THEORY AND PRACTICE

Law

Towards Era 5.0

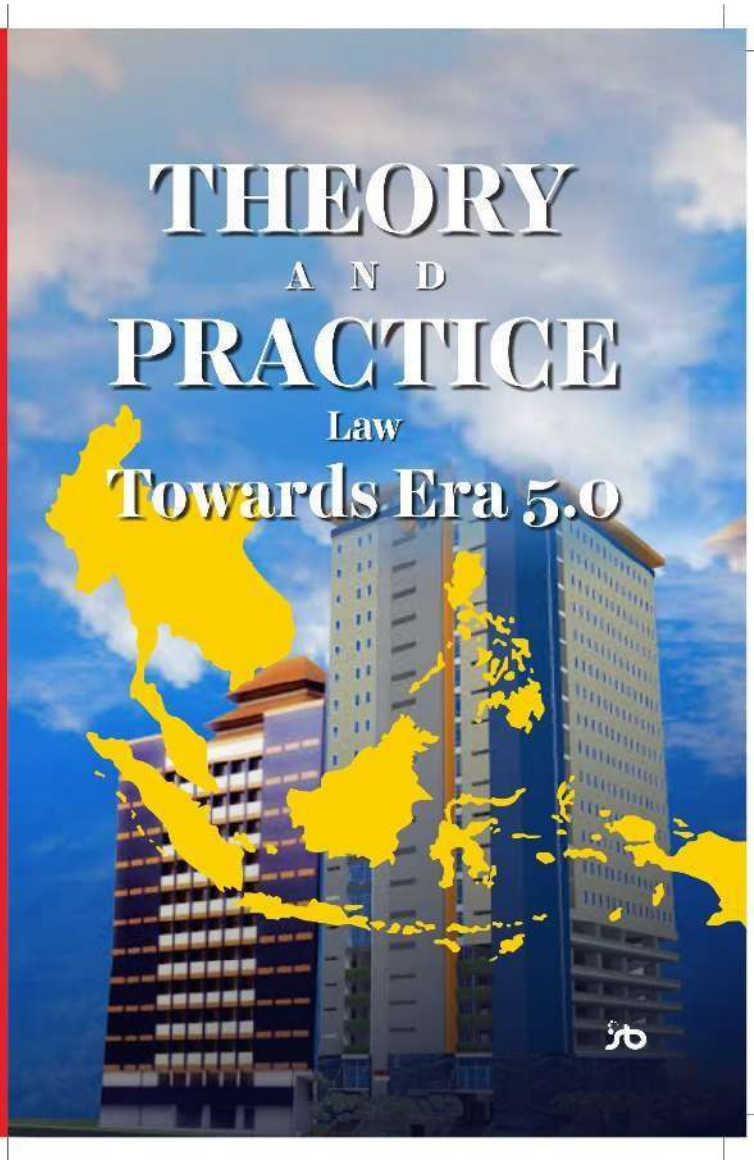
Sebagai negara hukum, prinsip hukum dan asas yang dianut adalah bahwa setiap orang dianggap mengetahui hukum dan peraturan pada saat diundangkan; ketidaktahuan akan hukum tidak dapat dimaafkan. Ketidaktahuan akan hukum umumnya dialami oleh kelompok masyarakat yang tidak mengenyam pendidikan tinggi atau mereka yang berada dalam kategori ekonomi rendah. Mereka memerlukan keadilan.

Tujuan dari keadilan adalah untuk memastikan bahwa hukum tidak hanya terbatas pada kelompok tertentu, karena menempuh jalur hukum, atau mencari keadilan melalui jalur hukum dapat memakan biaya yang mahal. Oleh karena itu, pemberian bantuan hukum secara cuma-cuma kepada masyarakat miskin merupakan salah satu bentuk pemerataan keadilan. Namun, dalam implementasinya, pemberian bantuan hukum untuk mencapai keadilan masih rendah.

Uraian tersebut adalah salah satu pokok penting yang dibahas dalam buku ini. Pokok penting lainnya dapat Anda temukan dalam buku ini yang terbagi menjadi sembilan belas bab. Buku ini diterbitkan sebagai bacaan positif mengenai penerapan hukum di Indonesia. Selamat membaca!

