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## GOVERNMENT REGULATION SUBSTITUTING THE LAW ON JOB CREATION IN THE PERSPECTIVE OF CONSTITUTIONAL LAW

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### ABSTRACT

*The debate over the Government Regulation in Lieu of Law on Job Creation has not ceased even though it has become an official law. Pros and cons persist due to its perceived deviation from Constitutional Court Decision Number 91/PUU-XVIII/2020, issued on November 25, 2021. This research aims to describe that regulations should not contradict one another, especially when there is already a Constitutional Court decision. Regulations should be made through a legitimate process without resorting to legal shortcuts. The research method used is a normative legal research with a qualitative approach. There is ample time available to follow the proper legislative process, yet shortcuts are taken by issuing Government Regulations in Lieu of Law, which are later ratified as laws. The research implies that despite the enactment of these regulations, there is significant resistance due to their divergence from the judicial review results at the Constitutional Court. As a result, this research suggests the necessity of revising relevant laws to include sanctions for failing to comply with Constitutional Court decision.*

### 1. Introduction

The general explanation of the 1945 Constitution explicitly mentions the foundation of the state government system, affirming that the Indonesian state is founded on the rule of law (*rechtsstaat*). It further emphasizes that the Indonesian government operates on the fundamental principles of a constitutional system (basic law), rejecting the notion of absolutism or unlimited power.<sup>1</sup> In Indonesia, groundbreaking constitutional changes have taken place, and their ongoing implementation shapes various sectors and government

1 Andrew Mario Ernesto Ataupah., How the Justice Power Post Constitution Amendment? A Review Book 'Politik Hukum Kekuasaan Kehakiman Pasca Amendemen Undang-Undang Dasar 1945', Ma'shum Ahmad, Total Media Yogyakarta, 2017, 193 Pages, ISBN: 979-1519-25-0, *Journal of Indonesian Legal Studies*, Vol.6 No.1, 2021, page.237-44

levels daily. These changes influence everything from central governance to provincial, district/municipality, and village administrations, creating a significant impact across the board.<sup>2</sup> As for this matter, it is clearly related to justice. In the framework of transitional justice, material or substantive justice has more relevance than formal justice, but the term "justice" might have several interpretations.<sup>3</sup>

This research aims to assess whether the Government Regulation in Lieu of Law has been enacted into Law Number 6 of 2023 concerning the Determination of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation as a Law. It originated from efforts to address the issues concerning Law Number 11 of 2020 on Job Creation, which were considered urgent. Consequently, the Indonesian president was granted the authority to create Government Regulations in Lieu of Law that are equivalent to laws without requiring the approval of the People's Representative Council of the Republic of Indonesia (hereinafter mentioned as DPR RI, *Dewan Perwakilan Rakyat Republik Indonesia*).

Another study indicates that the emergence of regulations related to job creation, from a socio-legal perspective, requires time and reciprocal efforts between the government and the public. Regulations must be effectively implemented across all segments of society. The appearance of the Government Regulations in Lieu of Law (Perpu, *Peraturan Pemerintah Pengganti Undang-Undang*) has also elicited both positive and negative responses from various sectors of society. The core issue lies in the need for legal certainty by the government and investors, while workers require legal protection to ensure a balanced and equitable position with business entities.<sup>4</sup> Indeed, when viewed from the perspective of the sociology of law, it differs from the constitutional law viewpoint. In the sociology of law, the emphasis is placed on the social reactions that arise when a regulation is implemented or the societal push for change that ultimately necessitates a rule to govern such changes. On the other hand, when looking at it from a constitutional law perspective, the focus is on the limitation of power in the administration of state authority.

The Omnibus Law on Job Creation was enacted on the basis of urgency. On the other hand, if we look at constitutional law. The Constitutional Court is part of constitutional law and is one of the institutions born from the results of constitutional amendments.<sup>5</sup> Constitutional courts, regardless of their form, are designed to uphold the core values of the constitution independently, free from

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2 Zen Zanibar., The Indonesian Constitutional System in the Post Amendment of the 1945 Constitution, *Sriwijaya Law Review*, Vol.2 No.1, 2018

3 Mirza Satria Buana., A Realistic Perspective to Transitional Justice: A Study of Its Impediments in Indonesia, *Journal of Southeast Asian Human Rights*, Vol.4 No.2, 2020;

4 AA Muhammad Insany Rachman, Eva Dwi Hastri, and Rusfandi Rusfandi., Tinjauan Penetapan Perpu Nomor 2 Tahun 2022 Tentang Cipta Kerja Dalam Perspektif Sosiologi Hukum, *Jurnal Panah Keadilan*, Vol.2 No.1, 2023;

5 Emy Hajar Abra and Rofi Wahanisa., The Constitutional Court Ultra Petita as a Protection Form of Economic Rights in Pancasila Justice, *Journal of Indonesian Legal Studies*, Vol.5 No.1, 2020

external influence.<sup>6</sup> Disagreements regarding the Government Regulation in Lieu of Law on Job Creation continue, even though this regulation has indeed been enacted as Law Number 6 of 2023 concerning the Determination of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation as a Law. It all began with an effort to address issues related to Law Number 11 of 2020 on Job Creation, which led to the government issuing Government Regulation in Lieu of Law Number 2 of 2022 and subsequently sparked a pros and cons debate. This controversy revolves around the debate on whether it complies with Constitutional Court Decision Number 91/PUU-XVIII/2020, dated November 25, 2021, or if, on the contrary, it contradicts the Constitutional Court's ruling. The Constitutional Court Decision Number 91/PUU-XVIII/2020 rendered significant judgments. Firstly, it contradicts the Constitution of the Republic of Indonesia of 1945 and lacks conditional legal validity unless it is construed as "no modifications are implemented within a period of 2 (two) years from the date of this decision." Second, it shall remain in effect until amendments to its formation are made within a period of two years from the date of this decision. Third, it orders the legislator to carry out amendments within a maximum period of 2 (two) years from the date of this decision. If no amendments are made within this time frame, the Job Creation Law shall become permanently unconstitutional. Fourth, it declares that if, within the two-year period, the legislator cannot complete the amendments to the Job Creation Law, then the law or articles or contents of the law that were repealed or modified by the Job Creation Law shall be reinstated. Fifth, it suspends all strategic and wide-ranging actions and prohibits the issuance of new implementing regulations related to the Job Creation Law.<sup>7</sup>

