



Volume 37 No 2, May 2022  
DOI: 10.20473/ydk.v37i2.33364

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Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)  
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FAKULTAS HUKUM UNIVERSITAS AIRLANGGA



Article history: Submitted 4 January 2022; Accepted 7 March 2022; Available Online 1 May 2022.

## Post Conditionally Unconstitutional of Job Creation Law: Quo Vadis Legal Certainty?

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### Abstract

Enigma emerged when the Constitutional Court declared that Law Number 11 of 2020 concerning Job Creation (UU CK) unconstitutional. The purpose of this legal research is to review the legal dynamics of the UU CK after the Constitutional Court Decision No. 91/PUU-XVIII/2020 based on the point of view of the formal review and procedural justice, as well as reviewing the relevance of the Decision as a monumental decision; while at the same time analyzing the phenomenon of 'conditionally unconstitutional' in the perspective of legal certainty and expediency. This legal research uses a conceptual approach and a statutory approach. The legal materials of this legal research consist of primary legal materials, secondary legal materials, and non-legal materials. The study results stated that the Constitutional Court Decision No. 91/PUU-XVIII/2020 is not a monumental decision, considering an omission of "freeze" norms from the UU CK. Meanwhile, if it is studied based on procedural justice and the conception of a formal review, then the UU CK should be null and void by law. Then, 'Constitutional Conditional' in the Decision of the Constitutional Court No. 91/PUU-XVIII/2020 provides legal chaos. There is a contradiction that the UU CK is declared not legally binding as a consequence of 'formal defects' from the process of forming the UU CK. Thus, the suggestion from the researcher is that the government can ratify a standard rule in the law regarding the formation of legislation regarding the construction of an omnibus law scheme.

**Keywords:** Unconstitutional; Job Creation Law; Legal Certainty; Formal Review.

### Introduction

The principle of constitutional supremacy has become the basis of an argument for legal scholars to review a legal issue that is relevant to current conditions. This moral obligation cannot be separated from the Republic of Indonesia, which states that law is the highest parameter of a country that exercises the supremacy of the

constitution itself.<sup>1</sup> However, it should also be understood; the legitimacy of the supremacy of the constitution consists of two things,<sup>2</sup> namely laws and regulations that are subject to the values as contained in the constitution and the satisfaction and participation of the community in the formation of these laws and regulations. However, the main parties making laws sometimes ignore this moral mandate, none other than the legislature. The delegation of community participation in legislation also occurred in the issuance of Law Number 11 of 2020 concerning Job Creation (after this referred to as the UU CK). The existence of the UU CK has indeed been controversial since the government announced it;<sup>3</sup> This has led to various waves of action against the UU CK throughout Indonesia.<sup>4</sup> If this is studied socio-juridically; This phenomenon illustrates the public's dissatisfaction with the products of the legislature as resulted from the political process, including the UU CK. Forming the UU CK can be assumed only serves particular interests, while the public interest is only lip service for legislators. So, in terms of the preparation of the UU CK, it is only interpreted textually, not oriented to material content that functions to protect the public interest.

The substance of law is born from a battle of arguments regarding the importance in the law; However, the current condition illustrates that the drafting of rules is more likely to be oriented towards using aspects of political power alone.<sup>5</sup> Moreover, it is appropriate that the decision to issue a statutory regulation is based on a party who has a voice that represents many interests, not a voice that controls interests. These interests are the interests of the community; Thus, the interests of the community must control more votes from the parliament.<sup>6</sup> It becomes a

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<sup>1</sup> Jimly Asshiddiqie, *Perkembangan Baru Tentang Konstitusi Dan Konstitusionalisme Dalam Teori Praktik* (Genta Publishing 2018).

<sup>2</sup> Neil Parpworth, *Constitutional and Administrative Law* (11th edn, Oxford University Press 2020).

<sup>3</sup> CNN Indonesia, 'Poin-Poin Kontroversial Omnibus Law' (*cnnindonesia.com*, 2020).

<sup>4</sup> Nur Fitriatus Shalihah, 'Aksi Demo Penolakan Omnibus Law UU Cipta Kerja Di 9 Daerah Berlangsung Ricuh, Mana Saja?' (*Kompas.com*, 2020).

<sup>5</sup> Michael Zander, *The Law-Making Process* (1st edn, Bloomsbury Publishing 2020).

<sup>6</sup> William N Eskridge and Philip P Frickey, 'The Making of "The Legal Process"' (1994) 107 *Harvard Law Review*. [2031].

severe problem if the process of forming the law only serves particular interests of particular groups, which causes harm to the community's interest groups, as it should be administered by those who develop the products of legislation.<sup>7</sup> Moreover, legislators tend to be oriented solely to political power relations, not building argumentative reasoning relations to produce a legal product's elaborative and deliberative form. Concerning the UU CK, controversy continues about the academic text of the UU CK, which is not accessible to the public, so the aspect of public participation in this matter is not fulfilled. This has damaged the relationship between public trust in legislators. Therefore, the UU CK has become the prima donna in various general information channels; The public's rejection of the UU CK is always echoed through numerous efforts, starting from writing opinions on social media, making petitions rejecting the UU CK, and including the judicial review of the UU CK.

Unexpectedly, the judicial review of the UU CK yielded results as the Constitutional Court in the Constitutional Court's (Mahkamah Konstitusi) Decision Number 91/PUU-XVIII/2020 (after this referred to as MK Decision 91/PUU-XVIII/2020) granted several points in the request for a formal review.<sup>8</sup> There are several points in MK Decision 91/PUU-XV/III/2020. *First*, the Constitutional Court ordered the government and the DPR to amend the UU CK. *Second*, the space for public participation is not accommodation in forming the UU CK. *Third*, for the revision of the UU CK, the government and the DPR are given two years since the issuance of the MK Decision 91/PUU-XV/III/2020. *Fourth*, the UU CK "remains in effect" for two years. *Fifth*, if the government and the DPR do not revise the UU CK, then the UU CK is declared unconstitutional. *Sixth*, the Constitutional Court suspends all policies or actions that are included in the strategic category and can have a broad impact and do not provide recognition and validity to all Implementing Regulations of the UU CK, which were just issued after the MK Decision 91/PUU-XV/III/2020.

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<sup>7</sup> Zander (n 5).

<sup>8</sup> Fachrur Rozie, 'Pertama Kali Kabulkan Uji Formil, MK Sebut UU Ciptaker Cacat' (*Liputan6.com*, 2021).

Of course, pros and cons are surrounding the MK Decision 91/PUU-XV/III/2020. Many parties consider that the MK Decision 91/PUU-XV/III/2020 is a middle way given by the Constitutional Court to balance the principles that should be carried out in the process of forming the UU CK with the spirit and strategic objectives of the UU CK itself. On the one hand, the laws and regulations regarding the formation of laws, namely Law Number 12 of 2011 concerning the Establishment of Legislations as lastly amended by Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 Concerning the Formation of Legislation (after this referred to as UUP3) is considered not to have the enthusiasm to respond to the new method (omnibus law) as a solution to make effective and efficient regulations or regulations;<sup>9</sup> Moreover, the result of implementing the method of forming new legislation (omnibus law) has an orientation to create the broadest possible employment opportunities in the form of ease of investment and the fulfillment of a decent living for the community. Controversy also came from the government side, when in a press statement as issued by the government through the President and the Minister which stated that the material and substance of the UU CK and its derivative regulations -Government Regulations and Presidential Regulations- were still in effect;<sup>10</sup> at the same time, and emphasize that the government will continue to provide security guarantees and certainty regarding investment space from within and outside the country. The statement is considered to tend not to understand the meaning of Conditional unconstitutional.

On the other hand, although the MK Decision 91/PUU-XV/III/2020 deserves appreciation considering the decision, the Constitutional Court opens an opportunity for the public to review the proper legislative process more elaboratively as following the procedures stated in the UUP3. On the other hand, the MK Decision 91/PUU-XV/III/2020 is seen as a middle ground that creates confusion. The Constitutional Court

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<sup>9</sup> Vendy Yhulia Susanto, 'Sidang Uji Formil, Ahli Sebut Pembentukan UU Cipta Kerja Tidak Cacat Formil' (*nasional.kontan.co.id*, 2021).