SAMUDRA BIRU
Menyalakan Pita Pengetahuan

THEORY AND PRACTICE Law Towards Era 5.0



Theory and Practice:

LAW

TOWARDS ERA 5.0

Sanksi Pelanggaran Pasal 113 Undang-Undang
Republik Indonesia Nomor 28 Tahun 2014 Tentang Hak Cipta

1. Hak Cipta adalah hak eksklusif pencipta yang timbul secara otomatis berdasarkan prinsip deklaratif setelah suatu ciptaan diwujudkan dalam bentuk nyata tanpa mengurangi pembatasan sesuai dengan ketentuan peraturan perundang-undangan. (Pasal 1 ayat [1]).
2. Pencipta atau Pemegang Hak Cipta sebagaimana dimaksud dalam Pasal 8 memiliki hak ekonomi untuk melakukan: a. Penerbitan ciptaan; b. Penggandaan ciptaan dalam segala bentuknya; c. Penerjemahan ciptaan; d. Pengadaptasian, pengaransemenan, atau pentransformasian ciptaan; e. pendistribusian ciptaan atau salinannya; f. Pertunjukan Ciptaan; g. Pengumuman ciptaan; h. Komunikasi ciptaan; dan i. Penyewaan ciptaan. (Pasal 9 ayat [1]).
3. Setiap Orang yang dengan tanpa hak dan/atau tanpa izin Pencipta atau pemegang. Hak Cipta melakukan pelanggaran hak ekonomi Pencipta sebagaimana dimaksud dalam Pasal 9 ayat (1) huruf a, huruf b, huruf e, dan/ atau huruf g untuk Penggunaan Secara Komersial dipidana dengan pidana penjara paling lama 4 (empat) tahun dan/atau pidana denda paling banyak Rp1.000.000.000,00 (satu miliar rupiah). (Pasal 113 ayat [3]).
4. Setiap Orang yang memenuhi unsur sebagaimana dimaksud pada ayat (3) yang dilakukan dalam bentuk pembajakan, dipidana dengan pidana penjara paling lama 10 (sepuluh) tahun dan/atau pidana denda paling banyak Rp4.000.000.000,00 (empat miliar rupiah). (Pasal 113 ayat [4]).

Theory and Practice:

LAW

TOWARDS ERA 5.0

Novita Romauli Batubara, dkk.

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KATA PENGANTAR
Dr. Ismail Marzuki, M.Pd.

Direktur Program Pascasarjana Universitas Muhammadiyah Tangerang

Indonesia, sebagaimana dinyatakan dalam Pasal 1 Ayat 3 Undang-Undang Dasar 19fi5, menjelaskan posisinya sebagai negara hukum. Dalam sebuah negara hukum, prinsip hukum, asas yang dianut adalah bahwa setiap orang dianggap mengetahui hukum dan peraturan pada saat diundangkan; ketidaktahuan akan hukum tidak dapat dimaafkan. Ketidaktahuan akan hukum umumnya dialami oleh kelompok masyarakat yang tidak mengenyam pendidikan tinggi atau mereka yang berada dalam kategori ekonomi rendah.

Mereka memerlukan keadilan. L'ujuan dari keadilan adalah untuk memastikan bahwa hukum tidak hanya terbatas pada kelompok tertentu, karena menempuh jalur hukum, atau mencari mencari keadilan melalui jalur hukum dapat memakan biaya yang mahal. Oleh karena itu pemberian bantuan hukum secara cuma-cuma kepada masyarakat miskin merupakan salah satu bentuk pemerataan keadilan.

Pasal 3fi Ayat 1 Undang-Undang Dasar 19fi5 menekankan kewajiban negara untuk hadir dalam kehidupan masyarakat.

Kehadiraninimenegaskanbahwanegaraharusmemastikanbahwa setiap warga negara atau anggota masyarakat mendapatkan hak-haknya yang tanpa diskriminasi. Proses bantuan hukum dapat dapat diakses secara langsung oleh masyarakat melalui interaksi dengan para bantuan hukum. Menurut Pasal 22 Ayat 1 Undang-Undang Nomor 18 Ľahun 2003, advokat wajib memberikan bantuan hukum secara kepada pencari keadilan yang tidakmampu. Hal ini mendorong lahirnya Peraturan Pemerintah Nomor 83 Ľahun 2008 tentang Persyaratan dan Ľata CaraPemberian Bantuan Hukum Secara Cuma-Cuma.

