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Struggle of Legal Positivism Versus Progressive Thoughts in the Formal Tests of the Job Creation Act (Legal Development through Hermeneutics)

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Abstract
Hermeneutics is a form of interpretation and interpretation of a text in legal philosophy, in practice it is also used in the considerations of constitutional judges to interpret and interpret a law, one of which is in the formal examination of the work copyright law which is the pros and cons because using the Omnibus Law method. This study aims to find out how the struggle between positivistic and progressive legal thinking and the reality of the art of hermeneutics as a means of legal development, the research method uses the legal research method through the statute approach, conceptual approach, and case approach, the data analysis is descriptive qualitative, the research results show The struggles of Legal Positivism and Progressive Thought in the decision actually met at one point, both of them acknowledged that Omnibus Law was a method of future legislation formation and interpretation through the art of Hermeneutics became a means of making a legal construction, which in the end could become a means of developing law forward.

Keywords: hermeneutics; legal positivism; omnibus law; progressive.

Abstrak
Hermeneutika merupakan bentuk penafsiran dan penafsiran suatu teks dalam filsafat hukum, dalam praktiknya juga digunakan dalam pertimbangan hakim konstitusi untuk menafsirkan dan menafsirkan suatu undang-undang, salah satunya dalam pemeriksaan formal terhadap undang-undang hak cipta karya yang merupakan pro dan kontra karena menggunakan metode Omnibus Law. Penelitian ini bertujuan untuk mengetahui bagaimana perjuangan antara pemikiran hukum positivistik dan progresif dengan realitas seni hermeneutika sebagai sarana pengembangan hukum, metode penelitian menggunakan metode penelitian hukum melalui pendekatan statuta, pendekatan konseptual, dan pendekatan kasus, analisis data bersifat deskriptif kualitatif, hasil penelitian menunjukkan perjuangan Positivisme Hukum dan Pemikiran Progresif dalam putusan tersebut sebenarnya bertemu pada satu titik, keduanya mengakui bahwa Omnibus Law merupakan metode pembentukan dan penafsiran legislasi di masa depan melalui seni Hermeneutika menjadi sarana pembuatan konstruksi hukum, yang pada akhirnya bisa menjadi sarana pengembangan hukum ke depan.

Kata kunci: *hermeneutics; hukum positif; omnimbus law; progresif.*

Introduction

The existence of the Constitutional Court in Indonesia is one of the significant improvements in the judicial power system in Indonesia, where in the constitution the Court's authority in reviewing laws against the Constitution is expressly specified in Article 24C of the Republic of Indonesia's 1945 Constitution. In exercising its authority to examine

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laws against the 1945 Constitution, the Constitutional Court has at least 5 (five) functions, namely: the Constitutional Court as the Guardian of the Constitution, the Constitutional Court as the Final Interpreter of the Constitution, the Constitutional Court as the Guardian of Democracy, the Constitutional Court as the Protector of Citizen's Constitutional Rights and the Constitutional Court as the Protector of Human Rights. This function is also mentioned in the arguments filed with the Constitutional Court in case Number 91/PUU-XVIII/2020 for judicial review of Law Number 11 of 2020 about Job Creation against the 1945 Constitution of the Republic of Indonesia.

One of the bodies that considerably influence the substance of positive legal norms in their concretization by judges in their decisions before the Court is the judicial authority that applies to a state of law. In other words, no matter how good the legal regulations set to ensure the safety of the community and the welfare of the people are, these regulations are meaningless if there is no judicial power to fill the power of these norms. This is where one of the judiciary's functions becomes a place to be justice for the community or to address issues concerning their legal rights and obligations (Yusa, 2011). According to Herman J. Pietersen, law (translated from the term "law") is a normative structure. In this perspective, the law is viewed as an instrument of the state or polis concerned with justice, with rules of conduct to regulate human behavior. According to this viewpoint, the law is an instrument for sustaining justice in the form of behavioral norms, with its primary goal being to regulate human behavior. This is the foundation for considering doctrinal legal teachings (Samekto, 2012).

The judiciary's decisions are one of the foundations that can be utilized to build laws and regulations, making a significant contribution to the process of developing national law in Indonesia. Indirectly, judicial judgments contain rules and norms that might be utilized as a guide in carrying out legal growth. The process of drafting a statutory regulation might also be based on a court ruling that must be included in a National Legislation Program (*Prolegnas*). This is reinforced again in Article 23 of Law Number 12 of 2011 Concerning Legislation Establishment, which indicates that the *Prolegnas* comprises an open cumulative list, one of which is the decision of the Indonesian Constitutional Court.

The Constitutional Court has recently reviewed a controversial law, namely the review of Law No. 11 of 2020 concerning Job Creation, which was proposed by Migrant CARE, the Coordinating Board for the Customary Density of West Sumatra, the Minangkabau Customary Court, and Muchtar Said, and registered in case Number 91/PUU-XVIII/2020 on the request for a review of Law Number 11 of 2020 concerning Job Creation. The Constitutional Court has given its decision which is final and binding by granting in part the request by declaring the formation of law. Law No. 11 of 2020 violates the Republic of Indonesia's 1945 Constitution and does not have conditionally binding legal force as long as it is not understood as not being remedied within 2 (two) years of the decision's issuance. To declare that Law Number 11 of 2020 remains in force until repairs to the formation are made in line with the grace period specified in the judgment,

instructing lawmakers to make adjustments within a maximum time of two (two) years after the decision is announced. If no repairs are performed within that time frame, Law Number 11 of 2020 is ruled permanently invalid.