<sup>10</sup> Agustiyani, 'Airlangga: Aturan Turunan UU Cipta Kerja Tetap Berlaku' (*katadata.co.id*, 2021); Kanavino Ahmad Rizqo, 'Jokowi: UU Ciptaker Tetap Berlaku, Tak Ada Satu Pasal Pun Dibatalkan MK' (*news.detik.com*, 2021).

stated that the UU CK was contrary to the constitution; however, the Constitutional Court still enforced the materials within the two-year deadline. This is the impact of conditionally unconstitutional as stated in the MK Decision 91/PUU-XV/III/2020. Not only that, the MK Decision 91/PUU-XV/III/2020 provides a suspension of all strategic actions or policies; However, the Constitutional Court gave a deadline for revising the UU CK within a maximum of two years. Moreover, the UU CK was formed without relying on any standardized and systematic method as the concept of changes that should be carried out based on UUP3. Thus, this study will address two legal issues. *First*, how are the dynamics of constitutional law regarding the UU CK after the MK Decision 91/PUU-XV/III/2020? *Second*, what is the point of view of the principle of legal certainty on the MK Decision 91/PUU-XV/III/2020? The purpose of this legal research is to review the legal dynamics of the UU CK after the MK Decision No. 91/PUU-XVIII/2020 based on the point of view of formal review and procedural justice, as well as reviewing the relevance of the decision as a monumental decision; while at the same time analyzing the phenomenon of 'conditionally unconstitutional' in the perspective of legal certainty and expediency.

Type of research is legal research as a series of efforts to review legal issues based on legal principles and various legal instruments.<sup>11</sup> this series seeks to analyze the relationship between legal instruments and the pattern of community development. The approach used in this study is a conceptual approach and a statute approach. The researcher carries out the abstract process by reviewing the doctrines and views in legal science related to the studied legal issues. Meanwhile, researchers review legislation relating to legal matters through a statutory approach. The legal materials used in this legal research are primary legal materials, such as the mk decision 91/puu-xv/iii/2020, law number 11 of 2020 concerning job creation, law number 7 of 2020 concerning third amendment to law number 24 of 2003 concerning the constitutional court and others; and using secondary legal materials, such as the principle of legal certainty, the code of legal benefit, the concept of

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<sup>11</sup> Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (13th edn, Kencana 2017).

formal review, the idea of procedural justice, legal books, legal journal articles, and so on. On the other hand, non-legal material is also a reference for this research. Next, the researcher conducts an inventory based on existing legal materials to obtain prescriptions by formulating and proposing guidelines and rules that must be obeyed by legal practice and legal dogmatics in the issues discussed; and analyze it in an elaborate manner to be further used to solve the problems encountered. The analysis will later conclude that answers the issues studied. The researcher conducts analysis using a deduction pattern to explain various regulatory norms relating to legal issues first; then, the researcher explains the legal facts later. The study is structured systematically, regularly, logically, thoroughly, and described in a holistic and detailed manner. Thus, the reasoning patterns are arranged systematically so that a conclusion is reached from the legal issues being studied.

### **The Constitutional Court Decision 91/PUU-XV/III/2020: Regarding Monumental Decisions, Procedural Justice, and Formal Review**

The formal review of the UU CK is actually an effort to provide an assessment regarding the formation of the UU CK whether or not it is in accordance with the regulated provisions as stated in the 1945 Constitution of the Republic of Indonesia and the UUP3. In this regard, the legal standing of the applicants in the formal review of a law is described in full and can be reviewed based on the material in MK Decision 006/PUU-III/2005 & MK Decision 11/PUU-V/2007.<sup>12</sup> *First*, if the legal subject has constitutional rights and/or authorities as granted by the 1945 Constitution of the Republic of Indonesia. *Second*, the constitutional rights and references are deemed to be impaired by enacting a law -in this case, the UU CK- which is being applied for in the review. *Third*, the constitutional loss must be specific (*unique*) and actual or at least potential, which according to rational reasoning can undoubtedly occur. *Fourth*, there is causality between the loss referred to and the law's enactment as requested for review. *Fifth*, there is a possibility that

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<sup>12</sup> Saldi Isra, *Sistem Pemerintahan Indonesia* (1st edn, PT RajaGrafindo Persada 2019).

if the application is granted, then the constitutional loss as stated by the applicant will not or will no longer occur. The room for submitting a formal review of the UU CK has a deadline of up to forty-five days after the law -the UU CK- is published in the state gazette, as contained in the MK Decision Number 27/PUU-VII/2009. Then, the formal review must be completed within sixty days from when the case is recorded in the Constitutional Case Registration Book.

According to Conrado Hübner Mendes; The Constitutional Court as an institution of judicial power actually has a moral duty which is divided into five matters to deal with principal cases,<sup>13</sup> no exception for the formal review of the UU CK. *First*, the Constitutional Court can veto decisions or the final results of the formation of laws, including the UU CK. Of course, the veto carried out by the Constitutional Court takes into account provisions that have welfare values for the community. *Second*, the Constitutional Court is the guardian of the norms, in-laws, and regulations that are passionate and relevant to the state constitution. This is because the standards established by lawmakers are not allowed to violate the philosophical and spiritual aspects of other laws, especially the Constitution of a country. *Third*, the Constitutional Court hears parties -especially the public- through the principles outlined in the MK Decision 91/PUU-XV/III/2020. The Constitutional Court must be sensitive to the public's wishes regarding the future of the law under review. However, the UU CK is of particular concern to the public; considering, the UU CK targets various aspects of people's lives. Thus, the norms contained in the UU CK should be provisions that represent the hopes and aspirations of the community and are the result of the elaboration of the community's thoughts as well. *Fourth*, the Constitutional Court must listen to the dialogue from both parties so that demands and arguments become a legal culture to realize decisions that refer to the common good. In this case, the Constitutional Court is being reviewed to exercise its 'power' to review the legislative power in a check and balance manner. In this case, it is a legal product issued by the legislative power.

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<sup>13</sup> Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press 2015).



*Fifth*, the Constitutional Court conducts deliberation as happened at the Judges of the Constitutional Court meeting to evaluate constitutional cases. For example, in the case of UU CK review, the deliberation aspect is powerful; because there is a percentage of 5 to 4 decisions in the judicial review of cases of the UU CK.<sup>14</sup> Thus, although the MK Decision 91/PUU-XV/III/2020 raises pros and cons; The Constitutional Court deserves appreciation from the public, especially from legal scholars. This is because the Constitutional Court has fulfilled its moral duty; how these steps are taken to provide a sense of justice to the community. Concerning the above, there is an ambiguity regarding the MK Decision 91/PUU-XV/III/2020 as stated in the ruling No. 3, No. 4, and No. 7. In principle, ruling No. 3 of the MK Decision 91/PUU-XV/III/2020 states that the process of forming the UU CK is contrary to the constitution and has no conditionally binding legal force. Then, the verdict No. 4 of the MK Decision 91/PUU-XV/III/2020 states that the UU CK remains in effect until improvements are made to the formation of the UU CK by the government and the DPR as based on the period given in the MK Decision 91/PUU-XV/III/2020. Furthermore, the verdict No. 7 The MK Decision 91/PUU-XV/III/2020 states that all policies or actions that are strategic and have a broad impact are suspended by the Constitutional Court; and all new implementing regulations for the UU CK are not allowed to be issued after the MK Decision 91/PUU-XV/III/2020.

Looking at the various phenomena above, the researcher justifies that the MK Decision 91/PUU-XV/III/2020 cannot be included in the category of a monumental decision, as researchers describe in several points. *First*, a monumental decision is a court decision that resolves legal questions regarding the implications of the existence of a legal instrument in the past, as the decision was followed consistently in other decisions related to matters decided by the monumental verdict.<sup>15</sup> In this regard, the MK Decision 91/PUU-XV/III/2020 actually raises legal questions to the

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<sup>14</sup> Iwan Satriawan, 'Pro-Kontra Putusan MK' (Pusat Kajian Konstitusi dan Pemerintahan Universitas Muhammadiyah Yogyakarta, 2021).

