

The *ratio decidendi* of the decision of the Constitutional Court of the Republic of Indonesia from the perspective of legal positivism

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Indonesia is currently facing economic problems related to the lack of investment and lack of job opportunities, as well as the difficulty of licensing. Therefore, the preparation of laws and regulations using the omnibus law method was then carried out to overcome these conditions so that Indonesia succeeded in issuing Law No. 11 of 2020 concerning Job Creation. Even though the existence of the Law is critical because of the various shortcomings in it, ranging from the mechanism for its preparation, the involvement of the parties, excessive (over regulation) to the level of norms which experts and legal observers feel need a more in-depth study. Based on this fact, the question then arises: What is the *ratio decidendi* of the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020? And is the decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 in accordance with the perspective of legal positivism? The method in this manuscript uses normative legal research. Based on the analysis, Law No. 11 of 2020 was decided as conditionally unconstitutional. So that the legislators need to improve no less than two years since the decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 was pronounced. So that Law No. 11 of 2020 in the context of legal positivism can also be said to be contrary to the constitution and declared to have no legal consequences.

Keywords: *ratio decidendi*, decision, Constitution of Indonesia, Constitutional Court, unconstitutional law, legal positivism, normative legal research.

1. Introduction

For being able to be adopted into the Indonesian legal system, the omnibus law must fulfill several things. Firstly, the principles of openness and public participation must be put forward since the beginning of its formulation. Secondly, the principles of transparency, prudence, and unhurriedness must be established during the discussion in the People’s Representative Council (Indonesian: *Dewan Perwakilan Rakyat*, DPR). Thirdly,

the substance does not go beyond the constitution. Lastly, the philosophical aspects of the amended laws must be still accommodated (Anggono 2020a, 195; 2020b, 35). Community participation as the manifestation of the principle of public involvement needs to be prioritized in the formation of laws and regulations especially if it is closely related to the interests of the community (Indrati 2007, 27). These principles are regulated in Law No. 12/2011 in conjunction with Law No. 15/2019¹ as a benchmark in the preparation of laws and regulations in Indonesia. The Republic of Indonesia is a constitutional state as stipulated in the 1945 Constitution, which simply states that the exercise of state power is carried out under the rule of law. In this state, the law serves as the basis for exercising government power (Attamimi 1992, 8). In addition, carrying out the preparation of laws and regulations must also refer to the rules that have been established as law.

The preparation of laws and regulations using the omnibus law method has been conducted in Indonesia, as seen in the issuance of Law No. 11/2020 concerning Job Creation. This law was issued because Indonesia is facing economic problems related to investment that has not been maximized, the lack of job opportunities, the difficulty of licensing, and the number of regulations, making them excessive (over-regulation) (Arief, Ramadani 2021, 107). Therefore, Law No. 11/2020 was issued to address those economic problems by creating job opportunities, streamlining overlapping regulations, and facilitating licensing. These things are expected to be able to maximize investment in Indonesia. Furthermore, the maximum foreign investment is expected to overcome unemployment by providing job opportunities, which in turn will increase the economy for the welfare of the people. The easiness of licensing and investing is addressed by simplifying the procedure for the establishment of limited liability companies for micro and small businesses with individual limited companies. The establishment of the company can be carried out in the form of a statement from the founder without the need for an agreement with another party and/or the capital partnership (Aziz, Febriananingsih 2020, 93). For these reasons, Law No. 11/2020 was issued to maximize the efforts to achieve people's welfare (Chaidir, Fahmi 2010, 74).

Law No. 11/2020 which is expected to provide solutions to the aforementioned problems is requested for a formal review to the Constitutional Court by parties who feel that their constitutional rights have been violated by the presence of the law. The Constitutional Court (Indonesian: *Mahkamah Konstitusi*, MK) based on the 1945 Constitution of the Republic of Indonesia has the authority to examine laws against the constitution (Natabaya 2008, 188). Eventually, the formal review of Law No. 11/2020 by the Constitutional Court was granted for some and rejected for others. Although the applicants wish to control the constitutionality of the law (UU No. 11/2020), it is the Constitutional Court that has the power to make decisions (Syahrizal 2006, 313).

There are at least two arguments that can be used as a consideration making this paper important and urgent.