The Constitutional Court's decision implies that in the formation mechanism of Law Number 11 of 2020 concerning Job Creation, the Constitutional Court has deemed it a formally flawed law. What is interesting here is that the decision of the Constitutional Court in the case of reviewing the law on job creation did not reach a consensus, there was a Dissenting Opinion on the considerations between the constitutional judges, and in the petition, four constitutional judges were expressing dissenting opinions, and the difference is reflected in the verdict. As law enforcers and justice, judges are obligated to investigate, comprehend, and apply legal values that exist in society; hence, the function of judges is to apply concrete law, including written and unwritten laws (Lotulung, 1997/1998).

Differences of opinion among justices are exclusively due to differences of opinion in applying the law through the Constitutional Court's power. Radbruch (1946) defines an ideal judge's ruling as one that contains proportional aspects of *Gerechtigkeit* (justice), *Zweckmassigkeit* (benefit), and *Rechtssicherheit* (legal certainty) (Mertokusumo, 2011). The distinction, when examined attentively, concerns the interpretation or interpretation of each constitutional judge; in philosophy, this interpretation or interpretation is known as hermeneutics. Hermeneutics investigates concerns of discourse and the explanation of something that is not yet obvious by the use of language expressions and translation from one language to another that is clearer. In general, hermeneutics is a system or philosophy about the interpretation of meaning (Sado, 2015).

According to James Robinson, the function and purpose of legal hermeneutics are to clarify something that is not obvious so that it is clearer. Meanwhile, Gregory claims that the goal of legal hermeneutics is to situate contemporary discussions on legal interpretation within the larger framework of hermeneutics (Hamidi, 2005). According to Gadamer, philosophical legal hermeneutics has an ontological task: to define the inevitable relationship between the text and the reader, the past and the present, which allows us to grasp the first occurrence (genuine) (Hamidi, 2005).

The author thought it would be interesting to add the art of interpreting hermeneutics in the decision of the formal test of the work copyright law in this article. This is because the ruling contains a fight for interpretation, or that the interpretation of the nine judges is not the same when there are two points of view on this topic. The two notions are legal positivism and progressive thinking concerning the Omnibus Law model for the formulation of laws and regulations. Thoughts emerging from the art of Hermeneutics demonstrate the existence of a new concept in the process of building a legal construction, which can then be employed as a point of view in future legal development. Based on the description above, the author is interested in writing about the reality of the art of hermeneutics as a means of legal development, given that there is a real struggle for different interpretations or interpretations in the decision of the formal

test of the law on work creation that can be used as a point of view in making changes to the formation of laws and regulations in Indonesia.

Research Problems

Based on the above background, the formulation of the problem in this writing is first, "How is the Struggle of Positivism Legal Thought Versus Progressive Thinking in the Formal Test of the Job Creation Act?", secondly, "How is the development of the law through the art of hermeneutics?

Research Methods

The method in writing this article used the legal research method through a statute approach, conceptual approach, and case approach (Marzuki, 2016). The statute approach is carried out by reviewing all laws and regulations related to the legal issues being handled. An example, in this case, is to study the consistency/compatibility between the Constitution and the Law, or between one law and another. The conceptual approach, then, is the type of approach used to understand the concepts related to normalization in law whether it is following the spirit contained in the underlying legal concepts. The case approach is a type of approach in which researchers attempt to construct legal arguments based on specific cases that occur in the field. The technique is carried out by reviewing cases involving legal issues that have resulted in court rulings with lasting legal power. The primary focus of the research was the judge's consideration, which can be utilized as an argument in resolving the legal challenges at hand. Written law is investigated in a normative legal study from numerous perspectives such as theory, philosophy, comparison, structure/composition, consistency, general explanations and explanations for each article, formality and binding authority of law, and the language employed is legal.

The data was analyzed using descriptive qualitative data analysis. Because the data obtained were official documents in the form of related legislation and decisions that are then made, it is presenting the data and information and then analyzing it using many conclusions as findings from the study results. The data was evaluated qualitatively, which was subjective and interpretive and was carried out by interpreting and gathering the data received and classified methodically before concluding. The outcomes of the study were obtained from the data that had been studied and narrowed down by employing deductive thinking, which was a form of thinking that was basic to things that were general and then drawn to specific conclusions.

Discussion

Many issues with current legislation must be addressed, including the situation of hyper-regulated laws and regulations, the number of laws and regulations that overlap (overlapping), regulatory disharmony, and the technical complexity of drafting laws and regulations. According to data from jdihn.go.id, as of December 23, 2021, the central level alone had 46,611 central legal products, while the regional level had 220,346 legal products.

In addition, the author's data obtained from the website of the Constitutional Court as of Saturday, March 5, 2022, found that the number of applications for judicial review from 2003 to 2022 registered 1530 cases, with the number of decisions on judicial review reaching 1491 decisions, with 281 decisions being granted, 533 cases were rejected, 23 cases failed, 495 cases were not accepted and 10 were not authorized, 23 cases were lost, not to mention thousands of regional regulations were canceled. The enormous number of court reviews of laws and legal products of Regional Regulations that have been canceled has become a severe challenge for Indonesia's legislative and regulatory formation. Indirectly, this conclusion means that numerous laws continue to be in contradiction with the constitution. The most recent is the formal review of Law number 11 of 2020 governing work copyright, often known as the Omnibus Law.

The Constitutional Court of the Republic of Indonesia on November 25, 2021, has decided to review Law number 11 of 2020 concerning Job Creation which is registered in case number 91/PUU-XVIII/2020 by granting in part the application. It is stated that the formation of Law Number 11 of 2020 is contrary to the 1945 Constitution and does not have conditionally binding legal force and no amendments have been made within 2 (two) years since this decision was pronounced. In addition, it is stated that Law Number 11 of 2020 is still in effect until corrections are made to the formation following the grace period as determined in the decision and instruct the legislators to make improvements within a maximum period of 2 (two) years since the decision was pronounced. If within that time limit no repairs are made, then Law Number 11 of 2020 is declared permanently unconstitutional. The decision of the Constitutional Court in the case of a formal review of law number 11 of 2020 concerning job creation registered in case Number 91/PUU-XVIII/2020 has extraordinary implications for the process of forming laws and regulations in Indonesia.

