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# REVIEWING CONSTITUTIONAL COURT DECISION NUMBER 91/PUU-XVIII/2020 REGARDING FORMAL REVIEW OF JOB CREATION ACT: A PROGRESSIVE LAW PERSPECTIVE

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## ABSTRACT

The Constitutional Court Decision Number 91/PUU-XVIII/2020 states that the Job Creation Act has a formal defect and must be corrected within 2 (two) years since the decision was pronounced. The a quo decision created a discourse in the community regarding the enforcement status of the Job Creation Act. This paper tried to review constructively using the perspective of progressive law and judicial proportionality in finding solutions and balances. This paper used a normative juridical research method, with a conceptual, case, and legislation approach. Progressive law in Satjipto Rahardjo's perspective has four criteria. The first has a big goal in the form of human welfare and happiness. Second, contains very good human moral content. Third, progressive law is a "liberating law" which includes a very broad dimension that does not only move in the realm of practice but also theory. Fourth, it is critical and functional, because it does not stop reviewing existing deficiencies and finding ways to improve them. Meanwhile, the principle of proportionality emphasizes the alignment of goals to be achieved, rational relationships, steps that must be taken, and the feasibility between the benefits obtained in realizing the goals to be achieved and the losses suffered against constitutional rights. Based on this explanation, it can be concluded that the Constitutional Court Decision Number 91/PUU-XVIII/2020 is in line with the concept of progressive law and tried to find out a middle way through a judicial proportionality approach by considering the smallest potential loss from the issuance of the decision.

**Keywords: Formal Review; Job Creation Act; Progressive Law; Proportionality**

## INTRODUCTION

Towards the end of 2021, the Constitutional Court through its decision stated that the *omnibus law* was conditionally contradictory to the constitution, which was then followed by a debate in the public sphere.[1] *Omnibus law* referred to here is Law Number 11 of 2020 concerning Job Creation or better known as Job Creation Act.[2] The policy background for the establishment of Job Creation Act through the omnibus law method is due to there being many regulations at the statutory level that hinder the investment process and empowerment of Micro, Small, and Medium Enterprises (MSME) in Indonesia.[3] Therefore, President Joko Widodo took the initiative to submit the Job Creation Act which formed using the omnibus law method to the DPR (People's Representative Council of the Republic of Indonesia) to overcome regulatory issues in the investment and economic sectors.[4] The President emphasized that regulations that

[1] Rakhmat Nur Hakim, "MK: UU Cipta Kerja Batal Sepenuhnya Bila Tak Selesai Diperbaiki Dalam 2 Tahun," (Constitutional Court: The Employment Creation Act is Completely Canceled If It Is Not Completed In 2 Years," Kompas *Kompas*, last modified 2021, accessed April 21, 2022, https://nasional.kompas.com/read/2021/11/25/19390991/mk-uu-cipta-kerja-batal-sepenuhnya-bila-tak-selesai-diperbaiki-dalam-2-tahun.

[2] Indonesia, *Law Number 11 of 2020 concerning Job Creation (Republic of Indonesia, 2020)*.

[3] Bayu Dwi Anggono, "Omnibus Law Sebagai Teknik Pembentukan Undang-Undang: Peluang Adopsi Dan Tantangannya Dalam Sistem Perundang-Undangan Indonesia," (Omnibus Law as a Law-Forming Technique: Adoption Opportunities and Challenges in the Indonesian Legislative System,) *RechtsVinding* 9, No. 1 (2020): 17–37.

[4] Syprianus Aristeus, "Transplantation, Legal Adoption, Harmonization Of Omnibus Law And Investment Law," *Jurnal Penelitian Hukum De Jure* 21, No. 4 (2021): 507-516.

hinder and complicate all investment processes and community economic empowerment must be trimmed and simplified in number.[5]

According to Black's Law Dictionary, the omnibus is "relating to or dealing with numerous objects or items at once; including many things or having various purposes" which can be interpreted as combining several things into one.[6] Meanwhile, according to Jimmy Z. Usfunan, omnibus law is "a method of drafting regulations where in one regulation there are many legal substances that can stand alone and can negate the provisions of other laws."[7] From this definition, it can be understood that omnibus law is a method of formulating regulations by combining several rules with different materials into a major regulation that functions as an umbrella act.[8] The legal consequence of the promulgation of the umbrella law is that several provisions, either partially or wholly, of the previous law become invalid.

Regarding the use of the omnibus law method in the creation of laws in Indonesia, casu quo of the Job Creation Act, many academics and legal practitioners consider that the creation of the law lacks public participation and seems rushed by taking advantage of the Large-Scale Social Restrictions conditions that were enforced at that time.[9] This has caused many parties to propose a review of the Job Creation Act, both from a formal and material perspective to the Constitutional Court. In the end, the Constitutional Court granted a partial review of the Job Creation Act, especially regarding formal aspects which resulted in the issuance of a conditional unconstitutional decision on the law.

