

## Implication of The Constitutional Court's Decision No. 91/PUU-XVIII/2020 on The Formal Examination of Law No. 11 of 2020

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#### ABSTRACT

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**Purpose of the study:** This paper aims to analyze the impact and implications of Constitutional Court Decision No. 91/PUU-XVIII/2020 on the formal review process of Law No. 11 of 2020. This includes an understanding of changes in the legal framework relating to the formal review process of the law and how the decision affects the formal review of the law.

**Methodology:** This paper employed the normative legal research method through a jurisprudence approach and a statute approach. This research examined primary and secondary legal materials.

**Results:** The Constitutional Court Decision No. 91/PUU-XVIII/2020 reflects the commitment of that highest justice institution to maintaining the enforcement of constitutional principles in the law-making process in Indonesia. It decided that the Law on Job Creation had a conditional unconstitutional status, as it did not follow the procedures of law formation stated in Law No. 12 of 2011. Even though it has a conditional unconstitutional status, the Law on Job Creation still applies until it is improved in two years by the government and the Legislative House.

**Applications of this study:** This research is useful for providing valuable insight for policymakers, lawyers, and constitutional law practitioners regarding the practical implications of Constitutional

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Court decisions on the process of proposing laws. It can also help people understand how this ruling affects laws and policies in Indonesia.

**Novelty/Originality of this study:** The novelty of this research lies in its special focus on Constitutional Court Decision No. 91/PUU-XVIII/2020 and its impact on the formal review of Law No. 11 of 2020. Apart from that, this research provides an important contribution to the concreteness of the Constitutional Court's formal legislative procedures.

**Keywords:** *Implications, Constitutional Court Decisions, Formal Tests.*

### **ABSTRAK**

**Tujuan penelitian:** *Tulisan ini bertujuan untuk menganalisis dampak dan implikasi Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 terhadap proses pengujian formil Undang-Undang Nomor 11 Tahun 2020. Termasuk pemahaman tentang perubahan kerangka hukum yang berkaitan dengan proses pengujian formil undang-undang dan bagaimana putusan tersebut memengaruhi pengujian formil undang-undang.*

**Metodologi:** *Tulisan ini menggunakan metode penelitian hukum normatif melalui pendekatan yurisprudensi dan pendekatan perundang-undangan. Penelitian ini mengkaji bahan hukum primer dan sekunder.*

**Hasil:** *Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 mencerminkan komitmen lembaga peradilan tertinggi tersebut untuk menjaga penegakan asas-asas konstitusional dalam proses pembentukan undang-undang di Indonesia. Memutuskan bahwa UU Cipta Kerja berstatus inkonstitusional bersyarat, karena tidak mengikuti tata cara pembentukan undang-undang yang tercantum dalam UU No. 12 Tahun 2011. Meskipun berstatus inkonstitusional bersyarat, UU Cipta Kerja tetap berlaku hingga disempurnakan dalam waktu dua tahun oleh pemerintah dan DPR.*

**Aplikasi penelitian ini:** *Penelitian ini bermanfaat untuk memberikan wawasan berharga bagi para pembuat kebijakan, pengacara, dan praktisi hukum tata negara mengenai implikasi praktis putusan Mahkamah Konstitusi terhadap proses pembentukan undang-undang. Penelitian ini juga dapat membantu masyarakat memahami bagaimana putusan ini memengaruhi hukum dan kebijakan di Indonesia.*

**Kebaruan/Keaslian penelitian ini:** *Kebaruan penelitian ini terletak pada fokus khusus pada Putusan Mahkamah Konstitusi No. 91/PUU-XVIII/2020 dan dampaknya terhadap pengujian formil UU No. 11 Tahun 2020. Selain itu, penelitian ini*

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*memberikan kontribusi penting bagi konkretnya prosedur legislasi formil Mahkamah Konstitusi.*

***Kata Kunci:*** *Implikasi, Putusan Mahkamah Konstitusi, Uji Formal.*

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## INTRODUCTION

Indonesia is a country which applies positive and constitutional legal systems. In this system, the Constitutional Court holds a crucial role in guaranteeing the alignment of laws to the Constitution. As the highest constitutional justice institution in Indonesia, the Constitutional Court has the power to examine the constitutionality of laws, including carrying out formal and material examinations.

The Constitutional Court's decisions have a significant impact on the laws and policies in Indonesia. This decision may change the gameplay in the legal framework and change how laws are produced, renewed, and improved. A Constitutional Court decision which yielded a great implication was Decision No. 91/PUU-XVIII/2020, which discussed the formal examination of Law No. 11 of 2020. This decision led to widespread debates which may potentially change the legal dynamics in Indonesia (I. G. A. Kurniawan, 2022).

Previous research on this topic was written by Mastur and Irawan (2023) which was entitled “*Dampak Putusan Mahkamah Konstitusi Nomor 91/PUU-XV/2020 tentang Pengujian Undang-Undang Cipta Kerja terkait Inkonstitusional Bersyarat* (The Impacts of the Constitutional Court Decision No. 91/PUU-XV/2020 on the Examination of the Law on Job Creation Related to Conditional Unconstitutional Decisions).” Their research discusses the Constitutional Court Decision No. 91/PUU-XVIII/2020, which states that the Law on Job Creation was a conditional unconstitutional decision as it did not follow the law formation procedures stipulated in Law No. 12 of 2011.

Even though it was a conditional unconstitutional law, the Law on Job Creation is still applicable until its improvement by the government and the Legislative House within a span of two years. If the government fails to fix it during that time, former stipulations which were changed by the Law on Job Creation will reapply. The government and the Legislative House were also asked to postpone new strategic policies related to this law. Apart from that, they were prohibited from issuing new implementing regulations for the Law on Job Creation. This decision may decrease the investment climate and create legal uncertainty for investors. It will

also impact the labor sector concerning work termination, wages, and specific time employment agreements (Mastur & Irawan, 2023).