The enactment of Law Number 6 of 2023 concerning the Confirmation of Government Regulation in Lieu of Law Number 2 of 2022 led to 15 labor unions or workers' unions, led by Rizal Ramli, filing a formal request for a formal review with the Constitutional Court. The plaintiff's expert testimonies in case Number 54/PUU-XXI/2023 presented several reasons and grounds explaining why the Job Creation Law was deemed unnecessary. It is stated that the government's claim of the country's economic instability due to the Covid-19 pandemic and the global crisis is deemed unrealistic. According to their observation, Indonesia's economy is projected to grow by approximately 5% from 2020 to 2023. This clearly indicates that Indonesia's economy is on an upward trajectory, not in crisis, and can still be managed innovatively. In this statement, the situation is considered grave only if there were an economic recession, which would require significant measures to restore it to a normal state. Meanwhile, the enforcement of this law is seen as being implemented for overly contrived reasons. Another reason the government provided is the simplification of overlapping regulations, permits, and regulations, with the expectation that initial investment would increase with the enactment of these

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6 John Sampe, Rosa Ristawati, and Be Hakyou., *The Guardian of Constitution: A Comparative Perspective of Indonesia and Cambodia*, *Hasanuddin Law Review*, Vol.9 No.2, 2023, page. 211–32

7 President of the Republic of Indonesia., *Law of the Republic of Indonesia No. 11 of 2020 on Job Creation*, 2020, <https://faolex.fao.org/docs/pdf/ins206548.pdf>.

regulations. It is acknowledged that the bureaucracy in Indonesia can be quite complex, involving various types of permits. However, the emergence has, in fact, added to the complexity and complications in this regard.<sup>8</sup>

The creation of the omnibus law, also known as the Job Creation Law, was one of the most controversial processes in Indonesia. Numerous issues arose during its formation, making it legally and procedurally problematic. This law, seen as a tactical and political response to a complex situation, resulted in problems not aligned with the fundamental principles of the state. The omnibus law lacks democratic elements, limits participation, and has the potential to surpass constitutional provisions. From a good governance standpoint, it falls short of meeting principles like legitimacy, transparency, accountability, responsiveness, and the rule of law. While effectiveness and efficiency principles still apply, this study suggests re-evaluating the Job Creation Law.<sup>9</sup> The Job Creation Law marks a shift in Indonesian labor policy towards deregulation, reducing government involvement in labor relations. Unlike the Labor Law that introduced flexibility, this Job Creation Law further emphasizes agreements between parties. Deregulation seems to be a consistent trend, seen in various policies. The focus now is on strengthening trade unions and collective bargaining to safeguard workers' interests post-Job Creation Law. Despite changes, current rules related to these aspects remain unchanged, allowing workers to protect their rights. The effort to secure workers' rights, primarily through trade unions, must persist amid these shifts.<sup>10</sup> This is based on two different studies, one addressing the general aspects of the Job Creation Law and the other discussing the deregulation of labor laws due to the emergence of the Job Creation Law. However, this article emphasizes that the presence of Government Regulation in Lieu of Law about Job Creation Law creates uncertainty from a constitutional law perspective.

Upon closer examination, this law consists of thousands of pages, and when simplified, there are many differences of opinion among the articles. Generally, this system should only apply temporarily or for a minimum of three months, except for industries capable of applying this system. Due to this standard, workers do not receive healthcare benefits and economic support for their families, which is a form of modern slavery. The Job Creation Law impedes workers' rights, akin to the colonial past when indigenous communities were deprived of the chance to enhance their living conditions in a conventional manner.

Moreover, while examining history, it becomes evident that the Indonesian government and the vision of the founding fathers of the Republic of Indonesia, at the time of its establishment, were focused on establishing a welfare state rather than promoting a daring and susceptible capitalist investment system.

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8 Mahkamah Konstitusi., Cipta Kerja Tak Memenuhi Unsur Kegentingan Memaksa Masalah Ekonomi, 2023, <https://www.mkri.id/index.php?page=web.Berita&id=19378>.

9 Bobi Yusuf Noor Fajar and Zaid Zaid., A Critical Review on the Job Creation Omnibus Law-Forming Process, *Syiah Kuala Law Journal*, Vol.5 No.2, 2021;

10 Nabiyla Risfa Izzat., Deregulation in Job Creation Law: The Future of Indonesian Labor Law, *PJIH: Pajajaran Jurnal Ilmu Hukum*, Vol.9 No.2, 2022;

The roles of the state, cooperatives, and the private sector are crucial for the sustainability of well-being and the ideal economic prosperity of Indonesia. Consequently, this will give rise to an intelligent and prosperous Indonesian nation. However, according to their viewpoint, implementing the Job Creation Law is highly contradictory to the Constitution of the Republic of Indonesia of 1945. Once again, the regulations within it are perceived as an attempt to impoverish workers and merely exploit them as production tools rather than recognizing them as integral members entitled to share in prosperity.

## 2. Research Methods

This article will discuss the issuance of the Government Regulation in Lieu of Law on Job Creation in light of Constitutional Court Decision Number 91/PUU-XVIII/2020 and the concept of the rule of law in Indonesia.<sup>11</sup> This literature and media study employs a normative or legal research method with a qualitative approach. Using the normative legal research method, the authors use statutory, case, and conceptual approaches. Based on the research conducted, the authors found that the Constitutional Court aims to uphold the balance of companies' efficiency and outsourced workers' rights protection.<sup>12</sup>

The normative approach involves examining the dimension of reality from a normative perspective. The normative approach entails examining the dimension of reality from a normative standpoint. The first step in using the normative approach is identifying the Constitutional Court Decisions. The qualitative method involves data collection and qualitative analysis to identify patterns, root causes, and fundamental reasons underlying a particular event. Document analysis, such as relevant regulations and public opinions, is necessary to implement this method. Furthermore, case studies should be conducted to provide empirical evidence of regulation implementation. Analytical descriptive data is obtained from research sources, primarily documents and news in online media.<sup>13</sup>

The data sources for this writing comprise primary, secondary, and tertiary sources obtained through library research rather than field research.<sup>14</sup> These sources are obtained from literary works, e-books, e-journals, and online mass media news. These sources are collected, then the texts are selected according to the research theme, and their content is mapped to address the issues intended to be answered through this article. This process can be described as a method to restate the main ideas within the data, provide an overview of patterns regarding the concepts generated from the data, and elucidate the meaning of the data to draw profound research conclusions.

