTING OF THE JOB CREATION LAW AFTER THE CONSTITUTIONAL COURT'S DECISION

On November 25, 2021, the Constitutional Court (MK) read Decision Number 91/PUU-XVIII/2020 concerning Formal Testing of Law Number 11 of 2020 on Job Creation (Job Creation Law). In its ruling, the Constitutional Court granted some of the applications submitted by Migrant CARE, the Nagari Customary Density Coordinating Board of West Sumatra, the Minangkabau Customary Court, and Muchtar Said. More fully, the citation *in a quo* judgment states that the establishment of the Job Creation Law is contrary to the 1945 Constitution and does not have conditionally binding legal force as long as it is not interpreted as "no improvement has been made within 2 (two) years since this decision was pronounced". Stating that the Job Creation Law remains in force until improvements are made to the formation in accordance with the grace period as specified in this decision."

The decision read by the Chief Judge of the Constitutional Court, Anwar Usman, not only succeeded in resolving the conflict between the people and the framers of the law (read: DPR and the President) due to the implementation of the Job Creation Law. However, more than that, the sound of the verdict also triggered the birth of confusion in the community. In a writing that dates back hundreds of years, James B. Thayer (1893) introduced the theory of judicial restraint. This theory, he introduced in a paper entitled "*The Origin and Scope of the American Doctrine of Constitutional Law*" by saying that courts should limit and refrain from making policies that are the domain of the authority of the executive and legislative branches of power.

The theory of judicial restrictions was later developed by many experts in the following years. One of the experts who developed this



theory and is widely referenced is Richard A. Posner. In his article entitled "The Rise and Fall of Judicial Self-Restraint" published in *California Law Review* (2012), he classified the approach to judicial restriction theory into three categories. All three categories are: first, the approach of legalism or formalism which states that judges only carry out the law and do not make laws. Second, modesty, institutional competence, or process jurisprudence which requires judges to respect and not enter the territory of legislative or executive authority. Ketiga, a constitutional restraint that places judges to be very reluctant to declare unconstitutional a decision or an executive or legislative action.

According to Bisariyadi (2015), the theory of judicial restrictions is also used by the courts to maintain harmonious relations with other branches of power, especially the executive and legislative branches of power. The relationship must be maintained by the courts so that they avoid political attacks that can endanger the existence of their institutions. Various kinds of political attacks can be in the form of dissolution of the judiciary, limiting the authority of the judiciary, increasing the authority of the judiciary without providing additional resources, politicizing the recruitment of judges, delaying the disbursement of the budget needed by the judiciary and other forms of political attacks that have the potential to threaten the existence of the judiciary.

For example, in 2012, the Hungarian Constitutional Court came under tremendous political attack through constitutional changes. Under the new constitutional rules, the authority of the Hungarian Constitutional Court was restricted and the procedure for selecting constitutional judges was changed to benefit the regime in power. Ukraine's Constitutional Court came under intense political pressure when it was asked to assess the constituency of the Ukrainian President's request to dissolve Parliament in 2007. Such intense political pressure even led the Chairman of the Constitutional Court of Ukraine to resign. One form of political pressure came from the police, when they decided to examine constitutional judges on corruption charges. Finally, the political pressure exerted on the Ukrainian Constitutional Court succeeded in shutting down the existence

of this constitutional judicial institution. This is because, after the incident, 3 judges were removed from office and another 4 judges applied for leave to the president.

The need for regulatory reform in Indonesia has been swelling due to the number of regulations that are perceived to be not easy to carry out in increasing business activities and the absence of support for investment activities. As in the present, the situation is getting worse due to the existence of data on laws and regulations that are often not the same as data managers from one another. Other problems such as the absence of an institution that is the place to be the sole manager of official laws and regulations data, thus making the data not become structured. therefore, in Indonesia, it still does not show that its regulations have problems that must be addressed quickly.<sup>8</sup>

A year after the enactment of Law Number 11 of 2020 concerning Job Creation, the Constitutional Court finally decided the job creation law was unconstitutional. Through Decision Number 91/PUU-XVII/2020 or the Formil Test Decision of the Job Creation Law read on November 25, 2021, the decision states that the Job Creation Law contains formal defects in the process of its formation, so that the DPR together with the government must improve the law in accordance with the procedures for the formation of the applicable law and within a maximum period of two years in the future. This Job Creation Law is a manifestation of neoliberal authoritarian cositualinalism that has been opposed by society since its inception. The Constitutional Court declared the Job Creation Law to be formally flawed, and the Job Creation Law is still valid even though it has been suspended.