The Constitutional Court's decision was not unanimously agreed upon, but there were different opinions (Dissenting Opinion) from the Constitutional Justices in their legal considerations. 4 judges expressed different opinions (Dissenting Opinion) namely Constitutional Justice (Arief Hidayat), Constitutional Justice (Anwar Usman), Constitutional Justice (Manahan M.P. Sitompul), and Constitutional Justice (Daniel Yusmic P. Foekh). The eventual rise of diverse interpretations of the Omnibus Law process in the formation of legislation in Indonesia divides constitutional judges into two camps, leading to legal positivism and progressive thinking. So far, judges' decisions and judgments have been affected by legalism and positivistic viewpoints. This positivist paradigm has long been ingrained in Indonesian law, giving rise to a legalistic mindset for judges who are merely entrusted with articulating the laws made by the government, without the authority to impart "soul" to the regulations they face (Musyahadah, 2013). In jurisprudence, we know the positivism or pure legal school which was introduced by Hans Kelsen. This school requires the law to be freed/sterilized from non-juridical elements. The execution of this concept will require law enforcement agents to perceive the law as written (*dassollen*) (Fauzan, 2009).

Positivism Legal Thought on the consideration of 5 constitutional judges

The positivistic viewpoint informs judges that the law solely deals with norms and does not care whether the substance is fair or not, nor does it consider the socio-juridical repercussions. This viewpoint reduces legal positivism as a large institution to something simple, linear, mechanistic, and deterministic, and it concludes with its incapacity to achieve the truth. Legal positivism's teachings have been criticized, one of which was initiated by Critical Legal Studies, who said that legal positivists sought to perpetuate an established situation (*status quo*) with legal certainty (Sarmadi, 2012).

The theory of Legal Positivism was first confirmed in the form of a systematic and conceptual formulation in The Province of Jurisprudence (1832) by John Austin through positive declarations or claims about the law that:

> "Law in the most generic and comprehensive theme... is defined as a rule issued to guide behavior to a human being as an intelligent being... from another human being (another intelligent being) in whose hands there is power (authority) over the first intelligent being" (Curson, 1993).

Austin further points out that the law contains numerous components, such as the existence of a ruler (sovereignty), an order (command), an obligation to obey (duty), and punishments for those who do not obey (sanctions). As a result, this notion can only be supported by written laws that are authorized by the power of government or a state.

The legal considerations of five constitutional judges in the decision on the formal review of the work copyright law demonstrate a positivist viewpoint, as evidenced by the consideration that states "That the 1945 Constitution, in principle, has determined the framework for the formation of laws, as the legal considerations in Paragraph [3.17] demonstrate. Starting from the provisions of Article 22A of the 1945 Constitution, Law 12/2011 which has been amended by Law 15/2019 as a delegate of the 1945 Constitution is now enforced, as stated in the preamble "In view of" Law 12/2011 which states that the quo Law is based on Article 22A of the Constitution. 1945 and it is also explained that the Law on the Establishment of Legislation is an implementation of the orders of Article 22A of the 1945 Constitution [vide General Elucidation of Law 12/2011]. Since Law 12/2011 is a delegation of the 1945 Constitution, the evaluation of requests for formal examination and decision making must also be based on the procedures for the formulation of laws as defined in Law 12/2011." Meanwhile, in adjudicating matters of formal judicial review of the Law, the Court relies, among other things, on Law 12/2011 as amended by Law 15/2019 as the Law that regulates the procedures for the establishment of statutory regulations. As an amendment to Law Number 10 of 2004 concerning the Establishment of Legislations (UU 10/2004), Law 12/2011 completes all the shortcomings of the previous Law regarding the technical aspects of drafting good laws and regulations while at the same time providing examples in the Appendix of the Act. 12/2011 as an inseparable part of the quo Law to provide clearer, definite, and standard guidelines in its preparation which is part of the formation of laws and regulations [vide General Explanation of Law 12/2011]. Thus,

it can be interpreted that, as stated in Articles 44 and 64 of Law 12/2011, every legislator must utilize definite, standardized, and determining processes in the development of academic writings and draft laws.

Positive thoughts have given birth to laws in mathematical sketches, resolve laws that arise in society based on what is written in the text of the law, crystallize in the binary position of a text, and then the reader must comprehend in that circumstance and are not permitted to think otherwise. Meanwhile, the courts determined cases based on the wording of the relevant legal issues. As in Indonesia, judges make decisions based on written law as the primary source. The groupings of judges who believe this form a conservative cult (Siahaan, 2006). Even when investigating corruption cases, textual judges tend to have difficulty proving elements. Research conducted by M. Syamsuddin states that the positivistic and non-positivistic mindsets in the practical setting give rise to different judges' tendencies in interpreting or interpreting the law in deciding corruption cases. The results of the study prove that the first type is the type of textual judge and the second type is the type of contextual judge. The implication is that judges of the first type often find it difficult or fail to prove the elements of a criminal act of corruption, resulting in an independent decision (Syamsuddin, 2011).

The critical meaning of the statutory text to achieve justice is important to be carried out by judges for several reasons. First, the legal text does not stand alone; it is necessary to understand the intent or purpose of the maker of the legal text; second, every legal text always has a goal and object to be achieved; it is necessary to look at the relationship between the article and the main purpose of the enactment of the regulation; third, the possibility of errors in the text of law because it is contrary to the people's sense of justice; and fourth, dare to criticize the legal text for its shortcomings (Sarmadi, 2012).

