

RECONSTRUCTION THE AUTHORITY OF CONSTITUTIONAL COURT ON IMPEACHMENT PROCESS OF PRESIDENT AND/OR VICE PRESIDENT IN INDONESIAN CONSTITUTIONAL SYSTEM^Ω

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Abstract

In the process of impeachment, Constitutional Court has the obligation to give its judgement to House of Representatives's opinion regarding allegation of violation by the President and/or Vice President. Constitutional Court checks and judges House of Representatives's opinion on whether or not the President and/or Vice President works fulfill Article 7A of Constitution of Republic Indonesia 1945 (UUD NRI 1945). The inspection done by Constitutional Court is the judicial process whose decision is in the form of justisil. The result of this impeachment process heavily depends on the judgement of People's Consultative Assembly in its plenary meeting which is also a politics forum, where President and/or Vice President could be dismissed or not. Constitutional Court's judgement does not apply to People's Consultative Assembly, hence, the difference of Constitutional Court and People's Consultative Assembly's judgement in plenary meeting that is very political by its nature is very likely to happen. Involvement of Constitutional Court in the procss of impeachment is, of course, different in each country. It depends on governance system in that particular country, it also relies on how much authority that is given by Constitution to Constitutional Court in the process of impeachment itself.

Keywords: authority, constitutional court, impeachment.

Abstrak

Mahkamah Konstitusi dalam proses pemakzulan mempunyai kewajiban memberikan putusan atas pendapat DPR mengenai dugaan pelanggaran oleh Presiden dan/atau Wakil Presiden. Mahkamah Konstitusi memeriksa dan mengadili pendapat DPR atas kinerja Presiden dan/atau Wakil Presiden yang dianggap memenuhi Pasal 7A UUD NRI 1945. Pemeriksaan yang dilakukan oleh Mahkamah Konstitusi merupakan proses peradilan yang putusannya berupa putusan justisil. Hasil dari proses pemakzulan sangat bergantung pada keputusan MPR dalam rapat paripurna yang merupakan forum politik, di mana Presiden dan/atau Wakil Presiden dapat diberhentikan atau tidak diberhentikan. Putusan Mahkamah Konstitusi tidak mengikat MPR sehingga sangat memungkinkan adanya perbedaan antara putusan yuridis yang dikeluarkan Mahkamah Konstitusi dengan keputusan MPR dalam rapat paripurna yang bersifat politis. Keterlibatan Mahkamah Konstitusi dalam proses pemakzulan berbeda di masing-masing negara, tergantung pada sistem pemerintahan yang dimiliki oleh negara tersebut, serta bergantung pada kewenangan yang diberikan oleh Konstitusi kepada Mahkamah Konstitusi dalam proses pemakzulan.

Kata kunci: kewenangan, mahkamah konstitusi, pemakzulan

Introduction

The idea of a constitutional state was built by legal development as a system that functional and equitable, developed by arranging super-structure and infrastructure of political institutional, economic and social orderly and organi-

zed, as well as fostered by creating cultural and legal awareness of rational and imperonal in the national and state life. Hence, the legal system needs to be built (law making) and enforced (law enforcement) as it should be, starting with the constitution as the highest legal position. To en-

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sure the enforcement of the constitution as "the guardian of the constitution".¹

The Constitution is a form of agreement of all the people (general agreement) associated with building an idealized state. Constitution applies as the supreme law because it is the highest form of social contract of all sovereign people in a country. Thus, changing the constitution is also a change in the social contract in accordance with the development and the experience of that society.² Constitution 1945 (UUD 1945) changes an essential prerequisite for building the constitutional system and more democratic political system that puts forward the sovereignty of the people, balances (checks and balances) between branches of power and guarantee of human rights. UUD 1945 change is one of the important and fundamental step to oversee the reform and to deliver the Indonesian nation towards consolidated democracy.³

UUD 1945 has undergone fundamental change, which is the establishment of the Constitutional Court (further referred as MK) specified in Section 7B, Article 24 and Article 24C of the Constitution 1945 (further referred as the UUD NRI 1945). This newly state institution is a manifestation of the power of authority of its own outside of the Supreme Court.⁴ Based on the amendment of UUD NRI 1945, the Constitutional Court has the authority to test the Constitution, to decide on dispute of the state institutions authority, the dissolution of political parties, disputes of results of the election, and to examine, judge, and decide upon the opinion of the House of Representatives (DPR) regarding to alleged violations of the law by the President and/or Vice President based on UUD NRI 1945.