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11 Arya Setya Novanto., Efektivitas Undang-Undang Cipta Kerja Dalam Pembangunan Hukum Indonesia, *Jurnal USM Law Review*, Vol.5 No.1, 2022

12 I. D. G Palguna et al., Indonesia's Constitutional Court Decisions on Outsourcing Scheme: Balancing Protection and Efficiency, *Journal of Indonesian Legal Studies*, Vol.8 No.2, 2023, page. 405–52

13 Muhaimin., *Metode Penelitian Hukum*, Mataram, Mataram University Press, 2023.

14 Bachtiar., *Metode Penelitian Hukum*, Banten, UNPAM Press, 2018.

### **3. Result And Discussion**

#### **3.1. The implications of the Government Regulation in Lieu of Law on Job Creation regarding the president's authority to amend regulations**

President has constitutional authority to issue Government Regulations in Lieu of Law based on Article 22D of the Constitution of the Republic of Indonesia of 1945. However, the use of this authority should be limited to situations that are truly urgent and important, such as in emergency situations or when there is an urgent need to regulate a specific sector that requires rapid changes; furthermore, with the changes in the law. Government Regulations in Lieu of Law on Job Creation grant the president the authority to significantly alter these regulations without going through a longer and more complex regulatory process. This can have a significant impact on regulations and policies in Indonesia. Additionally, the president, as the authority responsible for determining the content of the Government Regulations in Lieu of Law, can play a crucial role in directing the national economic reform toward socio-economic outcomes. This is where the president's authority in using Government Regulations in Lieu of Law also requires other presidential responsibilities in making other policy decisions as implications of the content of the Government Regulation in Lieu of Law on Job Creation.<sup>15</sup>

However, the content of the Government Regulation in Lieu of Law on Job Creation must adhere to the constitution and legal principles. Although this Government Regulation in Lieu of Law introduces significant alterations to the legal framework that may impact citizens' rights and responsibilities, these changes are essential for upholding constitutional principles, protecting human rights, and promoting economic and investment reforms.

It only stated that the procedures for the formation of the Job Creation Law needed to be repeated, with the requirement for an omnibus law as part of the registration process. Furthermore, Mahfud MD stated the government's reasons for improving the Job Creation Law through the issuance of the Government Regulation in Lieu of Law. This is because the Government Regulation in Lieu of Law on Job Creation holds the same legal status as the law itself. Based on the grounds of compelling urgency, the birth of the Government Regulation in Lieu of Law on Job Creation is the president's subjective right that does not require debate.<sup>16</sup> Of course, this statement also needs to be debated, as there are always limitations (restrictions) even within one's authority.

The enactment of the Government Regulation in Lieu of Law on Job Creation, which preceded the Job Creation Law on December 30, 2022, during a recess period, constitutes a blatant violation of the constitution. This conclusion is based on a chronological analysis of the events that occurred during the recess period. Article 52(1) of the Legislative Drafting Law explains that the

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15 Cipto Prayitno., Analisis Konstitusionalitas Batasan Kewenangan Presiden Dalam Penetapan Peraturan Pemerintah Pengganti Undang-Undang, *Jurnal Konstitusi*, Vol.17 No.3, 2020

16 Kompas., Peraturan Pemerintah Pengganti Undang-Undang Tentang Cipta Kerja Dalam Perspektif Negara Hukum, 2023

"*persidangan yang berikut*" is the first session of the DPR RI that occurs after the Government Regulation in Lieu of Law is enacted.

The subsequent session after its enactment on Job Creation would have been the Third Session of the 2022/2023 legislative year, which began on January 10, 2023, and ended on February 16, 2023. During this Third Session, it should have obtained approval from the DPR RI in accordance with the provisions of Article 22(2) and (3) of the 1945 Constitution, together with the explanation provided in Article 52(1) of the Legislative Drafting Law. However, it is worth noting that it did not receive approval from the DPR RI during the Third Session of the 2022/2023 legislative year. It eventually obtained approval on March 21, 2023, which was outside the Third Session of that legislative year.

If we strictly adhere to the provisions of the norms mentioned above, then the one that did not receive approval during the first session of the DPR RI should be revoked. Consequently, it loses its validity and can no longer be ratified by the DPR RI to become a law. This is where the significance of the time limitation, as outlined in Article 22(2) and (3) of the 1945 Constitution, in conjunction with the explanation provided in Article 52(1) of the Legislative Drafting Law, comes into play regarding the enforcement of a Government Regulation in Lieu of Law. In this context, the limitation or time constraint aligns with the president's authority to issue Government Regulations in Lieu of Law, specifically in urgent situations requiring swift enactment to be ratified as laws. Therefore, if anyone claims that the Government Regulation in Lieu of Law on Job Creation is still in effect because the approval of the DPR RI can be obtained during the Fourth Session of 2023, it can be confirmed that such a statement deviates from the law.<sup>17</sup>

Just as the right to decide a case depends entirely on the judge presiding, according to their convictions, it must still be based on two valid pieces of evidence. For the purpose of comparison, it is important to note that the evidentiary standard in accordance with the Criminal Procedure Code is established by Article 183 of the same code. This standard follows a negative statutory system, as stated in the text: The judge must not impose a criminal penalty on someone unless, with at least two valid items of evidence, they are convinced that a criminal act has truly occurred and that the defendant is guilty of committing it. In order to impose a penalty on the defendant, the following conditions must be met: Two valid items of evidence and the judge's conviction that a crime has been committed and that the defendant is guilty of committing that crime. Because evidence is the most important part of criminal procedural law, it governs how the state, through its instruments, exercises the power to prosecute and impose penalties. Certainty about the authenticity of the presented legal facts will lead to clarity regarding the legal status of the parties based on the legal arguments presented by the parties. This provides a clear picture for the judge to draw conclusions and make decisions about the facts and the culpability of the parties involved in the case. As we know, the purpose