<sup>15</sup> Susan Glazebrook, 'What Makes a Leading Case? The Narrow Lens of the Law or a Wider Perspective?' (2010) 41 Victoria University of Wellington Law Review.[339].



public, especially law scholars. This is motivated by the confusion as stated in the MK Decision 91/PUU-XV/III/2020 which states that there is a ‘formal disability’ against the UU CK; however, on the other hand, the Constitutional Court declared the UU CK to be conditionally unconstitutional, so that the Constitutional Court provided room for clarification on the materials contained in the UU CK within a certain time (two years). *Second*, monumental decisions are used as essential considerations for matters that have been decided in the written case; this decision will be taken into consideration and will often be quoted concerning future decisions.<sup>16</sup> Normatively, the MK Decision 91/PUU-XV/III/2020 is a material consideration for other decisions.

However, philosophically, when there is the omission of the norms contained in the derivative regulations of the UU CK, then there is a blaming of the legal function itself, namely regularity.<sup>17</sup> The presence of the MK Decision 91/PUU-XV/III/2020 does not cause irregularities, considering that there is no clear boundary line regarding allowed things and things that are not permitted as stated in the UU CK. The birth of a monumental decision must have a clear and definite historical and legal line. It is important to note that the derivative regulations of the UU CK are used as the basis for policies to issue policies such as those carried out by the central government and regional governments. These various policies certainly have an impact directly or indirectly on the community. However, if the approach is based on something that is still not valid in legal principle, then the problem has the potential to cause actions that have the potential to violate the law.

*Third*, monumental decisions contain legal principles that are the basis for consideration of other choices that review essential legal issues.<sup>18</sup> Although one of the elements of the monumental decision is to increase knowledge in the

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<sup>16</sup> Jacquelyn Gillen, ‘Striking the Balance of Fairness and Inclusion: The Future of Women’s Sports After the Supreme Court’s Landmark Decision in *Bostock v. Clayton County, GA*’ (2021) 28 Jeffrey S. Moorad Sports Law Journal.

<sup>17</sup> Henrique A Castro, ‘The Legal Construction of Power in Deliberative Governance’ (2020) 45 Law & Social Inquiry.[728].

<sup>18</sup> Ernest Lim, ‘Of “Landmark” or “Leading” Cases: Salomon’s Challenge’ (2014) 41 Journal of Law and Society.[523].

academic realm and is seen as a decision that plays a critical role in shaping legal theory or legal philosophy, at the same time, the decision has the values of unity; However, the monumental decision also contains values that are inherent and attached to the social considerations and futuristic views regarding the implications and consequences when the decision is issued.<sup>19</sup> Although one of the elements of the monumental decision is to increase knowledge in the academic realm and is seen as a decision that plays a crucial role in shaping legal theory or legal philosophy, at the same time, the decision has the values of unity; However, the monumental decision also contains values that are inherent and attached to the social considerations and futuristic views regarding the implications and implications when the decision is issued.

The decision to annul the UU CK in its entirety does not cause a legal problem; therefore, everything that is revoked due to the presence of the UU CK will come into effect again. However, the tolerance of the Constitutional Court as given in the MK Decision 91/PUU-XV/III/2020 presents something that seems 'grey.' The Constitutional Court suspended all strategic policies as departed from the UU CK. However, the Constitutional Court has given a deadline for the validity of the UU CK for two years. Moreover, the UU CK is a law that contains a comprehensive and broad strategic aspect of each policy. On the other hand, the UU CK is the only universal sweeping law oriented to the investment aspect. Various implementing regulations, which are derivative rules of the UU CK, cannot be used as a justification that the UU CK can be carried out for two years. Instead of providing legal certainty, the Constitutional Court seems to be stuck with the articles contained in the UU CK. Thus, monumental decisions can be assessed based on the impacts on the social sphere and other effects; because the decision will target cases related to everything contained in the monumental decision. The study of the MK Decision 91/PUU-XV/III/2020 can also be elaborated from procedural justice, which is the core of the formal review. Procedural justice provides the opportunity for a neutral third party,

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<sup>19</sup> *ibid.*

namely the Constitutional Court, as the party that judges and is appropriate to the processes that characterize the formation of the law.<sup>20</sup>

The law enforcement procedures are carried out in all branches of power related to the functions of each of these branches of power.<sup>21</sup> Thus, procedural justice encourages legislators to comply with the law's principles and carry out proper regulatory and implementation functions. Not only that, procedural justice shows the quality of decision-making and regulators that involve more than just that legislators have good faith in the community by respecting community involvement;<sup>22</sup> However, it is also oriented towards a suitable and aspirational mechanism for receiving aspirations from the public regarding the laws that are being drafted or made by the legislature. However, the public will impact the policies or actions that have been decided by the legislators as one of the holders of power so that the community should be a part of the formulation of the policy or law. In this regard, it has also become an obligation for lawmakers to always be transparent and accountable for all stages of drafting rules and regulations. Moreover, the history of freedom is primarily a history that shows our adherence to procedural guarantees.<sup>23</sup> Thus, procedural justice and order are inseparable parts of the essence of substantive freedom.<sup>24</sup> Thus, these substantive laws can last a long time if they are applied fairly and impartially.

The formation of legal products such as the UU CK that does not pay attention to procedural principles and facets that lawmakers do not carry out will result in legal consequences detrimental to the community and harmful to the existing constitution. This situation is exacerbated when minorities or opposition

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<sup>20</sup> Daniel S Nagin and Cody W Telep, 'Procedural Justice and Legal Compliance' (2020) 19 *Criminology & Public Policy*. [761].

<sup>21</sup> Catriona Mackenzie, Denise Meyerson and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Taylor & Francis 2021).

<sup>22</sup> *ibid.*

<sup>23</sup> Susi Dwi Harijanti, 'Catatan Terhadap Putusan MK Tentang Uji Formil UU CK' (Universitas Padjajaran 2021).

<sup>24</sup> Mahesh K Nalla and Anna Gurinskaya, 'Introduction to the Special Issue: Legitimacy and Procedural Justice Issues in Criminal Justice' (2020) 44 *International Journal of Comparative and Applied Criminal Justice*. [3].

parties are 'expelled' from the parliament in drafting or formulating the law. On the other hand, legal products such as the UU CK must be considered the most rational to be applied for the welfare of the community, not merely created based on the most votes from the parties making the UU CK. If the legislators do not carry out the legal principles of the formation of laws in the UU CK, it will result in poor quality of the UU CK, both formally and materially. The implication is that there are various rejections from the community as these activities show that legal products such as the UU CK originating from the legislature cannot be accepted because of thinking from the district and are not under the expectations and aspirations of the community. The number of demonstrations carried out by the community shows that the rational side of public acceptance of the legislators and laws -including the UU CK is fragile.<sup>25</sup>

In this regard, procedural justice emphasizes that legal products that are appropriate to be applied to the public are products that produce or create new legal principles as balanced with procedural order regarding their formation;<sup>26</sup> Thus, the legal product answers all questions regarding the legal review. On the other hand, in this case, legal instruments are statutory regulations -including the UU CK- are a scheme for public approval of everything the government and the state want to command the people themselves;<sup>27</sup> as legitimized through forming legal products that provide a role for the community and the legislators. According to Susi Dwi Harijanti, the procedure is the heart of the law itself because procedures always question justice aspects. If something contained in the law has been mutually agreed upon by the legislators, in this case, the UU CK, then it turns out that the Constitutional Court has identified that the material as stated in the joint objective is different from the material contained in the ratification; then, it is a fatal error. Thus, it can be said that the process of forming the UU CK

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<sup>25</sup> Vasiliy Laptev and Vladimir Fedin, 'Legal Awareness in a Digital Society' (2020) 8 Russian Law Journal [138].

<sup>26</sup> Klaus F Röhl and Stefan Machura (eds), *Procedural Justice* (Taylor & Francis 2019).

<sup>27</sup> Bayu Dwi Anggono, *Perkembangan Pembentukan Undang Undang Di Indonesia* (Penerbit Konstitusi Press 2014).

violates the principle of people's sovereignty, as the sovereignty of the people is the main element that gives moral ideals the birth of a material contained in the law, not least the UU CK. The ratification of the material in the law reflects the involvement of people's representation so that there is a role from the community through their representatives sitting in parliament.<sup>28</sup> It should also be noted that the applicability of a legal instrument, in this case, the UU CK is not based on which factions and approval of the law; instead it is based on every subject of people's representation; remember, the central spear of the people's voice is one of the people's representatives.