A conditional unconstitutional decision is a decision that legally does not suspend a law and deems it invalid. However, if the requirement determined by the Constitutional Court is fulfilled by the lawmakers, that law's application may be maintained (it may be deemed constitutional). This was discussed in the paper written by Abrar and Purnama (2022) entitled, "*Kewenangan Mahkamah Konstitusi Dalam Pengujian Formil Terhadap Undang-Undang Nomor: 11 Tahun 2020 Tentang Cipta Kerja: Analisis Putusan Mahkamah Konstitusi Nomor: 91/PUU-XVIII/2020* (The Constitutional Court's Authority in the Formal Examination of Law No. 11 of 2020 on Job Creation: An Analysis of the Constitutional Court Decision No. 91/PUU-XV/2020)." They discussed how the Constitutional Court must be firm in stating whether or not a law is constitutional. However, it does not have the authority to order the parliament to change that law. The legal impact is that the government is prohibited from issuing crucial regulations related to the implementation of the Law on Job Creation, meaning that this law is only valid at the legislation level. However, it is invalid at the technical regulation level (Abrar & Purnama, 2022).

Meanwhile, in the research written by Irawan (2022b) entitled "*Undang-Undang Cipta Kerja Di Tengah Himpitan Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020* (Law on Job Creation Amid the Pressure of Constitutional Court Decision No. 91/PUU-XV/2020)", he discussed that the position of the Law on Job Creation is that it is still applicable until an improvement is made before the deadline, which is at most two years. The application of the law (law in action) is carried out by implementing regulations from the policy of the institution that was given authority by that law. Even so, the Constitutional Court Decision also suspended all strategic actions/policies related to this law that have a wide impact. Apart from that, it is prohibited to create new implementing regulations related to Law No. 11 of 2020 on Job Creation. Thus, the position of the Law No. 11 of 2020 on Job Creation is that it is applicable. However, it cannot be applied to strategic and widespread matters. This means that for two years, the Law on Job Creation is temporarily unimplementable (Irawan, 2022b).

The difference between previous research and this research is that the authors' research will discover the background of the legal context, a short history of the Constitutional Court, as well as the relevance and complexities of Decision No. 91/PUU-XV/2020 on the formal

examination of Law No. 11 of 2020. Therefore, this paper will provide a deep understanding of this decision's implications on the Indonesian legal system (Aushaf, 2022).

As a country with a large population and a rich cultural, political, and social diversity, Indonesia has a complex legal framework. The constitutional law specially regulates basic principles which form this country. The Indonesian Constitution, which is called the 1945 Constitution, is the legal basis which determines the governmental structure, citizen rights, and limits to the government's power. In this system, the Constitutional Court functions as the guardian of the Constitution as it has the power to examine the constitutionality of laws (Hirma & Syamsir, 2023).

The constitution provides two types of examinations that may be carried out by the Constitutional Court, namely formal examination and material examination. Formal examination relates to the procedures of law formation, while material examination relates to the legal substance or content (Sanjaya & Rasji, 2021). The Constitutional Court has the authority to determine whether the proposed laws have fulfilled the formal and substantial requirements as regulated in the Constitution.

The Indonesian Constitutional Court was formed in 2003 as a result of the constitutional amendment which acknowledges its existence as a constitutional justice institution. The Constitutional Court has the function of examining the constitutionality of laws and other legal regulations. Constitutional Court Decisions have a permanent binding legal power that must be respected by all parties, including the legislative and executive institutions (I. G. A. Kurniawan, 2022).

Since its establishment, the Constitutional Court has issued many important decisions which influence the development of the law and politics in Indonesia. These decisions encompass many aspects, including human rights, general elections, and the Constitution. An important aspect of Constitutional Court Decisions is formal examinations of laws. This is an important part of the Constitutional Court's role in maintaining the validity and applicability of the law in Indonesia.

The Constitutional Court has become one of the centers of the legal discourse in Indonesian state administrative law. Based on the authority to resolve authority disputes between state institutions whose authority was given by the Republic of Indonesia's 1945 Constitution, according to the checks and balances principle, the Constitutional Court is a balancing institution. Meanwhile, through its authority to examine laws against the Republic of

Indonesia's 1945 Constitution, the Constitutional Court guarantees the fulfillment of citizens' constitutional rights as well as protects citizens from laws made by legislators which create constitutional harm. The National Legal Reformation Consortium states that there were at least four things which became the basis of the Constitutional Court's formation, namely (1) as an implication of the constitutionalism paradigm; (2) to carry out the checks and balances mechanism; (3) as an establisher of a clean state; and (4) to protect the human rights (Hadjar, 2013).

Such authorities made the Constitutional Court obtain the nicknames "the Guardian of the Constitution" and "the Sole Interpreter of the Constitution". The Constitutional Court's existence is a manifestation of an element in the Rule of Law doctrine, namely the existence of a constitutional court.

According to Jimly Asshiddiqie, the existence of the Constitutional Court is one of the elements of the legal state doctrine that is made as a parable to the Rule of Law atau *Rechtsstaat*. Apart from the Constitutional Court, Asshiddiqie also stated that there are eleven other elements. Thus, in total, there are twelve elements. Article 24C clause (1) and clause (2) of the Republic of Indonesia's 1945 Constitution and Article 10 clause (1) and clause (2) of Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court regulates this court's authority. In essence, the Constitutional Court has four authorities and one obligation.

The Constitutional Court has the authority to adjudicate at the first and final levels and its decisions have a permanent binding power to: a. Examine laws against the Republic of Indonesia's 1945 Constitution; b. Decide upon disputes on the authorities of state institutions' which were given by the Republic of Indonesia's 1945 Constitution; c. Determine the dissolution of political parties; and d. Decide upon disputes on general election results.