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17 Natasha., Presiden Partai Buruh: Cabut Omnibus Law Cipta Kerja Tanpa Kata-Kata Bersyarat, *Kedai Pena*, September 11, 2023, <https://www.kedaipena.com/presiden-partai-buruh-cabut-omnibus-law-cipta-kerja-tanpa-kata-kata-bersyarat/>.

of evidence is to provide a relevant picture of the truth of an event. The panel of judges considers whether, based on the defendant's statements, the testimony of witnesses, the documentary evidence presented by the public prosecutor, and the results of on-site examinations, the defendant can be prosecuted or not. So, what is meant by evidence is that a criminal act has occurred, and the defendant has committed that criminal act, making them accountable.<sup>18</sup>

In the authors' opinion, and also regarding the considerations and/or the decree of Constitutional Court Decision Number 91/PUU-XVIII/2020, the issuance of the Government Regulation in Lieu of Law regarding the Job Creation Law is not entirely in line with the Constitutional Court's decision. This means, on the one hand, the issuance of the Government Regulation in Lieu of Law must be acknowledged as an acceptable action. However, on the other hand, President Jokowi's reasons for issuing the Government Regulation in Lieu of Law regarding the Job Creation Law are legally problematic, especially in the context of Constitutional Court Decision Number 91/PUU-XVIII/2020. The Constitutional Court's panel of judges, in Constitutional Court Decision Number 91/PUU-XVIII/2020, page 412, declared the Job Creation Law conditionally unconstitutional for three reasons. First, it was not based on a precise, standard, and systematic method of law formation. Second, there were changes in the wording of certain provisions after the joint approval by the DPR RI and the president. Third, it contradicted the principles of legislation, especially the principles of clarity of purpose, formulation, and transparency. The legislators have addressed the first reason by incorporating the omnibus law method through Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation. Regarding the second reason, the lawmakers responded by making corrections and providing more detailed additions to the substance of the Government Regulation in Lieu of Law concerning the Job Creation Law. This is exemplified, for instance, by examining the provisions related to halal certification or government administration in the Government Regulation in Lieu of Law concerning the Job Creation Law. There are more detailed regulations in the Government Regulation in Lieu of Law compared to the previous Job Creation Law. Considering the second and third reasons mentioned above, the statement made by Mahfud MD, the government's legal spokesperson, assuring us that the issuance of the Government Regulation in Lieu of Law did not violate the Constitutional Court's decision may be acceptable. As for the third reason, according to the Constitutional Court, the conditional unconstitutionality of the Job Creation Law arises because it does not adhere to the principles of legislation.

In this case, the first issue is the lack of clarity of purpose and formulation, mainly due to citation errors in referencing articles in the Job Creation Law. The second issue is the lack of transparency. The Job Creation Law was not openly discussed as determined by the Constitutional Court. According to the Court,

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18 Stiklif John Ridel Loway, Adi T. Koesoemo, and Herlyanty Bawole., Kedudukan Hakim Dalam Proses Pembuktian Peradilan Pidana Indonesia, *Jurnal Lex Crimen*, Vol.11 No.5, 2022

although various meetings were held with different community groups, they did not address the academic manuscript and the substance of the changes, leading to the public's lack of precise knowledge about the changes. The principles of clarity of purpose and formulation have been satisfied by the lawmakers through corrections made to the formulation of the Government Regulation in Lieu of Law concerning the Job Creation Law. In this context, in the authors' view, the issuance of the Government Regulation in Lieu of Law concerning the Job Creation Law can be understood. In the authors' perspective, the main issue with the Government Regulation in Lieu of Law concerning the Job Creation Law lies in the failure to fulfill the principle of transparency, which should have been addressed by the government, particularly the president, before its issuance. However, the Constitutional Court had given a maximum of 2 years to rectify the procedure to ensure openness that allows public participation in the formation process. Since the Constitutional Court's Decision Number 91/PUU-XVIII/2020, issued on November 25, 2021, until the issuance of the Government Regulation in Lieu of Law concerning the Job Creation Law on December 30, 2022, as we know, there was not enough public socialization or discussion regarding the issuance of the Government Regulation in Lieu of Law concerning the Job Creation Law. This is a problem in terms of public participation. On the other hand, there is still ample time for the next year, until November 25, 2023, to create opportunities for public participation, as mandated by the Constitutional Court. This crucial legal issue has been the subject of debate as to why the formal form of Government Regulation in Lieu of Law concerning Job Creation Law is considered contradictory to the Constitutional Court's Decision Number 91/PUU-XVIII/2020.

The Constitutional Court ordered the improvement of the law in the form of legislation and hence was given a maximum period of two years to ensure transparency in the legislative process. At the same time, the president made amendments through the formal issuance of the Government Regulation in Lieu of Law concerning the Job Creation Law, which lacked public participation. President Jokowi's urgency in issuing the Government Regulation in Lieu of Law, even though there was still a year left to provide room for public participation, cannot be simply attributed to an urgent necessity. If it is claimed that it was due to an urgent necessity, the question arises: why was it not issued immediately after the Constitutional Court's Decision Number 91/PUU-XVIII/2020, dated November 25, 2021? Why was the Government Regulation in Lieu of Law concerning the Job Creation Law only issued on December 30, 2022? It is indeed true that the issuance of Government Regulations in Lieu of Law is subject to the subjective judgment of the president. However, the Constitutional Court's Decision Number 138/PUU-VII/2009, dated February 8, 2010, page 20, emphasizes that the president's subjective judgment should not be absolute. This is because the president's subjective judgment must be based on objective circumstances, namely the presence of three conditions as

parameters for the existence of an urgent necessity, as interpreted by the Constitutional Court in the aforementioned decisions.<sup>19</sup>