First, on Wednesday, November 13, 2021, the Constitutional Court of the Republic of Indonesia granted part of the formal review of Law No. 11/2020, even though the decision

¹ Hereinafter all the Indonesian acts and court decisions are cited from Mahkamah Konstitusi Republik Indonesia (Accessed May 25, 2024. https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_8240_1637822490.pdf) and Database Peraturan (Accessed May 25, 2024. <https://peraturan.bpk.go.id/Details/121716/uu-no-15-tahun-2019>).

contained a dissenting opinion from some judges. The partial acceptance of the judicial review is stated in the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020. The decision is related to the case of a formal review of Law No. 11/2020 against the 1945 Constitution of the Republic of Indonesia. With the acceptance of the formal test, the decision surely has a certain *ratio decidendi* that underlies the background of the decision.

Second, the decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 needs to be examined from the point of view of legal positivism. This is because the decision needs to be considered from the aspect of legal certainty. The decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 is expected to provide legal certainty, especially for parties who submit a formal review of the law and generally for all components of the Indonesian people.

Based on the description above, this paper presents the research problems as outlined in the following section. What is the *ratio decidendi* of the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020? Is the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 based on the perspective of legal positivism?

2. Basic research

2.1. *The Ratio Decidendi of the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020*

In the Constitutional Court Law regulating the formal review of the law, the applicants of formal review are obliged to explain clearly that the formation of the law to be reviewed does not meet the provisions of the 1945 Constitution. Formal review (*Formele Toetsingsrecht*) is carried out to assess a legislative product, such as a law, to find out whether the product incarnated through its procedures is contrary to applicable laws and regulations. In other words, the formal review is about the procedure for making laws (Safa'at et al. 2019, 163)². Furthermore, in a formal review of regulatory products (laws), it is necessary to consider the fulfillment of statutory requirements and natural justice. The fulfillment of formal requirements based on statutory regulations is undoubtedly necessary. Besides, the terms of natural justice are based on the judge's decision which is considered fair. Furthermore, decisions should be impartially and only to the truth. Therefore, judges should not be biased towards one of the litigants (Asshid-diqie 2014, 105–106).

With the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020, the formal review for the case of Law No. 11/2020 against the 1945 Constitution of the Republic of Indonesia was granted for some requests. Case No. 91/PUU-XVIII/2020 was filed by Hakiimi Irawan Bangkid Pamungkas, Ali Sujito, Muhtar Said, S. H., M. H., Migrant CARE, the Coordination Board of Kerapatan Adat Nagari of West Sumatra (Indonesian: *Badan Koordinasi Kerapatan Adat Nagari Sumatera Barat*),

² “Hukum Acara Mahkamah Konstitusi (Cet. 1.) Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi Bekerjasama dengan Asosiasi Pengajar Hukum Acara Mahkamah Konstitusi”. *Tim Penyusun Hukum Acara Mahkamah Konstitusi*. 2010, 92.

and the Customary Court of Alam Minangkabau (Indonesian: *Mahkamah Adat Alam Minangkabau*)³.

The Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 is stated as follows.

1. To declare that the establishment of Law No. 11/2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) is contrary to the 1945 Constitution of the Republic of Indonesia and has no conditionally binding legal force as long as it is not interpreted “no correction is made within two years since this decision is pronounced”.

2. To declare that Law No. 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) is still in effect until corrections are made regarding the improvement of the establishment of the law within the time limit as determined in this decision.

3. To order the legislators to make improvements within a maximum period of two years since this decision is pronounced and if within that time limit no corrections are made, then Law No. 11/2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) becomes permanently unconstitutional.

4. To declare that if within a period of two years the legislators cannot complete the revision of Law No. 11/2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573), then the laws, articles, or material contents that have been revoked or amended by Law No. 11/2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) are declared to be in effect again.

5. To declare to suspend all strategic and broad-impact actions/policies and to not allow to issue new implementing regulations relating to Law No. 11/2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573)⁴.

The instructions contained in the decision can be interpreted as follows. First, the formation of Law No. 11/2020 is contrary to the 1945 Constitution of the Republic of Indonesia. As a result, it has no conditionally binding legal force as long as it is not interpreted as “no correction is made within two years since the decision is pronounced”. Second, the law remains in effect until the corrections are made regarding the improvement of the establishment of the law within the time limit as determined in the decision. Third, Law No. 11/2020 becomes permanently unconstitutional if within a maximum period of two years since the decision is pronounced no corrections are made. Fourth, if within two years Law No. 11/2020 is not corrected, the laws, articles, or material contents that have been revoked or amended by this law shall be declared to be re-applicable. Fifth, all strategic and broad-impact actions/policies are suspended and it is not permissible to issue new implementing regulations related to Law No. 11/2020.