Then, the Constitutional Court has the obligation to give decisions on the opinion of the Legislative House that the President and/or Vice President is suspected of having committed a law violation in the forms of treason against the state, corruption, gratification, and other severe crimes, or despicable actions, and/or no longer fulfill the requirements as a President and/or Vice President as regulated in the Republic of Indonesia's 1945 Constitution.

The Constitutional Court's Decision in the legislation examination may vary. For instance, in the end, the examined legislation may be granted, partially granted, rejected, or deemed unacceptable. There is a new development in the Constitutional Court Decision where it carries out some true efforts to uphold the law and justice. For instance, in a decision whose

order grants a submission results in the revocation of a norm and does not have a legally binding power, this decision cannot be separated from the *erga omnes* principle that has a legally binding power towards all components of the nation. Thus, all parties must be obedient in implementing that decision (Syukri, 2013).

An interesting form of decision is the decision with a “rejected” and “granted” order but its legal consideration states the requirement of constitutionality. Conditional constitutionality is a decision which states that a certain legal stipulation does not violate the Constitution. However, the Court gives requirements to the state institution on that law’s implementation so that the related institution pays attention to the interpretation of the Constitutional Court on the constitutionality of these examined legal stipulations (Syukri, 2013). A decision is granted and deemed to violate the 1945 Constitution. It does not have legal power. This was because a condition based on the interpretation of constitutional judges is given so that it may become constitutional under the requirements given by the Constitutional Court. The application of these articles or laws is only effective until those articles or laws are revised.

This happened in the case of the Constitutional Court Decision No. 91/PUU-XVIII/2020 on the formal examination of Law No. 11 of 2020 on Job Creation. This decision was issued on November 25<sup>th</sup>, 2021 with the status of a Conditional Unconstitutional Law. One of the statements of the decision order is that the formation of Law No. 11 of 2020 on Job Creation violates the Republic of Indonesia's 1945 Constitution and does not have a legally binding power under a certain condition. It must be improved in two years since this decision was made. This condition leads to a legal void as there is the factor of uncertainty related to the product's continuity.

This research becomes crucial to be academically studied as it provides a significant insight into how the Constitutional Court has a role in guaranteeing the consistency between the law and the Constitution, especially in the context of Law No. 11 of 2020 on Job Creation's formal examination. This research opens up various important questions that may be further discussed. Some aspects that become the focus of this research include: (1) What are the judicial considerations in Constitutional Court Decision No. 91/PUU-XVIII/2020 on the formal examination of Law No. 11 of 2020 on Job Creation? and (2) What are the implications of Constitutional Court Decision No. 91/PUU-XVIII/2020 towards policies on labor and economy in Indonesia and does it bring significant changes in the labor or economic practices?

## RESEARCH METHOD

This was normative legal research, namely research on the norms contained in the positive law which perceived the law as written and unwritten principles or decisions from authorized institutions. Normative research is defined as research whose study object includes basic norms and principles, legal principles, legal regulations, legal comparisons, doctrines, and jurisprudence (Amiruddin & Asikin, 2006).

In its relationship with the normative research, the authors employed two approaches, namely the statute approach and the jurisprudence approach. The statute approach was one of the approaches where, in this research, the authors had the obligation to understand hierarchies and principles of legal regulations. First, the researchers took inventory of several legal regulations, starting from legal regulations of the lowest hierarchy. In this case, it included Law No. 11 of 2020 on Job Creation, Law No. 24 of 2003 which was amended into Law No. 8 of 2011 on the Constitutional Court, as well as the Republic of Indonesia's 1945 Constitution.

The jurisprudence approach was an approach which was carried out by reviewing cases related to the discussed issue which has been transformed into a courtly decision with a permanent power (Ibrahim, 2006). In normative legal research, the jurisprudence approach aims to study legal norms or principles carried out in legal practice (Ibrahim, 2006). In using the case approach, the authors must understand the *ratio decidendi*, namely the legal reasons that judges used before reaching their decision (P. M. Marzuki, 2010). With this case approach, it is hoped that judges' considerations may add to the legal arguments in this research.

The legal materials obtained in the library study research originated from primary and secondary legal materials. Primary legal materials consisted of Constitutional Court Decision No. 91/PUU-XVIII/2020 and legal regulations. For this reason, this research was categorized as normative research. The processing of legal materials was in essence an activity to systematize legal materials. This systemization means making classifications on these legal materials to ease analysis and construction tasks (Soekanto & Mamudji, 2012).

Legal materials that have been systematically arranged were analyzed using the explorative-qualitative method. The explorative analysis aimed to analyze something that was not well understood and that attracted attention (Muhaimin, 2020). The collected legal materials were then analyzed to obtain a profound and comprehensive definition. This analysis aimed to obtain a solution to the occurring problem. More simply put, all collected materials, including



primary, secondary, and tertiary legal materials were holistically analyzed to obtain a systematic and actual argumentation (Dimiyati & Wardiono, 2004).

## RESULTS & DISCUSSION

Based on the research problems above, in this research, the authors used some theories to support the related discussion, namely the legal state theory and the Constitutionalism Theory.

### *The Legal State Theory*

A great idea of the Indonesian nation's founding fathers in the amendment of the 1945 Constitution was the restatement that Indonesia is a legal state. According to Jimly Ashiddiqie, according to the legal state concept, the law is ideally used as the highest order in the life of the nation and the state. Terminologically, the legal state in Indonesian (*negara hukum*) is a translation of the rule of law in English and *rechtsstaat* in Dutch.

There are generally two great concepts related to the legal state concept. First, there is the rule of law concept that is often applied by the Anglo-Saxon legal system. Second, there is the *rechtsstaat* concept that is often used in countries with a civil law system or continental Europe. The thoughts in the Anglo-Saxon tradition were developed by A. Van Dicey with the term "The Rule of Law". Meanwhile, the continental Europe concept was pioneered by Immanuel Kant, Julius Stahl, etc., with the term *rechtsstaat* (Wijaya, 2013).