Although the Government Regulation in Lieu of Law is considered to have issues, the process of challenging the Government Regulation in Lieu of Law does not go through the Constitutional Court. This is because the Constitutional Court itself does not have the authority to review Government Regulation in Lieu of Law since the 1945 Constitution of the Republic of Indonesia does not grant it the power to do so. The 1945 Constitution of the Republic of Indonesia explicitly stipulates that the authority to "review" Government Regulations in Lieu of Law lies with the DPR RI. The need in practice to review Government Regulation in Lieu of Law should be a serious consideration for the DPR RI to determine whether it is necessary to amend the 1945 Constitution of the Republic of Indonesia. The Constitutional Court cannot expand its authority based on practical needs. The opinion of the Constitutional Court on this matter should be conveyed to the DPR RI so that they can conduct a study on the issue.<sup>20</sup> Article 1, paragraph (2) of the 1945 Constitution of the Republic of Indonesia states, "Sovereignty is in the hands of the people and is carried out following the 1945 Constitution of the Republic of Indonesia." The authority granted by the sovereign, which is the people, must be exercised by the 1945 Constitution of the Republic of Indonesia and must not deviate from it.

The Constitutional Court's authority, as stated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, is limited to reviewing laws against the 1945 Constitution of the Republic of Indonesia. If this authority was expanded to include the review of Government Regulations in Lieu of Law, it could be argued that it would not be in accordance with the 1945 Constitution of the Republic of Indonesia but would deviate from it. Any expansion or even reduction of the powers of state institutions must be explicitly determined through an amendment to the 1945 Constitution of the Republic of Indonesia. The Constitutional Court's action in reviewing Government Regulations in Lieu of Law could be considered a constitutional violation because, in essence, the Constitutional Court does not have the authority to do so. If there is a genuine need for the Constitutional Court to review Government Regulations in Lieu of Law, then amending the 1945 Constitution of the Republic of Indonesia would be the solution that should be pursued by the DPR RI. However, since the issuance of Constitutional Court Decision No. 138/PUU-VII/2009 and Constitutional Court Decision No. 145/PUU-VII/2009, the court has declared its authority to adjudicate The Government Regulation in Lieu of Law, which is why individuals like Rizal Ramli and their colleagues have filed constitutional challenges.

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19 Didit Setiawan., Analisis Putusan MK Nomor 91/PUU-XVIII/2020 Tentang Pengujian Formil Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja (Undang-Undang Tentang Cipta Kerja), 2023

20 Ni'matul Huda., Pengujian Perppu Oleh Mahkamah Konstitusi, *Jurnal Konstitusi*, Vol.7 No.5, 2010

### 3.2. The Perspective of the Rule of Law

The Preamble to Indonesia's 1945 Constitution reflects the nation's core principles, guiding the creation of constitutional articles to stay true to these fundamental values. The essence of the rule of law in Indonesia is rooted in the theory of State Sovereignty, emphasizing that the ultimate authority within the state is the law. This means that all parts of the government and citizens must follow and uphold the law without exceptions, regardless of their position or title. A.V. Dicey's perspective emphasizes the foundational elements of a government under the rule of law: the supremacy of the law, asserting that the highest authority in the state is the law itself; equality in legal status for all, emphasizing impartiality under the rule of law; and a distinctive view that the constitution is not the source of human rights, but rather a platform affirming the obligation to protect pre-existing rights. In Dicey's concise framework, legal sovereignty, egalitarian principles, and the constitutional role in human rights protection collectively shape a government committed to the rule of law. In this regard concerning human rights, national and international human rights bodies have suggested various ways to strengthen the foundation of human rights in Indonesia. This fundamentally requires a systematic and continuous strategy to enhance the realization of human rights.<sup>21</sup>

Enforcing the concept of the rule of law necessitates adherence to all constitutional norms without any exceptions.<sup>22</sup> In the Theory of Law Supremacy concept, this theory teaches that government derives its power not from God, kings, or the state itself but is based on the law. It is the law that is sovereign. Both the government and the people obtain their power from the law. The principles of popular sovereignty and the rule of law must be implemented in tandem as two sides of the same coin.

Since the Republic of Indonesia, according to Article 1, Paragraph 3 of the 1945 Constitution of the Republic of Indonesia, is a democratic state based on the rule of law, it is both a democratic state governed by law (*demokratische rechtsstaat*) and a constitutional democracy that are inseparable from each other.<sup>23</sup>

Based on the concept of the rule of law, the issuance of the Government Regulation in Lieu of Law concerning the Omnibus Law on Job Creation may not be considered a good and just legal product. Quoting the opinion of Franz Magnis-Suseno (1999), the idea of the rule of law should be based on two principles. First, there should be a relationship between those who govern and those who are governed based on an objective norm that binds all parties, which is the law. Second, the law should not only meet formal requirements but also align with the idea of law, where the law should be good and just. It

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21 Max Regus., Regulating Religion in a Time of Covid Pandemic in Indonesia Context Dynamic and Implications, *International Journal of Sociology and Social Policy*, 2021.

22 Dian Agung Wicaksono and Faiz Rahman., Influencing or Intervention? Impact of Constitutional Court Decisions on the Supreme Court in Indonesia, *Constitutional Review*, Vol.8 No.2, 2022

23 Jimly Ashidqie., *Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Jakarta, Rineka Cipta, 2007.

should be good because it aligns with what society expects, and it should be just because the fundamental purpose of the law is justice.

Perhaps formally, the Government Regulation in Lieu of Law concerning the Omnibus Law on Job Creation is considered to be in line with the Constitutional Court's Decision No. 91/PUU-XVIII/2020, especially by Mahfud MD, who serves as the government's legal spokesperson. However, the issuance of this regulation was not conducted openly and, therefore, lacked meaningful public participation. This makes it questionable whether the regulation can be considered a good and just law. Since it was issued without meaningful public participation, the Government Regulation in Lieu of Law concerning the Omnibus Law on Job Creation may not align with the expectations of society. Its issuance appears to be more a result of subjective judgment and hasty government policy. In this context, the regulation was not objectively driven by pressing urgency.