Legal certainty will become a symbol of truth as a result of the legal product itself. Justice is defined by what is written, and it excludes any justice that is not contained in a statutory language. This approach connects law to law. There is no law apart from the law, and the only law is the law itself (Muhammad, 2006). Legal positivism is widely acknowledged as having made significant contributions to the global development of modern law. However, this does not negate its flaws, which include ignoring the legal substance, namely justice and expediency (Yusriyadi, 2004).

When considering the considerations that emerged in the review of Law No. 11 of 2020 concerning Job Creation, which was registered in case number 91/PUU-XVIII/2020, it is clear that there are 5 (five) struggles of legal thought based on positivism and Progressive school of thought based on the hermeneutic method. Constitutional judges tend to lead to legal positivism in their interpretation of legislative formulation using the omnibus law model.

Considerations from Constitutional Justice, Manahan M.P. Sitompul and Constitutional Justice, Daniel Yusmic P. Foekh, who have a Dissenting Opinion regarding the Omnibus Law method, have considered by arguing that literally, "omnibus" is defined as relating to or dealing with numerous objects or items at once; including many things or

having various purposes (Bryan A. Garner, Black's Law Dictionary, 9th edition, p. 1197). Still in the same dictionary, "omnibus bill" means: 1. A single bill containing various distinct matters, usu. drafted in this way to force the executive either to accept all the unrelated minor provisions or to veto the major provision. 2. A bill that deals with all proposals relating to a particular subject, such as an "omnibus judgeship bill" covering all proposals for new judgeships or an "omnibus crime bill" dealing with different subjects such as new crimes and grants to states for crime control. (vide p. 186). Regarding the Omnibus Law method which has been defined in the Black's Law Dictionary above, it is defined as "relating to or dealing with numerous objects or items at once; including many things or having various purposes", then it can be interpreted as combining several things into one.

The model for legally forming legislation with the Omnibus Law is not specified in the regulation of the formation of laws in Indonesia, even though the Omnibus law model has been applied in nations that adhere to the Common Law system. Articles 44 and 64 of Law No. 12 of 2011 cover the formulation of laws and regulations, and both require the compilation of academic texts and draft legislation to be carried out in line with predefined methodologies. This attempts to create order in the production of laws and regulations so that future legal products are easy to understand and implement following the principles of law and regulation formation.

Therefore, definite and standard procedures and methods are needed that bind all institutions authorized to form laws and regulations. This is as intended by the preamble of "Considering" letter b of Law number 12 of 2011 concerning the formation of laws and regulations regarding definite methods and methods, and these standards have been outlined in the Attachment of Law number 12 of 2011 concerning the formation of laws and regulations invitation which is an integral part. It means that, legally, and formally adherents of the positivist Omnibus Law model, it is not regulated in the Law on the Formation of Legislation so all models that are made outside of those specified in Law No. 12 of 2011 concerning the formation of laws and regulations are not can be categorized as a good legal product.

One of the legal considerations of the Constitutional Court Justices who showed legal positivism can be seen in his legal considerations which stated that "the procedure for the formation of Law 11/2020 is not based on definite, standard, and standard methods and methods, as well as the systematic formation of laws; there is a change in the writing of several substances after the joint approval of the DPR and the President; and contrary to the principles of the formation of laws and regulations, the Court believes that the process of forming Law 11 of 2020 does not meet the provisions based on the 1945 Constitution so that it must be declared formally flawed".

"As a result, the Court understands the issue of "regulatory obesity" and the overlap of laws, which is why the government employs the omnibus bill technique, which intends to speed investment and boost employment prospects in Indonesia." However, this does not imply that it is possible to disregard the appropriate standard processes or guidelines

to attain this goal, because the objectives and means cannot be separated in principle when affirming the principles of a constitutional democratic rule of law. Therefore, it has been legally proven that the requirements regarding the procedures for the formation of Law 11/2020 and the big goals to be achieved with the enactment of Law 11/2020 have been issued and many implementing regulations have been issued and have even been implemented in many areas practice level. Accordingly, according to the Court, Law 11/2020 must be declared conditionally unconstitutional."

With the evolution of the Omnibus Law model adopted by Common Law countries, it becomes a reference to avoid over-regulation, as an alternative model in the future system of forming Indonesian laws and regulations, but the problem is that the Omnibus Law model has not been accommodated with certainty in the system of forming laws and regulations. Indonesian invitation, As a result, the Omnibus Law cannot be employed as long as it has not been incorporated in legislation formation law.

Whatever approach or method legislators employ to simplify the law, eliminate overlapping laws, or speed up the process of drafting laws is not a constitutional issue as long as the method is founded on established, conventional criteria. and criteria, as well as established in advance in the methodology of drafting laws and regulations, so that they can serve as recommendations for the creation of legislation that will employ these techniques or procedures. According to the author, five constitutional judges with positivistic views (excluding judges with different opinions/Dissenting Opinions) view the Omnibus Law model which has not been regulated in Law no. 12 of 2011 concerning the Establishment of Legislation so that the Omnibus Law model cannot legally be used formally.

According to the author related to Omnibus Law, the views of the 5 (five) constitutional judges contained in their legal considerations tend to be with the interpretation and interpretation of the Intentionalism hermeneutic model, interpreting and interpreting a legal text tends to be based on the thoughts that make the text, in this case, it is appropriate with texts written in existing laws that have been ratified in each of its articles, thus giving rise to views that are legal positivism.