The rule of law legal state concept is currently the most ideal legal state concept, even though in practice, this concept is applied in different ways. In Indonesian literature, the rule of law legal state concept is translated into *supremasi hukum* (supremacy of law) or governance based on the law.

In the legal state conception, there needs to be limitations on the authority and power of state institutions. This aims to prevent forms of arbitrariness carried out by those in power. Therefore, the legal state upholds human rights. In this case, it provides an instrument of protection for citizens who feel harmed due to the application of certain legal regulations.

According to A. Van Dicey, there are at least three important elements in the "rule of law" legal state concept, namely supremacy of law, equality before the law, and due process of law. In this case, Albert Van Dicey opined that the legal state does not need administrative justice, as it is deemed that general justice applies to everyone, including citizens and public officials. Meanwhile, Julius Stahl described at least four characteristics in the "*rechtsstaat*" legal state

concept, namely human rights protection, division of power, law-based government, and state administrative justice.

In essence, both *rechstaat* and the rule of law always emphasize the protection of human rights. The difference is that the *rechstaat* concept emphasizes the *rechtmatigheid* principle, while the rule of law always concept emphasizes equality before the law. These two concepts have some similarities, such as the acknowledgement of legal sovereignty and legal supremacy. Apart from that, there is the protection of individuals from the government's arbitrary actions.

Apart from the rule of law and *rechstaat* legal state concepts, Indonesia names its own legal concept with the term the Pancasila legal state (Erwinsyahbana & Syahbana, 2018). Pancasila means "the Five Principles" that make Indonesia's state ideals. The introduction to the legal state theory is actually not a new thing. However, it is an effort to classify the existing legal systems. It is also an effort to maintain Pancasila as the paradigm of stately and national life. Therefore, it has reached the position where the term "the Pancasila legal state" emerges.

However, if one observes the historical trajectory of the Indonesian nation which was an ex-colony of the Netherlands, one can find many elements of the *rechstaat* legal state concept. This was parallel with the statement of Marjane Termorshuizen in *The Concept Rule of Law*:

"The Indonesian legal state concept has been derived from the Western conception of *rechsstaat* during the first period after their independence in 1945 which was influenced by the European rather than by the American type. The reason, therefore, is that the consequence of long-lasting former colonialization law in the middle of the twentieth century was still much more affected by Europeans (Dutch) than Americans (common law doctrine)."

Based on the history of the Indonesian nation, Termorshuizen argued that Indonesia is still thick with the influence of *rechstaat*. However, if one tries to more comprehensively understand the influence of Pancasila as a paradigm of life, it can be seen that it has been manifested in all elements of national life, both substantially and formally. Many legal experts have expressed their opinions about this, including Philipus M. Hadjon.

Hadjon referred to the fact that the main principle of the Indonesian Constitutional Law or Administrative Law is democracy based on Pancasila. Therefore, from the juridic perspective of Pancasila, the legal state of Indonesia is ideally deemed as a Pancasila legal state. Hadjon argued in his dissertation "Legal Protection for the People" that there are at least two main core principles of the Pancasila legal state (Soemarsono, 2007). First, there is a tendency to resolve disputes through peace or the principle of deliberation. Second, there is the national harmony principle, which encompasses: (1) the existence of a harmonic relationship between the

government and the people based on the national harmony principle; (2) there is a functional and proportional relationship between powers of the state; (3) there is the principle of dispute resolution through deliberation. The litigation method is the last resort; and (4) there is a balance between rights and obligations.

Constitutionally, the restatement of Indonesia as a legal state has been clearly conceived in the stipulations of Article 1 clause (3) of the 1945 Constitution. The Constitution has also at least provided the statement that Indonesia is a state that is based on the law (*rechstaat*), as opposed to a state that is based on power (*machstaat*). Apart from that, there is a statement in the Indonesian constitution that in carrying out its tasks and authorities, the government must use the constitution as its basis. It must not apply the absolutism principle.

Referring to the opinion of Sudjito, there are at least two main points to the construction of the Pancasila legal state. *First*, the *rechstaat* concept that the Dutch colonizers brought to the state of Indonesia have brought significant impacts on the construction of the Pancasila legal state. Thus, up to this level, the construction carried out was only limited to the transplantation of modern law to the customary legal system that has strongly been applied by the native communities. *Second*, ideologically, the Indonesian nation has agreed to build a legal state with an Indonesian version, namely a legal state based on Pancasila. Pancasila is used as the source of all legal sources. Apart from that, Pancasila's values must dominantly color all legal products, including the formation, implementation, and enforcement processes (Erwinsyahbana & Syahbana, 2018).

Based on the description above, in essence, the Pancasila legal state concept must be based on a paradigm or a basic thought conception as follows:

First, as a legal ideal (*rechtsidee*) that reflects the legal foundation; state ideology; life and personality; the nation's paradigm; as well as the source of all legal sources that becomes the basis to all state and national life, especially the formation of the national law system, Pancasila must become the main footstep in the national legal development.

Second, the characteristic of a good law is the law that is according to the character, behavior, and life philosophy of a nation, just like the values that live and developed in Indonesia up to now.

Third, the formation of the national law must be able to internalize and pay attention to the diversity and existence of the local law (customary law) as a mozaic of Indonesia's legal richness without ignoring positive legal influences from outside.

Fourth, the law does not only have the role as a facility for society's social manipulation and bureaucratic renewal. However, it must be able to create a balance in the life order of the society, the nation, and the state.

The internalization of the institutionalization process of Pancasila values does not only encompass legislation products (laws). However, it also encompasses all legal products that apply in Indonesia, including state institutions.