The background of the decision can be investigated in the *ratio decidendi*. *Ratio decidendi* can be defined as “1. The principle or rule of law on which a court’s decision is

³ Putusan MKRI No. 91/PUU-XVIII/2020 Pengujian Formil Undang-Undang No. 11 Tahun 2020 Tentang Cipta Kerja Terhadap UUD 1945, 2021, 1–2.

⁴ *Ibid.*, 416–417.

founded [many poorly written judicial opinions do not contain a clearly ascertainable *ratio decidendi*]. 2. If the rule of law on which a later court thinks that a previous court founded its decision, a general rule without which a case must have been decided otherwise [this opinion recognizes the Supreme Court's *ratio decidendi* in the school desegregation cases]" (Garner 2010, 1378). The *ratio decidendi* is the legal reasons used by the judges to arrive at their decisions. The *ratio decidendi* can be found consisting of material facts. Facts can be in the form of people, places, times, and everything that accompanies them as long as they are not proven otherwise. However, material facts need to be considered because both the judge and other parties are looking for the right legal rules to be applied to these facts (Marzuki 2010, 119; Susanti, Efendi 2014, 119).

The following is the formulation of the *ratio decidendi* of the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020. First, the procedure for the formation of Law No. 11/2020 is not based on definite-and-standard methods and the systematic formation of laws. There is a change in the writing of several substances after the joint approval between the People's Representative Council and the President, which is contrary to the principles of the formation of laws and regulations⁵. Second, judges can understand the issue of "regulatory obesity" and the overlap between laws which is the reason the government uses the omnibus law method which aims to accelerate investment and expand employment opportunities in Indonesia. However, this does not mean that to achieve this goal, it is possible to override the applicable standard procedures or guidelines because the objectives and methods cannot be separated in affirming the principles of a constitutional democratic rule of law. In addition, judges found the unfulfillment of the legal requirements regarding procedures for the formation of Law No. 11/2020 although there are also big goals to be achieved with the enactment of Law No. 11/2020 that have created many implementing regulations and even been implemented at the level of practice⁶. Thirdly, for the sake of legal certainty, especially to avoid a legal vacuum over the law or articles or material content of the law that has been revoked or amended, it must be declared to be re-applicable if within a period of two years the legislators cannot complete the correction⁷. Fourth, to avoid a greater impact on the enactment of Law No. 11 of 2020 during two years, the implementation of Law No. 11/2020 relating to strategic and broad-impact matters should be postponed in advance, including not justifying the formation of new implementing regulations and also not justifying state administrators making strategic policies that can have a wide impact⁸. Fifth, because the court has not yet assessed the material constitutionality of Law No. 11/2020 even though the law has been widely sued for material testing, legislators in making improvements have the opportunity to review some of the substances objected to by several community groups⁹.

The decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 is related to the formation of Law No. 11/2020. In other words, it is not related to the material of the law. The criteria that can be used for assessing the constitutionality of law from its formal aspect (*formale testing*) are the extent to which the law is

⁵ Ibid., 412.

⁶ Ibid., 413.

⁷ Ibid., 414.

⁸ Ibid.

⁹ Ibid.

enacted in an appropriate form by an appropriate institution and appropriate procedures (Anggono 2014, 31). Therefore, in material terms, Law No. 11/2020 until the decision is issued is still constitutional because the case for a judicial review of the law has not yet been decided by the Constitutional Court.

2.2. The Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 in the perspective of legal positivism

One of the schools of thought developing in the legal philosophy field is positivism. It has emerged since the Middle Ages and has had an influence in many countries. The term “positivism” comes from the passive form of the word *ponere* (to put), namely *positus-a-um* which means to be put. Positivism refers to an attitude or thought that puts its views and approaches on something. Legal positivism holds the view that the law is issued and enforced by certain parties in society who have the authority to formulate laws (Cahyadi, Manullang 2015, 58). Legal positivism is identical with the maxim “law is the rule”. The rule is law, while outside the rule is not law. The only source of law is the rule (Rasjidi, Rasjidi 2012, 56). Law is legality. If the rules are determined by an authorized agency (i. e., the legitimate government) and are determined according to certain applicable criteria, then the legal legislation products have juridical power (validity) and are different from customs that do not apply legally (Huijbers 1995, 42).

