

# Investment in Indonesia After Constitutional Court's Decision in the Review of Job Creation Law

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**ABSTRACT:** In 2021, the Indonesian Constitutional Court decided conditionally unconstitutional in the review of the Job Creation Law. It was among a few decisions made by the Constitutional Court to accept a formal review, even if some dissenting opinions followed it. While the decision has largely influenced a wide array of regulatory laws because the Job Creation Law adopts the omnibus law model, the pivotal issue in this paper rests on the legal basis for investment in Indonesia after this decision. Firstly, it enquired whether the Constitutional Court exceeded its power for a procedural judicial review against the Job Creation Law. Second, it discussed the legal basis for investment in Indonesia after the Constitutional Court's Decision No. 91/PUU-XVIII/2020. Using normative research, the results showed that with the conditional unconstitutional decision, the Indonesian investment world would experience legal uncertainty for the next two years, especially new businesses, licensing, and investments with the enactment of the Job Creation Law. In particular, if the legislative branch failed to improve this law over two years, businesses, licensing, and investments in Indonesia might have no legal basis, resulting in the uncertain situation of the government's desire to realize the friendly investment.

**KEYWORDS:** Constitutional Court, Job Creation Law, Judicial Review.



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## I. INTRODUCTION

Since the beginning, the Job Creation Law has resulted in problematic issues. It has also triggered pros and cons to policies made by the country, from the criticism of the absence of transparency in formulating to enacting it, considered too hasty.<sup>1</sup> In particular, the drafting process of this Bill engaged with minimal public participation and limited debate in the parliamentary meeting.<sup>2</sup> As a result, the Job Creation Law was substantially problematic because many incompatibilities were found, and it was supposed to cause serious legal issues.<sup>3</sup> Amidst the pros and cons and various rejection actions, the legislative body (i.e., the House and the President) continued the process by enacting it in the House's plenary meeting on October 5, 2020, into the Job Creation Law 11/2020.<sup>4</sup> After the enactment, it questioned whether the final draft was used since the Job Creation Law had further versions with a different total of pages, indicated by the unfinished law that underwent revisions even after being enacted.<sup>5</sup> In particular, on October 12, 2020, the total number of pages significantly

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<sup>1</sup> Fajar Kurniawan, "Problematika Pembentukan RUU Cipta Kerja Dengan Konsep Omnibus Law Pada Klaster Ketenagakerjaan Pasal 89 Angka 45 Tentang Pemberian Pesangon Kepada Pekerja Yang di PHK" (2020) 5:1 Jurnal Panorama Hukum at 64.

<sup>2</sup> Bayu Dwi Anggono & Fahmi Ramadhan Firdaus, "Omnibus Law in Indonesia: A Comparison to the United States and Ireland" (2020) 7:3 Lentera Hukum 319–336 at 332.

<sup>3</sup> Maria Farida, "Problematika Konsep Diskresi dalam Penyelenggaraan Administrasi Pemerintahan Pasca Undang-Undang Cipta Kerja, Jurnal Ilmiah Hukum dan Hak Asasi Manusia" (2021) 1:1 Jurnal Ilmiah Hukum dan Hak Asasi Manusia 11–20; Amania N, "Problematika Undang-Undang Cipta Kerja Sektor Lingkungan Hidup" (2020) 6:2 Syariati: Jurnal Studi Al-Qur'an dan Hukum 209–220; Sulistina, Bayu Dwi Anggono, & Al Khanif, "The Pathway of Adopting Omnibus Law in Indonesia's Legislation: Challenges and Opportunities in Legal Reform" (2022) 2:2 Jurnal Kajian Pembaruan Hukum 155–182 at 166.

<sup>4</sup> Munawar, Marzuki, & Ibnu Affan, "Analisis Dalam Proses Pembentukan Undang-Undang Cipta Kerja Perspektif Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan" (2021) 3:2 Jurnal Ilmiah Metadata 452–468.

<sup>5</sup> *Ibid* at 465.

increased compared to the previously circulated manuscript from 905 to 1,035.<sup>6</sup>

The narrative above illustrates that the legislative process of the Job Creation Law reflected a bad legislative practice. The option with the omnibus model that amended many rules in various laws also encouraged this inexperienced legislative-making. However, it can be tracked back that worse precedent and recklessness in enacting this Bill had occurred since the beginning of its drafting – when the first Work Meeting discussed the Job Creation Bill.<sup>7</sup> At that time, the House immediately formed a Work Committee, even though the factions in the House had not finished completing the Issues Inventory List.<sup>8</sup> According to Article 151(1) of the House Order, the Work Committee was established after completing the Work Meeting. Furthermore, Article 154(1) explains that the Work Meeting discussing all materials of the Bill must follow *Daftar Inventarisasi Masalah (DIM)* or the Issues Inventory List of each faction in the House or Regional Leadership Council.<sup>9</sup>

While the legislative-making of this Law has resulted in several rejections, after its enactment, this Job Creation Law was responded to with the submission of judicial review to the Constitutional Court.<sup>10</sup> After the trial, the Constitutional Court finally decided to grant some suits of the procedural judicial review. First, Decision No. 91/PUU-XVIII/2020 stated that the Job Creation Law experienced a procedural judicial flaw, decided conditionally unconstitutional. It has become a landmark decision that will set a precedent as this is the first time the Constitutional Court has granted

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<sup>6</sup> Adhi S Prabowo et al, “Politik Hukum Omnibus Law di Indonesia” (2020) 13:1 Pamator Journal 1–6.