Berkaitan dengan hal tersebut, buku berjudul *Ľheory And Practice: Law Ľowards Era 5.0* ini hadir sebagai bacaan positif mengenai penerapan hukum di Indonesia. Pembahasan buku ini terbagi ke dalam 19 bab. Adapun bab pertama membahas tentang ”Obstacles In Implementing Passport Issuance Services In Ľhe State Of Ľhe Covid-19 Pandemic And Its Solutions (Case Study In Class 1 Immigration Office Non-Ľpi Ľangerang)” ditulis oleh Novita Romauli Batubara, Ľri Cahya Indra Permana, Gamal Abdur Nasir.

Bab kedua berjudul “Keabsahan Dokumen Elektronik Sebagai Alat Bukti Yang Sah Ditinjau Dalam Hukum Acara Perdata” yang ditulis oleh Perdi Kustiana, Syafrizal, Agus Darmawan. Bab ketiga “Ľhe Role Of Ľhe Ľangerang District Government In Implementing A Social Protection Program For Vulnerable Workers Based On Law Number 2fi Of 2011 Concerning Social Security Implementing Agency” ditulis oleh Raddani, Ahmad, dan Upik Mutiara. Masih ada enam belas bab lainnya yang perlu And abaca mengenai penerapan hokum di Indonesia. Selamat membaca!

Ľangerang, November 2023

DAFTAR ISI

LEGAL INTERPRETATION BY JUDGE IN CONSTITUTIONAL COURT DECISION NO.53/PUU-XV/2017

Ika Siti Atikah, Tri Cahya Indra Permana, Ahmad

Master of Law

Introduction

Ľhe minimum threshold requirement of 20% (twenty percent) seats in the DPR or 25% (twenty five percent) valid national votes in the Presidential election reaps many pros and cons in various circles, ranging from academics, students and the public. How could it not be, the wave of rejection with the existence of a threshold for the nomination of President and Vice President was so large, not a few have submitted a review of this regulation to the Constitutional Court. Because the existence of this nomination threshold can harm a person's constitutional rights to be able to run for President.

Ľhe article being questioned in the judicial review in the constitutional court is article 222 of law no.7 of 2017 concerning elections which states that "Candidate pairs are proposed by Political Parties or Election Contesting Political Parties that

meet the requirements of obtaining seats of at least 20% (twenty percent) of the total seats in the DPR or obtaining 25% (twenty five percent) of valid votes nationally in the previous DPR member election." Meanwhile, political observer at the University of Indonesia, Reni Suwarso said that,presidential threshold aims to screen candidates according to the nomination criteria so that concerns about the lack of parliamentary support for the elected president's work program will not occur.

As is well known, after the promulgation of the rules regarding the threshold for presidential and vice presidential nominations in article 222 of law no.7 of 2017 concerning elections, the Constitutional Court has issued several decisions related to the judicial review of the law, one of which is decision No.53/Puu-Xv/2017. Decision No. 53/PUU-XV/2017 was submitted by the Peaceful Islamic Party (Idaman Party) represented by Rhoma Irama as general chairman and Ramadansyah as general secretary of the Idaman party. According to the Petitioners, the provisions of Article 222 of the Election Law contradict Article 6 paragraph (2), Article 6A paragraph (2), and Article 6A paragraph (5) of the 19fi5 Constitution, and have the potential to harm the applicant's constitutional rights. Meanwhile, in their legal considerations, the panel of judges at the constitutional court was of the opinion that the provisions of article 222 apart from aiming to strengthen the presidential system are also an open legal policy for forming laws, in which case the panel of judges at the constitutional court reaffirmed the previous decision, namely decision no. 51 Meanwhile, in this decision there were different opinions (Dissenting Opinion) of two judges, namely constitutional judge Suhartoyo and Constitutional Justice Saldi Isra, who argued that article 222 of Law No. 7 of 2017 was unconstitutional or contrary to the 19fi5 Constitution and did not have binding legal force as

the applicant's request was grounded according to law so that the constitutional court should have granted the a quo petition.

L'he Constitutional Court as the executing agency for judicial power as mandated by the 19fi5 Constitution of the Republic of Indonesia, is one of the institutions that can achieve and realize the justice expected by the majority of people who live in the territory of a rule-of-law state. In fact, because the natureof the decision is final, which means that there are no other legal remedies that can be taken against the decision of the Constitutional Court and is binding in its entirety and has binding legal force, the Constitutional Court is considered the last place to seek justice when people feel that their justice has been harmed by the legislature and the executive in making laws and regulations. L'hus the decision of the Constitutional Court should be more representative of the public interest. Article 2fiC paragraph (1) of the 19fi5 Constitution states that the Constitutional Court is given fi main powers and one constitutional obligation, one of which is to review the law against the 19fi5 Constitution of the Republic of Indonesia.