This is in line with Art. 15 of *Algemene Bepalingen van Wetgeving*, that “Not to mention the deviations that are determined for Indonesian people and those who are equated with Indonesian people, the custom is not law unless the rules (legislation products) determine it” (Rasjidi, Rasjidi 2012, 57).

Law in the view of legal positivism is a law made by humans for humans. In addition, the law must be positive (Efendi, Susanti, Sari 2018, 60). The principles of juridical positivism are as follows:

The law is the same as the rules. The law is published for the state so that the correct law is the law that applies in a country.

There is no absolute relationship between law and morals. Law is the creation of legal experts only.

Law is a closed logical system. The interpretation of the law does not require guidance from social, political, and moral norms but is sufficient to be concluded from the law (Anshori 2016, 93).

The Constitutional Court has the authority to examine the law applied for by the applicants regarding its constitutionality both materially and formally. The decision is final and binding not only on the parties but also on all Indonesian people. If a law is tested in the Constitutional Court and proven to be in direct conflict with the 1945 Constitution of the Republic of Indonesia, then the application must be granted. The decision of the Constitutional Court whose decision stated that the formation of a law does not meet the provisions for the formation of law based on the 1945 Constitution of the Republic of Indonesia means that the law does not have binding legal force¹⁰.

Law No. 11/2020 which is formally tested is proven that the process of its formation is contrary to the 1945 Constitution of the Republic of Indonesia. Therefore, the law does

¹⁰ Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi, Pasal 57 Ayat (2).

not have binding legal force¹¹. Law No. 11/2020 because it is contrary to the constitution does not automatically become invalid since it was knocked by the Constitutional Court. The invalidity of the law will only take effect when the grace period of two years expires and the legislators do not correct the law based on the laws and regulations in making laws and regulations. The establishment of Law No. 11/2020 is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditionally binding legal force as long as it is not interpreted as not being corrected within two years since the decision is pronounced¹².

The statement of the Constitutional Court contained in its decision is a violation of the law. The phrase “as long as it is not interpreted as ‘no correction is made within two years since this decision is pronounced’” indicates that the Constitutional Court has violated the law governing the Constitutional Court itself. This is enshrined in the provisions of the Constitutional Court Law, as follows:

1. The decision of the Constitutional Court whose verdict states that the content of paragraphs, articles, and/or parts of the law is contrary to the 1945 Constitution of the Republic of Indonesia declares that the content of paragraphs, articles, and/or parts of the law does not have binding legal force.
2. The decision of the Constitutional Court whose verdict states that the formation of the concerned law does not fulfill the provisions for the formation of law based on the 1945 Constitution of the Republic of Indonesia declares that the law does not have binding legal force¹³.

Based on the norms contained in the Constitutional Court Law, Law No. 11/2020 which is contrary to the 1945 Constitution of the Republic of Indonesia should be declared to have no binding legal force since the decision was issued. Because of being not implemented, it principally has violated the Constitutional Court Law itself by not declaring the invalidity of Law No. 11/2020 since the decision has been validated. In this case, the Constitutional Court just gave room for improvement by the legislators within a grace period of two years after the decision was pronounced.

In the school of legal positivism, the law is the same as the rule, the rule is law, outside the rule is not law, and the only source of law is the rule (Rasjidi, Rasjidi 2012, 56). Law is legality. If the rules are determined by an authorized agency (i. e., the legitimate government) and are determined according to certain applicable criteria, then the legal legislation products have juridical power (validity) and are different from customs that do not apply legally (Huijbers 1995, 42). According to the legal positivism argument, the provisions of Art. 57 of the Constitutional Court Law are the norm of orders that must be carried out by judges of the Constitutional Court to declare Law No. 11/2020 not valid since it was pronounced because the process of its formation is contrary to the constitution.

The *ratio decidendi* of the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 states that judges can understand the issue of “regulatory obesity” and the overlap between laws which is the reason the government uses the omnibus law method which aims to accelerate investment and expand employment op-

¹¹ Putusan MKRI No. 91/PUU-XVIII/2020 Pengujian Formil Undang-Undang No. 11 Tahun 2020 Tentang Cipta Kerja Terhadap UUD 1945, 2021, 416.

¹² Ibid.

¹³ Pasal 57 Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi.

portunities in Indonesia. However, this does not mean that to achieve this goal, it is possible to override the applicable standard procedures or guidelines because the objectives and methods cannot be separated in affirming the principles of a constitutional democratic rule of law. Judges also found the unfulfillment of the legal requirements regarding procedures for the formation of Law No. 11/2020 although there are also big goals to be achieved with the enactment of Law No. 11/2020 that have created many implementing regulations and even been implemented at the level of practice¹⁴.