<sup>7</sup> Munawar, Marzuki, & Ibnu Affan, *supra* note 4.

<sup>8</sup> *Ibid* at 460–462.

<sup>9</sup> Editorial, “Pengesahan UU Cipta Kerja : Legislasi Tanpa Ruang Demokrasi”, *Pus Studi Huk Dan Kebijakan Indones PSHK* (6 October 2020), online: <<https://pshk.or.id/publikasi/pengesahan-uu-cipta-kerja-legislasi-tanpa-ruang-demokrasi/>>.

<sup>10</sup> Some submissions were registered in No. 91/PUU-XVIII/2020, No. 103/PUU-XVIII/2020, No. 105/PUU-XVIII/2020, No. 107/PUU-XVIII/2020, No. 4/PUU-XIX/2021, and No. 6/PUU-XIX/2021.

the request for a law revision under the formal judicial review. While it has drawn criticism and praise, the decision granting the procedural judicial review is inevitably a progressive step that not only reflects the Constitutional Court as the guardian of the constitution and democracy.

The Constitutional Court Decision caused more uncertainty in business practice related to legal problems. Especially foreign investment in Indonesia, that since the 1997-1998 Crisis, has proved to be resilient during financial crises in East Asian countries. Such evidence was also shown during the Mexican crisis of 1994-95 and the Latin American debt crisis of the 1980s. Therefore it is essential to provide safety for International Investment through legal certainty.

Scholars studied investment terms and their implementation. For instance, there were issues of potential investor claims and possible state defenses during the COVID-19 emergency.<sup>11</sup> Investors' potential claims could be delivered based on violations of the principles of fair and equal treatment, full protection and security, national treatment, and most favored nations.<sup>12</sup> In the meantime, another research addressed the different episodes of the umbrella clause over the past decade.<sup>13</sup> It projected the debate over the clause's scope and development, the government's action, and social perception, following to what extent it changed the standard of investment protection in international treaties.<sup>14</sup> However, no paper specifically analyzed investment in Indonesia after the Constitutional Court's decision in the review of the Job Creation Law.

In so doing, we are interested in reviewing the legal basis for investment in Indonesia after Constitutional Court's Decision No. 91/PUU-XVIII/2020. In this study, the Constitutional Court exceeded its authority in conducting a procedural judicial review against the Job Creation Law. After such a Constitutional Court's decision, the legal basis for investment in Indonesia. Then, this paper is organized into two main sections of analysis. First, did

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<sup>11</sup> Sefriani & Seguito Monteiro, "Potential Investor Claims and Possible State Defenses During the Covid-19 Emergency" (2021) 5:2 Sriwijaya Law Review 236-246.

<sup>12</sup> *Ibid* at 3.

<sup>13</sup> *Ibid* at 30.

<sup>14</sup> *Ibid* at 33.

the Constitutional Court exceed its power for a procedural judicial review of the Job Creation Law? Second, what is the legal basis for investment in Indonesia after such a Constitutional Court's decision?

## II. METHODS

In this study, the method focused on the legal process and the application of law, dealing with the legal provisions substantially and procedurally.<sup>15</sup> In practice, an in-depth examination of the law was held to seek an alternative to the problems concerned.<sup>16</sup> The legal method used in this research was normative legal research to find the rule of law, legal principles, and doctrines to answer the legal issues.<sup>17</sup>

Legal research was taken to construct new arguments, theories, and concepts as a prescription for solving the problem of this study,<sup>18</sup> by using the legislative, case, historical, conceptual, and literature approaches.<sup>19</sup> This study is based on the Constitutional Court's Decision No. 91/PUU-XVIII/2020, given the constitutional interpretation of the process of forming the Job Creation Law. As for interpretation, the Constitutional Court, often referred to as "*the guardian of the constitution and the sole interpreter of the constitution*," decides whether a product of legislation is contrary to the constitution,<sup>20</sup> on the review of the constitutionality of laws against the 1945 Constitution.<sup>21</sup> The methods used in interpreting the law vary. John H. Garvey and T. Alexander Aleinikoff put forward several

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<sup>15</sup> Yati Nurhayati, Ifrani, & MYasir Said, "Metodologi Normatif dan Empiris Dalam Perspektif Ilmu Hukum" (2021) 2:1 Jurnal Penegakan Hukum Indonesia 1–20.