The use of the Intentionalism hermeneutic model in the interpretation of the formal test is likewise consistent with Paul Ricoeur's legal hermeneutics model. Ricoeur's hermeneutics indicates that in the process of reading the text of the law, there exist relations that are neither straightforward nor chaotic/fluid. According to Ricoeur, the creator of the statutory text has a definite limit as the first reader, but he cannot control the text after his "death." The death of the author does not imply that the author is unimportant; rather, the author is merely the foundation stone upon which the process of understanding the work will be built without the participation of the initial author (Susanto, 2008).

Ricoeur's viewpoint is founded on his belief that the legislative text is a linguistic knowledge (discourse) in the sense of "event" rather than "meaning." If the text is viewed as meaning, the meaning contained within it may be grasped by referring directly to the

speaker's tone and gestures. Hermeneutics is thus unnecessary because the utterances delivered are still connected to the speaker. Meanwhile, the process of interpreting the wording of the statute will not be constrained by the original context. Therefore, the text will build meaning either in the imaginary relationship built by the statutory text or the text's relationship with other texts so hermeneutics is very necessary considering that the statutory text has independence and totality (Susanto, 2008).

Thoughts that promote legal positivism interpret the formation of laws and regulations with the Omnibus Law method as a method of formation that is not following law number 12 of 2011 concerning the formation of laws and regulations. The Omnibus Law method is not explicitly regulated in law number 12 of 2011 concerning the formation of laws and regulations which have been used as guidelines for makers of laws and regulations in Indonesia. For this reason, whenever there is a new pattern or model regarding the formation of new laws and regulations which means that the model cannot be applied immediately. This means that the formation of laws and regulations in Indonesia has been limitedly regulated in the provisions of these laws and regulations, and cannot be separated from the provisions that have been determined.

From this description, at least it can be seen that the influence of the teachings of legal positivism creates rigidity where legal rigidities are considered that the law in Indonesia is not able to create justice and this is the source of the dominance of the paradigm of positivism and modern legal science (Samekto, 2011). In practice, the use of the positivism paradigm in modern law tends to be more procedural so that what appears on the surface is formal/procedural justice that has not represented or fulfilled conscience. Furthermore, this means that modern law has not yet produced substantial justice, but is only capable of producing procedural justice.

However, Positivism thought is also known for legal doctrines inspired by positivist teachings such as: "equality before the law or justice for all", making these doctrines theoretically good. The teachings of legal positivism have a rational nature, namely the nature of procedural rules which are an important basis for upholding justice and protecting human rights.

Progressive Thought on the Dissenting Opinion of 4 constitutional judges

The legal considerations in the decision on the formal review of the law on job creation were not unanimously agreed. 4 judges had different views from the majority of the examining constitutional judges, Constitutional Justice (Arief Hidayat), Constitutional Justice (Anwar Usman), Constitutional Judge (Manahan MP Sitompul), and Constitutional Justice (Daniel Yusmic P. Foekh) who have different opinions, which according to the author is an out of the box opinion. The thoughts of Constitutional Justice Arief Hidayat and Constitutional Justice Anwar Usman firmly articulated progressive legal ideas.

Progressive law is a response to the current legal system's weakness, which is riddled with bureaucracy and seeks to break away from the dominance of a sort of liberal law. The idea is for law enforcement to not view what is stated as a rule. As has been the case in the

past, law enforcement has been locked in a limited interpretation of positivist law and a lack of passion to investigate the fulfillment of a more contextual sense of justice (Ridwan, 2009). Even in criminal instances, the findings of Agus Raharjo and Angkasa's research include the use of psychological abuse by numerous investigators to gain confessions or information from suspects (Raharjo and Angkasa, 2011).

The Progressive Law Paradigm genuinely encourages the legal worker community to take risks in administering the law in Indonesia, rather than being limited by positivist and legal-analytical ideas. It is advised not just for setting and following rules, but also for breaking them. This breakthrough does not imply anarchy, because there are numerous legal techniques, legal theories, and new paradigms that can be suggested to carry out the rule-breaking. Progressive legislation is a type of law that serves and gives wealth and happiness to people.

According to Rahardjo's liberal legal paradigm, every time a social order develops with its legal type, it always begins with the collapse of the previous social order. The feudal social structure crumbled and was replaced with bureaucratic law types (12th century) until the Rule of Law was established (RoL). According to Rahardjo, the RoL structure, which is employed and spread in practically every country throughout the world, is a liberal law construction. Human liberalization can be traced back to the dark ages, feudalism, medievalism, the enlightenment, and, finally, the liberal order. There is a movement to liberate the individual from many restrictions (Rahardjo, 2003).

Legal modifications that have the potential to impact social change are consistent with one of the legal purposes, namely the role of law as a means of social change or social engineering (Fuady, 2011). There is no doubt that legal products can impact, and even transform the structure of people's lives in an evolved legal system with the formation and development of laws that are professionally and logically created. Progressive law first appeared in Indonesia in 2002, spearheaded by Rahardjo. Because the teachings of positive law (analytical jurisprudence) that have been practiced in practical reality in Indonesia have not been adequate, progressive law was born. The concept of Progressive Law developed from concern about the quality of law enforcement in Indonesia, particularly since the mid-1997 reform. If the ideal purpose of the law is to contribute to the solution of societal issues, what is happening in Indonesia now is opposed to the ideals of the ideal (Rahardjo, 2005).

However, when a legal product is changed, either by the parliament, government, or court, there is already a cry/need in the community for the change. The faster the law responds to the voice of legal reform/change in society, the greater the role played by law for societal change. On the other hand, the slower the law responds to the voices of reform in society, the smaller the function and role of the law in changing the community because the community has already changed itself. In this case, the law only functions as ratification and legitimacy, thus in such a case shows that it is not law that changes society, but developments that change law. The rigidity of legal texts should be enhanced by correct and responsive efforts to read legal texts. Without a law that is able to respond to

community justice (responsive law) then the law itself has lost its spirit. The spirit of the law is moral and justice (Husni, 2006).