In general, the behavior of those in power, the law-enforcing apparatus, the bureaucratic apparatus, and society, is not determined by the goodness of the legal substance and the developed system. However, they are highly influenced by how far the Pancasila values are embraced, cultivated, and institutionalized into every person, both individuals and communities, including the power behavior of state institutions in the holistic establishment practice.

Based on some points above, it can be said that etymologically, the Pancasila legal state concept is a legal state concept with a character that is unique to Indonesia. This is because it is a result of a crystalization and a deposition process of the Indonesian nation's noble cultural values that are wise and universal. In this case, the legal norm system is built based on the legal behavior system that is implemented based on the Preamble of the 1945 Constitution and the value system contained in Pancasila.

The Pancasila legal state is not individualistic-secular. Neither does it apply to the Islamic nomocracy-theocracy nor the socio-communist paradigms. Neither is it passive. On the contrary, it has the characteristics of a value system that is centered on the values of belief in God Almighty, the value of civilized and justice humanity, the value of Indonesian unity, the value of representation, and the value of justice (Erwinsyahbana & Syahbana, 2018).

### ***The Constitutionalism Theory***

In state administrative law, the constitutionalism theory is a thought framework that emphasizes the importance of the application of constitutional principles and legal supremacy in a state (Effendi, 2011). This means that the constitution, the legal document that determines the legal structure, citizen rights, and governmental authority, must become the main basis that is respected by all institutions and individuals in that state (Asshiddiqie, 2005). In the constitutionalism theory, there are two main principles:

First, is constitutional supremacy, where the constitution is deemed as the highest law in the state. All actions, including the law and governmental policies, must be according to the Constitution. There is no authority that is above the Constitution.

Second, limited government. Constitutionalism applies that the government must apply within the limitations determined by the Constitution. No government may act arbitrarily according to their will without consideration for the law.

Third, the protection of human rights. Constitutionalism emphasizes the protection of human rights as its basic principle. The constitution must guarantee the rights of each individual, such as the freedom of speech, the freedom to embrace religion, and other rights.

Fourth, a transparent and accountable government. The accountability and transparency principle in constitutionalism means that the government must be responsible for its actions to the people and carry out its policies in an open manner.

Fifth, is the division of power. Constitutionalism encourages the division of power between the executive, legislative, and judicial branches to prevent the concentration of power that may lead to the abuse of power.

Sixth, a consistent law. All laws and policies must be consistent with constitutional stipulations. In cases of conflict, the constitution must be the main guideline.

The constitutionalism theory becomes the basis of the constitutional law system that is democratic and that emphasizes the importance of maintaining a balance between governmental power and the rights of citizens (M. L. Marzuki, 2010). It provides an important legal framework for maintaining the legal supremacy and human rights of a state.

### ***Judicial Considerations in the Constitutional Court's Decision No. 91/PUU XVIII/2020 on the Formal Examination of Law No. 11 of 2020 on Job Creation***

The Constitutional Court's Decision No. 91/PUU XVIII/2020 on the Formal Examination of Law No. 11 of 2020 on Job Creation (the Omnibus Law) becomes an important decision in Indonesia as it considers various aspects in determining the constitutionality in the formation process of that law. In its decision, the Constitutional Court states that the Job Creation Law has a conditional unconstitutional status. The Court states that the formation process of this law does not holistically fulfill the formal principles mandated in the Constitution, especially related to the principles of transparency, public participation, and legal certainty that become the basis of the lawmaking procedures in Indonesia (The Republic of Indonesia's Constitutional Court,

2021). However, the Court gave the lawmakers a deadline of two years to improve the procedures and substances of the Job Creation Law so that they are in line with the constitutional principles before stating that this law is fully revoked.

The Constitutional Court's judicial decision in this case is crucial as it relates to three main aspects that become the foundation of formal examination, namely procedure, public participation, and legal certainty. First, judges highlighted the procedures of this law's formation. The Constitutional Court found that there was a deviation in the legislation process of the Job Creation Law, especially regarding the formulation procedures which are deemed to lack transparency. According to the Court, the Job Creation Law formulation process which utilized the Omnibus Law method does not yet have a clear legal basis in the Indonesian legal system. Thus, it ignited doubts on the formal validity of this law.

According to the Court, the Omnibus Law method which combined various laws into one law requires the existence of clearer legal guidelines to prevent the occurrence of confusion and uncertainty in society. In its consideration, the Court stated that the lack of a standard regulation on the Omnibus Law method made the discussion and formulation processes of the Job Creation Law lack systematization. Moreover, it is deemed to be carried out in a rush (Romli, 2017). With the existence of this procedural issue, the Court assessed that in the formal sense, this law has not fully fulfilled stipulations of Article 22A of the 1945 Constitution and Law No. 12 of 2011 on the Formation of Legal Regulations.

The second aspect that became the main consideration was public participation. The Constitutional Court deemed that the formation process of the Job Creation Law lacked adequate public participation, even though the issues regulated in this law encompassed strategic sectors, such as labor, investment, environment, as well as land ownership. In its consideration, the Court stated that public participation is an integral part of the democratic legislation process. The Court found that there are many stipulations in the Job Creation Law that were formulated without adequate public participation, as the consultation and suggestion delivery processes from society were deemed to not be carried out in a transparent and effective manner.

For the Court, the failure to involve public participation shows that the procedure of this law formulation has ignored the basic principle of a democratic legal state, where society has the right to be involved in the formation of the law that will have a direct impact on their lives. According to the Court, such a lack of adequate participation makes this law's formulation

process violate the principles of transparency and accountability which were mandated in Article 28D clause (1) and Article 28C clause (2) of the 1945 Constitution.