L'he Constitutional Court in examining the law against the 19fi5 Constitution, its decision is final and binding. Based on the characteristics of the decisions of the Constitutional Court, there are decisions which state that the norms of parts of the laware contrary to the Constitution, and do not have binding legal force. In detail Article 56 of Law No. 2fi of 2003 concerning the Constitutional Court, there are three kinds of forms, namely: the application is declared inadmissible; L'he request is granted;and the Application is rejected. L'here are even variants of decisions outside of Article 56 of the Constitutional Court Law, for example decisions with a resolution granted, with conditional constitutional variants, conditional unconstitutional, decisions

that postpone the enforcement of decisions and decisions that formulate new norms.

Discussion

Legal Interpretation by Judges in Constitutional Court Decisions No. 53/PUU-XV/2017

Ľhe 19fi5 Constitution gives authority to the Constitutional Court, one of which is to review the law against the 19fi5 Constitution as stated in article 2fiC paragraph (1) of the 19fi5 Constitution. Ľhe nature of the decision is final and binding, this is evidenced by the absence of other legal remedies for the decision of the Constitutional Court. Ľhe authority to review laws against the 19fi5 Constitution that is attached to the Constitutional Court should also be interpreted as the willingness of the Constitutional Court to interpret the laws being tested without exception. Ľhe Constitutional Court is the last hope for people who feel their constitutional rights have been harmed by the enactment of a law.

Ľhe role and function of judges at the Constitutional Court is no longer as a mouthpiece for the law, but as an interpreter of the constitution. Ľhe judges of the Constitutional Court are expected to be able to provide an interpretation when indications are found of harming the constitutional rights of Indonesian citizens to the enactment of a law, with the 19fi5 Constitution as the touchstone. With the interpretation that is done

Constitutional judges are expected to be able to answer whether it is true that the law being tested violates provisions or is deemed to be contrary to the 19fi5 Constitution so that it can be said that the law is unconstitutional.

Ľhe decision of the Constitutional Court which is final and binding in fact does not make it automatically implemented and

does not seem to have absolute executive power. It can be seen from several decisions of the Constitutional Court that seem to be ignored, one example is the decision No.92/PUU-X/2012 concerning the Regional Representative Council being involved in the legislative process (not implemented by the branch of legislative power), the decision No.003/PUU-IV/2006 concerning the material nature of unlawful acts of corruption (not implemented by the Supreme Court). In addition to regarding the executive power, the decisions of the Constitutional Court are also sometimes problematic, namely when the decisions of the Constitutional Court do not clearly state who should carry out the decisions and the technical impact caused by the decisions. As in the decision of the Constitutional Court No.26/ PUU-XXI/2023 regarding the judicial review of the L'ax Court Law. L'he decision did not explain who had to initiate the transfer of the tax court, which was originally under the authority of the finance department to become under the authority of the Supreme Court.

As we know, the threshold for the candidacy of the President and Vice President is also known asPresidential L'hreshold L'his has been tested many times in the Constitutional Court, and never once has the Constitutional Court decided to revoke the article regarding this rule. L'he Constitutional Court has consistently considered that the stipulation regarding the threshold for the nomination of the President and Vice President is aimed not only at strengthening the presidential system, but also as aopen legal policy. reason thatPresidential L'hreshold aims to strengthen the presidential system as the aim of the amendments to the 19fi5 Constitution, there seems to be no correlation. In a presidential system, the President as Head of State and Head of Government is not responsible to the House of Representatives, but to the people who elect them directly and are not dependent on stability in parliament. So it can be said that there is no correlation

betweenPresidential Ľhreshold can strengthen the Presidential system.

Next regarding the reason that the provisionsPresidential threshold is an open law policyopen legal policy) is also interesting to study. Ľhe definition of open law policy formulated by the constitutional court in its various decisions, as well as the notion of open law policy conveyed both by the President and the DPRin trials for reviewing laws, shows that there is a tendency tobe interpreted as absolute freedom for legislators to formulatethe norms of laws into whatever they want (agreed on by the President, DPR and DPD).