The Constitutional Court through Decision No. 91/PUU-XVIII/2020 states that the Job Creation Act has a formal defect and must be corrected within 2 (two) years since the decision was pronounced.[10] In addition, the Constitutional Court also suspended all strategic and broad-impact actions/policies and prohibited the issuance of new implementing regulations related to the Job Creation Act. If within two years it is not corrected, then the Job Creation Act status becomes permanently unconstitutional. The Constitutional Court decision in which there is a conditional unconstitutional clause and a prohibition on the Government to issue implementing regulations since the decision was read is a contradictory situation.[11] Therefore, the prohibition against issuing strategic policies related to the Job Creation Act, within the limits of reasonable reasoning makes the Job Creation Act only applies at the statutory level but not at a more technical level.[12]

The Constitutional Court in examining the formal review of the Job Creation Act based on the provisions of Article 22A of the 1945 State Constitution of the Republic of Indonesia and linked it to Law Number 12 of 2011 concerning the Formation of Legislation (Legislation

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[5] Editorial Media Indonesia, "Memangkas Penghambat Investasi," (Cutting Investment Barriers) *Media Indonesia*, last modified 2019, accessed December 22, 2021, https://mediaindonesia.com/editorials/detail_editorials/1807-memangkas-penghambat-investasi.

[6] Bryan A. Garner, *Blacks Law Dictionary*, 9th ed. (Dallas: Thomson Reuters, 2009).

[7] Jimmy Z. Usfunan, "Mengharmonisasikan Undang-Undang Melalui Omnibus Law Model Indonesia," (Harmonizing the Law through the Indonesian Omnibus Law Model) in *Prosiding KNHTN IV Penataan Regulasi Di Indonesia*, vol. 4 (Jember: UPT Penerbitan Universitas Jember, 2017), 237.

[8] Paulus Aluk Fajar Dwi Santo, "Memahami Gagasan Omnibus Law," (Understanding the Omnibus Law Idea), *Universitas Bina Nusantara*, last modified 2019, accessed December 22, 2021, https://business-law.binus.ac.id/2019/10/03/memahami-gagasan-omnibus-law/.

[9] Haryanti Puspa Sari, "Kekhawatiran Atas Minimnya Partisipasi Publik Dalam Pembahasan RUU Cipta Kerja," (Concern over the lack of public participation in the discussion of the job creation act) *Kompas*, last modified 2020, accessed April 22, 2022, https://nasional.kompas.com/read/2020/04/28/10414481/kekhawatiran-atas-minimnya-partisipasi-publik-dalam-pembahasan-ruu-cipta?page=all.

[10] PSHK, "Putusan Uji Formil UU Cipta Kerja: Tafsir Baru Yang Ambigu," (Decision on Formal Testing of the Job Creation Act: An Ambiguous New Interpretation), last modified 2021, accessed April 21, 2022, https://pshk.or.id/publikasi/siaran-pers/putusan-uji-formil-uu-cipta-kerja-tafsir-baru-yang-ambigu/.

[11] Hananto Widodo, "Peraturan Pelaksana UU Cipta Kerja Pasca Putusan MK," (Implementing Regulations of the Employment Creation Law after the Constitutional Court's Decision), *Media Merah Putih*, last modified 2021, accessed December 22, 2021, https://mediamerahputih.id/baca-595-peraturan-pelaksana-uu-cipta-kerja-pasca-putusan-mk.

[12] Ibid.

Formation Act).[13] According to the Constitutional Court, this is because the Legislation Formation Act is a delegation of Article 22A of the 1945 State Constitution of the Republic of Indonesia[14], so based on the provisions of Article 51 paragraph (3) of Law Number 24 of 2003 concerning the Constitutional Court (Constitutional Court Act)[15], for examination of the request for a formal review and decision-making must be based on the procedures for the formation of laws regulated in Legislation Formation Act. In its legal considerations, the Constitutional Court also emphasized that the procedure for establishing the Job Creation Act did not fulfil the principles of clarity of purpose, the principle of clarity of formulation, and the principle of openness. This is because the norms of Article 5 letter a, letter e, letter f, and letter g of the Legislation Formation Act require that all principles be fulfilled cumulatively. The non-fulfillment of 1 (one) principle has resulted in the provisions of Article 5 of the Legislation Formation Act being neglected by the process of establishing the Job Creation Act.

The Constitutional Court also noted that due to the thick regulations and overlapping laws that became the background for the government to use the omnibus law method to accelerate and expand the investment process and create employment opportunities, it should not negate the procedure for the formation of legislation. The exclusion of definite, basic, and standard guidelines as stipulated in the Legislation Formation Act regarding the establishment of the Legislation Formation Act is an action that cannot be justified.[16] The Constitutional Court implicitly said, if you want to simplify the law through the formation of laws using the omnibus law method, then definite, basic, and standard guidelines for carrying out this method must first be contained in the law for the formation of legislation. Therefore, it can be understood that the formal requirements relating to clear and standard procedures in the formation of legislation are a direct mandate of the constitution.

The existence of a formal defect in the Job Creation Act does not necessarily make the Constitutional Court immediately declare the law is unconstitutional and has no binding legal force without any exceptions for improvement. The Constitutional Court in its legal considerations realized that the important purpose of the existence of the Job Creation Act is to create employment opportunities and accelerate the economy by making changes and improvements to various laws. At that point, the Constitutional Court tried to find a balance point between fulfilling the formal requirements for the formation of law in order to obtain a law that reflects elements of legal certainty, expediency, and justice as well as taking into account the national strategic objectives of the establishment of the Job Creation Act.