The third consideration that became the basis for the Court's decision was the legal uncertainty that occurred from the application of the Job Creation Law. The Court assessed that the formulation technique used in creating Job Creation Law confusing the public, business owners, and the law enforcing apparatus. One of the main issues was simultaneous changes to various sectoral laws without clarity on a detailed and comprehensive transition law. From the Court's perspective, such a method of formulation leads to uncertainty in the policy's application in the field. It violates the principle of legal certainty which is one of the important elements of the legal state. The Court stated that a good law must provide clear and certain guidelines to society without causing ambiguity that brings loss to their rights. Therefore, from the perspective of the Court, the Job Creation Law does not fulfill the principles of legal certainty regulated in Article 28D clause (1) of the 1945 Constitution.

In its decision, the Constitutional Court gave lawmakers two years to fix the Job Creation Law, especially by considering the aspects that became a problem in this formal examination. The Court gave the government and the Legislative House the chance to fix the existing legislation process so that it is according to constitutional principles. In this case, the Court mandates that during the improvement process, all stipulations in the Job Creation Law still apply. However, the Court also emphasized that if in two years, no improvement is carried out, the Job Creation Law will automatically be deemed permanently unconstitutional. Thus, all stipulations regulated in it no longer have a binding legal power (Rahman & Wicaksono, 2016).

The Court's decision also contains several important warnings for lawmakers related to principles in the law formation. The Court reminded that the legislation process in Indonesia must be based on the principles of accountability, transparency, and public participation. Further, the Court suggested that the Omnibus Law method that was chosen by the government should be regulated in a clearer manner in the Law on the Formation of Laws. This is to prevent the occurrence of doubts about the formal legality of that method in the future. Therefore, the Court hopes that in the future, the government and the Legislative House may apply the Omnibus Law method in a more directed manner according to the principles of law and democracy.

The Court also gave an emphasis that in the formation of a law that has a wide scope such as the Job Creation Law, legal certainty is absolute. The Court suggests that inconsistency in

the formation of law, which can be seen from the lack of transitional laws and clear technical guidelines, will harm many parties, especially society and business owners that need certainty in carrying out their activities. From the perspective of the Court, legislation that does not provide legal certainty may potentially cause instability and mistrust towards the legislation process, which in the end will bring negative impacts to the quality of the legal state.

### ***How the Constitutional Court Decision No. 91/PUU-XVIII/2020 Affects Policies on Labor and Economy in Indonesia***

Constitutional Court Decision No. 91/PUU-XVIII/2020 on the formal examination of Law No. 11 of 2020 on Job Creation has a significant impact on legal certainty and the governmental establishment in Indonesia (Susetiyo, Ichwan, Ifitah, & Dievar, 2022). Its impacts regard legal changes, legislative processes, and the implementation of policies related to Job Creation. The following are some forms of legal certainty that may be identified after the issuing of that decision:

*First*, legal uncertainty. The Constitutional Court Decision stated that Law No. 11 of 2020 on Job Creation violated the Republic of Indonesia's 1945 Constitution and does not have a conditional binding legal power, leading to legal uncertainty (Y. A. Kurniawan & Al Huda, 2022). This was caused by the condition that "no improvement is carried out in two years after this decision is issued". This uncertainty relates to the continuity of this legal product and policies that were regulated in the Law on Job Creation.

*Second*, opportunities for improvement and change: The Constitutional Court Decision gives the government and the legislative institution the opportunity to improve or revise the Law on Job Creation in two years so that it is according to the Constitution. This creates an opportunity for the government to fix the weaknesses or the controversies that exist in that law.

*Third*, impacts on business and investment: Legal certainty is an important factor in making business and investment decisions. Such decisions may influence how companies and investors perceive the legal environment in Indonesia. Legal uncertainty may inhibit investment and the development of economic projects (Naqiyyah & Sujatnika, 2023).

*Fourth*, socio-political impacts: The Constitutional Court Decision also has significant socio-political impacts. Changes in the labor law and related policies may influence the relationship between the government, workers, labor unions, and business owners (Pratama & Uwiyono, 2022).



*Fifth*, cooperation with related parties: The government and related institutions must cooperate with the Constitutional Court and other stakeholders to guarantee the implementation of this decision. This includes the improvement or revision processes of the law as well as coordination with various involved parties.

*Sixth*, monitoring of the legal developments: The parties that are influenced by this decision must monitor the legal development in the next two years to understand what changes may occur in the Law on Job Creation and their impacts on labor and business practices.

In the context of legal certainty, it is important for the government, legislative institutions, business owners, and society to communicate and cooperate to understand the implications of this Constitutional Court Decision. The government must plan the next steps in establishing governance and forming policies according to the constitution (Ningsih, 2022).

The government's enthusiasm for simplifying business permits to increase investment is manifested in the issuing of Law No. 11 of 2020 on Job Creation. Aside from the pros and cons of society on the issuing of that Job Creation Law, the business sector has high hopes that the ease that this law provides may soon be achieved (Naqiyyah & Sujatnika, 2023). Business owners have also started to have enthusiasm for participating in business socializations. They also try to apply for business permits based on the Job Creation Law that was established by the Ministry and related technical institutions. Business owners in the regions also utilize the Job Creation Law to submit a business permit application that becomes the authority of the Provincial Government to the Local Regional Government.

In November 2021, the Constitutional Court issued Decision No. 91/PUU-XVIII/2020 on the formal examination of Law No. 11 of 2020 on Job Creation. This decision brings implications to the permit creation process which is a type of public administrative service in business activities. Business permit applicants were confused, especially when their permits were submitted before the issuing of that Constitutional Court Decision.

An example was a case that was handled by Muhammad Wildan as a Representative Assistant of the Republic of Indonesia's Ombudsman of West Java Province. The reporter of the complaint was an Applicant of a Building Construction Approval/*Persetujuan Bangunan Gedung* (PBG) that was formerly called the Building Establishment Permit/*Izin Mendirikan Bangunan* (IMB), to one of the technical services in a Regional Government (Wildan, 2022). The applicant studied the derivative regulations of the Job Creation Law and followed the introduction program established by the related central institution.

