



PROCEDURAL JUSTICE OR SUBSTANTIVE JUSTICE: REVIEW OF CONSTITUTIONAL COURT DECISION NUMBER: 91/PUU/XVIII/2020

Samuel Hamonangan Simanjuntak, Lita Tyesta A.L.W.
Master of Law Faculty of Law Universitas Diponegoro, Semarang
Corresponding author, Email: samuelsimanjuntak17@gmail.com

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ABSTRACT

The formal test application of the Omnibus Law of Job Creation through the Constitutional Court Decision Number:91/PUU-XVIII/2020, in its statement the Constitutional Court declared its unconstitutional conditional. The Constitutional Court decision was made because considering the need to balance the formal and the strategic objectives of the establishment of the Job Creation Law, the formal condition is procedural justice while the strategic objective is substantive justice. The decision raised the question of whether the verdict was oriented to procedural justice or substantive justice. Research question of the study was what is the Orientation of Justice of the Constitutional Court Decision Number:91/PUU-XVIII/2020? This study is on normative law research. The postpositivism paradigm used a qualitative approach through the in concreto study of and court behaviour. The results of the study are the Constitutional Court Decision Number:91/PUU-XVIII/2020 through its considerations, opinions and verdicts in the main application oriented to procedural justice. It can be concluded that The Decree of Constitutional Court Decision Number:91/PUU-XVIII/2020 is oriented to procedural justice. The study recommends, in line with the principle of justice of John Rawls, the basic legal values of Gustav Radbruch and the social justice value of Pancasila and the 1945 Constitution of the Republic of Indonesia, formal test on Omnibus Law of Job Creation should have been rejected, and made substantive justice orientation of the Constitutional Court Decision Number:91/PUU-XVIII/2020.

Keywords: Constitutional Court decision Number: 91/PUU-XVIII/2020; procedural justice; substantive justice

INTRODUCTION

Background

The idea of limitation of power or separation of powers is one part of the 1998 reform agenda. Through the amendment of the 1945 Constitution of the Republic of Indonesia, significant changes can be seen in the Indonesian constitutional system, notably regarding the idea of limiting power within the

framework of a *unitary state*.¹ One of them is a fundamental change in the system of judicial power, namely the system of constitutional review of laws as legislative products by the Constitutional Court of the Republic of Indonesia. Based on the theory of judicial review, Arend Lijphart states that to decide

¹ Eriko Fahri Ginting dan Dian Agung Wicaksono, "Dualisme Kewenangan Pengawasan Rancangan Peraturan Daerah Oleh Pemerintah Pusat Dan Dewan Perwakilan Daerah," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 3 (2020): 404.

whether the law is in line with the constitution.² Before the amendment, there was no such mechanism, because in principle the law was inviolable, which meant that judges could only apply the law, so they could not judge the law or even interpret it.³

The only state institution that was given a deadline for its formation was the Constitutional Court, which was expressly and explicitly regulated in Article III of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia, which stated *“The Constitutional Court shall be formed no later than August 17, 2003 and before it is formed all its authority shall be exercised by the Supreme Court”*. The third amendment to the 1945 Constitution has created a new institution that is part of the judicial power. With special authority which is a form of *judicial control* within the framework of a *system of checks and balances* between the branches of state power.⁴ More detail in article 24 paragraph (2) of the 1945 NRI Constitution states that *“judicial power shall be exercised by the Supreme Court and agencies within the general court, religious court, military court, state administrative court and by a Constitutional Court”*.

The Constitutional Court is a constitutionally established and independent state institution whose main purpose is to maintain and safeguard the constitution as the highest basic law,⁵ as well as one

of the judicial power institutions that has the authority stipulated in Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court *juncto* Law Number 24 of 2003 concerning the Constitutional Court (hereinafter abbreviated as the Constitutional Court Law), precisely in Article 10, namely: Examine laws against the 1945 Constitution of the Republic of Indonesia; decide disputes over the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia; decide on the dissolution of political parties; decide disputes over the results of general elections; and the Constitutional Court must give a decision on the opinion of the DPR that the President and / or Vice President is suspected of having violated the law in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts, and / or no longer qualify as President and / or Vice President as referred to in the 1945 Constitution of the Republic of Indonesia.

Meanwhile, the 1945 Constitution also explicitly regulates the authority of the Constitutional Court, in Article 24C paragraph (1) states *“The Constitutional Court shall hear cases at the first and final level whose decisions are final to test laws against the Constitution, decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, and decide disputes over election results”* and paragraph (2) states *“The Constitutional Court shall give a decision on the opinion of the House of Representatives regarding alleged violations of the President and/or Vice President according to the Constitution”*.

The Constitutional Court’s authority to examine laws against the 1945 Constitution is a test of the constitutionality of a law, both in terms of formal and material. The examination of the content of the law against the 1945

2 M. Beni Kurniawan, “Politik Hukum Mahkamah Konstitusi Tentang Status Anak Di Luar Nikah: Penerapan Hukum Progresif Sebagai Perlindungan Hak Asasi Anak,” *Jurnal HAM* 8, no. 1 (2017): 71

3 Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, (Jakarta: Rajawali Pers, 2016), 291.

4 Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, (Jakarta: Sinar Grafika, 2015), 1.

5 Tanto Lailam, “Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional,” *Jurnal HAM* 13, no. 1 (2022): 66.

Constitution of the Republic of Indonesia is a material test, while the examination of its formation is a formal test. The authority regarding the material and formal tests is clearly regulated in Article 51 paragraph (3) of the Constitutional Court Law which briefly states that: (a) the formation of the law does not fulfill the provisions based on the 1945 Constitution of the Republic of Indonesia and/or (b) the content material in paragraphs, articles and/or parts of the law is considered contrary to the 1945 Constitution of the Republic of Indonesia. Thus, it can be said that the object of the authority to examine the law does not have to be related to the material of the law, but can also be related to the process of forming the law. The purpose of testing legislation is to correct, replace, or straighten out the contents of the law so that it does not conflict with the 1945 Constitution of the Republic of Indonesia, so that the law can provide justice (*rechtvaardigheid*) and benefits (*nuttigsteid*) for the community.⁶

If the law is carried out on its material, then such testing is called material testing which results in canceling some of the material of the law. As for formal testing, it means that what is questioned is in terms of *form, format and formulation* as well as the formation process. That the law is not in accordance with constitutional procedures as it should be. In general, what can be referred to as formal testing (*formeele toetsing*) is the testing of a legal product, not in terms of its material, but from its form and structure. In general, the criteria that can be used to assess the constitutionality of a law from a formal perspective (*formeel toetsing*) is the extent to which the law is enacted in the right form (*apporiate form*), by the right institution (*appropriate institution*) and according to the

right procedure (*appropriate procedure*).⁷

As observed from the recapitulation quantity data per 2020, as many as 266 decisions granted by the Constitutional Court were all requests for judicial review.⁸ Then the details of the formal review decisions as of 2019 were 44 decisions, of which 7 decisions (the petition was withdrawn, 21 decisions were inadmissible, and 17 decisions rejected the petition.⁹ From these data, academics and legal practitioners assume that the formal test is an indiscretion, because indeed the legal consequences that result if a formal test decision is granted will cancel the law (all norms) as well as proving the unconstitutionality of a law is quite difficult.