In substance, the Job Creation Law is considered very detrimental to the community, especially in the field of labor. Normatively, in Article 51A paragraph (3) of the Constitutional Court Law, if it is connected with the Constitutional Court Decision Number 79/PUU-XVII/2019, it has

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<sup>8</sup> Wicipto Setiadi, *Simplifikasi Regulasi Melalui Pendekatan Omnibus Law: Suatu Keniscayaan*, Orasi Ilmiah Dalam Rangka Dies Natalis Universitas Pembangunan Nasional "Veteran" Jakarta Ke-57, 7 Januari 2020, p. 2.

determined the requirements in submitting an application for formal testing, as follows:

1. Testing of the implementation of procedures in the formation of laws, both in the discussion and in making decisions on the draft law into law;
2. Assessment of the form, format, or systematics of the statute;
3. Testing with respect to the authority of the institution, which makes decisions in the process of forming laws;
4. Testing of other things that are not included in material testing.

In the main application submitted, the applicant in the Constitutional Court Decision Number 91 stated that, the Job Creation Law did not meet the provisions in the formation of laws based on the 1945 NRI Constitution and Law No. 12 of 2011, so that in this formation it was considered a formal defect or procedure, because: <sup>9</sup>

1. This Job Creation Law is not appropriate and violates the compositional format in the regulations in Law Number 12 of 2011;
2. This Job Creation Law is contrary to the principles in the formation of laws and regulations, in the form of the principle of clarity in objectives, the principle of usefulness and usefulness, the principle of clarity of formulation and the principle of openness;
3. Changes to the content material after the joint approval with the DPR and the Government, which is contrary to Article 20 Paragraph (4) of the 1945 NRI Constitution and Article 72 Paragraph (2) of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations.

The establishment of a law must guarantee meaningful participation, it needs more than just the constitutional court to control the formation of laws, the constitutional court's decision can cause legal uncertainty, and the best way for the government to improve the Job Creation Law is to repeal it first. In testing the Job Creation Law, it is indeed colored by various differences of opinion by Constitutional Judges, so it is important

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<sup>9</sup> Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2021.

to straighten out some of the Constitutional Court's considerations in the Formal Testing of the Job Creation Law as follows:

1. In relation to the grace period for applying for formal examination, based on the Constitutional Court Decision Number 27/PUU-VII/2009 mentioned in The Constitutional Court Decision Number 91, which is for 45 days from the time the law is contained in the state gazette. The Constitutional Court has a deadline to conduct an examination of no more than 60 days from the time the case is heard. The formal testing case of the Job Creation Law, which was registered on November 24, 2020 and was only read on November 25, 2021, was due to the consideration of the Constitutional Court that the test of the Job Creation Law was in the trial period, so it had to wait for the case to be examined by the Constitutional Court.
2. The use of the omnibus law method in the formation of the Job Creation Law was considered by the Constitutional Court that:
  - 1) In addition to using the 1945 NRI Constitution as the basis of the state, Law Number 12 of 2011 concerning the Establishment of Laws and Regulations is used as a benchmark in conducting formal tests, as stated in the opinion of the Constitutional Court in its Decision Number 27/PU-VII/2009. Therefore, in the preparation of laws, it must be in accordance with rules or procedures and methods that are certain, standard, and in accordance with standards that can bind all authorized institutions.
  - 2) There is a vagueness in the form of the Job Creation Law which is reviewed in terms of giving titles, where the procedure for giving this title has also been regulated by default in Appendix I to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations, both in terms of new laws, changes and those that have been repealed.
  - 3) The formulation of the Job Creation Law raises confusion because as a changing law, there is a separate formulation of principles, objectives and scopes so as to cause overlaps that

cause uncertainty or confusion by readers in understanding the Job Creation Law, and the Constitutional Court considers the principle of clarity and problem formulation to be appropriate and qualified in accordance with the provisions of the Laws and Regulations.