In the Constitution of the Republic of Indonesia of 1945, Article 22 states: "In the event of an urgent necessity, the president is entitled to issue government regulations in lieu of laws. These government regulations must obtain approval from the DPR RI at the next session. The government regulations must be revoked if they do not receive approval".<sup>24</sup> This provision suggests that the situation is more urgently pressing and highly compelling without waiting for the conditions established by a regular law and outlines the potential consequences that cannot be delayed under a regular law. The essence of issuing Government Regulations in Lieu of Laws is to anticipate situations of "compelling urgency," indicating a compelling need to address these situations promptly. However, this must be done within the legal framework through the issuance of Government Regulations in Lieu of Laws. These regulations must be promptly discussed and ratified by the DPR RI to become laws. If they are not approved by the Dewan Perwakilan Rakyat, they must be revoked according to the law.<sup>25</sup>

Even Article 11 of the Law on the Formation of Laws and Regulations states that the content of Government Regulations in Lieu of Laws is the same as that of laws. However, the processes of creating Government Regulations in Lieu of Laws and laws are different, considering that laws are formed by the DPR RI with the president's approval, while Government Regulations in Lieu of Laws fall under the president's authority.<sup>26</sup> As per Ismail Sunny, the president's authority under the 1945 Constitution of the Republic of Indonesia includes administrative, legislative, judicial, military, diplomatic, and emergency powers. Administrative power involves the execution of laws and administrative policies;

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24 Pasal 22 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

25 Farhan Permaqi., Politik Hukum Pembentukan Peraturan Pemerintah Pengganti Undang-Undang Dalam Asas Hal Ikhwal Kegentingan Yang Memaksa (Kajian Yuridis Normatif Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2017 Tentang Perubahan Atas Undang-Undang Nomor 17 Tahun 2013 Tentang Organisasi Kemasyarakatan), Vol.14 No.4, 2017

26 Ida Zuraida., Batasan Kegentingan Yang Memaksa Dalam Pembentukan Peraturan Pemerintah Pengganti Undang-Undang (PERPPU) Di Bidang Perpajakan, *Jurnal BPPK KEMENKEU*, Vol.1 No.1, 2018

legislative power includes advancing legislative proposals and approving legislation; judicial power encompasses the authority to grant pardons and amnesties; military power relates to control over the armed forces and governance; and diplomatic power pertains to foreign relations and emergency powers.<sup>27</sup>

### **3.3. The Contents of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation and Its Urgency for the State**

The formation of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation is based on the provisions of Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that the president has the authority to establish Government Regulations in Lieu of Law. The Government Regulation in Lieu of Law on Job Creation comprehensively addresses various facets of economic development. It bolsters the investment and business ecosystem, streamlines labor and employment policies, and provides support and empowerment for cooperatives and micro, small, and medium-sized enterprises (MSMEs). The regulation also emphasizes the ease of doing business, encourages research and innovation, addresses land procurement issues, and outlines provisions for economic zones. Furthermore, it covers aspects such as Central Government investments, the acceleration of national strategic projects, and governance administration. The imposition of sanctions is a crucial component, ensuring compliance and accountability within the outlined regulatory framework. Collectively, these measures aim to foster a conducive environment for economic growth and job creation in Indonesia.

The implications of the Government Regulation in Lieu of Law on Job Creation will have a significant impact on the government, society, and specific sectors. The changes in taxation will aid companies that have suffered losses due to the COVID-19 pandemic and can improve the country's economic conditions. Providing incentives to companies investing in specific sectors is expected to boost investments in those areas and contribute to national development.

The president issues Government Regulation in Lieu of Law, which grants the president authority to create regulations in urgent situations. Nevertheless, these regulations must thereafter get approval from the DPR RI in the next session. If the regulation is not accepted, it will be withdrawn. This procedure ensures prompt response during crises while simultaneously requiring democratic approval to prevent potential abuse of power.

The implications of the Government Regulation in Lieu of Law on Job Creation will have a significant impact on the government, society, and specific sectors. The changes in taxation will aid companies that have suffered losses due to the COVID-19 pandemic and can improve the country's economic conditions. Providing incentives to companies investing in specific sectors is expected to boost investments in those areas and contribute to national development. Meanwhile, the president's basis for issuing the Government Regulation in Lieu

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27 Mohammad Zamroni., Kekuasaan Presiden Dalam Mengeluarkan Perppu (President's authority to Issue Perppu, *Jurnal Legislasi Indonesia*, Vol.12 No.3, 2015

of Law is Article 22 of the 1945 Constitution of the Republic of Indonesia, which states:

### 3.3.1. The Theory of Popular Sovereignty

Since its inception, the Republic of Indonesia has recognized and adhered to the principle of popular sovereignty or democracy. The highest authority lies with the people. Real power originates from the people, by the people, and for the people. According to this theory, the state derives its authority from its citizens, not from God or a monarch. This theory contradicts the doctrine of divine sovereignty and presents facts that do not align with the teachings of divine sovereignty. Monarchs, who were supposed to govern their subjects justly, honestly, and benevolently (under the will of God), often acted arbitrarily towards their subjects. Recall the reign of King Louis XIV in France. These realities gave rise to doubts and prompted the emergence of new ideas that gave space to human thought (the Renaissance). This new realm in the field of governance would lead to a new concept: the theory of popular sovereignty.<sup>28</sup>

This belief was a reaction to the theories of divine and royal sovereignty and later materialized in the French Revolution. Subsequently, it has come to dominate the entire world up to the present day in the form of the 19th-century myths that gave rise to the concept of popular sovereignty and representation (democracy).

### 3.3.2. The Theory of State Sovereignty

According to this theory, the existence of the state is a natural occurrence, and so is the supreme authority vested in the state's leader. In this view, sovereignty has existed since the birth of a State.<sup>29</sup> So, it is clear that the state is the source of sovereignty. Laws are binding because this is desired by the state, which naturally possesses absolute authority.