The Constitutional Court's effort to balance these two things in its decision is a progressive and revolutionary step. Apart from that, this is the first decision that partially grants a formal review request, as well as to avoid the impact of greater losses as the substance of objections submitted by several community groups.

Various studies were conducted after the issuance of the Constitutional Court Decision No. 91/PUU-XVIII/2020 regarding the formal review of the Job Creation Act, none has yet been based on the perspective of progressive legal theory and judicial proportionality. For example, the research conducted by Atang Irawan in a journal entitled Job Creation Act in the Midst of the Constitutional Court Decision No. 91/PUU-XVIII/2020. The research conducted an analysis related to the position and enforcement of the Job Creation Act after the Constitutional Court Decision No. 91/PUU-XVIII/2020 and its juridical implications for 45 government regulations and 4 presidential regulations.[17]

Furthermore, Dodi Haryono in his journal entitled Method of Interpretation of Constitutional Court Decision in the Constitutional Review of the Job Creation Act focused his research on

[13] Indonesia, *Law Number 12 of 2011 concerning the Foramation of Legislations (Republic of Indonesia, 2011)*.

[14] Indonesia, *1945 Constitution of the Republic of Indonesia (Republic of Indonesia, 1945)*.

[15] Indonesia, *Law Number 24 of 2003 concerning the Constitutional Court (Republic of Indonesia, 2003)*.

[16] Constitutional Court Decision No. 91/PUU-XVIII/2020

[17] Atang Irawan, "The Law on Job Creation in the Midst of the Constitutional Court Decision Number 91/PUU-XVIII/2020," *Jurnal Litigasi* 23, No. 1 (2022): 101–133.

the method of constitutional interpretation used by the Constitutional Court in Decision No. 91/ PUU-XVIII/2020 and its theoretical implications. In his research, Dodi Haryono concluded that the Constitutional Court had used two eclectic approaches to interpretation, namely originalism, and non-originalism.[18]

Constitutional Court Decision No. 91/ PUU-XVIII/2020 is interesting to study further considering that there are four constitutional justices with different opinions. The discourse regarding the judicial proportionality of Constitutional Justices in making decisions has resurfaced. What is the real reason behind the panel of constitutional justices issuing a conditional unconstitutional decision in the review of this Job Creation Act. The author tries to review it through a constructive analysis based on the perspective of progressive law theory and judicial proportionality.

## RESEARCH METHODS

This writing uses normative juridical law research. The approaches used in this research include the conceptual approach, case approach, and statutory approach. The collection of legal materials is carried out by searching for and collecting primary legal materials and conducting library searches for secondary legal materials and non-legal materials. The legal materials used consist of primary, secondary, and non-legal materials. The primary legal materials consist of the 1945 State Constitution of the Republic of Indonesia, the Constitutional Court Act, the Legislation Formation Act, the Job Creation Act, and the Constitutional Court Decision Number 91/ PUU-XVIII/2020. Secondary legal materials are books, journals, and legal scientific papers. Non-legal materials in the form of non-legal books and information accessed via the internet. The legal material analysis technique used to analyze the problem in this paper is analytical prescriptive.

[18] Dodi Haryono, "Metode Tafsir Putusan Mahkamah Konstitusi Dalam Pengujian Konstitusional Undang-Undang Cipta Kerja," (The Method of Interpreting the Decisions of the Constitutional Court in the Constitutional Review of the Job Creation Act) *Jurnal Konstitusi* 18, No. 4 (2022): 774–802.

## DISCUSSION

A. Constitutional Court Decision Number 91/PUU-XVIII/2020 in the Perspective of Progressive Law

Reviewing the Constitutional Court Decision No. 91/PUU-XVIII/2020 from the point of view of progressive law is interesting, considering that in the decision the Constitutional Court Justices were divided, four of whom chose dissenting opinions. Of the four dissenting opinions, Constitutional Justices Arief Hidayat and Anwar Usman specifically used a progressive legal perspective in expressing their differences of opinion. This can be seen in the dissenting opinion quote in the Constitutional Court Decision No. 91/ PUU-XVIII/2020 below:

> "Law does not only undergo evolutionary changes but in its development requires revolutionary changes, jumping from one method to a method that is more capable of adapting to the needs of society, such legal changes are often referred to as paradigmatic legal changes (paradigmshift). The change eliminates changes in a logical and coherent order because it suddenly takes a new starting point and point of view that is different from what was previously used. Such a change is called rule-breaking or it can also be known as a leap from the adoption of normal law to unusual law which then returns to normal law with a new paradigm. Such a change can be called a type of law that is unique and unfinished but is a legal idea that continues to develop and is not trapped in stagnation, this kind of law takes a big hypothesis that law is for humans, not just humans for law. The life of society, nation, and state in the current global era cannot be facilitated strictly into a positivistic, legalistic, and dogmatic approach so a new approach is needed in law, namely a progressive approach by doing rule breaking so that paradigm changes are needed."