2021 was the first time the Constitutional Court granted a request for a formal test of the law, and even then it was only partially granted. In Decision Number 91/PUU-XVIII/2020, this decision is a formal test of Law Number 11 of 2020 concerning Job Creation (hereinafter abbreviated as the Job Creation Law), which was submitted by the government on February 12, 2020.¹⁰ After considering the petition for provision and the main petition of the petitioners, the testimony of the DPR and its experts, witnesses and evidence, and the testimony of the President and his experts, witnesses and evidence, the Constitutional Court in its verdict, namely:¹¹ in the provision (declaring the petition for provision of petitioners I and II inadmissible and rejecting

6 Machmud Aziz, "Penguujian Peraturan Perundang-Undangan Dalam Sistem Peraturan Perundang-Undangan," *Jurnal Konstitusi*, 7, no. 5 (2010), 149.

7 Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Konstitusi Press, 2006), 63-64.

8 <https://www.mkri.id/index.php?page=web.RekapPUU&menu=4>, accessed 31 November 2021.

9 <https://www.hukumonline.com/berita/baca/lt5f8e4201deea4/tantangan-pengujian-proses-legislasi-di-mahkamah-konstitusi?page=2>, accessed on 31 November 2021.

10 Agus Suntoro, "Implementasi Pencapaian Secara Progresif Dalam Omnibus Law Cipta Kerja," *Jurnal HAM* 12, no. 1 (2021): 2.

11 Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020, 416-417.

the petition for provision of petitioners III, IV, V, and VI; then in the main petition (declaring petition I and II inadmissible and granting the petition of petitioners III, IV, V, and VI in part). This decision is a formal examination of Law Number 11 of 2020 concerning Job Creation.

As a legal consequence of the partially granted decision, it is declared that the establishment of the Job Creation Law is contrary to the 1945 Constitution of the Republic of Indonesia and has no legal force considering conditionally (unconstitutional with conditions) as long as no improvements are made for 2 years since the decision *a quo* was pronounced.¹² This means that the Job Creation Law is still valid for the whole, but if no improvements are made within a maximum of 2 (two) years by the legislators, then the Job Creation Law becomes permanently unconstitutional by itself (*mutatis mutandis*).

From the *a quo* decision, it can be seen that the Constitutional Court in its considerations and rulings indirectly tugged at procedural justice and substantive justice, both in terms of approach and results. This can be seen from the Constitutional Court's consideration which stated "*That the Court's choice to determine that Law 11/2020 is conditionally declared unconstitutional is because the Court must balance the requirements for the formation of a 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 Law a quo*".¹³ The formal requirements and strategic objectives are 2 different types of justice, namely procedural justice and substantive justice. On the one hand, the Constitutional

Court considers the formal requirements or the validity and illegality of the formation of a law based on formal law, while on the other hand the Constitutional Court also considers strategic objectives which are actually the overall substance of the Job Creation Law

Regarding procedural justice and substantive justice, according to *Black's Law Dictionary*, procedural justice is defined as "*justice administered according to the rules of substantive law, notwithstanding errors of procedure*" meaning (justice administered according to substantive law, regardless of procedural errors.¹⁴ Meanwhile, procedural justice according to I Dewa Gede Atmadja is "*It refers to procedures applied in settling a dispute or taking a decision*" meaning that justice is expressed in the application of dispute resolution procedures or decision making.¹⁵ It can also be seen in the 3 (three) basic values in law proposed by Gutav Radbruch in his book "*einführung in die rechtswissenschaften*", namely: justice (*gerechtigkeit*); expediency (*zweckmassigkeit*); and legal certainty (*rechtssicherheit*).¹⁶ Legal expediency and legal certainty are approaches to achieving justice, but legal expediency is synonymous with substantive justice and legal certainty is synonymous with procedural justice.¹⁷

Then what is the orientation of justice used by the Constitutional Court in deciding the decision *a quo*, whether on procedural justice or substantive justice or even on both so that there is a tug of war between procedural justice and substantive justice in the decision *a quo*. For this reason, this paper is entitled "Procedural Justice or Substantive Justice: A Review of the Constitutional Court

12 *Ibid.* 417.
13 *Ibid.* 413.

14 Ach Rubaie, *Putusan Ultra Petita Mahkamah Konstitusi: Perspektif Filosofis, Teoritis, dan Yuridis*, (Surabaya: LaksBang, 2017), 4.
15 I Dewa Gede Atmadja, *Filsafat Hukum, Dimensi Tematis dan Historis*, (Malang: Setara Press, 2013), 76.
16 Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2012), 19.
17 *Ibid.*

Decision Number: 91/PUU-XVIII/2020”.

Based on the author’s search, there are two previous writings related to this study. I Putu Eka Cakra and Aditya Yuli Sulistyawan in their study entitled “*Compatibility of the Application of the Omnibus Law Concept in the Indonesian Legal System*” in 2020, examined the issue of how the compatibility of the application of the *omnibus law* in the Indonesian legislative system. Then the results of his research say that legal transplation should be carried out which includes *reception in law* and *reception in society*, as well as the necessity of participation and socialization to the community, and comprehensive harmonization in laws and regulation.¹⁸

In Dewi Sartika Putri study entitled “*Is the Implementation of the Job Creation “Omnibus Law” in Indonesia Effective or Not? Review Study Based on the Legal System in Indonesia*” in 2021 examined or answered the problem of how to properly apply the *omnibus law* on job creation in Indonesia. Furthermore, the result this study suggested that the government should have matured in initiating the concept of *omnibus law* by mitigating conflicts between laws and regulations and conflicts between authorities if it wants to realize omnibus law in the legal system in Indonesia, if without this mitigation, *omnibus law* cannot realize legal certainty as a support for investment and development or the purpose of *omnibus law*.¹⁹

In those two previous articles, the object of the research focused more on the Omnibus Law on Job Creation in a formal study, to comprehensively study the aspects of the use of omnibus law methodology in the Omnibus

Law of Job Creation. In contrast, this paper studies the Omnibus Law on Job Creation after the formal decision test by the Constitutional Court is released, hence why this study used the decision of The Constitutional Court as the object of the research. On the other hand, the two previous articles used the omnibus law method in the Omnibus Law on Job Creation as the object of their researches. In spite of the decision of The Constitutional Court is a decision on the formal review of the Omnibus Law on Job Creation, the study is very different from the previous studies, especially the difference periode of between the before and the after of the decision of The Constitutional Court on the formal review of the Omnibus Law on Job Creation are being issued.

Research Question

Based on the background above, the research question for this study is: What is the Justice Orientation of The Constitutional Court Decision Number 91/PUU-XVIII/2020?

Research Objective

This study aims to analyze and to construct the justice orientation of the Decision of The Constitutional Court Number 91/PUU-XVIII/2020.