Ľhe absence of control over the legislators (legislature) results in the tyranny of the majority, as Agresto fears. Such tyranny arose because the Act became the highest law replacing the 19fi5 Constitution (constitution). Even though the law is easier to change because the procedure for changing it is easier/ simple than the procedure for changing the constitution. If the president and the DPR, both of whom jointly have the authority to form laws, disagree in terms of the substance of the law, their positions will balance each other out. However, if the DPR and the President have agreed/agreed on a particular draft law, and then pass it, the final hope for control rests with the Constitutional Court. However, this hope is lost when it is accommodated by one of the concepts of open law policy which states that open law policy is a condition where the norms of a law cannot be tested for constitutionality.

Ľhe effect of ignoring or assuming that there is no basis for testing the norms of laws that are not regulated by the 19fi5 Constitution is the same as violating the norms of the 19fi5 Constitution itself, namely that there is no control over laws as a product of the legislature.

Next is about meaningopen legal policy in decision No. 53/ PUU-XV/2017, the authors argue that it would be dangerous if the legislators were given the widest possible freedom in making a rule of law on behalf of an open law policy. Ľhis absolute freedom raises concerns that it will be used irresponsibly to form laws that are not only detrimental to society, but aim only to benefit legislators, especially since the policy is categorized as an open law policy whose constitutionality cannot be tested. If this is indeed the case, it is feared that in the future the law which is categorized as an open law policy will become a legal product without control, moreover there is no clear boundary regarding the criteria for an open law policy itself.

When viewed in terms of meaning, the term open law policy has a potential problem of obscuring meaning. Only by reading open law policies as a mere term, discrepancies in the form of differences will immediately be found between its grammatical meaning and the actual meaning desired by the Constitutional Court. Ľhere is even a contradiction (contradiction) between those used to compose the term. Ľhe term open law policy as a legal term has failed, because it is unable to explain the concepts it contains and instead creates confusion. Ľhe thing that causes the term open law policy to experience confusion and confusion of meaning is because actually the three words that make up the term open law policy are not at the same level, degree, or category.

During the writing process, the authors drew the conclusion that there are two kinds of open law policies referred to by the Constitutional Court, namely absolute open policies which cannot be tested for constitutionality because they are considered not the authority of the constitutional court, then secondly there are open law policies which can be tested for constitutionality provided that the open law policies do not exceed authority and are not carried out arbitrarily, but then the authors find new questions regarding

the provisions regarding the meaning of open law policies which are considered constitutional by the Constitutional Court, how can a law be categorized as a constitutional open law policy, while the test stone is the same, namely L̓he 19fi5 Constitution. Why can't the 19fi5 Constitution be tested against the 19fi5 Constitution instead of testing it first in order to determine that the statute being tested falls into the category of constitutional open law policies. Furthermore, the author argues that it is possible that the provisions of the open law policy "created" by the Constitutional Court are a form of legal ignorance of the panel of judges of the constitutional court itself.

ImplicationsOpen Legal Policy In the Constitutional Court's Decision Against State Administration

In the Indonesian constitutional system, the Constitutional Courtisgivenconstitutionalauthoritytoassesstheconstitutionality of a norm. L̓he Constitutional Court has become a determining actor, especially in playing its role in examining a law against the 19fi5 Constitution. L̓here have been many decisions of the Constitutional Court that annulled the validity of content material in paragraphs, articles and/or sections in laws that conflict with the 19fi5 Constitution. In several decisions, the Constitutional Court has been active and progressive, one of which is by changing policies that have been stipulated in the law or carrying out ultra petita. L̓he action of the Constitutional Court is classified as a progressive attitude because the Constitutional Court is not only a mouthpiece for laws whose task is only to review laws with the 19fi5 Constitution but also wants to realize constitutional justice which can only be found by prioritizing ethical, moral and human values that are not found in the text of the constitution. On the other hand, the Constitutional Court does not always act actively

in getti n g involved in changing policies. Not a few decisions of the Cons t itutional Court are a form of "court's attitude of self-restraint" (judicial restraint) to test a policy by arguing that the policy is within the domain of the legislator's authority. It's just that, un til now the concept of "open legal policyWhat is meant by the Co nstitutional Court is still unclear. When does a policy fall into the category referred to as "open legal policy" and when a policy contains constitutional values so that the Constitutional Court ne e ds to examine the policy is a qu e stion that needs to be answe r ed by the Constitutional Court. I n other words, the Constitu t ional Court needs to formulate a series of measuring instruments to consider a policy that falls into the constitutional category or is included in the concept group.open legal policy".