In the next opinion, the two constitutional judges tried to contextualize progressive law in the process of forming the Job Creation Act using the omnibus law method. More details are as follows:

> "Whereas in the context of progressive law, the method of law formation through the omnibus law method does not question

whether the value is good or bad. Because it is a value-free method. Therefore, the method of law formation with the omnibus law method can be adopted and is suitable to be applied in the conception of the Pancasila legal state as long as the omnibus law is made in accordance with and does not conflict with the values of Pancasila and the principles contained in the 1945 Constitution. Moreover, Law Number 12 of 2011 concerning the Legislation Formation Act in conjunction with Law 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Legislation Formation Act (hereinafter referred to as Law 12/2011) does not explicitly specify the necessity to use what method in the formation of law so that the practice of forming laws using the omnibus law method can be carried out. This is in accordance with the rules in the fiqh which states, "The law of origin of something is permissible until there is an argument that shows it is forbidden". Although this fiqh rule is not necessarily in accordance with the problems of implementing the omnibus law method discussed, the philosophical values contained in this fiqh rule can at least be used as a basis for assessing the use of the method in question. Therefore, the omnibus law method in the law-making process is a legal breakthrough that can be performed because the Legislation Formation Act does not explicitly regulate, allow or prohibit it. That way, even though it was not preceded by changes to the Legislation Formation Act, basically the law in using the omnibus law method is permissible and not prohibited. Moreover, in practice, the omnibus law method has been used in the formation of laws in Indonesia, namely: 1. Law Number 13 of 2003 concerning the Manpower Article 192 which revoked 15 legislation and declared them to be invalid. 2. Law Number 20 of 2009 concerning the Titles, Mark of Service and Mark of Prestige Article 43 which revoked 17 legislation and declared them to be invalid. 3. Law Number 7 of 2017 concerning the General Elections Article 571 which revoked 3 legislation and declares them to be invalid. This law has incorporated Law no. 42 of 2008 concerning the Election of President and Vice President, Law no. 8 of 2012 concerning the General Elections for Members of DPR (People's Representative Council of the Republic of Indonesia), DPD (Regional Representative Council of the Republic of Indonesia), and DPRD (Regional People's Representative Council of the Republic of Indonesia), Law no. 15 of 2011 concerning the General Election Organizers. From the above practice, basically, the omnibus law method is not a new thing to be applied in the formation of laws in Indonesia. It's just that the "omnibus law" nomenclature became popular only when the Job Creation Act was enacted. Therefore, there is no reason to reject the application of the omnibus law method even though it has not been explicitly regulated in the law for the formation of legislation. This is because this method has generally been implemented in the formation of several laws as described above."

Furthermore, Constitutional Justices Arief Hidayat and Anwar Usman also mentioned that there were several weaknesses related to the formation of laws using the omnibus law method, but this was not a reason to declare the Copyright Act to be conditionally unconstitutional. More details are as follows:

> "Whereas legally, the formation of laws using the omnibus law method, although it has weaknesses in terms of format and technical legal drafting or law-making procedures, currently there is an urgent need to make cross-sectoral laws using the omnibus law method. This is because, if the legislators do not use the establishment of the Job Creation Act using the omnibus law method, then there are approximately 78 laws that must be made at the same time and certainly takes a relatively long time, while the need for a comprehensive regulation is very urgent. The legislators expect that the implementation of the Omnibus Law method in the Job Creation Act can resolve conflicts (disharmony) of laws and regulations quickly, effectively, and efficiently; the licensing be more integrated, effective, and efficient; improve coordination relations between related agencies; uniform government policies at the center and in the regions to support the investment climate; able to break the convoluted bureaucratic

chain; guarantee legal certainty and legal protection for policymakers; and address of the law in question, as well as being able to synchronize and harmonize 78 laws with 1,209 affected articles being the single substance contained in the Job Creation Act."

Constitutional Justices Arief Hidayat and Anwar Usman in their next opinion also emphasized that the formation of the Job Creation Act had followed the format of the Legislation Formation Act although the guidelines that were attached to it were only guiding and does not need to be understood stiffly and rigidly and emphasized the importance of progressive law. More details are as follows:

"Whereas in the context of Law 12/2011 in conjunction with Law 15/2019, the format for the formation of the Job Creation Act must have followed the format for the formation of law as stipulated in Law 12/2011 in conjunction with Law 15/2019, although there are things that are not commonly carried out because of the neglect of several materials in the guidelines for the formation of laws which are annexed to Law 12/2011 in conjunction with Law 15/2019, for example, related to the mechanism for revocation and amendment of laws. However, the guidelines that are annexed to Law 12/2011 in conjunction with Law 15/2019 are only a guide and do not need to be understood stiffly and rigidly. This is because the guidelines for the formation of laws contained in Appendix II are prepared based on the practices and habits that have been carried out so far and then set forth in a written rule. These guidelines may change so that a new constitutional convention and constitutional habit is formed as a legal basis that is equivalent to the law for further practices. Let alone Law 12/2011 in conjunction with Law 15/2019, the 1945 Constitution as the highest law can also be changed to adapt to the needs of the community and the times, one of which is through the interpretation route by the judicial institution (judicial interpretation), namely the Constitutional Court. This causes the 1945 Constitution to be transformed into a living constitution because it is adaptive and responsive to the needs of society and the times. This is where the importance of taking the law progressively and not only with a positivist-legalistic view. Because the law is for humans and not humans for the law."