### 3.3.3. The Theory of Supremacy of Law

This theory teaches that government does not derive its power from God, a king, or the state but rather from the law. The law is sovereign, and the government and the people derive their power from it. The principles of popular sovereignty and legal sovereignty must be implemented in tandem as two sides of the same coin. Because Indonesia, according to Article 1, Paragraph 3 of the 1945 Constitution of the Republic of Indonesia, is a democratic state under the rule of law (*Demokratische Rechtsstaat*), it is simultaneously a democratic state based on law Constitutional Democracy, and these two aspects are inseparable from each other.<sup>30</sup>

### 3.3.4. The Theory of Legal Politics

The democracy that exists today is the result of a political process with its own political configuration. The political configuration of a country gives rise to a particular character of legal products within that country. In a country with a

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28 Christine S.T. Kansil, *Hukum Tata Pemerintahan Indonesia*, Jakarta, Ghalia Indonesia, 1983.

29 *ibid*.

30 Ashidiqie, *Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, page1.155.

democratic political configuration, its legal products tend to be responsive in character. This hypothesis applies to public laws that regulate power relationships or laws related to politics. As for private laws, while the hypothesis is true, its influence is not as pronounced.<sup>31</sup>

### 3.3.5. The Theory of Political Science

Political science, according to Miriam Budiardjo, encompasses various activities within a political system (or state) that involve the process of determining the goals of that system. Decision-making regarding the objectives of the political system involves the selection of several alternatives and the prioritization of the chosen goals. In order to achieve these objectives, it is necessary to establish public policies concerning the regulation and allocation of available resources. Implementing these policies requires the possession of power and authority, which can foster cooperation and resolve conflicts that may arise in the political process. The methods used can be persuasive or, when necessary, coercive. Without an element of coercion, these policies remain mere statements of intent. Politics always concerns the goals of the entire society (public goals), and it also involves the activities of various groups, including political parties and individual actions.<sup>32</sup>

Political science examines and studies "politics," as mentioned, which involves the political system of a state, decision-making, public policy or policies, power, authority, and distribution or allocation. The definition of political science can vary depending on what aspect a political science expert focuses on or pays attention to.<sup>33</sup>

### 3.3.6. The Theory of Legal Science

By definition, jurisprudence discusses and encompasses everything related to law. It is so vast in its scope that many opinions suggest its boundaries cannot be determined. In English, it is referred to as jurisprudence.<sup>34</sup> Some legal experts also argue that the study of law is the science that examines formulations of the law, which can encompass all aspects of this vast subject. Creating a comprehensive definition is indeed a challenging task, as it requires meeting various criteria, such as using as few words as possible while ensuring clarity and conciseness. Law, with its many facets, cannot be distilled into just a few sentences, making such a definition imperfect.<sup>35</sup>

### 3.3.7. The Concept of Legal Politics

The creation of legislation is intricately tied to the political configuration, which has implications for the politics of law and the emergence of regulations. According to Mahfud MD, Legal Policy or "Politik Hukum" is the legal direction set by the state to achieve the state's objectives, typically manifested through creating new laws and replacing existing ones. In this interpretation, the law must be grounded in the state's objectives and the system in place in the

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31 Mahfud MD., *Membangun Politik Hukum*, Yogyakarta, UII Press, 2003, page.67.

32 Miriam Budiardjo., *Dasar-Dasar Ilmu Politik*, Jakarta, Gramedia Pustaka Utama, 208AD.

33 Bintan Ragen Siragih., *Politik Hukum*, Bandung, CV Utomo, 2006.

34 Satjipto Rahardjo., *Ilmu Hukum*, Bandung, Alumni, 2006.

35 Lili Rasjidi., *Filsafat Hukum, Apakah Hukum Itu?*, Bandung, Remaja Karya, 1984.

respective country. Authentically, the document outlining the state's objectives in Indonesia is the Preamble to the 1945 Constitution of the Republic of Indonesia, particularly Pancasila, which gives rise to legal enforcement principles.<sup>36</sup>

The field of legal political science dissects all elements within a system, with its primary components, as categorized by Friedman, consisting of three major elements: legal substance, legal structure, and legal culture. In this context, legal political science not only encompasses the politics of law in the sense of the official direction taken by the state to enforce or not enforce laws in order to achieve State objectives, but it also encompasses the background and environment that influence it, as well as the various challenges encountered in the effort to uphold it.

### 3.3.8. The Theory of Constitutional Emergency Law

The authority of the president to establish Government Regulations in Lieu of Law is an extraordinary power in the field of legislation. Meanwhile, the authority to participate in the formation of laws, government regulations, and presidential regulations is a regular authority. The fundamental requirement that the president must fulfill in issuing Government Regulations in Lieu of Law is the presence of a "pressing emergency" or "urgent necessity." Before the amendment, article 22 of the 1945 Constitution of the Republic of Indonesia is explained as follows: "This article pertains to the president's emergency ordinance power. Such rules are necessary to ensure the security of the state, especially during pressing emergencies that compel the government to act promptly and swiftly. Nonetheless, the government remains subject to oversight by the DPR RI. Therefore, regulations issued by the government under this article, which have the same force as laws, must also be ratified by the DPR RI".<sup>37</sup>

Based on the description above, the question arises: does Article 22, paragraph (1) of the 1945 Constitution of the Republic of Indonesia have the intended meaning with the issuance of the Government Regulation in Lieu of Law on the Job Creation Law, and does it comply with the applicable provisions? The reality is that there is still an ongoing and extensive debate among legal experts because the issuance of the Government Regulation in Lieu of Law on the Job Creation Law did not comply with Constitutional Court Decision No. 91, which provided a two-year period to amend the Job Creation Law. The Government Regulation in Lieu of Law issued by the President in Number 2 of 2022 is related to Article 22 of the 1945 Constitution of the Republic of Indonesia concerning situations of pressing emergency. Its appropriateness is determined by the specific circumstances and the need to prevent legal vacuums (*rechtvacuum*), the presence of threats that endanger the state, and the consideration of policies and laws that must be carefully observed and thoroughly studied before the regulations are enforced.

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36 Mahfud MD., *Politik Hukum Di Indonesia*, Jakarta, LP3ES, 2001, page.9.