In this regard, representative participation as the role of parliament members is not only physically present in the preparation or ratification of the UU CK;<sup>29</sup> However, the extent to which these parliamentarians understand the material they use as norms in a legal product, including the UU CK. The aspect of participation is an element that influences the quality of the legislative body and maintains public trust and confidence in the agency. If the participation space is not used to prepare a legal instrument, then the law has no legitimacy.<sup>30</sup> Therefore, the participation carried out by interested parties in the stages of preparation and product approval should carry out meaningful participation,<sup>31</sup> as participation in having their opinions heard, their opinions considered, and getting an explanation. Therefore, through formal review, the existence of procedural justice can be applied in law. or the answers or opinions given. Procedural justice is closely related to formal review.<sup>32</sup> Therefore, through formal review, the existence of procedural justice can be applied

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<sup>28</sup> Bayu Dwi Anggono and Fahmi Ramadhan Firdaus, 'Omnibus Law in Indonesia: A Comparison to the United States and Ireland' (2020) 7 *Lentera Hukum*. [319].

<sup>29</sup> Ibnu Sina Chandranegara, 'Pengadopsian Mekanisme Fast-Track Legislation Dalam Pengusulan Rancangan Undang-Undang Oleh Presiden' (2021) 21 *Jurnal Penelitian Hukum De Jure*. [123].

<sup>30</sup> Bayu Dwi Anggono, 'Omnibus Law Sebagai Teknik Pembentukan Undang-Undang: Peluang Adopsi Dan Tantangannya Dalam Sistem Perundang-Undangan Indonesia' (2020) 9 *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*. [17].

<sup>31</sup> Rongxin Li, 'Public Participation and Its Limits in Legislative Consultation: A Case Study on Local Legislation in China' (2019) 7 *The Theory and Practice of Legislation*. [27].

<sup>32</sup> Mackenzie, Meyerson and MacDermott (n 21).

in a law.<sup>33</sup> According to Jimly Asshiddiqie, formal review is a review that is not about material content.<sup>34</sup>

The formal review is an effort to maintain balance and provide aspects of supervision as well as control over the political process as well as democratic practice which also acts as an effort to establish law in parliament in order to comply with all the principles and constitutional rules that have been regulated in the 1945 Constitution of the Republic of Indonesia and the UUP3.<sup>35</sup> Judicial review of political processes as they occur in parliament is an orientation to maintain the essence of the formation of laws that are decided and enforced in a binding manner for the public. As a pillar of the formal review, the constitutional court becomes a controlling and balancing function by the judicial power over the political processes in the people's representative institutions, claiming that the institution is a "truly" representative of the entire people sovereign.<sup>36</sup> Thus, reviewing objectivity based on the norms in the constitution and other laws and regulations becomes the legitimacy parameter of legal products issued by the people's representative institutions. Moreover, the Constitutional Court also plays a role in controlling the performance of democracy and the state.<sup>37</sup> Therefore, the legislature that acts as a law-making body does not only emphasize that they are legitimate as bodies or institutions that have the legitimacy to make a legal product, namely a law; however, the institution should be able to legitimize the formation of such a law based on chain procedures as a series that relates one stage to another correctly and adequately. Formal review of law has the consequence that the entire law is invalid, but materially only certain materials become invalid. In the case of UU CK; the UU CK will remain in effect for two years; The Constitutional Court is still providing recognition of the UU CK for the time being.

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<sup>33</sup> Bagir Manan and Susi Dwi Harijanti, *Memahami Konstitusi: Makna Dan Aktualisasi* (Rajawali Pers 2014).

<sup>34</sup> Jimly Asshiddiqie, *Pengujian Formil Undang-Undang Di Negara Hukum* (Konstitusi Press 2020).

<sup>35</sup> *ibid.*

<sup>36</sup> Abi Adams-Prassl and Jeremias Adams-Prassl, 'Systemic Unfairness, Access to Justice and Futility: A Framework' (2020) 40 *Oxford Journal of Legal Studies*. [561].

<sup>37</sup> Muhammad Bahrul Ulum, 'Indonesian Democracy and Political Parties After Twenty Years of Reformation: A Contextual Analysis' (2020) 10 *Indonesia Law Review*. [29].

However, if it is not repaired within two years, then all the articles contained in the UU CK cannot be re-enacted; Thus, all laws and articles that are no longer enforced with the presence of the UU CK will be re-applicable. Thus, the judgment regarding the judicial review of the UU CK does not need to be decided beforehand, not to mention the *niet onvankelijke verk-laard* aka the claim cannot be accepted.<sup>38</sup> If the lawsuit for judicial review can be decided now, then the correction - if the case is granted - can be immediately carried out by the legislators. Moreover, ignoring the “freeze” norms of the UU CK can cause policy instability. On the other hand, theoretically, if the procedure for the formation of the UU CK is not based on the principles or provisions contained in the legislation; then, the UU CK should be null and void by law. The consequences of a formal trial decision as happened in the case of the UU CK cannot be equated with the implications or consequences of a judicial review decision as it only annuls a few paragraphs or articles, except if the article is the heart of pieces that can cancel the entire contents of the regulatory provisions of legislation from the law itself. Amendments to UUP3, including the Omnibus Law method used in the preparation and ratification of the UU CK, cannot immediately complete the obligations as ordered by the Constitutional Court. Therefore, the procedure for establishing the UU CK must start from the beginning of the discussion.

Moreover, the procedure for the formation of laws and regulations -including the UU CK- is the heart of the law itself because these activities are activities that are chained or uninterrupted from one another and are continuous until the law is passed. Of course, each stage of the formation of the UU CK has a relationship with other settings as it becomes a series pattern; so, if there is an error regarding the procedure for the UU CK, the Constitutional Court should have the courage to cancel the UU CK, considering that one stage of making the UU CK has significant implications for the formation of the UU CK. In this regard, UUP3 provides the meaning that laws are written regulations as they contain legally binding norms in general; So,

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<sup>38</sup> Denny Indrayana and others, ‘Putusan Mahkamah Konstitusi Atas Undang-Undang Cipta Kerja: Konsekuensi Dan Antisipasinya’ (2021).



philosophically, the meaning of “binding in general” is the main element of the law. Therefore, if the law -in this case, the UU CK - is canceled but still enforced -conditionally unconstitutional- the law shows an inconsistency. Moreover, a rule -including the UU CK - has the character of *erga omnes*; Thus, the existence of the UU CK has a broad impact, and there is no effort for the government except to make improvements as suggested by the MK Decision 91/PUU-XV/III/2020. Particular attention to procedural aspects in the formation of laws –including the UU CK – is a ‘fixed price’; considering that procedures are an essential aspect to determine the systematics of valid and appropriate implementing regulations as ordered by law or rules drawn up ratified by the law-making body.<sup>39</sup>

The procedure is a scheme to open deliberative spaces to produce quality norms;<sup>40</sup> Thus, the law is colored by intellectual debates that can be understood rationally and have an orientation for the benefit of the community. Therefore, the Constitutional Court should avoid all things that have the potential to cause legal uncertainty as indicated by the Conditional unconstitutional decision as stated in the MK Decision 91/PUU-XV/III/2020. The primary way to guarantee the success of a policy is legal certainty itself and providing legal protection to all interested parties.<sup>41</sup> The Constitutional Court should provide a more nuanced interpretation that supports efforts to maintain respect for the requirements, processes, and procedures for the formation of laws that are relevant and in harmony with the constitutional aspect; Thus, the Constitutional Court empowers all interest groups that place all interests in a better position to exercise social control over the law. Thus, the government’s steps should be to postpone the entire implementation of matters relating to the UU CK as all matters, including those suspended by the Constitutional Court. The government should not use the particular slashing method to identify or interpret the considerations of the Constitutional Court, which are deemed to be beneficial to the government alone.

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<sup>39</sup> Mackenzie, Meyerson and MacDermott (n 21).

<sup>40</sup> Nalla and Gurinskaya (n 24).

<sup>41</sup> Dan Priel, ‘The Place of Legitimacy in Legal Theory’ (2011) 57 McGill Law Journal [1].