From some of the dissenting opinions quoted by Constitutional Justices Arief Hidayat and Anwar Usman above, it is necessary to analyze in more depth, whether it is appropriate to use a progressive legal point of view in "legitimizing" the Job Creation Act without formal problems. When referring to the legal considerations of the Constitutional Court which are the opinion of the majority of Constitutional Justices, it has been clearly explained that the Job Creation Act does not meet the principles of clarity of purpose, the principle of clarity of formulation, and the principle of openness in the formation of legislation. The Constitutional Court in its legal considerations assessed that the Job Creation Act did not provide maximum space for public participation.

The close relationship between the concept of progressive law and the formation of legislation is at the stage where public participation is maximally involved. It is at this point that a legal product that is formed will show whether it has accommodated the will of the wider community or not.[19] The law is in charge of serving the community, not the other way around. Law for man, not man for law. That is the legal philosophy according to Satjipto Rahardjo which is given the term Progressive Law.[20] In the legal context for humans, of course, humans are the main object who will be affected by the implementation of a legal product, in this case, the Job Creation Act. Therefore, it is very important for the community to hear their wants and needs, considering that public participation is very important in the construction of progressive legal thinking, in order to understand and know what is best and what is the goal of a legal product.[21]

Progressive law teaches that law is not a king, but a tool to describe the basis of humanity

[19] Eko Noer Kristiyanto, "Urgensi Omnibus Law Dalam Percepatan Reformasi Regulasi Dalam Perspektif Hukum Progresif," (The Urgency of Omnibus Law in Accelerating Regulatory Reform in a Progressive Legal Perspective) *Jurnal Penelitian Hukum De Jure* 20, No. 2 (2020): 233–244.

[20] Suteki, *Masa Depan Hukum Progresif* (The Future of Progressive Law) (Yogyakarta: Thafa Media, 2015).

[21] Eko Noer Kristiyanto. Op.Cit., 235.

that functions to give grace to the world and humans. Progressivism does not want to make the law a technology that has no conscience, but an institution with human morality. The rationale behind this legal progressivism is: The law exists for humans, not for themselves; The law is always in a "law in the making" condition and is not final; The law is an institution that has human morals, and is not a technology without a conscience.[22] With this background in mind, the criteria for progressive law are: Having a big goal of human welfare and happiness; Containing very good human moral content; Progressive law is a "liberating law" covering a very broad dimension that does not only move in the realm of practice but also theory; It is critical and functional because it does not stop reviewing existing deficiencies and finding ways to improve them.[23]

Progressive law departs from two basic structures in law, namely rules, and behavior.[24] Law, apart from being placed as an aspect of behavior as well as a regulation. Regulation will build a positive legal system, while behavior or humans will drive regulations and systems that have been (will) be built. Progressive law has a big goal so that the way of law is returned to legal thinking, which is law for humans.[25] The law will be sought and trusted by the community if it is able to carry out its duties to guide and serve the community. Therefore, the law cannot be carried backward but to the present and the future. That is the essence of progressive law and progressive legal interpretation.[26] This essence is in the soul of the community or nation itself so its enforcement must consider the values of justice that live and are embraced by the majority of their community or nation, not the other way around that the community or nation must orient itself to the law.[27]

Moving on from the progressive legal conception, the Constitutional Court Decision No. 91/PUU-XVIII/2020 has reflected the four criteria of progressive law itself. The **first** reason, the Constitutional Court has considered that the existence of the Job Creation Act has a noble purpose to accelerate the economy and create jobs, but the use of the omnibus law method must first determine the basic and standard guidelines in the law for the formation of legislation to ensure legal certainty, expediency, and justice in the future.

**Second**, the Constitutional Court decision stating that the Job Creation Act is unconstitutional for two years and ordering the Government to make improvements and to suspend all strategic and broad-impact actions/policies, as well as prohibiting the issuance of new implementing regulations, is a concrete manifestation of the progressiveness of the Constitutional Court law. The Constitutional Court stated that the legislators in making formal improvements to the Job Creation Act, could at the same time review several substances that were objected to by several community groups. If within a period of 2 (two) years the legislators are unable to complete the revision of the Job Creation Act, in order to ensure legal certainty to avoid a legal vacuum, then the law or articles or material content of the law that has been revoked or amended by Job Creation Act must be declared to be valid again. This reflects the progressive legal spirit of the Constitutional Court which is oriented toward human welfare and happiness and constantly reviews the shortcomings in the law and finds ways to improve them.