The reality in the field was that the applicant found that the permit application mechanism in that Regional Government was not according to the applicant's understanding based on his independent review of legal regulations and the materials of the socialization program he participated in. The applicant complained that there were still permit requirements that were not according to Regional Regulation No. 16 of 2021 on the Implementing Regulation of Law No. 28 of 2002 on Building Construction as a derivative of the Job Creation Law in managing that PBG. This happened even though the permit-issuing requirements have been simplified based on Regional Regulation No. 16 of 2021. This additional permit requirement implied the longer period needed to apply for PBG that was proposed by the applicant because he must prepare the permit requirements that are not according to Regional Regulation No. 16 of 2021.

After carrying out further clarification of the related technical service in the Regional Government, it was found that the requirements that were not regulated in Regional Regulation No. 16 of 2021 were derivative regulations of the Job Creation Law. This was because some Regional Regulations that regulate the obligation to fulfill requirements in managing PBG/IMB still apply. Apart from that Regional Regulation No. 16 of 2021 does not yet have highly detailed derivative regulations to become technical guidelines in issuing PBG. Meanwhile, the PBG was only regulated in Regional Regulation No. 16 of 2021 and no other derivative regulations which are more specific have been issued. In line with this, the Regional Government still cannot issue Regional Regulations that are adapted to that governmental regulation. This was because, in one of the Orders of the Constitutional Court Decision No. 91/PUU-XVIII/2020, it is stated that the Constitutional Court suspends all actions/policies that are strategic and that have a wide impact. Apart from that, it cannot issue new implementing regulations related to Law No. 11 of 2020 on Job Creation (Irawan, 2022a).

## **CONCLUSION**

The Constitutional Court Decision No. 91/PUU-XVIII/2020 reflects the commitment of that highest justice institution to maintaining the enforcement of constitutional principles in the law-making process in Indonesia. This decision stated that the formation of each legal regulation must follow procedures according to the Constitution. It must involve the wide participation of the public as well as provide clear legal certainty for society. This decision also showed that the Court did not only view the substantial aspect of the law. However, it also made sure that its formation process was according to the principles mandated by the Constitution.

Through this decision, the Court hopes that the government and the Legislative House may be more careful in arranging legal regulations in the future, especially concerning regulations which are related to the extensive interest of the public. The Court hopes that this decision may become a momentum for lawmakers in strengthening the principles of democracy and legal certainty in every legislation process to create a better legal order that provides justice for all Indonesians.

The Constitutional Court Decision No. 91/PUU-XVIII/2020 decides that the Law on Job Creation had a conditional unconstitutional status, as it did not follow the procedures of law formation stated in Law No. 12 of 2011. Even though it has a conditional unconstitutional status, the Law on Job Creation still applies until it is improved in two years by the government and the Legislative House. If it is not fixed, former stipulations that were changed with the Law on Job Creation will apply once more. The government and the Legislative House are also asked to postpone new strategic policies. Apart from that, they are prohibited from issuing new implementing regulations related to the Law on Job Creation. This decision may degrade the investment climate and cause legal uncertainty for investors. Apart from that, it will impact the labor sector, especially regarding work termination, wages, and Specific Time Employment Agreements.

## REFERENCES

- Abrar, S., & Purnama, E. (2022). Kewenangan Mahkamah Konstitusi Dalam Pengujian Formil Terhadap Undang-Undang Nomor : 11 Tahun 2020 Tentang Cipta Kerja (Analisis Putusan Mahkamah Konstitusi Nomor : 91/PUU-XVIII/2020). *Jurnal Ilmiah Mahasiswa*, 6(11), 288–297.
- Amiruddin, & Asikin, Z. (2006). *Pengantar Metode Penelitian Hukum*. Jakarta: Raja Grafindo Persada.
- Asshiddiqie, J. (2005). *Konstitusi dan Konstitusionalisme (The Constitution and Constitutionalism)*. Jakarta: Konstitusi Pers.
- Aushaf, A. R. (2022). *Analisis Putusan Mahkamah Konstitusi No. 91/Puu-Xviii/2020 Tentang Pengujian UU Cipta Kerja Perspektif Masalah Mursalah* (Universitas Islam Negeri Salatiga). Universitas Islam Negeri Salatiga. Retrieved from <http://e-repository.perpus.iainsalatiga.ac.id/14263/>
- Dimiyati, K., & Wardiono, K. (2004). *Metode Penelitian Hukum*. Surakarta: Universitas Muhammadiyah Surakarta.
- Effendi, S. (2011). Konstitusionalisme dan Konstitusi Ditinjau dari Perspektif Sejarah. *Humanus: Jurnal Ilmiah Ilmu-Ilmu Humaniora*, 10(1), 73–81.
- Erwinsyahbana, T., & Syahbana, T. R. F. (2018). Perspektif Negara Hukum Indonesia Berdasarkan Pancasila. *INA-Rxiv, February*. <https://doi.org/10.31227/osf.io/cwev7>
- Hadjar, A. F. (2013). *Pokok-pokok Pikiran dan Rancangan Undang-undang Mahkamah*