Research Method

1. Approach

This paper is normative research on judges decision and judges and the judges’ behavior. Using the qualitative approach, what is meant by a study of judge decision is by utilizing the The Constitutional Court Decision Number 91/PUU-XVIII/2020 as the object of this research, and a study of judges’ behavior was conducted by analyzing how the judges consider and notion on the decision made in court. The study on the judges decision and judges’ behavior is a post-positivism and legal positivism paradigm,²⁰and within the concept

18 I Putu Eka Cakra dan Aditya Yuli Sulistyawan, “Kompabilitas Penerapan Konsep *Omnibus Law* Dalam Sistem Hukum Indonesia,” *Jurnal Crepido*, 2, no. 2 (2020), 59 – 69.

19 Dewi Sartika Putri, “Penerapan *Omnibus Law* Cipta Kerja di Indonesia Efektif atau Tidak? Studi Tinjauan Berdasarkan Sistem Hukum di Indonesia,” *Jurnal Hukum & Pembangunan*, 51, no. 2, (2021), 523 – 540.

20 Suteki dan Galang Taufani, *Metode Penelitian*

that in-concerto legal is decided by a court decision and a court behavior.²¹

2. Data Collection Method

Since this is a normative study, the data collection method used in this paper is a literature review method. The data to collected for this study are: philosophical and theoretical reviews regarding court justice according to the experts and from the perspective Pancasila and the 1945 Constitution of the Republic of Indonesia; The Constitutional Court Decision Number 91/PUU-XVIII/2020; and other The Constitutional Court decision related to this paper.

3. Analysis Method

After obtaining the data, a qualitative analysis was carried out, through a fairness review which was used to analyze and to find the justice orientation of the The Constitutional Court Decision Number 91/PUU-XVIII/2020. After being qualitatively analyzed, the conclusions were drawn using the deductive method as well as providing some advice.

DISCUSSION

John Rawls: The Principles of Justice as Freedom, Diversity and Opportunity

In his books entitled *A Theory of Justice*, John Rawls explored justice, as he mentioned that it is one of the supporting aspect of formal justice. According to John Rawls, formal justice cannot fully promote the creation of a well-ordered society. He believes in a concept of justice that can be generally accepted, whereas formal justice tends to be imposed by the authorities.²² The theory of justice which gives more space to all people who are reached by certain public policies is a good theory of justice, which guarantees

the interests of all people fairly.²³ John Rawls' concept of justice and its implications in socio-political and economic arrangements must be placed in a contract perspective.²⁴

John Rawls divided the principle of justice into several parts, namely:²⁵ *First*, equal liberty of principle; *Second*, differences principles; and *Third*, equal opportunity principles. He argued that should there be a clash between these principles of justice, the equal liberty of principle must take precedence over the other principles. The equal liberty of principle should be prioritized over the differences principles, and according to him, freedom and equality are the basic elements of the theory of justice.²⁶ Therefore, freedom and equality must be sacrificed for the sake of social or economic benefits, even though the great benefits come only from that point of view. He believed that equal treatments for all people who are accommodated in formal justice or procedural justice actually implies an acknowledgment of freedom and equality for all.²⁷

In his theory, John Rawls formulated two principles of justice, which are:²⁸ "First, each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others; Second, social and economic inequalities are to be range so that they are both (a) reasonable expected to be every one's advantage, and (b) attached to positions and offices open to all". In his book entitled *A Theory of Justice*, he explained that the theory of social justice as the difference principle and the principle of fair equality of opportunity. The meaning of the difference

Hukum: Filsafat, Teori dan Praktik, (Depok: Rajawali Pers, 2018), 80.

21 *Ibid.*

22 Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*, 1955. Terjemahan, *Filsafat Hukum Perspektif Historis*, (Bandung: Nuansa dan Nusamedia, 2004), 238.

23 *Ibid.*

24 Budiono Kusumohamidjojo, *Teori Hukum: Dilema Antara Hukum dan Kekuasaan*, (Bandung: Yrama Widya, 2016), 289.

25 John Rawls, *A theory of Justice*, (Massachusetts: Revised Edition, Harvard University Press, 1971), 57.

26 Budiono Kusumohamidjojo, *Op. cit.* 290.

27 *Ibid.* 297.

28 John Rawls, *Op. cit.* 53.

principle is that social and economic differences must be regulated in order to provide the greatest benefit to those who are least fortunate.²⁹ Meanwhile the principle of fair equality of opportunity exhibited those who have least opportunity to achieve prosperity, income and authority prospects, then they should be given protection.³⁰ In the Theory of Justice, John Rawls also explained that there must be a social relationship between individual and community. A cooperation between the community and the state for fulfilling justice which includes wealth, income, food, protection, authority, power, self-respect, and freedom is also needed.³¹

Gustav Radbruch: The Conflict between Certainty and Justice

Gustav Radbruch was really not convinced of the theory and concept of *grundnorm* by Hans Kelsen, then he remolded the value of justice as the crown of all law. As a Neo-Kantian exponent who was heavily influenced by the Baden School, he tried to overcome the dualism between *sein* and *sollen*, between matter and form or between formal and material. In contrast with Stammler and Kelsen who accentuated the dualism of *sein* and *sollen* or formal dimensions, Radbruch viewed dualism as two sides of a coin, "material fills form and form protects material".³² In Radbruch's point of view, the value of justice is a material that must be the content of the rule of law, and the rule of law is a form that must protect the value of justice.

Based on the basic theory of the Baden school, Radbruch stated that law carries the values of justice for substantial human life. Law as a bearer of the value of justice,

becomes a measure whether a legal order is fair or not. The value of justice is also the foundation of regulation as the law. Thus, justice does not only have a normative nature, but also a constitutive nature for law.³³ It is said as naturally normative because it works as a transcendental prerequisite that underlies every positive law, which is the moral basis of the law and at the same time an indicator of a positive legal system, hence why the positive law must be based off justice.³⁴ As for its constitutive nature, he believed that justice must be an absolute element for regulations as law, without justice a regulation cannot be categorized as law.³⁵

According to Gustav Radbruch, there are three objectives of law, which are: justice, certainty and expediency.³⁶ He thought that justice must be seen as a purpose as proposed by Aristotle. In order to realize the purpose of justice with its substantial content, it must be seen in terms of certainty, and to complete justice and certainty, certainty is needed. So according to Radbruch, there are three aspects of the law, which are justice, certainty and expediency.³⁷ The justice aspect shows equal rights before the law. The aspect of certainty shows the purpose of justice, which is advancing generosity in human life.³⁸ The aspect of certainty refers to the assurance that the law which contains justice and norms actually functioned as obeyed regulations. Radbruch said that justice is an ideal framework of law, while certainty is an

29 Budiono Kusumohamidjojo, *Op. cit.* 292.

30 *Ibid.* 296.

31 Winshery Tan dan Dyah Putri Ramadhani, "Pemenuhan Hak Bekerja Bagi Penyandang Disabilitas Fisik di Kota Batam," *Jurnal HAM* 11, no. 1 (2020): 35.