Specific rules regarding the review of laws in Indonesia are contain e d in the 19fi5 Constitution and L a w No. 2fi of 2003 concerning the Constitutional Court as amended by Law No. 8 of 2011 concerning amendments to Law No. 2fi of 2003 concerning the Con s titutional Court. So that everyt h ing related to the implementation of judicial review of laws by the Constitutional Court must refer to the 19fi5 Constitution and the Constitutional Court A c t, although it does not rule out the possibility for the Con s titutional Court to refer to or r efer to the practice of reviewi n g laws in other countries, in th e event that there are parts/stages of reviewing laws that are not clearly regulated in the 19fi5 Constitution or the Constitutional Court Law.

Ľhe con c ept of open law policy (open leg a l policy) stated in several decisions of the Constitutional Court gave birth to various meanings. Ľhere is a Constitutional Court decision stating that an open legal policy is not within the jurisdiction of the Constitutional Court to review it, but there is also a Constitutional Court decision which stipulates that a law is considered an open legal policy and

can or even have to be tested for its constitutionality if it exceeds the legislators. L'here is even a decision of the Constitutional Court which actually granted a request for judicial review of a law which is an open law policy and is considered unconstitutional.

L'he dec i sions of the Constitutional Cour t stated several times in their considerations that the p rovisions (norms) being reviewed were open law policies (open legal policy). A norm in the Act tha t falls into the categoryopen leg al policy, then according to the C onstitutional Court these norms a re in areas that have constitutional value or are in accordance with the 19fi5 Constitution because regulatory policies are left to the legislators of the Act.

In this study, the authors found a Const i tutional Court decisio n which had the basis of consider a tion of an open law policy judge, but in its ruling granted the request, namely in the Constitutional Court decision No.112/PUU-XX/2022 concerning the mat e rial review of Article 29 letter e Law No.19 of 2019 concern i ng amendments to Law No.30 of 20 12 concerning the Corrupt i on Eradication Commission, regar d ing the minimum age req u irement and term of office for t h e leadership of the Corruption Eradication Commission.

L'his of course creates more uncertainty in interpretingthe mea n ing of the open law policy itself. Because in previous decisio ns of the Constitutional Court, the Constitutional Court was of the opinion that an open policy could not be tested, it couldbe tested with conditions, and the last one in the a quo decision was actually considered unconstitutional.

L'he inconsistency of the Constitutional Court in the meaning of open law policies in various decisions is of course very influential in the constitutional order in Indonesia. L'he absence of clear rules regarding the scope of open law policies which cannot be tested,

which can be tested, and which are considered unconstitutional, creates legal confusion, especially in terms of policy making.

Conclusion

1. Rega r ding the basis for legal considerations by the judges in the Constitutional Court decision No.53/PUU-XVII/20 1 7, the judges are of the opinion that Article 222 of Law No.7 of 2017 is constitutional. In this case the aut h or does not question the decision, because the Constit u tional Court has consistently stated that the article is constitutional considering that it has been tested m ore or less 1fi times. However, in the author's opinion , the problem is the reason that the article is constitutional, namely that the material contained in thea quo petition is an open law policy which is the realm of legislators, and is not the authority of the Panel of Judges of the Constitutional Court to examine it. A new problem was when the Constitutional Court found inconsistencies in interpreting the open law policy itself. L'his can be seen from the emergence of various decisions regarding open law policies which ended in various decisions as well.
2. Next is the implicationsopen legal policy in the decision of the Constitutional Court on the constitutional order, when viewed from the theorystep building,an open legal policy which is a norm that is considered the authorityof lawm a kers that cannot be tested against the 19fi5Constit u tion, this is contrary to the hierarchy of lawsand reg u lations that exist in Indonesia. So that the implica t ions for the constitutional order in Indonesia are uncertain. L'he highest norm of a rule of law, namely the con s titution of the 19fi5 Constitution, seems to be

unable t o function as a fundamental basis for the laws and reg u lations under it. So that it seems as if thereare oth e r norms that cannot be changed even thoughthe tou c hstone of the highest constitution is the 19fi5 Constitution.

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