*Konstitusi. KRHN dan Kemitraan.*

- Hirma, H., & Syamsir, S. (2023). Kajian Yuridis Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 Tentang Undang-Undang Cipta Kerja: Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020. *Limbago: Journal of Constitutional Law*, 3(1), 22–37. <https://doi.org/10.22437/limbago.v3i1.20114>
- Ibrahim, J. (2006). *Teori dan Metodologi Hukum Normatif*. Malang: Bayumedia Publishing.
- Irawan, A. (2022a). Keberadaan Konsep Rule by Law (Negara Berdasarkan Hukum) Didalam Teori Negara Hukum The Rule of Law. *Litigasi*, 23(1), 61–82. <https://doi.org/10.23969/litigasi.v23i1.5030>
- Irawan, A. (2022b). Undang-Undang Cipta Kerja Di Tengah Himpitan Putusan Mahkamah Konstitusi Nomor 91/Puu-Xviii/2020. *Jurnal Litigasi (e-Journal)*, 23(1), 101–133. <https://doi.org/10.23969/litigasi.v23i1.4773>
- Kurniawan, I. G. A. (2022). Putusan Mahkamah Konstitusi Terhadap Undang-Undang Cipta Kerja Dalam Perspektif Filsafat Utilitarianisme. *Jurnal USM Law Review*, 5(1), 282–298. <https://doi.org/10.26623/julr.v5i1.4941>
- Kurniawan, Y. A., & Al Huda, M. (2022). Politik Hukum Yudisial dalam Putusan Mahkamah Konstitusi (Studi Kasus Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 Undang-Undang Cipta Kerja). *Jurnal Kewarganegaraan*, 6(2), 4739–4751. <https://doi.org/10.31316/jk.v6i2.4013>
- Marzuki, M. L. (2010). Konstitusi dan Konstitusionalisme. *Jurnal Konstitusi*, 7(4), 2.
- Marzuki, P. M. (2010). *Penelitian Hukum (Legal Research)*. Jakarta: Kencana. Retrieved from <https://opac.perpusnas.go.id/DetailOpac.aspx?id=1409842>
- Mastur, M., & Irawan, F. (2023). Dampak Putusan Mahkamah Konstitusi Nomor 91 / PUU-XVIII / 2020 tentang Pengujian Undang-Undang Cipta Kerja Terkait Inkonstitusional Bersyarat. *JULR*, 6(3), 2–12. <https://doi.org/10.26623/julr.v6i3.8044>
- Muhaimin. (2020). *Metode Penelitian Hukum*. Mataram: Mataram University Press.
- Naqiyah, I., & Sujatnika, G. (2023). Politik Hukum Perizinan Berusaha Di Daerah Pasca Putusan Mahkamah Konstitusi No. 91/PUU-XVIII/2020 dan Berlakunya UU Nomor 6 Tahun 2023. *Syariati: Jurnal Studi Al-Qur'an Dan Hukum*, 9(1), 65–88. <https://doi.org/10.32699/syariati.v9i1.4627>
- Ningsih, F. (2022). Politik Hukum Problematika Keberlakuan UU Cipta Kerja Pasca Putusan Mahkamah Konstitusi No. 91/PUU-XVIII/2020. *COMSERVA: Jurnal Penelitian Dan Pengabdian Masyarakat*, 2(7), 963–970.
- Pratama, A. L., & Uwiyono, A. (2022). Politik Hukum UU Ketenagakerjaan Sebelum Dan Pasca Putusan Mahkamah Konstitusi Pengujian Formil UU Cipta Kerja Perkara 91/PUU-XVIII/2020. *Jurnal Justitia: Jurnal Ilmu Hukum Dan Humaniora*, 9(5), 2700–2716. <https://doi.org/10.31604/justitia.v9i5.2700-2716>
- Rahman, F., & Wicaksono, D. A. (2016). Eksistensi dan Karakteristik Putusan Bersyarat Mahkamah Konstitusi. *Jurnal Konstitusi, Mahkamah Konstitusi RI*, 13(2). <https://doi.org/10.31078/jk1326>
- Romli, A. S. M. (2017). Pesan Alquran tentang akhlak (Analisis hermeneutis double movement Fazlur Rahman terhadap QS al-Hujurat Ayat 11-13). *Diya Al-Afkar: Jurnal Studi Al-Quran Dan Al-Hadis*, 5(2), 453–476. <https://doi.org/10.24235/sqh.v5i02.4350>
- Sanjaya, D., & Rasji, R. (2021). Pengujian Formil Undang-Undang Cipta Kerja Dalam Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020. *Jurnal Hukum Adigama*, 4(2), 3255–3279. <https://doi.org/10.24912/adigama.v4i2.17910>
- Soekanto, S., & Mamudji, S. (2012). *Penelitian Hukum Nornatif Suatu Tinjauan Singkat*. Jakarta: Raja Grafindo Persada. Retrieved from

- <https://opac.perpusnas.go.id/DetailOpac.aspx?id=1174906>
- Soemarsono, M. (2007). Negara Hukum Indonesia Ditinjau Dari Sudut Teori Tujuan Negara. *Jurnal Hukum & Pembangunan*, 37(2), 300–322.
- Susetyo, W., Ichwan, M. Z., Iftitah, A., & Dievar, T. I. (2022). Kepastian Hukum Undang-Undang Cipta Kerja Bidang Kesehatan Pasca Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020. *Jurnal Supremasi*, 12(2), 27–36. <https://doi.org/10.35457/supremasi.v12i2.2315>
- Syukri, A. (2013). Model dan Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang – Undang (Studi Putusan Tahun 2003 – 2012). *Jurnal Konstitusi, Mahkamah Konstitusi RI*, 10(4). Retrieved from <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/1046>
- The Republic of Indonesia’s Constitutional Court. *Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 Perihal Pengujian Formil Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja Terhadap Undang Undang Dasar Negara Republik Indonesia Tahun 1945*. , (2021). Indonesia.
- Wijaya, M. H. (2013). Keberadaan Konsep Rule by Law (Negara Berdasarkan Hukum) Didalam Teori Negara Hukum The Rule of Law. *Jurnal Magister Hukum Udayana*, 2(3), 44075.
- Wildan, M. (2022). Implikasi Putusan MK Terkait UU Ciptaker Jangan Buat Bingung Pemohon Perizinan. Retrieved September 26, 2023, from Ombudsman website: <https://ombudsman.go.id/artikel/r/pwkinternal--implikasi-putusan-mk-terkait-uu-ciptaker-jangan-buat-bingung-pemohon-perizinan>