32 Theo Hujibers, *Filsafat Hukum Dalam Lintas Sejarah*, (Yogyakarta: Kansius, 1982), 162.

33 *Ibid.*

34 Bernard L. Tanya, dkk., *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi*, (Yogyakarta: Genta Publishing, 2013), 117.

35 *Ibid.*

36 Mohammad Kamil Ardiansyah, "Pembaruan Hukum Oleh Mahkamah Agung Dalam Mengisi Kekosongan Hukum Acara Perdata Di Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 376.

37 Satjipto Rahardjo, *Biarkan Hukum Mengalir: Catatan Kritis Tentang Pergulatan Manusia dan Hukum*, (Jakarta: Kompas, 2008), 80.

38 *Ibid.*

operational framework of law.³⁹ The need for certainty justice is a permanent and definite part of the law, whereas certainty contains elements of relativity because of the purpose of justice in order to embody the value of human kindness.

Gustav Radbruch indeed admitted that there was always a contradiction on these three aspects. In a country with a collective legal system, there will be a conflict between certainty and justice, he explained. According to justice, the guilty person must be punished, while certainty does not allow it. Contrary to the State with a collective legal system, in a state with an individual legal system, the certainty is individual, so a conflict between one certainty and the other certainty may arise. According to the regulation, certainty applies for the sake of legal certainty. However, certainty against the concession as well. Some questions also arise from this conflict, what will happen if there is a conflict between justice and certainty in law, and what will happen if certainty is not in conform with the value of justice. Gustav Radbruch added that if there is a conflict between certainty and other aspects, then justice is the priority, so for the sake of justice, certainty must be exempted or ignored.⁴⁰

The Overview of Justice from The Perspective of Pancasila and the 1945 Constitution of the Republic of Indonesia

Indonesia enacts Pancasila as a reference for justice to be achieved. Pancasila is the first norm of Indonesia after its independence, Pancasila is used as the source of all sources of law, and Pancasila is also the spirit and the life philosophy of all Indonesians.⁴¹ Notonagoro in a paper written by A. Hamid S. Atamimi in Oetojo Oesman Alfian's book

specified "Pancasila as an Ideology" which means Pancasila is the fundamental norm of the state (*staatsfundamentalnorn*), or according to a the most consequent terms of positivism, Hans Kelsen eliminated the idea of law from our understanding and perception of law itself.⁴²

Pancasila can also be positioned as the basic philosophy of the state, it does not act as the source of legislation only, but also as the source of morality especially in the implementation and administration of the state. On the Second Principle of Pancasila, which is "Just and civilized humanity", it portrays the source of moral values in a life as the citizens of Indonesia. The Religious values are divided into 4, which are: the value of the truth of reality that originates from the element of human's intelligence; the value of beauty that originates from the element of human's sense; the value of moral goodness that originates from the element of human's ethical will; and the value of Divinity that originates from human's belief or faith.

The values mentioned above can be connected with the values in the second and the fifth principles of Pancasila, which are: *First*, there is a value of just humanity in the second principle of Pancasila, such as recognizing the dignity of humanity, treating all human beings fairly, becoming civilized human beings which means humans with the potential to create, sense, intend, and believe in order to clearly distinguish humans and animals; *Second*, there is a value of social justice in the fifth principle of Pancasila, which are: the embodiment of justice in social justice for all Indonesians which includes the fields of ideology, politics, economics, social and culture, the purpose of a just, financially, and spiritually prosperous society, a balance

39 *Ibid.*

40 *Ibid.*

41 P. J. Suwarno, *Pancasila Budaya Bangsa Indonesia, Penelitian Pancasila Dengan Pendekatan Historis, Filosofis & Sosio-Yuridis Kenegaraan*, (Yogyakarta: Kansius, 1993), 125.

42 Oetojo Oesman Alfian, *Pancasila Sebagai Ideologi Dalam Berbagai Bidang Kehidupan Bermasyarakat, Berbangsa Dan Bernegara*, (Surabaya: Karya Anda, 1983), 99.

between the rights and obligations as well as respecting the rights of other people, the purpose of progress and development.

The values of Pancasila are also objective, because they are in accordance with reality and are general in nature. The subjective nature of the values of Pancasila emerges from the reasoning of the Indonesians. The objective value of Pancasila is, among other things, that the core of the principles of Pancasila will be a life-long ideology in the life of all humans in terms of customs, cultures, and religious life. The subjective values of Pancasila are the values of Pancasila emerging from the results of the assessment and philosophical thought of the Indonesians themselves. The values of Pancasila is a philosophy of life, a way of life, a guide to life, and it is in accordance with the value of Indonesia.

The meaning of just and civilized in the second precept in Pancasila, quoted from Notonagoro's writing in his book "Pancasila Scientifically Popular, is the core of the purposes of life, which is perfect happiness. It means no disappointment, satisfying, and no thinking.⁴³ Meanwhile, what is meant by civilized is the form and implementation of a dignified life.⁴⁴

Meanwhile, the meaning of social justice in the fifth precept in Pancasila is interpreted by Notonagoro as justice among human beings, justice in the relationship of human life with his God or religious justice, and human justice towards himself.⁴⁵ Furthermore, Notonagoro concludes that social justice elements are reflected to the nature of humans' monoduality or the nature of unity of individual and the nature of social beings in a dynamic balance both as a national basis and

as an international basis.⁴⁶

Based on the description above, it can be concluded that the meaning of social justice is how the state can create balance in the life of the state, both fellow citizens and citizens with God as well as create balance between citizens in the international environment. The meaning of social justice is a summary of the previous precepts which also holds a concept of world peace. The meaning of social justice in the state life of fellow citizens means that the court as one of the institutions in a state of law is tasked with creating balance, a harmony in the lives of citizens by giving decisions according to the concept of social justice desired by the fifth precept. Courts serve as institutions that create a balance between fellow citizens, citizens with the government and citizens with their environment.

In the 1945 Constitution of the Republic of Indonesia, justice is also oriented to social justice which contains special articles and chapters on social welfare, namely CHAPTER XIV. Historically, the chapter was originally entitled "social welfare", so that all articles on the economy must be read and understood within the framework of the conception of social welfare as depicted in the ideal social justice⁴⁷. However, since the Fourth Amendment to the 1945 Constitution of the Republic of Indonesia, the formulators of the Amendment emphasized the existence of constitutional policy guidances in the economic sector that all national economic policies and of course including regional policies should be implemented based on the 1945 Constitution of the Republic of Indonesia. Since the fourth amendment, the title of CHAPTER XIV was changed into "National Economy and Social Welfare".⁴⁸

43 Notonegoro, *Pancasila Secara Ilmiah Populer*, (Jakarta: Bumi Aksara, 1983), 99.

44 *Ibid.* 100.

45 *Ibid.* 183.

46 *Ibid.*

47 Anna Triningsih dan Oly Viana Agustine, "Putusan Mahkamah Konstitusi Yang Memuat Keadilan Sosial Dalam Penguji Undang-Undang," *Jurnal Konstitusi* 16, no. 4 (2019), 840.