There needs to be awareness that the law is important for humans, not the other way around. The law is not made because the rulers want to do it or just for the sake of group interests or temporary interests in order to fulfill legal formalism. Yet, the law is very much determined by its ability to serve humans, and even engineer humans into a just culture of life.

There are two kinds of law in terms of legal changes, namely laws that tend to be changed and laws that tend to be conservative. Family law or personal property laws are mostly conservative and rarely changed. On the other hand, many areas of business law, state administration, and administrative law are laws that tend to change according to the wishes and developments in society.

Therefore, in the context of the implementation of the method of establishing laws and regulations using the Omnibus Law method, if there is a new need in accordance with the dynamics of the current conditions that develop in the formation of laws and regulations, whether it is related to changes or revocations, then there is room for changes to the Attachment of Law number 12 of 2011 concerning the formation of laws and regulations. This means that technical matters or methods are designed to always be able to follow or adapt to the development of needs, including if there will be simplification of laws and regulations by any method, including the Omnibus Law method. This is intended to regulate technical standards and normative which do not become an obstacle to the process of forming laws and regulations, as long as the formation is carried out in accordance with predetermined standards. Thus, orderly conditions are still created in the formation of laws and regulations as intended by the determination of the principles in the formation of laws and regulations as stipulated in Article 5 of Law number 12 of 2011 concerning the formation of laws and regulations.

This means that with those legal considerations, the Court orders that a standard legal basis be immediately formed to be a guide in the formation of laws using the Omnibus Law method which has this specific nature. Therefore, based on the legal basis that has been established, namely Law Number 12 of 2011 concerning the formation of laws and regulations, improvements have been made to meet a definite, normative and standard way or method, as well as the fulfillment of the principles of the formation of laws, as mandated by Law Number 12 of 2011 concerning the formation of laws and regulations.

The formation of law through court decisions can simultaneously contain two elements, namely on the one hand the decision is the settlement or resolution of a concrete event and on the other hand it is a legal regulation for the future. However, according to van Apeldoorn, the judge's decision shaped it in the concrete, the law in the abstract, thus it is in general (Kansil, 1980).

Dissenting Opinions from Constitutional Justice Arief Hidayat and Constitutional Justice Anwar Usman conveyed their considerations with a legal approach as described by

the professor, Satjipto Rahardjo by using a new approach that is out of the box which is very relevant to be used in anticipating changes. The progressive legal approach contains the spirit of breaking away from conventional legal traditions thus the law must be dynamic and progressive.

The law can be seen both in itself (dogmatically) and in a perspective outside itself (non-dogmatically). In this case, it is a must for law enforcers to look not only at examining the logical-rational building of a series of formal and procedural regulatory articles (analytical jurisprudence) but also in the social perspective of the law, namely the moral aspect, conscience and sense of community justice (Sarmadi, 2008).

Law does not only undergo evolutionary changes, but in its development it requires revolutionary changes, jumping from one method to a method that is more able to adapt to the needs of society. Such legal changes are often referred to as paradigmatic legal changes (paradigm shift). Such a change is called rules breaking or it can also be known as a leap from the adoption of normal law to unusual law which then returns to normal law with a new paradigm.

The current legislation has many problems, including the large number of laws and regulations (over regulated). There are many overlapping laws and regulations, and disharmony between regulations and the technical complexity of making laws and regulations. This is what underlies the need for the application of the Omnibus Law method in solving these legislative problems.

The life of society, nation and state in the current global era cannot be facilitated strictly into a positivistic, legalistic, and dogmatic approach. Therefore, a new approach to law is needed, namely a progressive approach which carried out by rules breaking thus paradigm changes are needed. Therefore, the method of law formation with the omnibus law method can be adopted and is suitable to be applied in the conception of the Pancasila legal state as long as the Omnibus Law is made in accordance with and does not conflict with the values of Pancasila and the principles contained in the 1945 Constitution of the Republic of Indonesia.

The law is not something final (finite scheme) but it continues to move and dynamically follow the changing times. Thus, the law must continue to be studied by conducting a review through progressive efforts thus the ultimate truth can be achieved and present human freedom in achieving harmony, peace, order which in the end realizes a just and civilized welfare in accordance with the spirit of Pancasila values (Nuryadi, 2016).

Constitutional Justice Manahan MP Sitompul and Constitutional Justice Daniel Yusmic P. Foekh in their legal considerations gave their thoughts on the possibility of adopting the omnibus method if it was to be applied to countries whose basis is not common law but still open through legal transplants. Legal transplantation allows the transfer or borrowing of legal concepts between existing legal systems. The provisions of Law Number 12 of 2011 concerning the Establishment of Legislation in conjunction with Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the

Establishment of Legislation do not explicitly mention certain methods that must be used in the preparation of laws and regulations. In contrast to the concept of criminal law which emphasizes *lex scripta, lex certa*, and *lex stricta*, something that is not explicitly regulated in law (which is administrative in nature) does not necessarily mean a prohibition or taboo to do. Other methods in drafting laws and regulations, including the omnibus method, may be adopted into the national legal system when it is deemed more effective and efficient to accommodate several content items at once, and is really needed in overcoming legal impasse.

