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Formal Constitutional Review of the Legislative Process: An Obvious Accommodation or an Innovation for Democracy?

Introduction

Legislative loads put a burden on the economy and investment. For those reasons, the Indonesian government introduced a new approach to legislation as part of law reform by consolidating 80 laws into a single act. This idea was widely questioned based on such argumentations as: it was enacted during the pandemic; the numerous articles make the law difficult to understand; there is excessive delegation to secondary legislation by shifting power to legislate to the executive; and also the issue of the legality of the final draft because of the many versions of the newly enacted law during the time it is enacted and published in the statute book. The omnibus law was then challenged in front of the constitutional court, which was the first time the constitutional court conducted a judicial review on the law-making process.

Constitutional Court Decision Number 91/PUU-XVIII/2020 on the judicial review of the Job Creation Law is said to be a landmark decision as the Court granted a formal judicial review. Referring to several examples of the Court's decisions above that reject the application of formal judicial review, the Constitutional Court is inconsistent in making decisions for the submission. Despite acknowledging the procedural defect in the formation of law, Constitutional Court Decision Number 27/PUU-VII/2009 deems it as insufficient for the Court to grant a formal judicial review based on the principle of legal expediency.

Constitutional Court Decision Number 91/PUU-XVIII/2020 granted a formal judicial review and adjudged that the Job Creation Law is conditionally unconstitutional. A conditionally unconstitutional decision is when the provision requested to be re-

viewed is deemed unconstitutional at the time the decision is rendered. Yet, the provision becomes constitutional if the requirements as set out by the Constitutional Court are fulfilled. In this case, the Constitutional Court gave two years from the date the Court's decision was rendered for the legislators to revise the Job Creation Law based on the procedures for the formation of laws that meet definite, standard methods and methods in forming omnibus laws that must also comply with the fulfillment of the requirements for the principles of law formation that were determined. If no revision is made within the said period, then the Job Creation Law becomes permanently unconstitutional, and the laws, articles, or substance of the regulations that have been revoked or amended by the Job Creation Law will be declared valid again.

The Constitutional Court Decision can be deemed biased referring to the Court's consideration, the Court stated the urgency to revise the Job Creation Law to comply with a definite, normative, and standard method, as well as the fulfillment of the principles in the law concerning legislative drafting about the principles of openness that must include the inclusion of meaningful public participation, which is embedded in art. 22A of the 1945 Constitution.¹ The verdict of the Court's Decision did not contain any instruction to revise provisions in the Job Creation Law,² meanwhile, the dissenting opinion of the court justice supports the idea of initially revising the Job Creation Law.³ This article analyzes the innovation of the Constitutional Court in accommodating formal judicial review from the perspective of the rule of law and democracy.

Formal Judicial Review in the Constitutional Court of the Republic of Indonesia

Referring to the Constitutional Court's decision, an example of a formal judicial review that was rejected by the Court can be analyzed from two Court decisions: Constitutional Court Decision Number 27/PUU-VII/2009 and Constitutional Court Decision Number 59/PUU-XVII/2019. Constitutional Court Decision Number 27/PUU-VII/2009 conducted a formal review of Law Number 3 of 2009 on the Second Amendment to Law Number 14 of 1985 on the Supreme Court (hereinafter Law 3/2009) against the 1945 Constitution. The applicant stated that formally, the formation of Law 3/2009 did not fulfill the quorum requirement. This is because the decision-making by the Chairman of the House of Representatives (DPR) did not fulfill the requirement, which is a violation of the principle of transparency.⁴

¹ Constitutional Court, Decision Number 91/PUU-XVIII/2020, 2021, p. 414, https://www.mkri.id/public/content/persidangan/ujungan/ujungan_mkri_8240_1637826598.pdf (accessed: 2022.05.15).

² *Ibid.*, p. 416–417.

³ *Ibid.*, p. 417–447.

⁴ Constitutional Court, Decision Number 27/PUU-VII/2009, p. 14–23, https://www.mkri.id/public/content/persidangan/ujungan/ujungan_sidang_Putusan%20No%202027%20-PUU-VII-2009.pdf (accessed: 2022.05.15).