48 Jimly Asshiddiqie, *Model-Model Pengujian*

All constitutional guidelines regarding to the national economy must be translated from the perspective of social welfare. The 1945 Constitution of the Republic of Indonesia is named as the constitution for social welfare and the constitution for social justice which is the soul or spirit of all aspects of constitutional policy regarding to the economy. Thus, the 1945 Constitution of the Republic of Indonesia is referred to as a social welfare constitution, this can be explicitly seen in Chapter XIV of the 1945 Constitution of the Republic of Indonesia which was originally entitled “social welfare” which contains two articles, namely Article 33 and Article 34. Article 33 consists of three paragraphs, while Article 34 only contains one paragraph, namely “*the poor and neglected children are cared for by the state*”. However, after the Fourth Amendment to the 1945 Constitution of the Republic of Indonesia, two paragraphs were added to Article 33, and three paragraphs were added to Article 34. The title of CHAPTER XIV was changed to “National Economy and Social Welfare”. Thus, CHAPTER XIV which contains Article 33 and Article 34 of the 1945 Constitution of the Republic of Indonesia after the second amendment does not only contain the idea of social welfare, but also explicitly regulates policy guidance in the economic field in general.⁴⁹

This social justice is explicitly contained in the 1945 Constitution of the Republic of Indonesia, one of which is in paragraph 1 in which there is the principle of “*humanity and justice*”. It is used as the reason why colonialism in the world must be abolished. Article 28H paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that “*everyone has the right to get special facilities and treatment to obtain the*

same opportunities and benefits in order to achieve equality and justice”. Furthermore, Article 33 paragraph (3) states “*Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people*” and paragraph (4) states “*The national economy is organized based on economic democracy with the principle of togetherness, efficiency, justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity*”.

Constitutional Court Decision Number 91/PUU-XVIII/2020: Procedural Justice or Substantive Justice

The Constitutional Court Decision Number 91/PUU-XVIII/2020 is the result of the Court’s judicial review case on the application for a formal examination of the Job Creation Law, which was submitted by 6 applicants on October 15, 2020. In this case, apart from submitting the principal application for a formal examination, the Petitioners also submitted a provision for a priority examination and an application for an interim decision.

1. Priority Check Application

The application for priority examination submitted by the Petitioner on the grounds that the application for a material examination and a formal examination has different characteristics. In the decision on the formal test, the Constitutional Court will decide that the formation of the law is contrary to the procedure provided in the 1945 Constitution of the Republic of Indonesia and Law Number 12 of 2011 on Legislation Making—(hereinafter abbreviated as UU P3) and has no binding legal force. Considering that the applicant fulfills the requirements for the formal test application, namely the 45-day grace period given by the Constitutional Court,⁵⁰ it is stated in the Constitutional

Konstitusional di Berbagai Negara, (Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi, 2006), 95 – 96.

49 *Ibid.* 97 -98.

50 Constitutional Court Decision Number 91/PUU-XVIII/2020, 22 – 23.

Court Decision Number 27/PUU-VII/2009 that *“Apart from the decision in the principal of a quo petition, the Court deems it is necessary to provide a time limit or deadline for a law to be formally reviewed. The consideration why the limitation of this deadline is needed is the fact that the characteristics of formal testing are different from material tests. A law that is formed not based on the procedures as determined by the 1945 Constitution will be easier to identify compared to a law in which its substance is contrary to the 1945 Constitution. For legal certainty, it is necessary to acknowledge whether a law has been legally enacted or not, because a formal review will cause the law to be annulled from the start. The Court considers that the deadline of 45 (forty five) days after the Law is published in the State Gazette as sufficient time to file a formal review of the Law.”*⁵¹, meaning that the Constitutional Court can obtain legal certainty more quickly on the status of the law that is formally tested. Therefore, regarding the priority application, the Petitioner asked the Court to examine, hear, and decide on the case on priority, which was prioritizing the examination of the application for a formal examination compared to the application for a judicial review of the Job Creation Law, and being able to resolve the case within the next 30 days. Considering that in January to March 2021 the Constitutional Court’s agenda was the handling of PHPKDA, so the Petitioners requested that the Court would resolve the case before entering the Court’s agenda, which was PHPKDA.⁵²

Regarding to to the Petitioner’s priority application, the Constitutional Court decided that the Petitioners’

application was not legally grounded and thus rejected the application.⁵³ Based on considerations on the Decision of the Constitutional Court Number 79/PUU-XVII/2019, the Constitutional Court stated that the case was under examination when the decision was pronounced, therefore the Court has not been bound by a 60 working day deadline since the case was recorded in the file case.⁵⁴ In addition, the Constitutional Court considered that the Constitutional Court would face the PHPKDA agenda since December 2020, so that the Court must decide on the PHPKDA case within 45 days, thus the Court had to temporarily suspend all examinations of existing cases, including the case of the Petitioner’s application⁵⁵. The Constitutional Court also stated that because of the non-natural disaster, the Covid-19 pandemic that the world is currently facing, especially Indonesia, the Court decided to stop several cases including the case of the Petitioner’s formal test application⁵⁶ to prevent the spread or transmission and take into account the Enforcement of Restrictions on Community Activities (PPKM) policy. But in the same case, at least the Constitutional Court would conduct a separate examination between the application for a formal review and a judicial review of the Job Creation Law.⁵⁷

Looking at the considerations and decisions of the Constitutional Court on priority applications, consistency in creating substantive justice dominates compared to procedural justice. The Petitioner made the previous decision as a precedent that must be used by the Court in deciding cases. It is a formal reference to a law, considering that the previous judge’s decision can be used as law as jurisprudence for

51 Constitutional Court Decision Number 27/PUU-VII/2009, 92.

52 Constitutional Court Decision Number 91/PUU-XVIII/2020, 24 – 25.

53 *Ibid.* 381.

54 *Ibid.* 374.

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

judges in deciding a case. Related to the precedents submitted by the Petitioners, the Constitutional Court dares to deviate from the law or decisions they made with the consideration of a greater interest to be prioritized, namely the PHPKDA agenda and based on the consideration that the Government policy towards Enforcement of Restrictions on Community Activities (PPKM) is to avoid the spread of Covid-19. According to John Rawls, injustice, whatever gives more benefits to people in terms of welfare and income should get a priority position.⁵⁸ Nevertheless, the Constitutional Court still gave consideration and granted the petition of the applicant who requested that the examination of the application for a formal examination and a judicial review of the Job Creation Law separately (split).