The idea of the establishment of the Constitutional Court started from the debate of the

People's Consultative Assembly (MPR) after the second amendment of UUD NRI 1945 in 2001, about the possibility of a President can not be dismissed politically by House of Representatives in the presidential system of government. The polemic regarding to the legality, propriety and consistency to build and to strengthen the presidential system,⁵ especially when President Abdurrahman Wahid was dismissed in the middle of his period from his position as president.⁶

Impeachment process of President and/or Vice President in UUD NRI 1945 is not regulated firmly on the authority of the Constitutional Court to examine the opinion of the House of Representatives on alleged violations of the law by the President and/or Vice President. The issues raised in the submission of the alleged violations of law to the Court by the House of Representatives, it is not automatically binding on MPR. Based on the construction of Article 7B paragraph (7) UUD NRI 1945 allows MPR ruling out its decision even if the President and/or Vice President was proved violating law. Based on the substance of Article 7B paragraph (7) UUD NRI 1945 above, said that the function of the Constitutional Court in the context of impeachment of the President and/or Vice President is not effective, because the Constitutional Court's decision is not binding on the members of MPR. Means, a plenary meeting of MPR may produces a different decision with the decision of the Constitutional Court. The implementations of constitutional court's power in UUD NRI 1945 tends to emphasize procedural aspect than substantive aspects of the impeachment process itself.

Problem

Based on the description above, thus the needs of reflection to study the problems of

¹ Aninditya Eka Bintari, "Mahkamah Konstitusi sebagai Negative Legislator dalam Penegakan Hukum Tata Negara", *Jurnal Pandecta*, Vol. 8 No. 1, January 2013, Semarang: Faculty of Law Universitas Negeri Semarang, page 84.

² Weldy Agiwinata, "Konvensi Ketatanegaraan sebagai Batu Uji dalam Pengujian Undang-Undang di Mahkamah Konstitusi", *Jurnal Yuridika*, Vol. 29 No. 2, May 2014, Surabaya: Faculty of Law Universitas Airlangga, page 162.

³ See Watiah and Kusriyah, "Tinjauan Yuridis Hubungan Lembaga Negara antara DPD dengan DPR dalam Sistem Bicameral", *Jurnal Hukum Khaira Ummah*, Vol. 3 No. 2, September 2008, Semarang: MIH UNISSULA, page 186.

⁴ Dian Utami Mas Bakar, "Pengujian Konstitusional Undang-Undang Pengesahan Perjanjian Internasional", *Jurnal Yuridika*, Vol. 29 No. 3, September 2014, Surabaya: Faculty of Law Universitas Airlangga, page 288.

⁵ Jimly Asshiddiqie, *Sejarah Mahkamah Konstitusi RI (1)*, ceramah, <https://www.youtube.com/watch?v=Gq1LxxOkr7M>, accessed on July 6, 2015.

⁶ Ahmad Syahrizal, "Problematik Implementasi Putusan MK", *Jurnal Konstitusi*, Vol. 4 No. 1, March 2007, Jakarta: MKRI, page 107.

Constitution Court authority as regulated on Article 7B paragraph (7) UUD NRI 1945 in the reconstruction form of Impeachment of President and/or Vice President in Indonesian constitutional system.

Research Methods

This type of research is normative legal research with some research approaches including legislation approach, conceptual approach, historical approach and comparative approach. Collecting legal material is conducted with study method of literature in accordance with the approach used. All legal materials that have been collected and inventoried will then be proceed and analyzed in depth in order to obtain the ratio legis of the legal issues which is studied. Primary and secondary legal materials that have been systematically synchronized then be further assessed based on law theories in order to obtain scientific formula to answer the legal issues which is discussed on this law research.

Discussion

One of the constitutional dynamics which obviously shows a close relation between the legal and the political process is the process of dismissing the President as head of state and head of government. President dismissal process is known in constitutional practice in many countries, commonly called as impeachment.⁷

According to Mahmud MD there are two models of President and/or Vice President impeachment, those are dismissal politically (impeachment) and dismissal through a special court forum (previli-giatum). Article 7A and 7B embrace both models impeachment and previli-giatum at once. Dismissal by the MPR is a form of impeachment models and assessment by the Constitutional Court is a model form of previli-giatum. The intervention of the Constitutional

Court in the process of dismissing the President is hoping that the dismissal of the president are not based on purely political grounds but also legal reasons.⁸

Impeachment is one of the mechanism that constitutionally provided by the UUD NRI 1945 to replace the President and/or Vice President in their term of office if found in violation of the law. Impeachment of President by experts is known as extra-ordinary political event in the Presidential Government system.⁹ Impeachment is the legal retributive action based on the evidence of law. Unlike the impeachment, impeachment is a procedure where an elected public official, indicted for unlawful acts. The political process of filing an House of Representatives's opinion to prove whether the President and/or Vice President have violated the law or not by the Constitutional Court is the process of impeachment, while the concept of impeachment is an act of judgment to dismiss the President and/or Vice President of the violation that has been done.¹⁰

Based on Article 7A UUD NRI 1945, the President and/or Vice President may be dismissed in their term of office by the MPR upon the recommendation of the House of Representatives, if proven to have violated of the law in the form of treason, corruption, bribery, other felonies or misconduct, and if they do not qualify again as President and/or Vice President. Article 7B paragraph (1) of UUD NRI 1945 shows that the impeachment process after the amendment of UUD NRI 1945 involving three state institutions, namely House of Representative, Consti-tutional Court, and MPR. The existence of Consti-tutional Court as one of the holders of judicial authority in the constitutional system of the Republic Indonesia is the implementation idea of constitutionalism and to reinforce the mechanism of checks and balances.¹¹

⁷ Eko Noer Kristianto, "Pemakzulan Presiden Republik Indonesia Pasca Amandemen UUD 1945", *Jurnal Rechtsvinding*, Vol. 2, No. 3, Dec. 2013, Jakarta:BPHN, page 332.