The Constitutional Court in its considerations stated that the formulation process of Law 3/2009 indeed violated the formal provisions enforced at that time, namely the DPR Rules of Procedure Number 08/DPR RI/2005-2006 and art. 20 of the 1945 Constitution, hence it can be categorized as a law enacted with procedural defects. However, the Constitutional Court further stated two reasons used as the basis to reject the application for judicial review. Although the enactment of Law 3/2009 is tainted with procedural defects, the Law does not give rise to any legal problem.⁵

Furthermore, if Law 3/2009 is declared unenforceable and without binding legal force, it will not improve the situation, as first, the Law regulates a better substance than the previous Law 14/1985 it amended. Second, Law 3/2009 has been implemented and has legal consequences in the institutional system as regulated in the Law itself and related to various laws (among others: Law Number 48 of 2009 on Judicial Authority; Law Number 49 of 2009 on the Second Amendment to Law Number 2 of 1986 on General Judiciary; and other institutions such as the relationship between the Judicial Commission and the Supreme Court which operates based on Law 3/2009). The Constitutional Court decision explicitly stated that, although it was proven that there were procedural defects in the formation of Law 3/2009, the Constitutional Court prioritizes the implementation of the principle of legal expediency, and hence the Law shall remain in force.⁶

Other Constitutional Court Decisions that rejected formal judicial review are Constitutional Court Decision Number 59/PUU-XVII/2019 and Constitutional Court Decision Number 79/PUU-XVII/2019, which formally examined Law Number 19 of 2019 on the Second Amendment to Law Number 30 of 2002 on the Commission for the Eradication of Corruption (hereinafter Law 19/2019) against the 1945 Constitution. According to the Applicants in Case Number 79/PUU-XVII/2019, Law 19/2019 is enacted with procedural defects, especially in the Planning, Preparation, and Discussion phase, based on five arguments. First, there was legal smuggling by the legislators, within the absence of the 2019 National Priority Legislation Program and the fact that the planning period until the Law was enacted only took 14 days; second, the violation of the principle of the formation of laws; third, no participation from the community and the Corruption Eradication Commission (KPK) as the related institution; fourth, in the plenary session of the DPR a quorum was not met in making decisions on the Law; and fifth, fictitious Academic Papers were used as references and fulfillment of the requirements for drafting the Law.⁷

Meanwhile, the application of Case Number 59/PUU-XVII/2019 generally also argues that the formation of Law 19/2019 does not fulfill the provisions of the 1945 Constitution or Law Number 12 of 2011 on the Formation of Legislation (hereinafter Law 12/2011), hence it requested the Constitutional Court to declare Law 19/2019 null and

⁵ *Ibid.*, pp. 92–93.

⁶ *Ibid.*, pp. 93–94.

⁷ Constitutional Court, Decision Number 79/PUU-XVII/2019, pp. 359–360, https://www.mkri.id/public/content/persidangan/ujungan/ujungan_mkri_7838.pdf (accessed: 2022.05.15).

void.⁸ Since the applications for a formal review of the two cases above are similar, the legal considerations of Constitutional Court Decision Number 79/PUU-XVII/2019 apply *mutatis mutandis* as legal considerations for Constitutional Court Decision Number 59/PUU-XVII/2019. The dissenting opinion from Constitutional Judge Wahiduddin Adams in Constitutional Court Decision Number 79/PUU-XVII/2019 also applies to Constitutional Court Decision Number 59/PUU-XVII/2019.⁹

The Constitutional Court Judge stated that the propositions delivered by the Applicant are not proven because the draft bill on KPK had been included in the National Priority Legislation Program for a long time, and the length of the discussion depends on the law itself. Technically, harmonization is needed with other laws. This causes the possibility of a time difference in implementing the harmonization of the law. Regarding public participation in the formulation of Law 19/2009, the DPR involved the community and relevant stakeholders, including the leaders of KPK, in the discussion of the draft bill. The fact that KPK refused several times to attend discussions regarding the revision of Law 19/2019 means that it is therefore not the legislators' (DPR and the President) fault for not involving the KPK, rather KPK refused to be involved in discussions for planning the revision of Law 19/2019.¹⁰

Constitutional review is considered a reflection of the principles of constitutional supremacy and constitutionalism.¹¹ However, in practice, in a constitutional democracy, judicial review of laws always creates questions regarding the legitimacy of institutions and how these mechanisms should be implemented.¹² Furthermore, in carrying out this role, the Constitutional Court is considered the preeminent institution having control over the legislative and the power of the executive branch, which, in turn, raises concerns about the term Judiciary State (*rechterstaat*).¹³ It is not merely once or twice that the Constitutional Court rendered decisions considered controversial, including *ultra petite*¹⁴ decisions and decisions that have the quality of being from a positive legislator.¹⁵

⁸ Constitutional Court, Decision Number 59/PUU-XVII/2019, p. 187, https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_7832.pdf (accessed: 2022.05.15).