**Third,** the Constitutional Court stated that the Job Creation Act did not meet the principles of clarity of purpose, the principle of clarity of formulation, and the principle of openness in the formation of legislation. From a progressive legal perspective, reading the rules is a good guide in law enforcement. Reading the rules is diving into the spirit, principles, and purposes of the law.[28] If the establishment of the Job Creation Act does not reflect the principles of good formation of legislation, then the Constitutional Court has rightly declared the law to be unconstitutional

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[22] Satjipto Rahardjo, "Hukum Progresif : Hukum Yang Membebaskan," (Progressive Law: The Law That Liberates) *Jurnal Hukum Progresif* 1, No. 1 (2011): 1–24.

[23] Ibid.

[24] Satjipto Rahardjo, *Membedah Hukum Progresif* (Dissecting Progressive Law) (Jakarta: Penerbit Buku Kompas, 2006).

[25] Imam Soebechi, *Hak Uji Materiil (Material Test Rights)* (Jakarta: Sinar Grafika, 2016).

[26] Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban* (Law in the Universe of Order) (Jakarta: UKI Press, 2006).

[27] Marilang Marilang, "Menimbang Paradigma Keadilan Hukum Progresif," (Considering the Progressive Legal Justice Paradigm) *Jurnal Konstitusi* 14, No. 2 (2017): 315–331.

[28] Satjipto Rahardjo. *Membedah (Dissect)* Op.Cit., 124.

even though it is conditional.[29]

According to the Constitutional Court, the establishment of the Job Creation Act did not provide maximum space for public participation, although various meetings with various groups had been held, they had not yet discussed academic texts and materials for amendments to the law. This makes the public not know for sure what material changes to the law will be incorporated into the Job Creation Act, especially academic texts, and the Job Creation Act cannot be easily accessed by the public. In addition, the change in the writing of several substances after the joint approval of the DPR (People's Representative Council of the Republic of Indonesia) and the President, shows that the process of forming the Job Creation Act was carried out in a hurry.[30]

The involvement of the community in the formation of laws in an effort to place the community as actors and subjects in the planning and implementation process to the utilization and supervision of public policies, is a must to be implemented in the administration of government.[31] In addition to providing space for the public to find out early on the possible implications of the formation of legislation, participation is needed to ensure that the community interests are not ignored by the legislators.[32] Moreover, in essence, all regulations established are directed at the realization of a life order that is beneficial to the public interest.[33]

At that point, progressive law functions as a "liberating" force, which is to free oneself from legalistic-positive types, ways of thinking, principles, and legal theories. The Constitutional Court tries to find a balance between objectives and procedures and emphasizes the importance of maximum community participation in the formation of the Job Creation Act. The paradigm of liberation from progressive law is not interpreted through acts of anarchy, but is still based on the logic of social propriety and the logic of justice and is not solely based on the logic of regulations.[34] The liberation paradigm makes progressive law free to construct and find the right format, thoughts, principles, and actions to make it happen.[35]

## B. Constitutional Court and Judicial Proportionality

The definition of the principle of proportionality has not yet been clearly defined. The birth of this principle begins with the settlement of a case and grows widely until it is adopted by the constitutional court to resolve a case. The constitutional court adopts the principle of proportionality in a method called the proportionality test. This method measures whether there is a conflict of rights that must be protected by the court with policies issued by the government for the common interest of the whole community. The court is faced with a dilemma between protecting the citizens rights or defending the government programs. In considering these dilemmatic problems, proportionality measures are used as a reference before making a final decision.[36]

The principle of proportionality has an important value in the discourse related to the process of examining the constitutionality of

[29] Yuliandri, *Asas-Asas Pembentukan Peraturan Perundang-Undangan Yang Baik: Gagasan Pembentukan Undang-Undang Berkelanjutan (Principles of Formation of Good Laws and Regulations: The Idea of Formation of Sustainable Laws)* (Jakarta: Rajawali Pers, 2009).

[30] Fahmi Ramadhan Firdaus, *Mewujudkan Pembentukan Undang-Undang Yang Partisipatif* (Realizing the Formation of Participatory Laws) (Banyumas: Amerta Media, 2021).

[31] Eko Noer Kristiyanto. Op.Cit., 239.

[32] Saldi Isra, *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia* (Shifting Legislative Functions, Strengthening the Parliamentary Legislation Model in the Indonesian Presidential System) (Jakarta: Rajawali Pers, 2010).

[33] Pataniari Siahaan, *Politik Hukum Pembentukan Undang-Undang Pasca Amandemen UUD 1945* (Legal Politics of Law Formation Post Amendment to the 1945 Constitution) (Jakarta: Konstitusi Press, 2012).

[34] Mukhidin, "Hukum Progresif Sebagai Solusi Hukum Yang Mensejahterahkan Rakyat," (Progressive Law as a Legal Solution for the Welfare of the People), *Jurnal Pembaharuan Hukum* 1, No. 3 (2014): 267–286, http://jurnal.unissula.ac.id/index.php/PH/article/viewFile/1488/1156.

[35] Ibid.