<sup>16</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: Universitas Indonesia (UI-Press), 2008) at 43; Muhammad Abdulkadir, *Hukum dan Penelitian Hukum* (Bandung: Citra Aditya Bakti, 2004) at 32.

<sup>17</sup> Muhammad Abdulkadir, *supra* note 15 at 29.

<sup>18</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2009) at 35.

<sup>19</sup> *Ibid* at 36.

<sup>20</sup> Feri Amsari, *Perubahan UUD 1945 Perubahan Konstitusi Negara Kesatuan Republik Indonesia Melalui Keputusan Mahkamah Konstitusi* (Jakarta: Rajawali Pers, 2011) at 80–81.

<sup>21</sup> Jimly Asshidique, *Pengenalan Mahkamah Konstitusi dan Pendidikan Kesadaran Berkonstitusi* (Jakarta: Mahkamah Konstitusi Republik Indonesia, 2005) at 1.

main methods for interpreting the constitution: interpretivism and non-interpretivism; textualism; original intent; stare decisis; neutral principles; and a combination of these methods.<sup>22</sup> In addition, it asked which interpretation was used: grammatical, historical, legal history, systematic, sociological, teleological, functional, or authentic interpretation.<sup>23</sup> In this case, the Constitutional Court's decision used textual and contextual interpretation by referring to the original intent as this Court explored the intent and meaning of the formal judicial review process.

### III. THE CONSTITUTIONAL COURT'S POWER FOR FORMAL JUDICIAL REVIEW

The Constitutional Court was established due to socioeconomic and political turbulence from the Indonesian reformation. Hence, this Court was introduced during the constitutional amendment from 1999-2002, in the third amendment phase. In the 1945 Constitution, this Court is stipulated explicitly in Article 24C, broadly vesting the power to conduct a constitutional review of laws under the 1945 Constitution, resolve disputes between state institutions, adjudicate the dissolution of political parties, and decide the dispute over the result of the general election. The power to review laws is essential as the balance of power controls legislation products that may contradict the constitution.<sup>24</sup> Hans Kelsen called it "*recognized the need for an institution with the power to control or regulate legislation.*"<sup>25</sup> In this case, the control in the form of judicial review<sup>26</sup> can be a means to review the legislation produced by the legislature so as not to harm the

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<sup>22</sup> Saldi Isra, *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia* (Jakarta: Rajawali Pers, 2010) at 55.

<sup>23</sup> Jazim Hamidi, *Hermeneutika Hukum, Teori Penemuan Hukum Baru dengan Interpretasi Teks* (Jakarta: UII Press, 2005) at 53.

<sup>24</sup> Maruarar Siahaan, *UUD 1945 Konstitusi Yang Hidup* (Jakarta: Sekjen dan Kepaniteraan MK, 2008) at 49; S Cassese, "Global administrative law: the state of the art" (2015) 13:2 *International Journal of Constitutional Law* 465-468.

<sup>25</sup> John E Ferejohn, "Constitutional Review in the Global Context, 6th New" (2003) 6:49 *Legislation and Public Policy* 49-52.

<sup>26</sup> D Lustig & JH Weiler, "Judicial Review In The Contemporary World—Retrospective and Prospective" (2018) 16:2 *International Journal of Constitutional Law* 315-372.

public.<sup>27</sup> The Procedural Law of the Constitutional Court is a set of rules on the procedural judicial state functions to enforce material constitutional law, which includes various rules and regulations that apply formally in implementing the state culminating in the constitution.<sup>28</sup> Therefore, the primary function of the Constitutional Court is to control and balance the legislative function in ensuring the constitution is carried out consistently (*the guardian of the constitution*) and as the sole interpreter of the constitution.<sup>29</sup> Constitutional Court Law 24/2003 outlines the role of the Constitutional Court in upholding the constitution as a means to realize law and democracy. In this case, the Constitutional Court is given the authority to enforce the constitution and maintain democracy, with judicial review authority.<sup>30</sup>

In conducting a judicial review, Jimly Asshiddiqie divides two types of judicial reviews, i.e., concrete and abstract norm reviews.<sup>31</sup> By following the objects reviewed, legal product review, in general, can be conducted formally (*formele toetsingrecht*) and materially (*materiele toetsingrecht*),<sup>32</sup> and

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<sup>27</sup> Syukri Asy'ari, Meyrinda R Hilipito, & Mohammad Mahrus Ali, "Model dan Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012)" (2013) 10:4 Jurnal Konstitusi 675–708.

<sup>28</sup> AK Jaelani, H IGAKR & L Karjoko, "Executability of the constitutional court decision regarding the grace period in formulating legislation" (2019) 28:15 Int J Adv Sci Technol 816–823; Jeffrey A Pojanowski, "Neoclassical Administrative Law" (2020) 133:852 Harvard Law Review 853–919.