⁹ *Ibid.*, p. 189.

¹⁰ *Ibid.*, pp. 362–372.

¹¹ J. Limbach, "The Concept of Supremacy of The Constitution", *The Modern Law Review* 2001, vol. 64, no. 1, p. 2.

¹² A. Marmor, *Interpretation and Legal Theory*, Hart Publishin 2005, p. 142.

¹³ R. Surbakti, "Mahkamah Konstitusi Pembuat UU?", *Kompas*, 9 August 2010.

¹⁴ As an example, Constitutional Court Decision Number 001-021-022/PUU-I/2003, in which the Supreme Court decided to annul Law Number 20/2002 on Electricity, and Constitutional Court Decision Number 006/PUU-IV/2006, in which the Supreme Court decided to annul Law Number 27/2004 on the Commission of Truth and Reconciliation.

¹⁵ As an example, Constitutional Court Decision No. 102/PUU-VII/2009 on the review of Law No. 42 of 2008 on the General Election of the President and Vice President and the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 on the Judicial Review of Law No. 10 of 2008 on General Election of Members of the People's Representative Council, Regional Representative Council and Regional People's Representative Council, should be used as an example of the Court's decision that formulates a new norm that has a regulating nature (*regellend*).

Constitutional Court Decision Number 91/PUU-XVIII/2020 ultimately had advantages and disadvantages; even though the Decision did not ask for a revision of the Job Creation Law, the legislative and the executives in the end interpreted the Constitutional Court Decision by initially revising the Law, which is the basis for the establishment of the legislature. In his dissertation, Radian Salman stated that one of the models of the Constitutional Court's decision that formulates new norms in the law, especially those that are conditionally constitutional, is the manifestation of the role of the Constitutional Court as a positive legislator. The decision is considered an entrance to formulate articles or provisions without making any amendments.¹⁶

Positive legislation in the context of this paper is the formulation of a Constitutional Court Decision that is *conditionally unconstitutional*; however, because of the emergence of judicial activism, the proposal is certainly faced with arguments for and against it to respond to the emergence of the omnibus law. Salman stated that the Constitutional Court has carried out its role sufficiently and proportionally in reviewing laws, without the need to make conditionally unconstitutional decisions. The compromise offered in this case is that the Constitutional Court only provides direction on constitutional issues, especially those related to the omnibus law, with the expectation that the DPR will improve, perfect, or change the law in question by the guidelines formulated in the Constitutional Court Decision.¹⁷

The Government's Response to Constitutional Court Decree

In deciding on the judicial review of the Job Creation Law, the Constitutional Court provides legislators with a period of two years from date the decision was rendered to revise the Job Creation Law by the procedures for the formation of laws to fulfill the definite process, method, and standards in forming omnibus laws, which also need to comply with the fulfillment of the determined requirements for the formation of legislation. If within the said period no revision is made, then the Job Creation Law becomes permanently unconstitutional. As a consequence, the laws, provisions, or

¹⁶ R. Salman, "Pengujian Undang-Undang Oleh Mahkamah Konstitusi Dalam Perspektif Konstitusionalisme Dan Demokrasi" [in:] *Dissertation*, Faculty of Law, Universitas Airlangga 2017, pp. 80–83.