[36] Bisariyadi, "Penerapan Uji Proporsionalitas Dalam Kasus Pembubaran Partai Politik: Sebuah Perbandingan," (Application of the Proportionality Test in Cases of Dissolution of Political Parties: A Comparison), *Jurnal Hukum dan Pembangunan* 48, No. 1 (2018): 84–109.

laws in a country. Proportionality is growing rapidly from a principle in the philosophy of science to a principle in law, from just a principle of a branch of state administration to a principle of constitutional law. The proportionality test is described as a measure to determine a proper relationship between the aims to be achieved with the means that are decided to be taken in order to achieve the final goal. The steps or methods taken are not only tested in order to assess the accuracy of these steps but also to measure whether these steps violate constitutional rights or not. Thus, the proportionality test becomes a justification in the context of limiting the constitutional rights of citizens that can be accepted. Proportionality is not only oriented towards aims and means but also examines the degree of constitutional harm that is likely to be suffered.[37]

According to Aharon Barak, the proportionality test consists of four components, namely: the goals to be achieved, the rational relationship, the steps that must be taken, and the feasibility between the benefits obtained by realizing the goals to be achieved and the losses suffered against constitutional rights. These four components are crucial in understanding proportionality.[38] Meanwhile, according to Robert Alexy the principle of proportionality is divided into three sub-principles, namely suitability, necessity, and balancing.[39] The sub-principle of balance is also called proportionality in a narrow sense (proportionality in strict sensu) as stated by Aharon Barak.[40] These three principles represent the idea of optimization. By applying the principle of proportionality, the maximum possible results will be obtained with the minimum possible loss.[41]

At the end of the 18th century, an academic named Carl Gottlieb Svarez was closely associated with the first case to apply the principle of proportionality in a state administrative court. The case is related to the settlement in the case of police authority (*Polizeirecht*).[42] Svarez stated that the state can demand the sacrifice of a citizen's rights only for reasons of the public interest, and for no other reason.[43] The case was decided by the state administrative court which marked the adoption of the principle of proportionality as a principle in state administrative law. The principle of proportionality which has a position in state administrative law is then tried to be applied to constitutional law. At the end of 1950, the German Constitutional Court perfected the formulation of the principle of proportionality by constructing a framework for testing stages.

Apart from Svarez, another academic who has contributed to the application of the proportionality principle is Rupprecht Krauss. Rupprecht Krauss's dissertation in 1953 had a major influence on the adoption of the proportionality test in the settlement of constitutional cases in the German Constitutional Court. Krauss explained that proportionality has consequences for the state to focus more on the constitutional rights of its citizens. As Krauss said: "*It is consequently simply irreconcilable with the system of the Basic Law that the executive could be permitted to make incursions into the private sphere of individuals that go farther than is absolutely necessary to the reaching of a permissible end*".[44]

In its development, several cases were resolved by the German Constitutional Court using the principle of proportionality, first, in the case of Apothekenurteil (pharmaceutical shop) in 1958. After the completion of the Apothekenurteil case, the German Constitutional Court was more confident in using the principle of proportionality, and the analysis was more formal. In 1963, the German Constitutional Court recommended the use of the principle of proportionality in all cases where there were restrictions on rights. In 1965, the German Constitutional Court announced that in the Federal Republic of Germany, the principle of proportionality had a constitutional status. Second, in the Tonband (recording) case in 1973, the German Constitutional Court again used the principle of proportionality in examining the constitutionality of wiretapping or recordings

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[37] Ibid., 92.

[38] Aharon Barak, *Proportionality, Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012).

[39] Robert Alexy, "Constitutional Rights, Democracy, and Representation," *Ricerche Giuridiche* 3, No. 3 (2014): 199.

[40] Aharon Barak. Op.Cit.

[41] Bisariyadi. Op.Cit., 93.

[42] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47 (2008): 100.

[43] Ibid.

[44] Ibid.

made without knowledge or consent and submitted as evidence in court. German Constitutional Court ruled that recording done secretly without consent has limited the rights of personal development.

As the German Constitutional Court, the Indonesian Constitutional Court also uses the principle of proportionality when faced with competing rights. However, the application and use of these principles are rarely used by constitutional judges. In the judge's opinion, the use of this principle is not the main way to consider requests for constitutionality testing, but by interpreting the constitution. This is because Constitutional Justices have the freedom to decide a case.[45]

The Constitutional Court has developed a proportionality model as a measure in an effort to find a balance between these intersecting rights. However, in most decisions, the principle of proportionality is implicitly stated. The following are some examples of decisions where the panel of judges applied the principle of proportionality to measure competing rights, namely Decision No.14-17/PUU-V/2007, No. 19/PUU-V/2007 and No. 52/PUU-X/2012.

The Constitutional Court has explicitly mentioned the use of the principle of proportionality in an effort to achieve a balance between intersecting rights. In Decision Number 9/PUU-VIII/2009, when the Constitutional Court examined the provisions regarding the announcement of the survey or poll results during the quiet period, the Constitutional Court considered the use of this proportionality principle. It is mentioned that:

> "... The principle of proportionality is the principle and morality of the constitution, which must be proposed at any time as a benchmark to be able to justify the exclusion of human rights that have become constitutional rights, namely the protection, promotion, enforcement, and fulfillment of obligations and responsibilities of the state, especially the Government (*obligation to protect, to promote, to enforce and to fulfil*) which is also stipulated in Article 28I paragraph (4) of the 1945 Constitution. Due to the constitutional obligations and responsibilities of the state and the Government in Article 28I paragraph (4), the application of Article 28J paragraph (2) as a reason to override human rights which are constitutional rights, to be said to be valid, it must be carried out carefully, thoroughly, and scrupulously, and by determining operational measures..."