Therefore, the MK Decision 91/PUU-XV/III/2020 provides a form of constitutional warning to the forming parties; however, on the one hand, the MK Decision 91/PUU-XV/III/2020 also provides recognition of the existence of a justification for the constitutional error. Thus, the MK Decision 91/PUU-XV/III/2020 can be said to be incomplete. Whereas, in fact, an obligation that is not perfect except that condition, it is obligatory at that time.<sup>42</sup> Therefore, if the permissibility to act is based on these conditions, then the act is not considered valid before these conditions are met. So, in this case, the controversy over MK Decision 91/PUU-XV/III/2020 if the procedure for establishing the UU CK is declared to violate the constitution and is not under the proper method, then materially, the content in the UU CK should not behave too. Therefore, the requirements or procedures for establishing the UU CK are not fulfilled; Inappropriate terms and/or procedures are the root of the problem, as well as causing the material content of law to be problematic. Moreover, the norms of the UU CK have generated a lot of polemics; so, there should be a line of confirmation regarding the enactment of this UU CK.

### **Post Conditionally Unconstitutional of Job Creation Law: Quo Vadis Legal Certainty?**

The conditional unconstitutional phenomenon in the MK Decision 91/PUU-XV/III/2020 seems to be an ‘exciting’ object for legal scholars to study and analyze in an elaborative manner. Many legal scholars have different perspectives on the conditional unconstitutional phenomenon in the MK Decision 91/PUU-XV/III/2020. Of course, this will create good legal dynamics for the development and sustainability of legal development in Indonesia. Conditionally unconstitutional is when there is a law -or part of the law - which has unconstitutional content (contrary to the 1945 Constitution of the Republic of Indonesia and UU P3) when the decision is read out, and the decision can become constitutional (not contradictory to 1945

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<sup>42</sup> Satriawan (n 14).

Constitution of the Republic of Indonesia and UU P3);<sup>43</sup> if the conditions as stated by the Constitutional Court can be fulfilled. However, if the Constitutional Court's conditions in the MK Decision 91/PUU-XV/III/2020 cannot be fulfilled; then, the law or part of the law -in this case, the UU CK- cannot be fulfilled is declared unconstitutional. The conditional unconstitutional background in the MK Decision 91/PUU-XV/III/2020 is based on the purpose of the UU CK, which is oriented to tackling the problem of regulatory obesity and overlaps between law.

At least, there is a primary choice in responding to the MK Decision 91/PUU-XV/III/2020 to include conditionally unconstitutional in its ruling, between binding rules as interpreted by non-binding principles, namely expediency;<sup>44</sup> alternatively, binding rules are supported by binding principles, namely legal certainty.<sup>45</sup> Researchers are more oriented that the MK Decision 91/PUU-XV/III/2020 should make the principle of legal certainty the primary goal of the decision; not an aspect of legal expediency. The researcher, in several points, elaborates the justification. *First*, the MK decision 91/PUU-XV/III/2020 illustrates that the decision was actually 'forced' to follow the 'truth' of the law and people's freedom, which is beneficial for everyone. The idea that becomes the benchmark for adherents of utilitarianism is perilous if it is implemented in legal instruments;<sup>46</sup> considering, the community will provide standardization regarding the meaning of legal instruments in their interests;<sup>47</sup> thus, opening up space for the possibility of disputes arising due to different interpretations and legal meanings of the UU CK or MK Decision 91/PUU-XV/III/2020. If the MK Decision 91/PUU-XV/III/2020 is only based on achieving the conditions that make them 'happy'; hence, they also have the

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<sup>43</sup> Kathleen M Sullivan, 'Unconstitutional Conditions' (1989) 102 Harvard Law Review [1413] See Robert L Hale, 'Unconstitutional Conditions and Constitutional Rights' (1935) 35 Columbia Law Review.[321].

<sup>44</sup> PJ Kelly, 'Utilitarianism and Distributive Justice: The Civil Law and the Foundations of Bentham's Economic Thought' (1989) 1 Utilitas 62; E Nathan Cheung, 'Considerations for Closing the Moral and Legal Gap in Public Utility Regulation' (2020) 40 Journal of the National Association of Administrative Law Judiciary.[60].

<sup>45</sup> Hans Kelsen, 'On The Pure Theory of Law' (1966) 1 Israel Law Review.[1].

<sup>46</sup> Олександр Михайлович Москаленко, 'The Concept of Legal System in The Theory and Philosophy of Law: From Utilitarianism to Positivism' [2020] Problems of Legality.[8].

<sup>47</sup> *ibid.*

potential to ignore other features such as one's motives or reasons for carrying out legal actions; although, the legal action is the implementation of the rights of the legal subject itself. Why could it be so? Therefore, a utilitarian person will tend to make the truth an absolute truth from his point of view an absolute truth.<sup>48</sup> Thus, truth from a subjective point of view and happiness cannot be the only part of the foundation when we make a generally binding decision.

*Second*, the usefulness aspect of the law does not have a certain standard of justice itself.<sup>49</sup> Aspek kemanfaatan hukum seringkali mengabaikan keadilan,<sup>50</sup> therefore, the concept of utilitarianism leads to potentially morally wrong actions of legal subjects to achieve the aspect of 'maximum pleasure'.<sup>51</sup> Adherents of this flow are oriented towards rules that can be made to follow the wishes of the maximum benefit of the community.<sup>52</sup> Thus, the conditional unconstitutional idea as stated in the MK Decision 91/PUU-XV/III/2020 under the pretext of a "middle way" actually has the potential to violate socially applicable norms to achieve only 'fun' as the 'pleasure' has the nature of high subjectivity. This does not rule out the possibility of arbitrary acts carried out by every legal subject in implementing the MK Decision 91/PUU-XV/III/2020; In fact, opening up the possibility that unlawful acts occur only under the pretext of achieving maximum 'pleasure' for the human person in order to carry out his rights and obligations as stated in the UU CK based on that person's perspective. One may use the pleasure parameter based on traits that target hedonic and antagonistic actions to calculate the greatest happiness for that number impractical.<sup>53</sup> Moreover, in essence, every legal subject has specific duties or obligations to other people. This will make humans lose their integrity if

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<sup>48</sup> Tim Kaye, 'Natural Law Theory and Legal Positivism: Two Sides of the Same Practical Coin?' (1987) 14 *Journal of Law and Society*. [303].

<sup>49</sup> *ibid.*

<sup>50</sup> Tadeusz Biernat, 'On the Lawmaking Policy, Discretion and Importance of the Rule of Law Standards' (2020) 29 *Studia Iuridica Lublinensia*. [67].

<sup>51</sup> Deryck Beyleveld And Roger Brownsword, 'The Practical Difference Between Natural-Law Theory And Legal Positivism' (1985) 5 *Oxford Journal of Legal Studies*. [1].

<sup>52</sup> *ibid.*

<sup>53</sup> Dennis Patterson, 'Theoretical Disagreement, Legal Positivism, and Interpretation' (2018) 31 *Ratio Juris*. [260].

they decide to carry out a legal method that considers the benefits that are important for them personally.

*Third*, aspects of the usefulness of the law as taught by utilitarianism allow multiple interpretations of a legal instrument to develop law and the welfare of society.<sup>54</sup> Opening the opportunity for dual application in a decision such as the MK Decision 91/PUU-XV/III/2020, which contains conditional unconstitutional rulings, also creates “parameters” that confuse the public. That is, the community is in a dilemma with the verdict; because people are confused about choosing between wanting the MK Decision 91/PUU-XV/III/2020 or carrying out their rights and obligations based on the materials contained in the UU CK as the basis for implementing a policy for themselves and their interests concerning the public. Moreover, it is also necessary to know; that the calculation of parameters of one is finding happiness is very abstract;<sup>55</sup> so that to achieve happiness, everyone has a different scheme or way.<sup>56</sup> Thus, if the existing conditions clear the space for misinterpretation of the enactment of the UU CK, then it is possible for ‘legal stuttering’ to arise in the community, as indicated by the many interpretations from the community regarding the MK Decision 91/PUU-XV/III/2020. which has implications based on them carrying out legal actions.

*Fourth*, being oriented to the benefit of the law will dictate the community to pay more attention to the outcome of a thing, not the process.<sup>57</sup> Why is that? In the context of laws and regulations, when they are only oriented to benefit, the public will only give a special assessment of the law after its ratification, not the process of making the law.<sup>58</sup> The substance or material contained in the law results from the contemplation of each stage that is a series of the law-making process.<sup>59</sup> Thus,

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<sup>54</sup> Dan Priel, ‘Law as a Social Construction and Conceptual Legal Theory’ (2019) 38 Law and Philosophy.[267].