- 4) In the Job Creation Law, it is not justified in the name of the length of time in forming the Law, this is to reduce deviations in standard and standard procedures for this purpose. Basically, in a constitutional democratic state, efforts to achieve goals cannot be made by violating definite principles and ordinances and must meet the standards in the formation of laws.
- 5) The omnibus law method, which is not contained in the Law Forming Law, the Constitutional Court affirmed that it is related to the Technique or method used by the framers of the Act as an effort to simplify the Act and to eliminate the overlapping of the Act. In accelerating the process of forming an Act, it is not a question of constitutionality as long as the methods used are appropriate and appropriate in accordance with definite guidelines and meet the standards. This omnibus law method cannot be used before it is adopted in the law on the formation of laws and regulations. When compared to Law Number 32 of 2004 concerning Local Government and Law Number 7 of 2017 concerning General Elections, according to the Constitutional Court, the character of the omnibus law method in the Job Creation Law is different from the formation of the two laws. it can be seen from the number of laws that were simplified to 78 laws with different content materials and all these laws were combined into one, except for the articles amended in Law Number 11 of 2020.<sup>10</sup>

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<sup>10</sup> Indrayana, Denny. "Polemik Dibalik Putusan MK Terkait UU Cipta Kerja". *Makalah*. Disampaikan dalam Diskusi Publik Perhimpunan Mahasiswa Katolik Republik Indonesia, Melbourne, Australia. Tanggal 6 Desember 2021.

3. There was a change in the content material after the approval of the Draft Law, which was not just a technical nature of writing, including any errors in its citation, the Constitutional Court gave the opinion that there were at least 8 articles that were linked on pages 151-152, 388, 390, 391, 374, 424, 492-494, and which underwent substantial changes between the manuscripts before and after ratification. The Constitutional Court also found some errors in the reference to the article in the Job Creation Law, which is contained in Paal 6 of the Job Creation Law which refers to Article 5 and should be used as a reference in Article 4 letter a. The Constitutional Court also held that this proves that there has been a citation error in referring to the article so that it is not in accordance with the principle of "clarity of formulation" which states that every law must meet the technical requirements preparation of laws and regulations, systematics, choice of words or terms, as well as clear and easy-to-understand legal language so as not to cause various kinds of interpretations in its implementation.
4. Related to the Job Creation Law which is contrary to the principle of clarity of purpose, the principle of usefulness and usefulness, the principle of clarity of formulation, and the principle of openness. The Constitutional Court gave an opinion that there had been a legal fact that the procedures for the establishment of the Job Creation Law did not meet the principle of clarity of purpose and the principle of clarity of formulation. Because the norms of Article 5 require the fulfillment of all principles cumulatively, with the non-fulfillment of only 10s, the provisions of Article 5 of the Law on Laws and Regulations are neglected by the process of forming laws and regulations. Accordingly, according to the Court it is irrelevant to further consider the petitioners' pleadings, except with regard to the principle of openness.

With the consideration given by the Constitutional Court which stated that the process of forming the Job Creation Law did not meet the

provisions under the 1945 NRI Constitution, so it was declared a formal defect. However, taking into account that there are also big goals to be achieved, with the enactment of Law Number 11 of 2020 concerning Job Creation and many implementing regulations have been issued and many have even been implemented and practiced. Thus, in order to avoid any legal uncertainty and the great impact that will be caused, the Constitutional Court must declare it conditionally unconstitutional. This is because the Constitutional Court must adjust between the conditions for the formation of a law and must be met to ensure the elements of legal certainty, expediency and justice, with the strategic objectives of the establishment of a quo Law<sup>11</sup>.

Against the Constitutional Court Decision Number 91/PUU-XVIII/2020, there were 4 Constitutional Judges who expressed dissenting opinions with the decision (dissenting opinion). The four Constitutional Judges, namely: (a) Constitutional Judge Arief Hidayat; (b) Constitutional Judge Anwar Usman; (c) Constitutional Judge Manahan M.P. Sitompul; and (d) Constitutional Judge Daniel Yusmic P. Foekh. The existence of differences of opinion that arise between Constitutional Judges (5 people to 4 people), shows that the decision is not unanimous among constitutional judges and tends to be ambiguous or multi-interpretation. Responding to the Constitutional Court Decision Number 91/PUU-XVIII/2020, the Government through the coordinating minister for Economic Affairs, provided an explanation and response through a press release as follows:<sup>12</sup>