<sup>29</sup> J Cobbe, "Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making" (2019) 39:4 Leg Stud 636–655.

<sup>30</sup> Jose H Choper, *Judicial Review, and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago and London: The University of Chicago Press, 1980) at 4-7; I Dewa Gede Palguna, *Mahkamah Konstitusi, Judicial Review, dan Welfare State* (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, 2008) at 3.

<sup>31</sup> I Dewa Gede Palguna, *supra* note 30. at 14.

<sup>32</sup> On the right to test materially, Sri Soemantri gave the bottom line that the test is an authority to investigate and then assess whether the rule of law is following or contrary to higher regulations and whether a specific power (*verordenende macht*) has the right to issue a particular regulation. While the right to formal testing, according to Sri Soemantri, is the authority to assess whether a legislative product such as legislation, for example, is formed through means (procedures) as regulated in the applicable laws and regulations. In concise language, a review of the formalities of a

reviewing laws materially or legally is recognized as an effort to check and balance the state practice.<sup>33</sup> Although the power of the procedural judicial review is not explicitly affirmed in the 1945 Constitution, contextual interpretation requires the authority of the procedural judicial review by the Constitutional Court, as in the Case of *Marbury v. Madison*.<sup>34</sup> This trial subsequently gave birth to the breakthrough in introducing the judicial review power vested to the courts. Then, in many post-authoritarian democracies like Indonesia, the power of this procedural judicial review serves to maintain democracy as the Court is highly considered to hold the constitution as a living law,<sup>35</sup> or the sole law of the land.<sup>36</sup> Hence, the interpretation used by the courts should also include context in addition to interpreting textually.<sup>37</sup>

In this context, Article 4 of Constitutional Court Regulation No. 6/PMK/2005 stipulates that judicial review applications include material and procedural judicial reviews. A material review relates to the test of content material in paragraphs, articles, and/or parts of the law that are considered contrary to the 1945 Constitution. On the other hand, a procedural judicial review is the constitutional test of the law relating to establishing the law and other matters that do not include material testing.

In connection with the formal review before the Constitutional Court's Decision No. 91/PUU-XVIII/2020, several cases were submitted to the Constitutional Court but never granted, such as the Decision No. 79/PUU-XII/2014) and Decision No. 27/PUU-VII/2009. According to

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statutory product is the testing of a procedure for establishing rules and regulations. See Feri Amsari, *supra* note 19 at 76-79.

<sup>33</sup> K Fukuda & AP Liff, "A Fourth Model of Constitutional Review? De Facto Executive Supremacy" (2022) 21 Washington University Global Studies Law Review at 211.

<sup>34</sup> PO Celeridad, "Marbury v. Madison and R (Miller) v. the Prime Minister: an Attempt at Comparative Constitutional Rhetoric" (2021) 94 Philadelphia Law Journal at 1.

<sup>35</sup> Harison Citrawan, "The 'Life' in the Living Law: Law, Emotion and Landscape" (2021) 1:2 Journal of Contemporary Sociological Issues 124-144.

<sup>36</sup> DR deButts, "A Game Theoretic Analysis of Marbury v Madison: The Origins of Judicial Review" (2019) 9:2 James Blair Historical Review at 2.

<sup>37</sup> Seyed M Ghammamy & Seyed H Hoseini, "Theoretical Foundations of the Basic Constitutional Review" (2020) 50:1 Public Law Studies Quarterly 139-158.



Jorawati Simarmata, some records need to be observed in these cases considered by Constitutional Court in breaking the procedural judicial review.<sup>38</sup>

To begin with, since 2003, the House of Representatives Code of Conduct was taken as a material review in a procedural judicial review against the 1945 Constitution. As per the excerpt of the Constitutional Court's opinion on the previous procedural judicial review in ruling number 27/PUU-VII/2009, it is possible to determine whether the House has accepted or rejected the Bill solely based on the House's Rules of Order. In this case, the 1945 Constitution can only be put into effect with the House of Representatives Code of Conduct because the constitution does not control how the House makes decisions. The constitution is being put into effect largely thanks to the House of Representatives Code of Conduct. In the end, the Constitutional Court stated that the House of Representatives Regulation No. 08/DPR RI/I/2005.2006 conflicts with the ruling No. 001-021-022/PUU/I/2003.<sup>39</sup>

In addition, the material review is more important than the procedural judicial review. According to Constitutional Court's opinion on the previous procedural judicial review in Decision No. 73/PUU-XII/2014. The Court argued that the laws could not be tested against the other laws, and the Court would only use laws or regulations governing procedural mechanisms or judicial arising from constitutionally mandated delegations of authority. This argument can be found in Decision No. 27/PUU-VII/2009.