Until now, the Constitutional Court has not provided a benchmark for testing the proportional principle in the context of competing rights. As a comparison, the doctrine of proportionality is often associated with the decision of the Supreme Court of Canada in the case of R v. Oakes. In this case, the panel of judges formulates an analysis of the clause that allows the limitation of rights through law if it fulfills the specified conditions. These conditions include:

> "*First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance*."

The method of analyzing the proportionality test in a simple way is, for example, the purpose of the legislators to make rules (laws) is "A". "A" can be reached in two ways, namely "X-1" and "X-2". It turns out that to achieve "A" the paths taken, both must have the potential to cause harm to the constitutional rights of citizens. This loss is represented by "Y". If it is calculated, it turns out that the "X-1" way has the potential to harm citizens much more than "X-2". However, legislators prefer the "X-1" instead of "X-2" to achieve the goal of "A" with political considerations such as "X-1" will reach "A" faster. So the proportionality test carried out by the judiciary is to measure the

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[45] Irene Angelita Rugian, "Prinsip Proporsionalitas Dalam Putusan Mahkamah Konstitusi (Studi Perbandingan Di Indonesia Dan Jerman)," (The Principle of Proportionality in the Decisions of the Constitutional Court (Comparative Study in Indonesia and Germany) *Jurnal Konstitusi* 18, No. 2 (2021): 462–479.

policy choices taken by the legislators between "X-1" and "X-2". After carrying out a proportionality test, the court based on strong evidence decided that although "X-1" was faster to reach destination "A" with the consideration that the losses suffered by citizens were greater than through the "X-2" way, accordingly the "X-1" had to be annulled because it is contrary to the constitution.[46]

This method is also known as the "Pareto" method because of its similarity to the "Pareto-optimality" theory in economics. In essence, this idea is based on achieving goals that contain risks of loss with the orientation of generating more profits but having the least potential for losses. Unfortunately, this approach method has not been developed in the decisions of the Constitutional Court. Although in several decisions, the Constitutional Court implicitly considers balancing the intersecting rights, the parameters used are not fixed and there is no doctrine as a parameter for the proportionality test.[47]

The relationship between the Constitutional Court Decision No. 91/PUU-XVIII/2020 and the use of the principle of proportionality in examining the Job Creation Act is that the Constitutional Court tries to find a middle way by considering the smallest potential loss from the issuance of the a quo decision. This can be seen from the Constitutional Court legal considerations which states:

> "That the Constitutional Court's choice to stipulate Law 11/2020 is declared conditionally unconstitutional because the Court must balance the requirements for the formation of law that must be fulfilled as a formal requirement in order to obtain a law that meets the elements of legal certainty, expediency, and justice. In addition, it must also consider the strategic objectives of the establishment of the a quo Law. Therefore, in enacting Law 11/2020 which has been declared conditionally unconstitutional, it creates juridical consequences for the enactment of Law 11/2020 a quo, so that the Court provides the opportunity for legislators to revise Law 11/2020 based on the procedures for the formation of laws that meet definite, basic, standard procedures and methods in forming omnibus law which must also be subject to the fulfillment of requirements for the principles of the formation of laws that have been determined."

At this point, it can be understood that the Constitutional Court, which considers various aspects by choosing a decision with the smallest possible loss potential, has implicitly used the principle of proportionality in making its decision. The Constitutional Court on the one hand sees that there is regulatory obesity and the desire of legislators to accelerate the economy, on the other hand, the Constitutional Court cannot allow a law to be formed haphazardly, ignoring the principles of establishing good laws and regulations and ignoring public participation. Therefore, the Constitutional Court chose to declare the Job Creation Act conditionally unconstitutional with a period of improvement by the legislators for two years. If there is no improvement within the two years period, the Job Creation Act will be permanently annulled. In this formal review of the Job Creation Act, it has been shown that the Constitutional Court uses a judicial proportionality approach in its decision

## CONCLUSION

The author's recommendations are, first, the legislators in this case the DPR (People's Representative Council of the Republic of Indonesia) together with the Government is obliged to follow up on what is required by the Constitutional Court to improve the Job Creation Act as contained in the Decision No. 91/PUU-XVIII/2020 within the period of two years. Second, the legislators must make amendments to the Legislation Formation Act by formulating definite, basic, and standard formulas related to the formation of laws using the omnibus method. This is to ensure legal certainty for the formation of laws using the omnibus method in the future. Third, the Constitutional Court should provide definite and standard guidelines regarding the use of the principle of proportionality in a judicial review if it contains competing rights.

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[46] Bisariyadi et al., "Penafsiran Konstitusi Dalam Pengujian Undang-Undang Terhadap Undang-Undang Dasar," (Constitutional Interpretation in Judicial Review of the Basic Law), *Laporan Hasil Penelitian* (Jakarta: Kepaniteraan dan Sekretariat Jenderal MK RI, 2016).

[47] Ibid.

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