¹⁷ The formulation of the proportional role of the Constitutional Court in reviewing laws are: 1) the classic and general principles regarding the cancellation of laws are because they clearly contradict the Constitution (*clear mistake*); 2) the implementation of the law is not an object of examination which is the authority of the Constitutional Court in examining the law; 3) on constitutional issues that are expressly delegated to legislators and are referred to as *open legal policies*, the Constitutional Court should not enter the regulatory area as a result of the cancellation; 4) as a consequence of the hierarchical system of laws and regulations and separation of powers, the Constitutional Court's decision may not order lawmakers to make laws and to make laws whose material is also determined by the Constitutional Court; 5) the legitimacy of the process in the separation of powers scheme must be part of the Constitutional Court's procedural law. See *ibid.*, pp. 89–91.

statutory contents that have been revoked or amended by the Job Creation Law will be declared valid again.¹⁸

The character of the omnibus law method used in the Job Creation Law is different from the formation of previous legislation. It is difficult to understand whether it is a new law, an amendment of laws, or a revocation of laws. In one of its considerations, the Constitutional Court ordered that a standard legal basis should be immediately made as a guideline to form a law using the omnibus law method, which has a specific character. According to the Constitutional Court, this method cannot be used as long as it has not been adopted in the law on the formation of legislation. Furthermore, based on the legal basis that will be established, improvements must be made to the Job Creation Law to meet definite processes, methods, and standards, and to fulfill the principles of the formation of legislation as mandated by Law 12/2011 in conjunction with Law Number 15 of 2019 on the Amendment to Law Number 12 of 2011 on the Formation of Legislation (hereinafter Legislation Law).

In practice, there is a tendency for various forms of legal choices taken by the addressee of the Constitutional Court Decision regarding how to follow up the Court's decision being conditionally unconstitutional.¹⁹ Likewise, in this case, the DPR and the Government chose to revise the Legislation Law to accommodate the Job Creation Law. The Constitutional Court's consideration ordered the formation of a legal basis for the formation of an omnibus law such as the Job Creation Law, which was indeed not mentioned in the Constitutional Court's decision. According to the Constitutional Court, after establishing a legal basis, legislators can follow up with amending the Job Creation Law using the omnibus law formation method.²⁰ Interestingly, this consideration also appears in the dissenting opinions of the four judges in this decision. In their dissenting opinions, the four judges opined that to anticipate the emergence of other various omnibus draft bills, either in similar clusters or multi-clusters, the legislators must immediately amend Law 12/2011 by including the omnibus law formation method.²¹

At the time this article was written, the DPR had passed the revision of Law 12/2011 into law. However, since the process of its formation as a law is still pending the President's approval and promulgation into the State Gazette, this article will still be based on the Legislation Law draft bill. In the Legislation Law draft bill, the revision to Law 12/2011 resulted in 19 points of the amendment and changes to the general explanation, attachment I, and attachment II. These changes include regulating the process of forming a law using the omnibus method and regarding the mechanism for technical

¹⁸ Constitutional Court, Decision Number 91/PUU-XVIII/2020, 2021, pp. 1–327, subparagraph (3.20.4) https://www.mkri.id/public/content/persidangan/ujungan/ujungan_mkri_8240_1637826598.pdf (accessed: 2022.05.15).

¹⁹ M. Mahrus Ali *et al.*, "Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru" (*The Implementation of Constitutional Court Verdict on Conditionally Constitutional and New Legal Norm*), *Jurnal Konstitusi* 2015, vol. 13, no. 3, pp. 1–32.

²⁰ Constitutional Court, Decision Number 91/PUU-XVIII/2020, 2021, p. 1–327, subparagraph (3.20.3) https://www.mkri.id/public/content/persidangan/ujungan/ujungan_mkri_8240_1637826598.pdf (accessed: 2022.05.15).

²¹ *Ibid.*

improvements in the writing of a bill after the bill is jointly approved. Those two things are follow-ups to the findings of the Constitutional Court during the examination of the procedure of the formation of the Job Creation Law, which is deemed not based on a definite process, method, standard, or systematic formation of legislation. In addition, there were changes to the writing of several substances after the joint approval of the DPR and the President.

Apart from not meeting the principle of clarity of purpose and the principle of clarity of formulation, according to the Constitutional Court, the Job Creation Law also does not meet the full disclosure principle. In the Constitutional Court's examination, it was revealed that the legislators did not provide maximum space for public participation. Even though meetings have been held with various community groups, these meetings have not discussed the academic texts or materials for the amendments to the laws. Furthermore, the people involved in the meeting do not know for sure what changes to the existing laws will be incorporated into the Job Creation Law. Moreover, neither the academic texts nor the draft bill of the Job Creation Law were easily accessible to the public. Whereas according to art. 96 par. (4) of the Legislation Law, access to a draft bill is required to facilitate the public in providing input orally and/or in writing.