Historically, the Constitutional Court has granted priority requests for cases of judicial review, namely Constitutional Court Decision Number 19/PUU-XVII/2019, Constitutional Court Decision Number 20/PUU-XVII/2019, Constitutional Court Decision Number 56/PUU-XVII /2019, and the Constitutional Court Decision Number 75/PUU-XVII/2019.⁵⁹ For example, in the Constitutional Court Decision Number 20/PUU-XVII/2019, in his application, the applicant asked the Court to wisely prioritize the examination and decided on the a quo petition before the 2019 General Election voting, which would be held on 17 April 2019.⁶⁰ Then the Constitutional Court granted the Petitioner's request with the consideration that states "Regarding the a quo provision request, the Court considers that the Petitioners'

application has implications for the use of voting rights in the voting which will be held on April 17, 2019. Therefore, by adhering to the procedural law that applies in the Constitutional Court, the petition for provision of the petitioners is reasonable according to law."⁶¹

2. Application for Provision for Interim Decision

The application for provision for the interim decision filed by the petitioners with the following reasons: First, material changes for the Job Creation Law after the joint approval of the House of Representatives and the Government.⁶² The petitioners considered that the Job Creation Law did not meet the provisions for the formation of legislation – *Pembentukan Peraturan Perundang-Undangan* - (hereinafter abbreviated as P3) as stipulated in the 1945 Constitution of the Republic of Indonesia and the UU P3. Second, there was an error in the reference to the article in the Job Creation Law which makes it impossible to implement.⁶³ In article 6 there is a norm referring to article 5 paragraph (1) letter a, whereas in article 5 there is no paragraph (1) letter a. Based on the error in the reference, the petitioners considered that the article cannot be implemented. Third, there are provisions that require the stipulation of implementing regulations for a maximum of 3 months.⁶⁴ The petitioners considered that for the sake of legal certainty, before the Constitutional Court decided on the application, it was necessary to impose an interim decision that delays the implementation of the Job Creation Law until the Constitutional Court's final decision on the subject of the petition is made.

58 Budiono Kusumohamidjojo, *Loc cit.*

59 Alboin Pasaribu dan Intan Permata Putri, "Prosepek Penjatuhan Putusan Provisi Dalam Perkara Pengujian Undang-Undang," *Jurnal Konstitusi* 18, no. 1 (2021), 47.

60 Constitutional Court Decision Number 20/PUU-XVII/2019, 17.

61 *Ibid.* 71.

62 Constitution Court Decision Number 91/PUU-XVIII/2020, 27.

63 *Ibid.*

64 *Ibid.* 28.

Regarding the provision for the interim decision, the Constitutional Court decided to reject the request. According to the Constitutional Court, the reason for the application submitted by the petitioners was closely related to the content of the P3 Law, so it was not an appropriate reason for a formal examination application review. Therefore, the request for provision was groundless according to law.⁶⁵

Regarding the Constitutional Court's consideration and decision of the interim order petition requested by the petitioner, its orientation cannot be reviewed because the interim order's reason declared by the petitioner clearly related to the material test of the Job Creation Law which is not appropriate as the interim order petition reason. Juridically, the interim order is an order from the Constitutional Court for the petitioner or the respondent to temporarily stop the implementation of disputed authority until further Constitutional Court decision. The implementation of authority mentioned above is in the form of real action or legal action.⁶⁶ An interim decision can be issued if there is an urgent public interest that if the subject matter of the application is granted could give rise to more serious legal consequences and the authority in question is not a court service with permanent legal force.⁶⁷ These prerequisites must be met if applicants want their application for interim order provision on law examination to be considered by the Constitutional Court.

Formerly in history, the first provision petition granted by the Constitutional Court was the Constitutional Court Decision Number 133/PUU-VII/2009. The petitioner requested the Constitutional Court to issue an interim decision ordering

the Police to postpone the delegation of cases of alleged criminal acts and instructing the Prosecutor's Office to reject the delegation of cases of alleged criminal acts involving the Petitioners. Their reason was because Article 58 of the Constitutional Court Law stipulates that the Constitutional Court's decision is not retroactive to prevent violations of constitutional rights.⁶⁸ After considering, in the Supreme Court's decision, the Constitutional Court accepted the petitioner's petition and instructed the police to stop the investigation until Constitutional Court issue a decision with legal power.⁶⁹

3. The Petition Principal

In the petition, the petitioner conveyed the petition principal to the Court so that the Constitutional Court:⁷⁰ stated that Job Creation Law does not meet the article 3 of The 1945 Constitution; Job Creation Law contradicts to The 1945 Constitution of the Republic of Indonesia and does not have binding legal power, and states that the Job Creation Law provision that has changed, deleted, and stated that has no legal power is reinstated. Regarding the petition principal, the petitioner gave the following reasons or propositions :

- a. **First**, that the establishment of the Job Creation Law using the omnibus law method has created uncertainty as to whether the Job Creation Act is a new law or an amendment or revocation, thus contradicting the P3 Technical provisions stipulated in the Job Creation Act.⁷¹

Before giving consideration, the Constitutional Court explains that UU P3 is the delegation of The 1945 Constitution

65 *Ibid.* 381 – 382.

66 Pasal 12 ayat (1) dan (2) Peraturan Mahkamah Konstitusi Nomor 06/PMK/2005.

67 *Ibid.* Pasal 13 ayat (5) huruf a dan huruf b.

68 Constitution Court Decision Number 133/PUU-VII/2009, 20.

69 *Ibid.* 22.

70 Constitutional Court Decision Number 91/PUU-XVIII/2020, 79.

71 *Ibid.* 394.

of the Republic of Indonesia⁷², based on the article 51 chapter (3) the Constitutional Court Law, thus in reviewing formal test and making decision, the Constitutional Court follows law formation procedures regulates in UU P3 , reciprocal with the Constitutional Court's consideration in the Constitutional Court Decision number 27/PUU-VII/2009 that states "*According to the Court, should the benchmark for formal testing be based on the articles of the 1945 Constitution alone, it is almost certain that a formal examination cannot exist because the 1945 Constitution only contains principles and does not clearly regulate the formal procedural aspects. In fact, following the logic of the rule of law in accordance with the constitution, a formal examination must be carried out. Therefore, as long as the law, product regulations of state institutions, and laws and regulations on the mechanism or formal-procedure follows the delegation of authority according to the constitution, then the legislations can be used or considered as benchmarks or for formal test*".

In the consideration, the Constitutional Court thinks that if in conducting changes in the law do not need to make a general requirement that contains new nomenclature, which follows the formula of the scope, principle, and goal, except if there is something to change in the material aspect. Because of the Job Creation changes few norms from every laws (not revoke the whole law or the law norms changed, but still used), but also found the new principle and provision forms in the Job Creation Law that will lead to uncertainty to principle and goal of the Job Creation Law or the old law. Consequently, on this consideration, the Constitutional Court assumes that the Job Creation Law forming process contradict with The 1945 Constitution of the Republic of Indonesia.