<sup>55</sup> Anton-Hermann C Chroust, ‘Natural Law and Legal Positivism’ (1952) 13 Ohio State Law Journal.[178].

<sup>56</sup> Mónica García-Salmones Rovira, ‘What Is Positivism Today?’ (2020) 114 AJIL Unbound.[87].

<sup>57</sup> Dan Priel, ‘The Possibility of Naturalistic Jurisprudence’ (2017) Revus.[7].

<sup>58</sup> Sean P Sullivan, ‘Powers, but How Much Power? Game Theory and the Nondelegation Principle’ (2018) Virginia Law Review.

<sup>59</sup> Biernat (n 50).

when the community only evaluates the results of the process, then the community will never understand and try to review all processes related to an outcome that they know. Moreover, the process and stages of an outcome are a long way to go, which makes adjustments based on aspects of public interest and morality, particularly in making laws (as appropriate). However, the premise of utilitarianism which is oriented to the benefit of the law, is violated by the MK Decision 91/PUU-XV/III/2020; because this idea assumes that law is valid if the outcome of a decision maximizes whatever is classified as 'good' over what is considered 'bad'.<sup>60</sup> Meanwhile, the MK Decision 91/PUU-XV/III/2020; stated that the procedure for establishing the UU CK is a formal defect; however, the materials contained in UU CK are deemed to remain valid, indicating that the MK Decision 91/PUU-XV/III/2020 does not maximize the aspect of benefit comprehensively; therefore, the decision does not maximize 'happiness' in some way; as chosen in the study of the UU CK is to use a juridical scheme (judge's decision).

Thus, in reviewing the MK Decision 91/PUU-XV/III/2020, Constitutional Court Judges should use the soft-positivism paradigm as the doctrine that maintains the honor of legal certainty by considering the aspect of morality to clarify that moral commands or coercive orders can implement the law.<sup>61</sup> Why is that? Perhaps, legal certainty is often considered the basis for rigid guidelines when reviewing a legal case. However, if we review the opinion of H.L.A Hart,<sup>62</sup> legal certainty can also give birth and inspire moral values to realize substantive justice. According to him, legal certainty provides a classification that all laws are not just moral orders or coercive orders.<sup>63</sup> Both of these commands need to be conceptualized as laws that have a uniform understanding of the various types of social functions related to human law.<sup>64</sup> The researcher argues that the principle of legal certainty does

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<sup>60</sup> Chroust (n 55).

<sup>61</sup> Eleni Mitrophanous, 'Soft Positivism' (1997) 17 Oxford Journal of Legal Studie.[621].

<sup>62</sup> HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review.[593].

<sup>63</sup> *ibid.*

<sup>64</sup> William C Starr, 'Law and Morality in H.L.A.Hart's Legal Philosophy' (1984) 67 Marquette Law Review.[673].

not only identify the rules of a legal system; however, interpreting evaluates it on matters of a moral nature. Recognition in the point of view of legal certainty is not only based on sources that include a collection of laws alone; however, sources derived from community participation as relative supremacy.<sup>65</sup>

Legal certainty as it should be the primary orientation of the Constitutional Court Decision 91/PUU-XV/III/2020 does not depend on formalism or rigid adherence to general behavior rules as stated in the rules in the legal system. Therefore, the meaning of the MK Decision 91/PUU-XV/III/2020 is a legitimate recognition that considers the compatibility and conformity of the rules with moral values as a criterion for the validity of a legal product;<sup>66</sup> because, historically, the development of law is strongly influenced by moral opinions; Likewise, pattern standards are strongly influenced by law, and thus the material content of various statutory regulations and decisions should reflect moral rules or principles. The principle of legal certainty is not regulated in statutory regulation or referred to in statutory regulation.<sup>67</sup> The principle of legal certainty is not simply “taken away” by the Constitutional Court as a decision material; however, this principle should be inspired as the legal soul of the judges of the Constitutional Court. On the other hand, the focus of legal certainty evolves as is customary and binding; if there is sufficiently sizeable authoritative support from the line of the judgment of the Judges of the Constitutional Court.

The principle of certainty, which is adopted juridically as in the decision of the Constitutional Court, does not need to be formulated in the standard assessment as stated in the legislation; Thus, the principle of legal certainty must be owned by every case breaker, not least the Judges of the Constitutional Court. The focus of legal certainty is a moral command;<sup>68</sup> Thus, all legal instruments

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<sup>65</sup> Anthony J Sebok, ‘Misunderstanding Positivism’ (1995) 93 Michigan Law Review.[2054].

<sup>66</sup> Jack Clayton Thompson, ‘Law’s Autonomy and Moral Reason’ (2019) 8 Laws.[6].

<sup>67</sup> David Lyons and Ronald Dworkin, ‘Principles, Positivism, and Legal Theory’ (1977) 87 The Yale Law Journal.[415].

<sup>68</sup> Christopher J Insole, *Kant and the Divine: From Contemplation to the Moral Law* (Oxford University Press 2020).



-including the MK Decision 91/PUU-XV/III/2020- should try to balance legal certainty with the flexibility of the conditions that occur in the jurisdiction. If the legal instrument is not based on the aspect of legal certainty; then, it can be assumed that decision-makers do not have the wise attitude to manage humans in a definite and controlled scope. Legal certainty is a constitutive principle of law,<sup>69</sup> which means that the legal consequences of the action are clearly defined. The mirror of legal certainty, one of which is in Article 57 Paragraph (2) of Law (UU) Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, in fact provides the principle of legal certainty for every decision of the Constitutional Court, as stated that if a statutory regulation is not prepared procedurally through the existing statutory provisions; then, the law is declared to have no binding legal force.

Decisions -including the MK Decision 91/PUU-XV/III/2020- must illustrate that law is not just a descriptive concept; however, law is an interpretive concept which combines positivism and morality.<sup>70</sup> This form of inclusive positivism incorporates moral principles into a legal instrument. This perspective views that the desired condition of the law is the moral standard itself. This collaboration becomes an urgency; remember, there is no legally binding principle until the enactment of that morality becomes law.<sup>71</sup> On the other hand, a legally binding decision does not necessarily resolve the moral question regarding a person's obligation to obey or disobey the law. The urgency to make legal certainty in reviewing the MK Decision 91/PUU-XV/III/2020 a primary thing is an effort to maintain better consistency in the legal domain as manifested by the right combination of the meaning of existing norms and principles. The principle of legal certainty itself. Legal certainty should be realized by law enforcers and legal institutions who are pioneers in

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<sup>69</sup> WJ Waluchow, 'The Many Faces of Legal Positivism' (1998) 48 *The University of Toronto Law Journal* 387; Wil Waluchow, 'In Pursuit of Pragmatic Legal Theory' (2002) 15 *Canadian Journal of Law & Jurisprudence*. [125].

<sup>70</sup> Mitrophanous (n 61).

<sup>71</sup> Antony Hatzistavrou and others (eds), *The Legacy of H.L.A. Hart Legal, Political and Moral Philosophy* (OUP Oxford 2008).

resolving legal cases.<sup>72</sup> the Constitutional Court is no exception. Of course, it has become a moral commitment for the Constitutional Court to issue a legal decision that is authoritative and socially effective; by prioritizing material or substantive principles, considering that these two things cannot completely replace the other. Legal certainty and justice fight for the rule of law; as also attempted through the Constitutional Court. The MK decision 91/PUU-XV/III/2020 should show a balancing role in legal practice and a very core part of the law. It becomes a problem when there is a doubt in the legal certainty, as legal certainty is realized through legal products. Moreover, the MK Decision 91/PUU-XV/III/2020 as a legal product has an absolute value in law and becomes a full-fledged ideal parameter in the legal system to achieve the law's goals.

On the other hand, the MK Decision 91/PUU-XV/III/2020 is a generally recognized value or standard. Thus, the answer to the question embodied in the message can provide enthusiasm and purpose regarding the norms underlying the decision rather than it as a way to achieve substantive justice. Meanwhile, according to Mindus and Spaak, the application of legal certainty in a legal decision must fulfill several elements.<sup>73</sup> *First*, every legal product of a case must contain norms that provide space for 'concrete application'; the rule of law related to a concrete fact situation. It must be known that a legal product is a conceptual collaboration that is a solution to a problem. Thus, the legal instrument can be historically valid without violating other norms. In the case of the MK Decision 91/PUU-XV/III/2020, the standards affected by the Conditional unconstitutionality become "frozen"; so, these norms do not fall into the category of models that can be applied concretely. *Second*, positive law is based on the rules of legal logic that produce decisions for each situation factually and concretely. The UU CK, which legitimizes legal products as issued by the regional government or the central government itself, is a dilemma and is not concrete.