37 Bagir Manan., *Lembaga Kepresidenan*, Yogyakarta, FH UII Press, 2006, page.158.

Considering the current situation in Indonesia, the issuance of the Government Regulation in Lieu of Law on the Job Creation Law should be viewed as a policy that originates from a president in the continuity of the state system to achieve development with justice, without neglecting the rights of all citizens, including justice and welfare for citizens in various social groups, including the lower-middle class. Therefore, when it comes to policymaking related to the Government Regulation in Lieu of Law, the president's authority should take several considerations into account. The essence of issuing a Government Regulation in Lieu of Law is to anticipate a "pressing emergency" situation, which implies a compelling circumstance that requires immediate action. However, this should be done within the legal framework through the Government Regulation in Lieu of Law.<sup>38</sup> The Government Regulation in Lieu of Law must be promptly discussed and deliberated upon in order to be approved and enacted into law. If it is not approved by the DPR RI, then, by law, the Government Regulation in Lieu of Law must be revoked. The element of a pressing emergency must have the following general characteristics: (1) There is a crisis, and (2) There is urgency. A crisis exists when a grave and sudden disturbance creates an urgent necessity. Urgency arises when there is a situation that was not anticipated previously and demands immediate action without waiting for prior deliberation or when there are clear and reasonable indications that, if not regulated promptly, would disrupt both society and the functioning of the government.<sup>39</sup>

An emergency regulation (*noodregeling*) is a legal measure that arises from an emergency situation, as explained by Van Dullemen "The first is the necessity to have the highest interest of the state; the second is the necessity for the emergency regulations (*noodreggeling*); the enactment of emergency regulations (*noodreggeling*) for a temporary situation, that is, only applicable during the state of emergency. When a situation returns to normal, the ordinary regulations will apply, while the emergency regulations will no longer apply; and the fourth is upon the determination of the state of emergency, parliament cannot convene".<sup>40</sup>

The Government Regulation in Lieu of Law concerning Job Creation Law, despite becoming law, still raises issues, including among investors. Investors might reconsider their plans to invest in Indonesia if they are uncertain and perceive a lack of stability in the applicable regulations due to frequent changes in a short period. This uncertainty could lead to the cancellation of their investment intentions.<sup>41</sup> From the description above, the reality on the ground is that the submission of a formal challenge regarding Law No. 6 of 2023

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38 Andi Yuliani., Penetapan Kegentingan Yang Memaksa Dari Peraturan Pemerintah Pengganti Undang-Undang (Perpu), *Jurnal Legislasi Indonesia*, Vol.18 No.3, 2021, page. 337–50.

39 Sri Pujianti., Undang-Undang Tentang Cipta Kerja Tak Memenuhi Unsur Kegentingan Memaksa Masalah Ekonomi, 2023, <https://www.mkri.id/index.php?page=web.Berita&id=19378>.

40 Lutfil Ansori., Regulations in Liew of Statutes in States of Emergency In Indonesia, *Prophetic Law Review*, Vol.4 No.1, 2022, page. 22–47.

41 Novanto., Efektivitas Undang-Undang Cipta Kerja Dalam Pembangunan Hukum Indonesia, page. 401–11.

concerning the Determination of Government Regulations in Lieu of Law No. 2 of 2022 concerning Job Creation to the Constitutional Court is based on the argument that the Job Creation Omnibus Law did not follow the proper procedures outlined in the Legislation Formation Law.

As the Omnibus Law was discussed by the government and the DPR RI through a planning process, one of the required processes is public consultation, which should be preceded by an academic draft. However, in this case, there was no academic draft or public consultation; instead, the Government Regulation in Lieu of Law was issued. Therefore, this raises concerns, and that is why the submission to the Constitutional Court is made. The creation of the Indonesian Constitutional Court and the incorporation of socio-economic rights were the results of constitutional reform in Indonesia.<sup>42</sup> Essentially, the law and its institutions serve as a platform for resolving issues, aiming to minimize, if not completely resolve, conflicts and address them with a sense of justice. When it comes to a judicial body endowed with significant authority to interpret the constitution, the challenge extends further: ensuring that the constitution offers solutions to emerging problems and remains dynamic, actively safeguarding human rights.<sup>43</sup>

In light of this, it is hoped that the judges of the Constitutional Court will be able to make wise decisions for the benefit of all parties involved. The controversy caused by the Job Creation Omnibus Law has also attracted international attention. Consequently, in the near future, the International Labour Organization (ILO) will also express its stance by visiting Indonesia. The ILO will send a direct contact mission, led by Director-General Gilbert F. Houngbo from Togo, Africa, to examine whether the Omnibus Law violates or conflicts with ILO Convention No. 98 on the Right to Organize and Collective bargaining.<sup>44</sup>

#### **4. Conclusion**

Despite being enacted as a law, the Government Regulation in Lieu of Law still raises uncertainty, especially the constant regulatory changes that may make investors hesitant. It is essential for the government to rigorously design regulatory products in order to guarantee stability for forthcoming issues. Although several derivative regulations have been put into effect, investments remain stagnant, and the purported necessity for these regulations contradicts the positive economic growth anticipated in 2023. The government should transparently communicate the urgency, potentially considering global economic conditions. From a Constitutional Law perspective, the president's authority for such regulations should be reserved for true emergencies. An open and transparent procedure should be in place to ensure that the boundaries set

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42 Stefanus Hendrianto., Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia, *Constitutional Review*, Vol.6 No.2, 2020, page. 241 – 281

43 Bayu Dwi Anggono, Rian Adhivira Prabowo, and Yussele Nando Mardika., Constitutional Court and the Past Conflicts in Post- authoritarian Indonesia, *Constitutional Review*, Vol.9 No.1, 2023, page. 77 – 108

44 Natasha., Presiden Partai Buruh: Cabut Omnibus Law Cipta Kerja Tanpa Kata-Kata Bersyarat.

by the constitution are respected. In order to ensure compliance with decisions from the Constitutional Court and to maintain the principles of the rule of law and constitutional balance, it may be necessary to impose sanctions. As a research recommendation, it is crucial to consider revising the relevant laws to include provisions for sanctions in case of non-compliance with Constitutional Court decisions. This step is necessary to emphasize the importance of adhering to the rulings of the Constitutional Court, upholding the rule of law, and maintaining the constitutional balance of power as stipulated in the legal framework.

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