It is essential to scrutinize for the Constitutional Court in establishing the law requested for review by the applicants has violated the decision-making provisions: the House Order No. 08/DPR RI/2005-2006 and Article 20 of

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<sup>38</sup> Jorawati Simarmata, "Pengujian Undang-Undang Secara Formil Oleh Mahkamah Konstitusi: Apakah Keniscayaan? (Perbandingan Putusan Mahkamah Konstitusi Nomor 79/PUU-XII/2014 Dan Putusan Mahkamah Konstitusi Nomor 27/PUU-VII/2009)" (2017) 14:1 Jurnal Legislasi Indonesia 39-48.

<sup>39</sup> *Ibid* at 45-47.

the 1945 Constitution that was procedurally flawed.<sup>40</sup> Although the Court took this, declaring that the law *a quo* has no binding legal force, the Court, before such a case was filed, has never decided the application for legal testing that is examined in full and thoroughly.<sup>41</sup> In the meantime, the process of forming legislation was regulated by the House's Code of Conduct and the habits that develop in establishing a law based on the House's Rules of Conduct.<sup>42</sup> Such habits are considered by the House not contrary to the 1945 Constitution. The form of procedural defects in forming laws must be understood as a correction to the process of forming laws practiced under the 1945 Constitution.<sup>43</sup> The Court found that law should follow through the process of forming laws under the 1945 Constitution, as it was submitted by the Court in the verdict of the case *a quo*. Consequently, it is not appropriate to be applied to the review of the process of forming laws before this ruling, although there were procedural defects in forming a law. In this case, they did not materially cause legal problems. In case of the procedurally flawed law is declared to have no binding legal force, it will result in no better circumstances because, in such a law, there is precisely the substance of the arrangement whose content is better than the amended law. In addition, it has been applied and caused legal consequences in the institutional system stipulated in such a law and other related laws, including Judicial Power Law 48/2009, General Courts Law 2/1986 (amended to Law 49/2009), and other institutions such as the relationship between the Judicial Commission and the Supreme Court under Law 3/2009.

In conducting a formal judicial review for the Job Creation Law, even though the Constitutional Court exceeded its power, it will have a positive impact as a landmark decision on future constitutional practices in

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<sup>40</sup> SO Manullang, "Indonesian Law and Human Rights Expert's View on the Constitutional Court's Decision Against the Manpower Law from the Omnibus Law" (2022) 6 Linguistic and Culture Review 1–14.

<sup>41</sup> N Hadiyati, "Legal Implications of MSME Regulation on the Conditionally Unconstitutional Job Creation Law" (2022) 8:1 Jurnal Komunikasi Hukum JKH 291–306.

<sup>42</sup> *Ibid* at 303.

<sup>43</sup> JJ Tobing & L Sudirman, "Conditional Unconstitutional Omnibus Law: the Implications on Patent Regulation" (2022) 5:1 J Komunitas Yust 325–339.

Indonesia. There are three primary reasons for the importance of a formal judicial review at the Constitutional Court. To begin with, in the Constitutional Court's practices, the violations of citizens' constitutional rights prove that countries that institute Constitutional Court provide guarantees for the protection of rights both in formal and material means. Formal judicial review is essential to evaluate the actions or omissions of public officials in the political process.<sup>44</sup> While material judicial review evaluates the substance of the law produced by the parliament. Furthermore, testing the law's constitutionality can be carried out in two patterns; firstly, if the activity of the political process in forming laws is considered contrary to higher norms, in this case, the constitution; secondly, if the content or material of the verses, articles or part of the law is contrary to higher norms. The two patterns above bear different consequences. These laws will not have binding legal force if the formal review is granted. In most layman's logic, because the political activity or process of forming the law has violated the basic principles and norms of the constitution, the law can be annulled by the Constitutional Court. While in the judicial review, if granted, only the content of articles or paragraphs declared contrary to the constitution can be canceled by the Court.<sup>45</sup>

The second reason is the need for democracy. The political process often takes place in a patron-client relationship. Therefore a constitution is needed to ensure that the political process runs according to the principles and provisions of norms as an abstraction from the principle of constitutionalism, where clear laws surround official political activity.<sup>46</sup> The political superstructure can be a tool to impose or control the will of legislators. They include political parties, interest groups, pressure groups, political communication tools, and political figures. The state may be controlled by a coalition of investors who join for the common interest.

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<sup>44</sup> I Dewa Gede Palguna, *Pengaduan Konstitusional: Upaya Hukum Terhadap Pelanggaran Hak-Hak Warga Negara* (Jakarta: Sinar Grafika, 2013) at 153.

<sup>45</sup> I Dewa Gede Palguna, *Mahkamah Konstitusi: Dasar Pemikiran, Kewenangan, dan Perbandingan Dengan Negara Lain* (Jakarta: Konpress, 2018) at 162.

<sup>46</sup> Daniel S Lev, *Hukum dan Politik di Indonesia, Hukum dan Politik di Indonesia, Kesenambungan dan Perubahan*, 3d ed (Jakarta: LP3ES, 2013) at 476.