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<sup>72</sup> Walter L Moll and Rudolf Stammler, 'The Theory of Justice' (1926) Harvard Law Review.

<sup>73</sup> Patricia Mindus and Torben Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021).

Of course, derived from these legal products, the central government and local governments implement sectoral policies related to the economic and social aspects of the community. The government's policies currently have 'unclear' validity to be enforced. Therefore, the norms contained in the UU CK have been considered unconstitutional, but on the other hand, the standards in the UU CK have given "freedom" to be implemented under the pretext of "conditional"; as the MK Decision 91/PUU-XV/III/2020 which states that the UU CK is conditionally unconstitutional. As a result, there is confusion about implementing programs and policies, which have implications for issuing the UU CK and other implementing regulations. If this situation is maintained, then other aspects can be impacted, including the community, considering that the policies made by the government are also aimed at the welfare of the community. *Third*, the law is a rule without gaps, as its norms are needed for good legal practice and the welfare of society. Public confusion over the MK Decision 91/PUU-XV/III/2020 negatively impacts each legal subject's interpretation of these provisions is different. Therefore, misinterpretation also can lead to unlawful acts or legal actions that are not based on existing legitimacy.<sup>74</sup> If things are not regulated in legal instruments concerning the UU CK, it is feared that arbitrariness or ignorance of the law will result in errors in implementing policies.

*Fourth*, every social behavior must be understood as a reflection of obedience or application of the regulations issued by the government. In this regard, the MK Decision 91/PUU-XV/III/2020 should provide absolute certainty regarding all social behavior carried out by the community. If the public does not clearly understand the purpose of the decision because of the provisions that are considered permissible, and there is an assumption that this provision is not allowed to be carried out, it is feared that apathy will arise from the public towards the decision. The judiciary's decision must reflect clear guidelines regarding what behaviors are allowed to be carried out by the community. In this case, the role of legal certainty is very vital;<sup>75</sup> considering

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<sup>74</sup> Starr (n 64).

<sup>75</sup> Oshaba Gabriel Itodo, 'H.L.A Hart on Legal Positivism: Implications for Contemporary Nigerian Legal' (2021) 1 Journal of International Relations Security and Economic Studies.[50].

that legal certainty is a consistent principle to regulate precisely and complexly the norms contained in all legal products. At least, there are several essential points that a legal product can be categorized as a decision with legal certainty and morality.<sup>76</sup> *First*, the legal instrument -in this case the MK Decision 91/PUU-XV/III/2020- issued by the judiciary is not allowed to give rise to interpretations that can harm the majority of the people's constitutional rights. In this aspect, the non-applicability of various 'temporarily dead' norms as stated in the UU CK and various implementing regulations is a problem for the parties, including the community itself.

Why is that? Therefore, the existence of a "conditionally unconstitutional" decision triggers the actions of legal subjects who have done everything that is allowed and is considered valid by the various norms contained in the UU CK and its various implementing regulations. They have the potential to suffer losses; considering that these norms can be judged invalid in the future, so that their legal actions have implications for causing problems for them. This shows a dispute regarding the relative importance of each legal subject of the rules that have been studied. On the other hand, if the rules on which they base their legal actions are formally problematic, they have philosophically committed acts that do not reflect the law correctly.<sup>77</sup> *Second*, the decision does not lead to "bad law omission," which will cause a public commotion. The spirit of the MK Decision 91/PUU-XV/III/2020 shows that there is legal compliance that lawmakers must follow. However, due to the omission of various provisions that are considered unconstitutional and de facto as a consequence of the MK Decision 91/PUU-XV/III/2020, which states that the UU CK is conditional, various provisions in the UU CK are still carried out and used as the basis by different legal subjects. Of course, this will cause problems later on. The proper aim of the legal order is to minimize the element of arbitrariness in legal norms and decision.<sup>78</sup>

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<sup>76</sup> Hatzistavrou and others (n 71).

<sup>77</sup> Shidarta Shidarta, 'Bernard Arief Sidharta: Dari Pengembangan Hukum Teoretis Ke Pembentukan Ilmu Hukum Nasional Indonesia' (2020) 3 Undang: Jurnal Hukum.[441].

<sup>78</sup> Parpworth (n 2).

*Third*, the legitimacy of case decisions is in agreement that is entirely determined based on the community's common choice with the legislators. The MK Decision 91/PUU-XV/III/2020 spirit justifies that the UU CK does not accommodate people's participation. However, instead of saving the participation rights, the Constitutional Court's decision has left ambiguity on the actions that the people should take to deal with the phenomenon of the birth of the UU CK after MK Decision 91/PUU-XV/III/2020. This is because the government interprets that the law remains in effect until the time of improvement as determined by the Constitutional Court. Even though it has lost its legitimacy, the government considers that the UU CK is the result of a collaboration between the will of the people and the will of the government. In conditions like this, the community is like a 'crossroads'; on the one hand, they are 'happy' because the Constitutional Court has saved their constitutional rights; However, on the other hand, the community is met with legal uncertainty over the norms that are a manifestation of their participation as a constitutional right of legal subjects to provide encouragement and input in the preparation of laws and regulations, including the UU CK. Implementing the UU CK as one of the rules through the "conditionally unconstitutional" scheme also violates the "meaning" as a rule itself, considering the concept of a rule is one that applies in an all or nothing way.<sup>79</sup>

Facts that have been determined by regulation as ratified and in force; when the rule is given to the community, the law is considered valid, and the community must accept all its provisions.<sup>80</sup> So, if a legal product violates its own "meaning", then the law means avoiding society from substantial justice.<sup>81</sup> In this regard, legal products, including the MK Decision 91/PUU-XV/III/2020, must be a form of the legal principle that provides a one-way decision and does not cause various interpretations that can cause the law to be considered contrary to

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<sup>79</sup> Douglas E Edlin, 'The Sovereignty of Positivism' (2021) 12 Jurisprudence.[347].

<sup>80</sup> Bayu Dwi Anggono, 'Tertib Jenis, Hierarki, Dan Materi Muatan Peraturan Perundang-Undangan:Permasalahan Dan Solusinya' (2018) 47 Masalah-Masalah Hukum.[1].

<sup>81</sup> García-Salmones Rovira (n 56).

the legal regulation itself. However, the legal product is the result of collaboration between the method of elaborating and the prescription of applicable norms with the principles governing *das sollen* and *das sein*.<sup>82</sup> Therefore, legal decisions must be following the ideals set by law and morality.<sup>83</sup> In line with this, legal certainty will provide broad recognition for the community; because the MK Decision 91/PUU-XV/III/2020 in the perspective of legal certainty is not only an order of the Constitutional Court because the MK Decision 91/PUU-XV/III/2020 applies to individuals who treat them and relate to other individuals. The MK Decision 91/PUU-XV/III/2020 should have been socially constructed, considering that the provisions as contained in the UU CK affect all aspects of legal events and legal actions that rely on positive norms from the legal community.

Thus, the MK Decision 91/PUU-XV/III/2020 is indeed obliged to provide a certainty that takes into account the aspect of morality; therefore, not all residents can accept and acknowledge the legal validity concerning the decision. Moreover, most of the public's point of view is not based on legal provisions but is viewed internally from itself. The inaccuracy contained in the decision will cause general suffering from the regulation to the condition of the community experiencing legal uncertainty. It should also be emphasized that this legal certainty does not negate the principle of morality;<sup>84</sup> although the aspect of morality is also based on the perspective of the human person, however, morality itself has weaknesses that demand the application of the principle of legal certainty.<sup>85</sup> The development of cases and legal applications that will differ from time to time has the consequence that the legal facts and values that underlie legitimacy must have clear parameters and do not cause legal conflicts. Judges need these standards to avoid confusion and arbitrary action. The choice of law to be applied to a particular case also causes legal

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<sup>82</sup> Roger Crisp and Theron Pummer, 'Effective Justice' (2020) 17 *Journal of Moral Philosophy*. [398].