72 *Ibid.* 394 – 403.

b. Second, the petitioner argued that the omnibus law method is unknown in the UU P3, contradict with clarity of way and certain normative method.⁷³

Presidential expert states that the use of omnibus law method which is a combination of the laws have ever been applied in Indonesia, they were Law number 32 of 2004 on Provincial Government and Law number 7 of 2017 on General Election. Then the Constitutional Court gave consideration that the formation of Law Number 7 of 2007 on General Election is still applied within the corridor of the implementation in forming laws technique as regulated in UU P3 , because this law is a new law that contains three laws merged into one law. Therefore, there will not be other laws which regulate the election of the president and the vice president, member of the House of Representatives of the Republic Indonesia, member of the Regional Leadership Council, and the general election law. Correspondingly, for Law number 32 of 2004 on Provincial Government, there is no other law which regulates the law that has been changed. This is contrast with the Job Creation Law, 78 Laws that have been simplified or changed by the Job Creation Law are still applied except for the articles that have been changed by the Job Creation Law. As a result, the Constitutional Court assumed that Job Creation Law is incomparable with Law number 32 of 2004 on Provincial Government and Law Number 7 of 2017 on General Election, for its method of formation. In comparisson, the simplified method of Job Creation Law makes it difficult to understand whether it is a new law, revocation of law, or an amandement.

c. Third, the petitioner then argued that there was material substantiation alternation of the Bill of Job Creation Law after the President and the House

73 *Ibid.* 403 – 407.

of Representatives of the Republic of Indonesia Joint Agreement which was not only on the stylistic, but also inserting incorrect quotation.⁷⁴

Regarding this arguments, in its consideration, Constitutional Court found incorrect quotation in the article references, that is article 6 of the Job Creation Law that stated "*Improvement of investment ecosystem and business activity as mean in article 5 chapter (1) letter a*" while the article 5 chapter (1) contains "*The scope of article 4 involve law field that regulated in related laws*". In this matter, the Constitutional Court is of the opinion that it is proven there has been incorrect quotating in refering to article, thus does not follow the clarity of objective formulation which states that every law regulation must meet legislation making technical requirements, the systematics, words choice and terms. Moreover, it does not use legal language which is clear and easy to understand in order to not cause any interpretation in the implementation.

- d. Forth**, the petitioners also argued that the creation of Job Creation Law is contradictive with the provision of article 22A of The 1945 Constitution and the principles of law creation regulation stated in article 5 letter a, letter e, letter f and letter g P3 law, those are the principle clear purpose, the principle of usability, the principle of clarity of purpose formula, and the principle of openness.⁷⁵

Regarding that argument, The Constitutional Court assumed that the principle of clear purpose, the principle of usability, and the principle of clarity of purpose formula are not relevant considering more about the petitioner's petition. However, aside from the principle of transparency, the Constitutional Court thought that although meetings had been held with many communities as

stated by the government and The House of Representative of Indonesia, those meetings had not talked about academic script and changes of Job Creation Law material, so the people involved did not know for sure about the material changes and merged in Job Creation Law, and also the academic script was inaccessible by the people. Therefore, the Constitutional Court assumed that the Job Creation Law establishment did not give utmost space for the people's participation.

Consequently, towards all of the petitioner's arguments, as well as the statement of the government and the House of Representatives of the Republic of Indonesia, the Constitutional Court concluded that the Job Creation Law establishment were not based on definite and standard method, and the systematic of law formation. Moreover, there were changes of several substances after the joint approval of the House of Representatives and the President, and it was in contrary to the principles of the formation of laws and regulations. Therefore, overall, the process of the Job Creation Law establishment did not meet the requirements based on The 1945 Constitution of the Republic of Indonesia and should be declared as invalid formally.⁷⁶ Basically, the Job Creation Law which used the omnibus law method is one of law establishment method that regulates multisector contents.⁷⁷

Related to the Constitutional Court consideration and argument towards the petitioner's petition argument, it is argued that the Constitutional Court fully used a formal approach that results prosedural justice. As it has been mentioned before, that prosedural or formal justice

⁷⁴ *Ibid.* 407 – 411.

⁷⁵ *Ibid.* 411 – 412.

⁷⁶ *Ibid.* 412.

⁷⁷ Eko Noer Kristiyanto, "Urgensi Omnibus Law Dalam Percepatan Reformasi Regulasi Dalam Perspektif Hukum Progresif," *Jurnal Penelitian Hukum De Jure* 20, no. 2 (2020): 237.

is a justice that is expressed in the implementation of settling the controversy or taking a decision.⁷⁸ Procedural justice is philosophically closely related to doctrine or law positivism, it sees law as a regulation made and applied by the authority officer in making law. Source and validity of normative law originated from that authority, thus law should be separated from non law aspects such as sociology, ethics, morals, and politics.⁷⁹

Then what should the considerations and opinions be if the Constitutional Court wants to issue a decision that is full of substantive justice? In the *Black's Law Dictionary*, aforementioned substantive law is "*substantive law is that part of law which creates, defines, and regulates rights, as opposed to adjective or remedial law, which prescribes methods of enforcing the rights or obtaining redress for their invasion*"⁸⁰ It means that substantive law is the part of law that creates, decides, and manages various kinds of rights, that is law which manages the way how to uphold the rights that are set in substantive law. This means that the law that is opposed the adjective law shows that substantially actually can be seen from the urgency of the Job Creation Law establishment, not from the formal provision in the P3 law.

The Constitutional Court consideration of the Petitioner's argument states that the *omnibus law* method is a consideration full of legal certainty. The Constitutional Court firmly states that the UU P3 has determined the principle for the formation of laws and regulations (formal principle) as a necessity to be used in forming a law, but it turned out

that *omnibus law* on Job Creation did not use the formal provision. As a result if the legislator will use this method, they need to change the provision of the UU P3 *in casu* its attachments first.⁸¹ Likewise the Petitioner's argument against *omnibus law* on Job Creation is not clear whether it is an amendment, revocation or replacement. However, to the principles of establishing *omnibus law* on Job Creation which contrary to the UU P3 as argued by the Petitioner, researcher agrees that these principles are substance that must be completed in the formation of legislation.

The Constitutional Court in its decision stated that it complied with technical provision or procedure, this did not mean that the Constitutional Court have no concern on the substance aspects that have been compiled in the norms of the Job Creation Law, because in principle of the formation of law technical and substance (formal and material) are inseparable. The trade-off of procedural and substantive justice that the Constitutional Court wanted to achieve in giving its consideration and opinion, are clearly seen in the Constitutional Court statement about the importance to comply with the technical provisions for the formation of laws and regulations, but the Constitutional Court also stated that the Constitutional Court was not concern with the substance of objectives to be achieved in *omnibus law* on Job Creation. In addition, the Constitutional Court in giving consideration, carried out a tug of war between procedural and substantive justice, namely: the Constitutional Court is aware the problem of regulatory obesity, for example from 2014 to 2018 there were 7,621 Ministerial regulations while the number of presidential regulations were 765 and government

78 I Dewa Gede Atmadja, *Loc. cit.*

79 *Ibid.* 78.

80 Henry Campbell Black, *Black Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, (ST. Paul Minn: West Publishing CO., 1968), 1597.