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<sup>11</sup> Asas-asas hukum formal yang meliputi: (1). Asas tujuan yang jelas; (2). Asas organ/lembaga yang tepat; (3). Asas perlunya pengaturan; (4). Asas dapatnya dilaksanakan; (5). Asas konsensus. Asas-asas hukum material yang melingkupi: (1). Asas tentang terminologi dan sistematika yang benar; (2). Asas tentang aturan yang dapat dikenali; (3). Asas perlakuan yang sama dalam hukum; (4). Asas kepastian hukum; (5). Asas pelaksanaan hukum sesuai keadaan individual. I.C van der Vlies, *Buku Pegangan Perancang Peraturan Perundang-Undangan, Direktorat Jenderal Peraturang Perundang-undangan, Jakarta, 2005, pp. 238-307*

<sup>12</sup> Asshiddiqie, Jimly. 2020. *Pengujian Formil Undang-Undang di Negara Hukum*. Jakarta: Konpress.

1. The government respects and complies with the decision of the Constitutional Court and will implement Law Number 11 of 2020 concerning Job Creation (Job Creation Law) as well as possible in accordance with the decision of the Constitutional Court.
2. The decision of the Constitutional Court has stated that Law Number 11 of 2020 concerning Job Creation remains constitutionally valid until improvements are made to its formation in accordance with the grace period set by the Constitutional Court, which must be repaired no later than 2 (two) years after the decision is read.
3. The Decision of the Constitutional Court also stated that the Government should not issue new regulations of a strategic nature until improvements are made to the establishment of Law Number 11 of 2020 concerning Job Creation. Thus, the laws and regulations that have been enacted to implement the Job Creation Law still remain in force
4. Furthermore, the Government will immediately follow up on the decision of the Constitutional Court in question through the preparation of improvements to the Law and implement as well as possible the directives of other Constitutional Courts as referred to in the decision of the Constitutional Court.

## II. THE GOVERNMENT'S EFFORTS IN IMPROVING THE MANAGEMENT SYSTEM FOR THE ESTABLISHMENT OF LAWS AND REGULATIONS AFTER THE CONSTITUTIONAL COURT DECISION IN THE JOB CREATION LAW

After the emergence of debate among the public and academics from the implications of the Constitutional Court's decision on 12 Applications from the Copyright Law in November last year, there was only 1 case granted

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by the Constitutional Court concerned in the formal test. One such case is inadmissible because the petitioner cannot show his legal standing, while the other 10 cases related to material testing cannot be accepted because the application for loss of object, because the Constitutional Court has declared the Job Creation Law to be unconstitutional.

Denny Indrayana in his article explained that the constitutional court Decision there are 5 ambiguities that occur, as follows<sup>13</sup>:

1. The Job Creation Law which is expressly stated to be contrary to the 1945 Constitution but is still given room to be valid for 2 years, for example as published by the implementing rules and has implemented. However, theoretically the constitutional court should firmly overturn the Job Creation Law and the reason for improvement cannot be used as an excuse for a law that is declared to violate the constitution to remain in effect.
2. Of the 12 decisions related to the Job Creation Law, the Constitutional Court stated that 10 of them lost their objects because the Job Creation Law had been declared conditionally unconstitutional.
3. The Constitutional Court Decision Number 91/PUU-XVIII/2020 stated that the law was still in force while 10 other constitutional court decisions related to the same law stated that the application was not accepted. Even though the Constitutional Court has declared that the Job Creation Law is still valid with a 2-year delay for improvement, but it cannot be tested for substance. By deciding not to accept all material tests, it means that the constitutional court's decision has become the basis for the occurrence of 'constitutional impunity' for norms in the Job Creation Law that have the potential to violate the 1945 Constitution.
4. The Constitutional Court's ruling raises multiple interpretations on whether it can still be implemented or not. There are two camps that

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<sup>13</sup> Denny Indrayana, "Lima Ambiguitas Putusan MK Terkait Pembatalan UU Cipta Kerja", 26 November 2021, <https://www.integritylawfirm.id/2021/11/26/lima-ambiguitas-putusan-mkterkait-pembatalan-uu-cipta-kerja/>, diakses pada 22 Desember 2021

differ in opinion. One party views that the Job Creation Law can still be implemented in two years while the other party believes that the Job Creation Law should no longer be implemented at all.