<sup>83</sup> Brian Flanagan and Ivar R Hannikainen, 'The Folk Concept of Law: Law Is Intrinsically Moral' (2020) *Australasian Journal of Philosophy*. [1].

<sup>84</sup> RD Lumb, 'Natural Law and Legal Positivism' (1959) 11 *Journal of Legal Education*. [503].

<sup>85</sup> Martin Stone, 'Legal Positivism As An Idea About Morality' (2011) 61 *The University of Toronto Law Journal*. [313].

reactions for most people; however, if the choice of law will harm the way of human law, then the law can be said to be powerless. The excuse of utility over certainty is something of a paradox. Thus, it takes the aspect of morality as a counterbalance and a tool to interpret the provisions contained in the law.

The principle of legal certainty provides a stipulation that legal decisions issued must have three cumulative elements of certainty: not retroactive, sufficient clarity, and protecting the community's interests. From the perspective of the MK Decision 91/PUU-XV/III/2020, normatively, the MK Decision 91/PUU-XV/III/2020 should be included in the category of non-retroactive effect; so that all legal actions as before the MK Decision 91/PUU-XV/III/2020 will continue to apply following the law which is the legal basis. However, the Constitutional Court suspended all strategic policies and actions in this decision, as those policies were based on the UU CK. In practice, all stages and various strategic activities and policies running are *de jure* prohibited from continuing; but *de facto* worth continuing. This is inseparable from the various derivative rules of the UU CK, which give authority to various parties to do things that have never been done before the UU CK came into effect. Moreover, there is confusion in the community in interpreting this decision; Thus, the community does not have a legitimate guideline to carry out legal actions targeting the realm of the UU CK. On the other hand, this has implications for the dynamics of policies issued by the central and regional governments. Thus, *de jure*, the decision is not retroactive; however, in practice, the decision is only seen as a 'wind of wind'. Furthermore, the MK Decision 91/PUU-XV/III/2020 does not have sufficient clarity; because this 'conditionally unconstitutional' decision has the potential to give rise to various interpretations from the public; because the Constitutional Court stated that the UU CK remained valid for a certain period, in addition to declaring that the UU CK was a 'formal disability'.

A decision that states "conditionally unconstitutional" will cause "legal confusion", considering that a legal decision with legal certainty should not give rise to double interpretations and double validity; moreover, legal decisions with legal certainty have the essence of being elaborative decisions. An elaborative



decision means that it does not only consider aspects of the relationship between law and coercion as the decision is made; however, it also considers the relationship between law and social justification. It should also be understood that the MK Decision 91/PUU-XV/III/2020 is a means to determine which legal principles are most consistent with existing laws and which legal principles provide or win the best for the applicable law. There is. Thus, the community does not have a clear legal line regarding what can be done; and everything not to do. Thus, the MK Decision 91/PUU-XV/III/2020 is tough to interpret to be justified legally. The MK Decision 91/PUU-XV/III/2020 can also be said not to protect the community's interests. The condition of legal uncertainty as occurred after the MK Decision 91/PUU-XV/III/2020 raises pros and cons that can provoke horizontal and vertical conflicts between communities, even between the government and the community. Both the UU CK and the MK Decision 91/PUU-XV/III/2020 have a moral duty to protect and improve the community's welfare.

The authority of law is a binding principle of the contribution made to moral correctness for the legal practice of a society under consideration as a whole.<sup>86</sup> From the perspective of this case, certainty in the application of a legal system can only arise if the judges' agreement has the same interpretation; because certainty does not just flow how it starts from the objective features of things that come true as well as the precision of the words in the legislation. Moreover, the Constitutional Court's decision is an effort to create social order and respect the rights and obligations of the community that have the potential to be violated by the existence of the law being reviewed. Therefore, there is nothing that can achieve a goal of moral value without fulfilling the principles of legality as stated in the Constitutional Court Decision. It should be noted that the principle of legal certainty will repeatedly pursue precision in the form of a single rule to increase complex accuracy regarding joint efforts to achieve substantive justice.<sup>87</sup> This is different from the usefulness aspect of utilitarianism, as they view that these rules can be determined through

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<sup>86</sup> Lumb (n 84).

<sup>87</sup> Shirley Robin Letwin, 'Morality and Law' (1989) 2 Ratio Juris.[55].

social behavior that is considered good. Expediency is not enough to solve social problems. It is determined by each legal subject's moral truth and ideal dimensions and how each legal subject has different truths and objectivity values.<sup>88</sup>

Legal certainty will provide a risk if individuals violate the norms. Therefore, legal certainty becomes the determination of benefit as a determining element of social success.<sup>89</sup> On the other hand, expediency cannot be categorized as a normative principle;<sup>90</sup> because, there are no parameters regarding review the structure and constituent parts of the benefit itself to weigh the size of an ideal situation according to excellent or valid laws. Legal certainty provides an obligation that the MK Decision 91/PUU-XV/III/2020, which is issued, should be a basic pattern for implementing the correct legal method. Formal stipulations through decisions or legal products as included in the MK Decision 91/PUU-XV/III/2020 is the best option to increase the sense of justice for legal subjects. Thus, if the MK Decision 91/PUU-XV/III/2020 provides 'legal chaos', it results in irregularity in the interpretation of the law itself from the community. Thus, legal certainty is an essential principle that is the central part of legal philosophy. This principle manifests the elements of traditional publishing and law norms in a system, providing a comprehensive explanation. Thus, MK Decision 91/PUU-XV/III/2020 should contain a definite truth and not lead to multiple interpretations. Legal certainty must be more oriented considering that this principle concerns and refers to things that are indeed ordered, prohibited, and allowed from the norms published in positive law

## Conclusion

The conditional unconstitutional phenomenon in the MK Decision 91/PUU-XV/III/2020 provides a dilemma for the legal life of the community, especially in the constitutional aspect. The ruling stated that the UU CK was a 'formally flawed'

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<sup>88</sup> Brendan F Brown, 'The Definition of Law' (1960) 34 *New Scholasticism*. [254].

<sup>89</sup> Anna Di Robilant, 'Genealogies of Soft Law' (2006) 54 *The American Journal of Comparative Law*. [499].

<sup>90</sup> S Wexler, 'The Moral Confusions in Positivism, Utilitarianism and Liberalism' (1985) 30 *The American Journal of Jurisprudence*. [121].

law. However, on the other hand, various materials contained in the UU CK are still considered valid by the Constitutional Court for two years. This is contrary to the aspect of procedural justice, which states that when a legal product is declared not to comply with procedural provisions -in this case, the formation of the UU CK -; then, the law should be declared null and void, unless the legislation has been corrected, justified, or updated. This fact is also one of the elements that the MK Decision 91/PUU-XV/III/2020 cannot be categorized as a monumental decision. In this regard, the decision stating that the UU CK is Conditionally unconstitutional provides two possibilities regarding the existence of the UU CK. First, the UU CK will remain in effect if the repair conditions stated in the MK Decision 91/PUU-XV/III/2020 have been carried out by the government before the two-year deadline. Second, the UU CK becomes 'permanently unconstitutional' because the improvements made by the government are not under and/or meet the requirements stated in the MK Decision 91/PUU-XV/III/2020. The practice of conditional unconstitutional decisions is contrary to the principles of legal certainty; because legal certainty is the moral doctrine of the legal product itself; therefore, legal certainty is a conception of the rule of law. This principle is synonymous with the functionalization of the rule of law; Thus, legal certainty is considered a characteristic of good regulation. Moreover, the focus of legal certainty provides a stipulation that legal decisions issued must have three elements of certainty: sufficient clarity, not retroactive, and protecting the community's interests. When reviewed in the case of the MK Decision 91/PUU-XV/III/2020, the decision is not retroactive, but the ambiguity as stated in the decision does not fulfill the element of sufficient clarity and does not protect the public. Moreover, the UU CK or its implementing regulations have a strategic nature and broad impact; so, like it or not, the UU CK cannot be used as a basis for taking actions or policies. Differences in interpretation from the public will create legal uncertainty; Thus, society has the potential to incur legal sanctions for errors in interpretation. The government must immediately make improvements to the UU CK. On the other hand, the government can try to ratify a standard rule in the UUP3 regarding the formation of law with an omnibus law scheme. The government can

issue a PERPPU, considering that currently, there is legal uncertainty. Moreover, the essential vacuum regarding strategic policies still places an obligation on the government to provide the best solution

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