Participation is the foundation of the human rights framework.²² Participation in decision-making is a vital aspect of implementing democracy. It enables citizens to make their voices heard and influence decisions that affect their daily lives. The right to participate in public affairs is guaranteed in art. 21 of the Universal Declaration of Human Rights (UDHR). Furthermore, several legally binding international human rights law instruments also regulate the matter, such as art. 25 of the International Covenant on Civil and Political Rights (ICCPR) as well as in the articles of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Elimination of all Forms of Racial Discrimination (ICERD), and the Convention on the Rights of Persons with Disabilities (CRPD). All of these legally binding international conventions have been ratified by Indonesia.

The guarantee of participation rights is also stated in the 1945 Constitution, such as under art. 28, 28E par. (2 and 3), and 28F. As declared in the 1945 Constitution, as a state of law, Indonesia must ensure the creation of prosperity in people's lives through the enactment of laws by the DPR, the Regional House of Representative (*Dewan Perwakilan Daerah*, DPD), and the Government, specifically concerning economic, social, cultural, legal, educational, and political interests. The Indonesian legislative system is a series of written legal elements that are interrelated, integrated, and inseparable from one another, which is based on the philosophy of Pancasila and the 1945 Constitution.²³

Aspiration and participation in the law-making process have two meanings, namely: in the process and the substance. Process is a mechanism in law-making that must

²² H.J. Haricharan, M. Stuttaford, L. London, "Effective and meaningful participation or limited participation? A study of South African health committee legislation", *Primary Health Care Research & Development* 2021, vol. 22, pp. 1–8.

²³ J. Riskiyono, "Partisipasi Masyarakat Dalam Pembentukan Perundang-Undangan Untuk Mewujudkan Kesejahteraan", *Aspirasi* 2015, vol. 6, no. 2, p. 159–176.

be carried out transparently so that the community can voice its aspirations and participate in giving input to regulate contentious issues. Substance means the material that will be regulated in legislation must be intended for the benefit of the wider community to produce the democratic, aspirational, participatory, and responsive/populistic character of law.²⁴ Participation, transparency, and democratization in law-making are an integral and inseparable part of a democratic country.

Formally, art. 96 of Law 12/2011 provides arrangements for citizens to be involved in the law-making process. Article 96 of Law 12/2011 is also changed in the draft Legislation Law. Article 96 par. (9) of the draft Legislation Law stipulates that further provisions regarding public participation, as referred to in par. (1) to (8), will be regulated in Presidential Regulations, DPR Regulations, and DPD Regulations. Thus, the political will of the three institutions is an essential key to realizing participation in the law-making process. If these three institutions enable participation, then citizen participation in the law-making process will be realized.

The follow-up on the Constitutional Court's Decision is regulated in art. 10 par. (1) of the Legislation Law, which states that:

The contents that must be regulated by law contain:

- a. Further regulation on the provisions of the 1945 Constitution;
- b. The order of law to be regulated by law;
- c. Ratification of certain international agreements;
- d. Follow-up on the decision of the Constitutional Court; and/or
- e. Fulfillment of legal needs in society.

Article 10 par. (2) of the Legislation Law states that the follow-up on the decision of the constitutional court is carried out by the DPR or the President. Follow-up on the constitutional court decision made by the DPR or the President is included in the open cumulative list of the National Legislation Program (*Program Legislasi Nasional*, Prolegnas) as stated in art. 23 par. (1) of the Legislation Law, which states that the Prolegnas contains an open cumulative list consisting of the ratification of certain international agreements; legal consequences of the constitutional court decision; state budget; establishment, expansion, and merger of the province and/or regency/municipal regions; and the stipulation/revocation of government regulations instead of law.