The *ratio decidendi* is not a legal issue. The *ratio decidendi* regarding “regulatory obesity” and the overlap between laws as well as the objective of accelerating investment and expanding employment opportunities are not legal considerations. Legal considerations are sufficient with those stated in the norms of law, in this case, the Constitutional Court Law. In the Austinian perspective, the law is something that is determined by the object it governs (materialism). Legal norms are determined by legislators as something certain. Furthermore, a greater focus on legal reasoning has made it harder to claim a clear separation of law “as it is” and law “as it ought to be” (Erwin 2018, 236; Rato 2014, 183–184). The strict separation between law and morals is focused on applicable law and the law that should be or between *das sein* and *das sollen*, leading to the maxim “law is a command of lawgivers”. They strictly propose that the law is identical to the rules (Darmodiharjo, Sidarta 2006, 113–114). In this case, the legislators have enacted a Constitutional Court Law, which has stipulated that the formation of a law that does not meet the provisions for the formation of law based on the 1945 Constitution of the Republic of Indonesia does not have binding legal force¹⁵.

Judges (court) are not allowed to make additions, subtractions, or limitations as stated in the law. They are only the mouthpiece of the law. In addition, they must only state what has been stated in the law (Manullang 2020, 101). The law as a legal product is the decision of the state authorities (*overheidsbeluiter*) (Ekatjahjana 2015, 115) and the product of the legislators, namely the People’s Representative Council and the President. With this argument, the judges (Constitutional Court) are not allowed to make additions, subtractions, or limitations contained in the law. They are only the mouthpiece of the law. Moreover, they must only state what has been stated in the law. The Constitutional Court Law stipulates that laws whose formation is not based on statutory regulations and contrary to the constitution must be declared invalid and non-binding.

The Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 only states that the law is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditionally binding legal force as long as it is not interpreted “no correction is made within two years since this decision is pronounced”¹⁶. With these conditions, Law No. 11/2020 is still valid. However, if it is not corrected within two years, it will not apply permanently. By remaining valid within a grace period of two years, the judges (Constitutional Court) principally have violated the law. In this case, the judges (Constitutional Court) make additions, subtractions, or limitations from what has been stated in the law. In other words, they are not the mouthpiece of the law. Additionally, they

¹⁴ Putusan MKRI No. 91/PUU-XVIII/2020 Pengujian Formil Undang-Undang No. 11 Tahun 2020 Tentang Cipta Kerja Terhadap UUD 1945, 2021, 413.

¹⁵ Pasal 57 Ayat (2) Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi.

¹⁶ Putusan MKRI No. 91/PUU-XVIII/2020 Pengujian Formil Undang-Undang No. 11 Tahun 2020 Tentang Cipta Kerja Terhadap UUD 1945, 2021, 416.

do not state what has been stated in the law. The *ratio decidendi* of the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 also mentions “regulatory obesity” and the overlap between laws as well as investment acceleration and job expansion in Indonesia¹⁷. In the context of legal positivism, they are not legal problems because they are not listed in the Constitutional Court Law¹⁸. The decision of the judge (court) has legal force because it is based on the law. Therefore, the decision of the judge (court) must not conflict with the law (Wirawan, Sudaryanto, Ana 2002, 4).

3. Conclusions

According to the elaboration presented in the previous section, the main point regarding the *ratio decidendi* of the Decision of the Constitutional Court of the Republic of Indonesia No. 91/PUU-XVIII/2020 is that the state (government) wants to maximize investment in Indonesia, resulting in more job opportunities so that workers can be absorbed by the business world. However, in Indonesia, licensing is not easy and many laws and regulations overlap and are redundant. Based on the *ratio decidendi* aforementioned, the Constitutional Court decide that Law No. 11/2020 was conditionally unconstitutional. The Constitutional Court asked the legislators to revise the law within two years since the decision was pronounced. In the perspective of legal positivism, the decision violates the law. In the provisions of the Constitutional Court Law, it is stated that the formation of laws that are contrary to the constitution is declared non-binding. In addition, the law has no binding legal force. For this reason, Law No. 11/2020 does not have binding legal force. However, in the decision, the Constitutional Court provided two years for correcting, only after that, if not being carried out, the law is declared permanently unconstitutional.

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