Business people control legislative policies. Therefore the formation of law needs to be based on an orderly and law-abiding political process. The current state of legislation needs to be more legitimate and effective. In addition to formal legal procedures, legitimacy and effectiveness are indicators of the validity of a law. The legislative approach emphasizes and ensures that each legislative process can strengthen citizen participation. In the philosophy of political ethics, if laws are made freely, then, in fact, the law has been absent as a barrier to power.<sup>47</sup> By logic, the law will limit the political process. The constitution does not forever guarantee the stability of democracy. However, based on state tradition, the rule of law is designed to prevent leaders from concentrating or abusing power. Strictly speaking, political institutions work based on the rule of law to stem authoritarian tendencies.

The third reason is that the need to develop current legislation reflects public concern over several laws that were made by ignoring the formal procedural aspects of the law. Only a single decision, the Job Creation Law case, has been granted formal judicial review due to procedural defects. Several factors influence this. First, the request for a formal test still depends on the judge's interpretation approach. Second, the fundamental problem with the formal review of laws is mainly caused by the pattern of delegation of authority that occurs disproportionately. Third, the failure of the formal examination can be caused by the poor quality of the applicant's evidence. Apart from several factors that influence the success of formal tests in the Constitutional Court, in practical terms, the above analysis has provided a prescription for the importance of the need for formal tests in the Constitutional Court.

#### IV. UNCERTAINTY OF INVESTMENT LAW AFTER THE DECISION

The Constitutional Court's Decision No. 91/PUU-XVIII/2020 has been an important ruling in Indonesia's legislative history due to its nature as a

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<sup>47</sup> Muhammad Najib, *Jalan Demokrasi: Pengalaman Indonesia, Turki dan Mesir* (Jakarta: Republika, 2019) at 14.

landmark decision for formal judicial review. The decision contains a ruling declaring the Job Creation Law 11/2020 has contradicted the 1945 Constitution, so this law has no conditional binding legal force as long as it does not read "*no improvement has been made within two years since this ruling was granted.*" In addition, this decision declared the Job Creation Law 11/2020 has been applicable until the improvement of the establishment has been made as per the period as stipulated in this decision, ordering the legislative branch to improve its quality within a maximum of two years after the decision was issued. It would have further unconstitutional consequences if the improvement process took more than two years. In particular, if the amendment of improving the law cannot be completed within two years, the law revoked or amended by Job Creation Law 11/2020 is declared re-enacted. Hence, the decision suspended all strategic actions that have broad impacts, so it is not permissible to issue new implementing regulations relating to Job Creation Law 11/2020.<sup>48</sup>

Some arguments follow the Constitutional Court's decision declaring the Job Creation Law conditionally unconstitutional.<sup>49</sup> First, the procedure for establishing Law 11/2020 does not meet the principle of clarity of purpose and the principle of transparency of formulation. The norm of Article 5 letters a, e, f, and g of Law 12/2011 requires the fulfillment of all principles cumulatively. With the non-fulfillment of one principle only, the provisions of Article 5 of Law 12/2011 become neglected by the process of forming Law 11/2020. Second, regarding the principle of openness, the conference revealed the fact that the establishment of the law did not give the community maximum participation space. Although various meetings have been held with different community groups (Minutes of Meeting on September 23, 2021), the panel has not discussed academic manuscripts and material changes in such a law, so the people involved in the forum do not know exactly what legal changes will be combined in Law 11/2020.

Moreover, the academic manuscript and the draft of the Job Creation Law cannot be accessed easily by the public. Whereas based on Article 96(4) of

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<sup>48</sup> *Ibid.*

<sup>49</sup> Simon Butt, "Conditional Constitutionality and Conditional Unconstitutionality in Indonesia" in *Constitutional Remedies in Asia* (Routledge, 2019) at 77-97.

Law 12/2011, access to the law is required to facilitate the community providing input orally and/or in writing. Third, the procedure for the establishment of Law 11/2020 is not based on absolute, basic, and standard ways and methods, as well as systematic law formation; changes in the writing of some substance after the joint agreement of the House of Representatives and the President; and contrary to the principles of the establishment of laws and regulations. The Court argued that the process of establishing Law 11/2020 is not following the 1945 Constitution. Consequently, it must be declared a procedural judicial flaw. Fourth, with the above-mentioned legal considerations, the Court ordered that a standard legal basis be established immediately to become a guideline in the formation of laws using omnibus law methods with the nature of such specificity.