This article mandates the follow-up on the constitutional court's decision to be contained in the open cumulative list of the National Legislation Program.²⁵ The agenda regarding the amendment of Law 12/2011 is therefore listed in the 2020–2024 National Legislation Program proposed by the DPR. Unfortunately, on the other hand, the agenda for the amendment of the Job Creation Law is not listed as part of the National

²⁴ M.D. Mahfud, *Perkembangan Politik Hukum: Studi tentang Pengaruh Konfigurasi Politik terhadap Produk Hukum di Indonesia*, Jakarta: Penerbit Raja Grafindo 2010, p. 363.

²⁵ M. Fajarwati, "Tindak Lanjut Putusan Mahkamah Konstitusi Dalam Program Legislasi Nasional (The Follow Up of The Constitutional Court Decision In National)", *Kajian* 2017, vol. 22, no. 3, pp. 195–204.

Legislation Program. If it is calculated, the two-year period given by the Constitutional Court since the decision was rendered will end on November 25, 2023.²⁶

The Constitutional Court's decision regarding the Job Creation Law is considered controversial. This is not only because the law being reviewed is a controversial law or that this judicial review is the first formal test that the Constitutional Court has granted. It is also because of the conditional unconstitutional decision that provides two years from the rendering of said decision for legislators to make improvements since this decision was pronounced. Here, the controversial decision means that there is doubt that causes public polemics on the content of the Constitutional Court's decision and can be a factor for the DPR's consideration in following up on the Constitutional Court's decision. This factor will be even more decisive if, *de facto*, the DPR and the Government, who approved the establishment of the law, become parties in the Constitutional Court's examination session to examine the law against the 1945 Constitution. This will mean that the DPR and the Government will explain and defend the substance of the law they made themselves in front of the Constitutional Court. Therefore, the DPR is psycho-politically not ready to process the legislative review agenda of laws that are declared contrary to the 1945 Constitution in a brief period of time.²⁷

One of the example cases to learn from is the review of Law 30/2002 on the Corruption Eradication Commission against the 1945 Constitution (hereinafter KPK Law). In its decision, the Court stated that art. 53 of the KPK Law contradicted the 1945 Constitution. However, it is still legally binding until changes are made no later than three years from the date the decision was rendered. The postponement of up to three years to provide sufficient time for lawmakers to make improvements to comply with the 1945 Constitution makes this decision controversial. The dissenting opinion expressed by the Constitutional Judge, Laica Marzuki, strengthens the controversiality of the decision. Marzuki stated that the legal consequences (*rechtsgevolg*) of the Constitutional Court's decision begin from the moment it was rendered, and the enactment of a material norm, the content of paragraphs, articles, and/or parts of the Law that have been declared legally non-binding by the Constitutional Court, should no longer be postponed. This decision can be favorable for the DPR as it will give them enough time to prepare revisions or improvements to the unconstitutional law. However, it can also be considered unfavorable, considering that when the implementation of such unconstitutional provisions can be postponed, no severe constitutional violations have occurred. This means the substance in the decision justifies the law-making process conducted by the DPR. Under such conditions, the level of pressure felt by the DPR and the Government is considered to be tolerable. Such a controversial decision also affects the finalization of the KPK Draft Bill in the DPR, which is still considered slow-moving until the end of the DPR's completion of its duties.²⁸

²⁶ The verdict was pronounced in the Plenary Session of the Constitutional Court for the public on November 25, 2021.

²⁷ T.G. Lumbuun, "Tindak Lanjut Putusan Mahkamah Konstitusi Oleh DPR RI", *Legislasi Indonesia* 2009, vol. 6, no. 3, pp. 77–94.

²⁸ *Ibid.*

Hence, the controversial Constitutional Court decision can also influence the DPR and the Government's stance in following up on the Constitutional Court's decision to revise unconstitutional laws. However, it is recognized that the interests and authority of the DPR and the Government to make comprehensive amendments to the unconstitutional laws are the most decisive. In addition, one aspect that also determines the follow-up of the DPR and the Government on the Constitutional Court's decision is the mechanism for draft bill submission, which must refer to the national legislation program document, which is not easy to be deviated without a strong reason and considered necessary by the DPR and the Government.