81 Constitutional Court Decision Number 91/PUU-XVIII/2020, 400.

regulations were 452⁸² and there was overlap between laws in Indonesia, so the government used the omnibus law method which aimed to accelerate investment and to expand employment opportunities in Indonesia. However, on the other hand, the Constitutional Court is also insisted to achieve the goal, then override the applicable standard procedure or guideline because the objective and method cannot be separated in affirming the principle of a constitutional democratic rule of law.⁸³ Therefore, the Constitutional Court's opinion is the conditional unconstitutional decision made a decision in the formal review of *omnibus law* on Job Creation.

Against that, Gustav Radbruch argued that if there is a conflict between certainty and justice, then the aspect of justice must be prioritized. Formal provision is full of certainty value and produces procedural justice, while material aspect was full of justice value and produces substantive justice,⁸⁴ such as constitutive law.⁸⁵ If only take in consideration of the consideration and decision of the Constitutional Court that oriented to the rule in the UU P3 (formal), they will only produce certainty from the nature of the law (procedural justice), and do not produce justice from the nature of the law (substantive justice). Accordingly, John Rawls also said that justice should give priority to the less fortunate. The principle of fair equality of opportunity shows those who has the least opportunity to achieve prosperity, income and authority prospect, should be given protection.⁸⁶ In addition, Glen S. Krutz Hitching said that "omnibus

legislation has been "proliferated" since the 1970s."⁸⁷

Meanwhile, the President in his statement said that *omnibus law* on Job Creation, would be able to overcome labor problems with challenges to maintain and to provide employment, as well as to answer structural problems that disrupted the business ecosystem in Indonesia, both for large business and medium and small enterprises (MSEs) and cooperative. Then it also found that 4,451 government regulations and 15,965 Regional Regulations that hinder the development of human resources and infrastructure as well as fiscal.⁸⁸ With the existence of the Job Creation Law, there would be major positive impacts, such as:⁸⁹ First, job creation of 2.7 to 3 million/year (an increase from before the pandemic of 2 million/year), to accommodate 9.29 million people who do not/was not employed (7.05 million unemployed and 2.24 million New Labor Force); Second, wage increase which grow in parallel with economic growth and increased worker productivity. The increase in wage was also followed by an increase in the job seeker's competence and the worker's welfare. The Increased worker productivity would have an effect on increasing investment and economic growth. Currently, Indonesia's productivity at 74.4% is still below the ASEAN average of 78.2%; Third, an increase in investment of 6.6% - it 7.0%, to build new businesses or develop existing businesses, which will create new job and improve the worker's welfare, so that it will encourage the increase in consumption by 5.4% - it's 5.6% , as

82 Supriyadi dan Andi Intan Purnamasari, "Gagasan Penggunaan Metode Omnibus Law Dalam Pembentukan Peraturan Daerah," *Jurnal Ilmiah Kebijakan Hukum* 15, no. 2 (2021): 258.

83 *Ibid.* 413.

84 Theo Hujibers, *Loc. cit.*

85 *Ibid.*

86 Budiono Kusumohamidjojo, *Loc. cit.*

87 Ahmad Ulil Aedi, Sakti Lazuardi, dan Ditta Chandra Putri, "Arsitektur Penerapan Omnibus Law Melalui Transplantasi Hukum Nasional Pembentukan Undang-Undang," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 1 (2020), 3.

88 Constitutional Court Decision Number 91/PUU-XVIII/2020, 188.

89 *Ibid.* 189.

well as the youth of doing business in Indonesia;⁹⁰ and Fourth, empowering medium and small enterprises (MSEs) and Cooperatives, which supports increasing the contribution of medium and small enterprises (MSEs) to GDP to 65% and increasing the contribution of Cooperatives to GDP to 5.5%. Because medium and small enterprises (MSEs) and Cooperatives are business units with the most absorption of qualified workers in terms of job creation.

Based on the explanation above, the Constitutional Court in giving opinion and decision on the principal petition of the Petitioner, consideration on the orientation of substantial justice should be taken into account, rather than having to consider the formal provisions required in the UU P3. If there is a conflict between procedural justice (legal certainty) and substantive justice (justice), then the value of procedural justice can be ignored, Gustav Radbruch said in the aspect of his legal objectives. According to John Rawls, justice should substantially be able to provide greater benefits and must be able to side with the most disadvantaged people, in that case the disadvantaged people can be considered as unemployed as who would get a job because of the Job Creation Law.

Parallel with social justice from the perspective of *Pancasila* and the 1945 Constitution of the Republic of Indonesia. From the perspective of *Pancasila*, the Constitutional Court as one of the state administration institutions as a legal state concept is tasked with creating balance and harmony in the lives of citizens by making decisions according to the concept of social justice desired by the fifth precept. Meanwhile, from the

perspective of the 1945 Constitution of the Republic of Indonesia, Article 28H paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that “*everyone is entitled to special facilities and treatment to obtain the same opportunities and benefits in order to achieve equality and justice.*”

Furthermore, Article 33 paragraph (3) states “*Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people*” and paragraph (4) states “*The national economy is organized based on economic democracy with the principle of togetherness, efficiency, justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity*”. This is also in line with the Constitutional Court’s statement is parallel with the Constitutional Court Decision Number 41/PHPU.D-VI/2008 which stated “*The Court must not allow the rules of procedural justice to stifle and override substantive justice.*”⁹¹

CONCLUSION AND RECOMMENDATION

Conclusion

The Constitutional Court inclined to employ material approach for priority application and the application for an interim decision implored by the Petitioner, resulting in substantive justice in its decision. Meanwhile, in the argument and main point of the petition filed by the Petitioner, the Constitutional Court in its consideration tend to use a legalistic or formal approach, resulting in procedural justice. However, after giving an opinion on the petition’s argument, the Constitutional Court is still considering the urgency of the

90 Zaka Firma Aditya dan Abdul Basid Fuadi, “Konseptualisasi Omnibus Law Dalam Pemindahan Ibukota Negara,” *Jurnal Ilmiah Kebijakan Hukum* 15, no. 1 (2021): 150.

91 Miftakhul Huda, “Pola Pelanggaran Pemilukada Dan Perluasan Keadilan Substantif,” *Jurnal Konstitusi* 8, no. 2 (2010), 120.

establishment of *omnibus law* on Job Creation, which a substantial consideration of it and can be result in substantial justice. Based on the result in substantial, the trade-off between procedural justice and substantive justice is in the consideration of the Constitutional Court.

Suggestion

Based on the conclusions above, the Constitutional Court in its consideration and decision should prioritize the approach that will result in substantive justice. If there is a conflict between certainty (formal) and justice (material/substantive), Gustav Radbruch said that certainty must be ignored, then substantive justice takes the lead. The trade-off between procedural justice and substantive justice still does not produce substantive justice. John Rawls said that justice should benefit the people and the most disadvantaged. Hence in this case, *omnibus law* on Job Creation can provide benefit to many people (unemployed) by creating jobs. Likewise, Pancasila and the 1945 Constitution of the Republic of Indonesia provide guidelines that the concept of social justice must be a principle in the administration of the state, in this regard the considerations and decisions of the Constitutional Court should also be oriented to the perspective of substantive justice according to Pancasila and the 1945 Constitution of the Republic of Indonesia.

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