The Constitutional Court's decision in reviewing the law solely determines whether the law is constitutional or unconstitutional.<sup>50</sup> Indeed, if viewed between a procedural judicial review and a material review, the most noticeable consequence is the law that proved a procedural judicial flaw, as granting a procedural judicial review of a law will revoke a law as a whole.<sup>51</sup> While a material review will not invalidate a law entirely, it only states a portion of the section, article, paragraph, or phrase contrary to the 1945 Constitution.<sup>52</sup> The Court also considers the consequences of the defects of this Job Creation Law, which are contained in consideration. The Court can understand that the issue of "regulatory obesity" and inter-law overlap is why the government uses omnibus law methods to accelerate investment and expand employment in Indonesia. Achieve the objectives of constitutional democracy. The applicable ordinance or guidelines must support it because the objectives and the means, in principle, cannot be separated. It has been found that the legal validity of the conditions outlined in Law 11/2020 is invalid, while there are also big goals to be

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<sup>50</sup> RM Miharadi et al., "The Decision of the Constitutional Court Which Is Positive Legislature and Their Implications on Substantial Democracy in Indonesia" (2021) 8:12 International Journal of Multicultural and Multireligious Understanding at 191–200.

<sup>51</sup> *Ibid* at 195–196.

<sup>52</sup> *Ibid* at 197.

achieved with the enactment of Law 11/2020, and many implementing regulations have been issued. According to the Court on Law 11/2020, the conditionally unconstitutional law must be declared unconstitutional. The Court must decide whether Law 11/2020 is constitutional on the condition that it meets the constraints for establishing a law, including fulfilling judicial procedural requirements. A fair rule must consider the law's strategic objectives.

The Job Creation Law is decided as conditionally unconstitutional,<sup>53</sup> which means the article requested to be reviewed as unconstitutional if the conditions set by the Constitutional Court are not met.<sup>54</sup> The Constitutional Court first practiced the conditionally unconstitutional verdict in Case No. 4/PUU-VII/2009 on March 24, 2009, concerning the testing of Article 12 letter g and Article 50(1) letter g of the House Representatives Election Law, Regional Leadership Council, and Regional House of Representatives and Article 58 letter f of the Local Government Law.<sup>55</sup> The conditionally unconstitutional model of the verdict is a model of a ruling that legally does not invalidate and states that there is no norm<sup>56</sup>, but the model of the ruling contains an interpretive decision of a material content paragraph, article, and/or part of the law or law as a whole that is declared contrary or not contrary to the constitution, and they have no legal power or no binding legal force.<sup>57</sup> On the implementation of the constitutional court ruling, an unconstitutional condition tends to be absent (non-self-executing) because it must go through the legislative process, either with changes in the law or with the formation of legislation.<sup>58</sup>

The Constitutional Court's Decision No. 91/PUU-XVIII/2020, which states that it is conditionally unconstitutional, attracts pros and cons among legal activists.<sup>59</sup> The pro views the ruling as a landmark decision and a

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<sup>53</sup> S. Butt, *supra* note 47 at 79-80.

<sup>54</sup> *Ibid* at 80-83.

<sup>55</sup> *Ibid* at 84- 85.

<sup>56</sup> *Ibid* at 85-86.

<sup>57</sup> *Ibid* at 87-88.

<sup>58</sup> *Ibid* at 89-90.

<sup>59</sup> PA Oktavinanda, "Is the Conditionally Constitutional Doctrine Constitutional?" (2018) 8 Indonesia Law Review at 17.

progressive step toward not only serving as a guardian of the constitution but also a guardian of democracy. The opposing parties argue that the Constitutional Court's decision is contradictory. On the one hand, by considering that the Job Creation Law is contrary to the Law on the Establishment of Legislation but on the other hand still maintains the quo status of the Job Creation Law by not enacting the Old Law unless no improvement is made to the Job Creation Law within two years. While the implementation of conditionally unconstitutional within two years, the Constitutional Court also suspends all actions that are strategic and have a broad impact, and it is not allowed to issue new implementing regulations related to the Job Creation Law.

It has posed a question of how the basis of investment law used by stakeholders is. Should this go back to the old law? According to the Constitutional Court's decision, the Job Creation Law remains valid for up to two years, referring to it as sufficient time for the parliament to improve it. The law or articles or material content revoked or amended by the Job Creation Law is declared re-enacted. However, with this conditionally unconstitutional decision, the Indonesian investment experienced legal uncertainty for the next two years, especially the types of new businesses, licensing, and investments with the enactment of the Job Creation Law. Especially if the government and legislators fail to make improvements over the next two years, the fate of these new types of businesses, licensing, and investments will have no legal basis, so it becomes illegal. If the Old Law is enacted, it will not solve the problem of legal vacancy. Therefore, in this case, it is essential for the Government and Legislators to earnestly implement the improvement of the Job Creation Law for the next two years, following the procedures and principles stipulated in the applicable Laws and Regulations.