The consideration of the Dissenting Opinion in the formal examination of the job creation law shows that there are at least 4 Constitutional judges according to the writer who use interpretation and analysis with the hermeneutics of the Gadamerian hermeneutic school. He views that meaning must be constructed and reconstructed by the interpreter himself according to the context, which means in interpreting and analyzing the a text based on its own interpreter, in this case a constitutional judge who interprets and analyzes progressively. This can be seen in the considerations of Constitutional judge Arif Hidayat and Constitutional judge Anwar Usman in the decision Number 91/PUU-XVIII/2020 as follows: "That law is an institution full of dynamics. Therefore, the law is strongly influenced by the development of people's lives and the law must also be able to regulate the development of the needs of the community thus the law must be dynamic and progressive. Law as a progressive institution is not only needed in the present era, but also in the future. History has proven that the emergence of various approaches and methods in law has made the law not stagnant and stopped, but continues to grow, change and develop to adapt and be responsive to the development needs of society and its era. Legal changes to adapt and transform according to the development and needs of society is a necessity. This is to avoid the assumption that the law is seen as merely a historical monument which in the end fails to regulate effectively and efficiently the development of the needs of society and the state."

These considerations illustrate that responsive thinking in the formation of a law is very important, in law it is necessary to follow the development of community needs. In order for the existing law to move towards the realm of progressive law, there are several principles that can be used as the basis for the concept of thinking (Sarmadi, 2008), namely: *First*, the basic assumption of the law must be for humans not for themselves the law is held. If the law is intended for humans, it should not impose legal problems that become human problems, but treat human problems as legal problems; *second*, progressive law does not accept law as an absolute and final institution. Not trying to reduce the law to just rules, but something bigger than that, namely the law is placed in relation to humanity. Based on the spirit for humans, it does not mean that all existing laws are wrong but need to be perfected from being an automatic machine to being human, conscientious about the interests of humans themselves which continue to develop. Thus, the law must also develop to follow and defend humanity itself. *Third*, the law must not detach itself from its social purpose; fourth, the law serves humans, therefore

it must not ignore human conscience; *fifth*, the law must be moral. Law cannot separate itself from morals. Law is not just an ordinary rule but it is a building of ideas, culture and ideals. The downturn in law in Indonesia is due to the abbreviation of the law as a rule of law without seeing it as a rule of morality; sixth, progressive law is a correction of the weakness of the modern legal system which is full of bureaucracy and wants to free itself from the domination of a type of liberal law. Seventh, the law must always be in the process of continuing to be. Law is an institution that is constantly building and changing itself towards a better level of perfection. The quality of perfection can be verified into factors of justice, welfare, concern for the people and others. This is "the essence of law which is always in the process of becoming" (Law as a process, law in the making); eighth, progressive law rejects the analytical jurisprudence or *rechtsdogmatiek* tradition, and various notions or schools with legal realism, *freirechtslehre*, sociological jurisprudence, *interessenjurisprudenz* in Germany, natural law theory, and critical legal studies. Progressive law is a correction to the weakness of the modern legal system which is full of bureaucracy and wants to free itself from the domination of a type of liberal law; ninth, progressive legal interpretation with a conscience, seeing the law not only in the written plains of its formal texts but also in non-formal, pro-justice, pro-people for the sake of upholding its social goals; and tenth, progressive law accepts law not only internally but also wider, namely outside the law, even to build human life and happiness.

Thoughts of the judges who have different opinions (Dissenting Opinion) in the formal examination of the job creation law which sees the need to expand the method of forming laws and regulations with the Omnibus Law method has a very extraordinary impact. The Omnibus Law method in the process of law formation becomes a legal-breakthroughs that may be made because the Law on the Formation of Legislation does not explicitly regulate, allow or prohibit it. Thus, although changes to the Law on the Formation of Legislations are not preceded, basically the law in using the omnibus law method is permissible and not prohibited, in the development of national law, especially in terms of the formation of laws in the future and for the sake of comply with the principle of legal certainty. Thus, it is necessary to amend the Law on the Formation of Legislations as soon as possible to accommodate the omnibus law method in the formation of laws in the future.

Hermeneutics as a Legal Development Tool

The method of interpretation and analysis by judges is very important, especially for constitutional judges, the interpretation can at least be used as a means to make a legal discovery (*rechtsvinding*). The means of interpretation and interpretation for legal discovery (*rechtsvinding*) since the 19th century have indeed been introduced to the term hermeneutics. This method is used as a means to interpret a text. Legal hermeneutics is an interpretation used to free legal studies from the authoritarianism of positive jurists. The urgency of using hermeneutics in principle is an effort to find and present the true meaning of any signs used to convey ideas (Dewi, 2017).

Philosophical hermeneutics was first introduced by Friedrich Schleiermacher (1768-1834), followed by Wilhem Dilthey (1833-1911), Heidegger (1889-1976), Gadamer, Habermas to Paul Ricoeur (Attamimi, 2012).

The development of the hermeneutic school of philosophy occurred when two opposing schools of thought emerged, namely the pragmatics of the hermeneutics of Intentionalism and the hermeneutics of Gadamerian. Intentionalist pragmatics views that essentially meaning already exists because it is brought by the author or the compiler of the text, thus it is just waiting for the interpreter's interpretation, and meaning is behind the text. In contrast, Gadamerian hermeneutics views that meaning must be constructed and reconstructed by the interpreter himself according to the context, thus meaning is in front of the text. Gadamerian hermeneutics says that meaning is determined by the interpreter himself by considering the context (Attamimi, 2012).

The emergence of the hermeneutic interpretation method makes judges more independent in analysing and interpreting a text contained in a law, if a judge who follow a Gadamerian hermeneutic school then he tends to view a text contained in a law as detached from the meaning that made it, it means judges will analyze and interpret according to their thoughts. In contrast, judges who follow the hermeneutics of Intentionalism will analyze and interpret a legal text based on the thoughts that make up the text, in this case it is in accordance with the text written in the existing law which has been ratified in each of its articles.