Conclusion

The Constitutional Court's decision to review the procedural aspects of law-making indicates the development of a discourse on the protection of procedural rights. Certainly, this is an innovation in the perspective of the development of the rule of law and democracy in Indonesia. The Constitutional Court, which in previous decisions declared formal review unacceptable, has now begun to open up to a new paradigm, even though the decision is difficult to be interpreted and implemented by the lawmakers (DPR and President). The difficulty of implementation and revision can be viewed in at least two aspects: 1) delaying the enforcement of the Job Creation Law that is declared conditionally unconstitutional while the amendments are in progress can be interpreted that no serious constitutional violations have occurred; 2) instead of reviewing the Job Creation Law, the government proposes amendments to another law to confirm the omnibus technique so that the technique can be accepted in the legislation system in the future. Unfortunately, meaningful public participation in the formation of legislation as part of the procedural rights of citizens has not been properly followed up, even though these procedural rights, once violated, are not easy to enforce because the process of formation is difficult to repeat. Thus, in the future, there must be certainty regarding law enforcement for violations of procedural rights, for example by providing a minimum standard for the implementation of meaningful participation. It is not only that the substantive aspect in each provision should conform to what is protected in the constitution, or that the accommodation of legislative technique should be certain as in legislation laws, but it is also important to protect citizens' rights to meaningful participation during the legislative process. The innovation of the Constitutional Court, which protects procedural rights in making laws, also shows that the Constitutional Court remains within its jurisdiction to continue to lay down further policies only on legislators with an open legal policy model. This means that, in this case, the constitutional court does not position itself as a positive legislator.

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Summary

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Formal Constitutional Review of the Legislative Process: An Obvious Accommodation or an Innovation for Democracy?

Under the Indonesian constitution, the Constitutional Court exercises the power to review laws against the constitution. For the first time since its establishment in 2003, the Constitutional Court recently addressed not only the norms of the law but also undertook a judicial review of the procedure of law-making through court decree number 91/PUU-XVIII/2020. The Constitutional Court affirmed that Law Number 11 of 2020 concerning Job Creation (Omnibus Law) was formally flawed in its legislative process. The Court stated that the Job Creation Law was conditionally unconstitutional because the omnibus law infringed upon the principle of meaningful participation. Therefore, the House of Representatives (DPR) and the Government must revise it by the procedures for establishing the applicable law within a maximum period of two years. This article finds that the Constitutional Court's decision to review the procedural aspects of law-making indicates the development of a discourse on the protection of procedural rights. This is an innovation in the perspective of the development of the rule of law and democracy in Indonesia although the decision creates a difficult situation for lawmakers to interpret and implement.

Keywords: constitutional law; formal constitutional review; Indonesian Constitutional Court; innovation to democracy; meaningful participation.

Streszczenie

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Formalna kontrola konstytucyjności procesu legislacyjnego: oczywiste dostosowanie czy innowacja dla demokracji?

Zgodnie z Konstytucją Indonezji, Sąd Konstytucyjny posiada uprawnienia w zakresie kontroli konstytucyjności ustaw. Po raz pierwszy od swojego powstania w 2003 r., Sąd Konstytucyjny, obok merytorycznej kontroli zgodności ustaw z Konstytucją, podjął się sądowej kontroli procedury tworzenia prawa w drodze dekretu sądowego numer 91/PUU-XVIII/2020. Sąd Konstytucyjny stwierdził, że ustawa numer 11 z 2020 r. dotycząca tworzenia miejsc pracy (ustawa Omnibus) została przyjęta w wadliwej procedurze legislacyjnej z uwagi na naruszenie zasady partycypacji, w związku z czym jest warunkowo niekonstytucyjna. W związku z powyższym, Izba Reprezentantów (DPR) i rząd muszą ją zrewidować w drodze procedur zgodnych w obowiązującym prawem w terminie maksymalnie dwóch lat. W artykule wskazano, że decyzja Sądu Konstytucyjnego o dokonaniu kontroli proceduralnych aspektów tworzenia prawa wskazuje na rozwój dyskursu dotyczącego ochrony praw proceduralnych. Stanowi też innowację w kontekście rozwoju rządów prawa i demokracji w Indonezji, jednocześnie stawiając jednak ustawodawcę w trudnej sytuacji w zakresie dokonywania interpretacji i implementacji.

Słowa kluczowe: prawo konstytucyjne; formalna kontrola konstytucyjności; indonezyjski Sąd Konstytucyjny; innowacja dla demokracji; partycypacja.