The Constitutional Court's Decision No. 91/PUU-XVIII/2020 can be one of the landmark decisions. In the Black's Law Dictionary, a landmark decision is "a decision of the Supreme Court that significantly changes existing law." The landmark decision also means that the ruling has an essential impact on the life of the state and society, which must be adhered to by all stakeholders, including lawmakers. In essence, the practice of



Judicial Review is inseparable from the history of politics and legal developments, especially in the Case of *Marbury v. Madison*<sup>60</sup> in the 1800s in the United States, the Supreme Court overturned the Judiciary Act 1789 because it was considered contrary to the constitution.<sup>61</sup> Although the authority to repeal the law was not contained in the constitution.<sup>62</sup> Only John Marshall thought that the constitution was the supreme law of the land, so any law made by Congress, if it was contrary to the constitution, should be repealed.<sup>63</sup> The abandonment of the Act contrary to the constitution has also been mentioned in Alexander Hamilton's article in "The Federalist 78/1788," which was considered Marshall. Hamilton argues that any legislative action that conflicts with the Constitution is invalid. Denying this would mean claiming that the deputy is superior to his principal, the servant is superior to the master, and the representatives of the people are higher to the people themselves.<sup>64</sup>

The Marshall ruling began understanding the judicial review of the Law on the constitution in the theory of world law.<sup>65</sup> The former Chairman of the Constitutional Court, Mahfud MD, explained three reasons for John Marshall applying a review mechanism conducted by the judge.<sup>66</sup> First, the judge vows to uphold the constitution so that if a law contradicts it, the

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<sup>60</sup> FA Sjarif, "Kasus *Marbury V. Madison* dan Judicial Review di Amerika Serikat" in *Aradhana Sang Guru Perundang-Undangan* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2019).

<sup>61</sup> P McCosby, "In Search of a Solution: The Centrality of History to Constitutional Interpretation as Illustrated by the 19th Century First Amendment Controversy" (2019) *Liberty Lawyer* at 20.

<sup>62</sup> C Thomas, "Is the Prorogation Case the UK Supreme Court's *Marbury v Madison*? What makes an institution-defining case?" in *UK Supreme Court Yearb* (Appellate Press, 2021).

<sup>63</sup> DA Strauss, "Chapter Two on Having Mr. Madison as a Client" in *Arguing *Marbury v Madison** (California: Stanford University Press, 2022) at 38-44.

<sup>64</sup> Saldi Isra et al, *Perkembangan Pengujian Perundang-Undangan Di Mahkamah Konstitusi (Dari Berpikir Hukum Tektual Ke Hukum Progresif)* (Padang: Sekretariat Jenderal dan Kepaniteraan MK RI & Pusat Studi Konstitusi Universitas Andalas, 2010) at 46.

<sup>65</sup> *Ibid* at 47.

<sup>66</sup> Moh Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* (Jakarta: Pustaka LP3ES Indonesia, 2006) at 37.

judge must dare to overturn it.<sup>67</sup> Second, the constitution is the supreme law of the land, and it must regulate the institution to review in ensuring constitutional consistency. Third, the judge must not dismiss the case. In case of any citizens ask for a material test, the judge must do so for the trial process before the court.<sup>68</sup>

With regard to constitutional rights and democracy in general, it produces landmark decisions. This Court's Decision No.91/PUU-XVIII/2020 contextually considers interpretation. It tries to provide solutions to constitutional problems by considering the best verdict for the sake of the seeker of justice but still does not sacrifice certainty and justice. The Constitutional Court's decision declaring the Job Creation Law conditionally unconstitutional is a middle ground. On the one hand, if the Court decides that the Job Creation Law is unconstitutional, it will hurt justice. The Job Creation Law is a procedural judicial flaw. On the contrary, if the Job Creation Law is declared contradictory, it will have an impact on the cancellation of all contents of the Job Creation Law so that it returns to the Previous Law, which will bring new problems related to the concept of licensing, business forms, and new investments based on the legal basis of the Job Creation Law will lose its legality. Hence conditional unconstitutional remains good with all its drawbacks.

## V. CONCLUSION

The Constitutional Court has the power for procedural judicial review even though its power is not explicitly affirmed in the 1945 Constitution. The contextual interpretation demands the power of a procedural judicial review by the Indonesian Constitutional Court, following the case of *Marbury v. Madison*, which gave birth to the breakthrough to the introduction of judicial review. In this context, following the Constitutional Court's Decision on the review of Job Creation Law 11/2020, this law still applies as the basis of investment law in Indonesia unless, within two years of the amendment of the law, the legislative branch cannot completely improve

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<sup>67</sup> *Ibid* at 38.

<sup>68</sup> *Ibid* at 39.

this law. With the conditional unconstitutional decision, the Indonesian investment world will experience legal uncertainty for the next two years, especially new businesses, licensing, and investments that exist with the enactment of the Job Creation Law. In particular, if the legislative branch failed to improve this law over two years, businesses, licensing, and investments in Indonesia might have no legal basis, resulting in the uncertain situation of the government's desire to realize the friendly investment.

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## COMPETING INTEREST

The authors declared that they have no conflict of interest.

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