The writer considers that interpretations and analysis based on the hermeneutic model create an academic space for Constitutional Justices in the case of reviewing Law Number 11 of 2020 concerning Job Creation which is registered in case number 91/PUU-XVIII/2020 have wider independence in analyzing and interpreting the formation of legislation on the Omnibus Law model, which is not textually contained in a law. As a result, out of 9 (Nine) judges there were 4 judges who had differences of opinion (Dissenting Opinion) of the Constitutional Court. Those who stated the Dissenting Opinion were Constitutional Justice Arief Hidayat, Constitutional Justice Anwar Usman, Constitutional Justice Manahan M.P. Sitompul, and Constitutional Justice Daniel Yusmic P. Foekh, which it raises a struggle between legal positivism and progressive thinking.

The hermeneutic approach which is a method of finding law by means of interpretation can be used as an alternative in understanding the true meaning of "text" or "something". According to JJ., H., Bruggink., in this case a hermeneutical circle is shown, namely in the form of a reciprocal process between rules and facts because the hermeneutic postulate states that one must qualify facts in the light of the rules and interpret the rules in the light of the facts included in the paradigm of the legal discovery theory today (Mambaya, 2007).

Legal discovery (rechtsvinding) can be carried out by judges or law enforcement officers and also by legal experts, which is preceded by a systematic study of existing legal provisions in order to apply the law in concrete events that occur, problems that arise in the process of legal discovery (rechtsvinding) generally occurs in the environment of

judges or judicial institutions, judges make legal discoveries (rechtsvinding), the results of legal discoveries (rechtsvinding) carried out by judges are law because they have binding power as law as outlined in the form of a decision (Fauzan , 2009).

Bagir Manan divides the function of interpretation into several functions, namely first, understanding the meaning of the principle or rule of law; second, linking a legal fact with the rule of law; third, ensure that the application or enforcement of the law can be carried out appropriately, correctly and fairly; and fourth, bringing together the rule of law with social changes so that the rule of law remains actual and able to meet the needs in accordance with the community. Manan further emphasized that there were several reasons for the judge to use interpretation. First, there has never been a single legal event that exactly resembles a painting in legislation. To decide the judge must find a match between the facts and the law; secondly, an act is not covered by the ordinary words mentioned in the law; third, the demand for justice; fourth, the limitations of the meaning of language compared to symptoms or events that exist or occur in society, whether legal, political, economic or social events; fifth, language can be interpreted differently in each community environment; sixth, sociologically, language or words can have different meanings; seventh, the influence of community development; eighth, transformation or reception of foreign legal concepts used in legal practice; ninth, the influence of various new theories in the field of law, such as sociological jurisprudence, and feminist legal theory; and tenth, the provisions of language or words in the law are unclear, have multiple meanings, are inconsistent, and even contradictory or unreasonable (Christianto, 2011).

The existence of struggles in the thinking of constitutional judges in the consideration of the Dissenting Opinion of the decision on the formal examination of the Job Creation law viewed from the perspective of the art of interpretation and analysis of Hermeneutics gives rise to legal positivism and progressive thinking. It is a wealth of legal construction in our judiciary in finding the law (rechtsvinding), and it must still be addressed academically, that this thought becomes a wealth of legal scholarship and becomes a consideration in future legal development. The art of hermeneutics can also be used to study and explore as well as examine the meanings of the text from the perspective of the user or the reader. In legal science, the urgency of hermeneutics is to make legal reviewers able to explore and examine legal meanings from the perspective of readers and justice seekers. Indirectly, the art of Hermeneutics becomes a means of developing law, especially in the formation of laws and regulations in Indonesia, and makes us aware that the process of legal development must always follow the development of the situation and circumstances in which the era was running. Even though there was a struggle, in reality, the two views turned out to meet at the same point, which is to recognize the need for the Omnibus law model in the formation of laws and regulations in Indonesia, both from the central and regional levels in the future. This becomes an important consideration considering that the development of an era will also be accompanied by legal developments. This means that in order to anticipate future legal developments and in the

context of responsive and anticipatory legal development, the formation of laws and regulations must keep abreast of developments.

Conclusion

Based on the previous description and analysis, conclusions can be drawn in this paper as follows:

1. The formal test carried out by the Constitutional Court on the Job Creation law gave rise to two thoughts, namely legal positivism and progressive thinking, which was viewed in the legal considerations that did not reach consensus. It showed a struggle of ideas that had very substantive implications in the process of forming legislation In Indonesia, judges who view legal positivism are more likely to stick to predetermined rules/texts, while judges who view progressive thinking are more out of the box, dare to go out of predetermined corridors as long as people's circumstances require it. Even though there is a struggle between the two ideas, they meet at one point, which is to admit that in the future the Omnibus Law method needs to be accommodated as one of the methods/ways in the formation of laws and regulations in Indonesia.
2. Through the means of Hermeneutic Art used in the consideration of the decision on the formal examination of Job Creation law, it shows that there is room for constitutional judges to find the law (*rechtsvinding*). Through the art of Hermeneutics, judges can build a legal construction thus this construction can be used as a thought in future legal development.

Suggestion

Some of the writer's suggestions that can be conveyed in this paper are as follows:

1. As an anticipatory form of future legal developments in the process of forming laws and regulations in Indonesia, the implementation of the Omnibus Law model in the formation of laws and regulations needs to be carried out. Therefore, in order to have legal certainty, it is necessary to immediately make changes to Law Number 12 of 2011 concerning the Establishment of Legislations as amended by Law Number 15 of 2019 concerning amendments to Law Number 12 of 2011 concerning the Formation of Legislations, by accommodating the Omnibus law model.
2. Responding to legal developments which are the mission of developing national law in the future, therefore every time there is legal development there must always be anticipatory action, namely by building legal substance based on Pancasila values and being responsive and anticipatory to various technological advances and their implementation based on regulatory practices that both in accordance with international standards and the needs and characteristics of Indonesia.

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