5. In the Constitutional Court Decision Number 91/PUU-XVIII/2020, the Constitutional Court still looks very firm in implementing the formalities of lawmaking, including criticizing the lack of space for public participation in the formation of the Job Creation Law. However, the Constitutional Court did not apply the same standards when formally testing changes to the KPK Law and changes to the Mineral and Coal Law, which were also super lightning and actually eliminated public participation.<sup>14</sup>

In a constitutional democratic state, it is inseparable between the goals to be achieved in the right way in achieving those goals. This method of omnibus law cannot be used as long as it has not been adopted in the law on the formation of legislation. With the opening of space to make changes to the Job Creation Law, it means technical or methods designed to always follow or be adaptive to the development of needs, including if there will be simplification of laws and regulations in any way or method, including the omnibus law method as a draft law that has been approved with the DPR and the President. The formation of laws with processes and mechanisms that actually close or distance the involvement of community participation to participate in discussing and debating their contents, it can be said that the formation of these laws violates the principle of people sovereignty.<sup>15</sup>

To avoid a greater impact on the enactment of Law Number 11 of 2020 concerning Job Creation, the 2-year constitutional court stated:

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<sup>14</sup> Dodek, Adam M., "Omnibus Bills: Constitutional Constraints and Legislative Liberations", *Ottawa Law Review*, Vol. 48, No. 1, 2017.

<sup>15</sup> Andryan. "Implikasi Putusan Hak Uji Materiil di Mahkamah Agung Terhadap Legalitas Pimpinan Dewan Perwakilan Daerah Republik Indonesia". *Jurnal Penelitian Hukum De Jure*. Vol. 18. No. 3. Tahun 2018

1. Implementation of Law Number 11 of 2020 concerning Job Creation relating to matters of a strategic nature and has a broad impact to be suspended first;
2. It is not justified to form new implementing regulations;
3. It is also not allowed for state organizers to make strategic policies that can have a broad impact based on the norms of Law 11/2020 which has been formally declared conditionally unconstitutional.

The Decision of the Constitutional Court Number 91/PUU-XVIII/2020 is a new model variant which therefore contains conditional unconstitutional amar in the case of formal testing of a 1945 Law of the Republic of Indonesia. The Constitutional Court also gives mandates and a quo ruling is that are actually aimed at the framers of the law, not just the president. Therefore, this is the responsibility of the president, the DPR and certain things as well as the DPD. An in-depth study of the consequences of changing or replacing the Job Creation Law as a result of the Constitutional Court Decision Number 91/PUU-XVIII/2020 on various implementing regulations of the Job Creation Law is needed that has been created. Then, a more in-depth study of the concept and pattern of restructuring and reformulation of the Job Creation Law is needed in accordance with the mandate and decision of the Job Creation Law, furthermore, it is also necessary to conduct an in-depth study of the potential regulation of the omnibus law method in the formation of laws and regulations through changes or replacements from Law Number 12 of 2011 or with a presidential regulation system<sup>16</sup>.

Therefore, the government may be able to make efforts to improve the system of forming laws and regulations after the Constitutional Court decision which states that the Job Creation Law is conditionally unconstitutional, such as:

1. Immediately Draft a new Bill through the open cumulative list route;

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<sup>16</sup> Yunan Hilmy, 2021, *Kajian Awal Mengenai Implikasi Putusan Mk No. 91/Puu-Xviii/2020 Terhadap Upaya Reformasi Regulasi*, BPHN: Pusat Analisis Dan Evaluasi Hukum Nasional Badan Pembinaan Hukum Nasional Kementerian Hukum Dan Ham RI

2. Restructure the Job Creation Law in accordance with the rules or procedures in the formation of laws and regulations, namely Law Number 12 of 2011;
3. Include the concept of regulating the omnibus law method in changing the replacement of Law Number 12 of 2011 or regarding the Presidential Regulation.

## CONCLUSION

The Constitutional Court is one of the institutions that has the authority to test the Law against the 1945 Constitution of the Republic of Indonesia, both in substance and in the content, material contained in the law in accordance with the provisions of the laws and regulations. In the science of legislation, testing of the constitutionality of laws can be carried out materially or formally. Formal testing of the job creation law that is currently carried out on conformity in the stages of forming laws and regulations, because theoretically the law is declared defective then it can be undone in its entirety. But in its implementation, there are several constitutional court rulings that declare the application inadmissible, rejected, granted, constitutional or conditionally unconstitutional. As in the Constitutional Court Decision Number 91 / PUU-XVIII / 2020 which was declared conditionally unconstitutional because it did not meet the procedure in the formation of laws and regulations. Although the judgment was declared unconstitutional, the judgment was given a grace period of 2 years for remedial in accordance with the ordinance or methods in the formation of Legislation.

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