⁸ Hananto Widodo, "Politik Hukum Interpelasi Dewan Perwakilan Rakyat Republik Indonesia", *Jurnal Rechtsvinding*, Vol. 1 No. 3, Dec. 2012, Jakarta: BPHN, page 433.

⁹ Constitutional Court decision No. 23-26/PUU-VII/2010 section of expert testimony, Saldi Isra, page. 47.

¹⁰ M. Ilham Hermawan and Dian Purwaningrum, "Mekanisme Pemberhentian Presiden (Impeachment) dan Kritik Substansi Pengaturannya Di Indonesia", *Jurnal Ilmu Hukum Amanna Gappa*, Vol. 20, No. 2, June 2012, Makasar: Faculty of Law Universitas Hasanuddin, page 157.

¹¹ See Misranto, "Mahkamah Konstitusi dalam Konstruksi Sistem Peradilan *Impeachment*", *Jurnal Perspektif*, Vol. XIX, No. 3, September 2014, Surabaya: UWKS, page 154.

Indonesian constitutional history has two impeachment of President, which are the President Soekarno and President Abdurrahman Wahid. President Abdurrahman Wahid run the government by the controversial of attitudes and policies.¹² These conditions make the political power that brought President Abdurrahman Wahid switched to resistance. The feud between President Abdurrahman Wahid began by claiming the House of Representatives to President Abdurrahman Wahid about the Yanatera Bulog funds with the amount of Rp. 35 M and the Sultan of Brunei Darussalam help US \$ 2 million.¹³ That accusation is responded by the House of Representatives by proposing the uses of rights to do an investigation approved in the plenary meeting of House of Representatives on August 28, 2000 and continued with the establishment of the Special Committee on 5 September 2000.¹⁴

President Abdurrahman Wahid took political steps by releasing the Presidential Decree which states freezing of the House of Representatives and MPR, preparing the agency to hold the general elections within a year, and total reformation of the new order elements to freeze Functional Groups party (Partai Golongan Karya).¹⁵ That Presidential Decree was rejected by the House of Representative that continues on the Special Session with the revoke mandate agenda of the president with the MPR Decree No. III/MPR/2001 concerning Determination of Indonesian Vice President Megawati Soekarno-putri as President of the Republic of Indonesia.

The dismissal of President Abdurrahman Wahid be judged unconstitutional and only in-

fluenced by the political powers without any legal process. Two principle reasons impeachment of President Abdurrahman Wahid, the president is committing acts in violation of state policy thereby inhibiting the process of constitutional because it is not agreed to attend and refused to give an accountability to the Special Session of People's Consultative Assembly.¹⁶ Thus that impeachment process full with the political nuanced and obviously injure the meaning of Indonesia as a law state (*rechtsstaat*). To avoid a repeat of the impeachment process based on political reasons, then on third change of UUD NRI 1945 the new state institution was formed, namely the Constitutional Court.¹⁷ The idea formation of Constitutional Court is one of the modern constitutional which appears on the 20th century.¹⁸ The authority of the Constitutional Court in UUD NRI 1945 related to impeachment proceedings under Article 7B jo. Article 24C paragraph (2). Based on Article 7B paragraph (1) UUD NRI 1945 impeachment is not only based on political considerations, but also based on the legal (judicial) logic, rationality and accountable.¹⁹

Constitutional Court in the impeachment process has the obligation to give a decision on the opinion of House of Representative regarding to the alleged violations by the President and/or Vice President. Constitutional Court examines and adjudicates opinion of House of Representatives on the performance of the President and/or Vice President which deemed comply the Article 7A UUD NRI 1945. Examination conducted by Constitutional Court is a judicial process that its

¹² Ahmad Syahrizal, *op. cit.*, page 107.

¹³ Muhammad Bahrul Ulum, "Mekanisme Pemakzulan Presiden dan/atau Wakil Presiden Menurut UUD 1945 (Antara Realitas Politik dan Penegakan Konstitusi)", *Jurnal Konstitusi*, Vol. 7, No. 4, August 2010, Jakarta: Sekjen dan Kepaniteraan MK, page 141.

¹⁴ Muhammad Bahrul Ulum, "Mekanisme Pemakzulan Presiden dan/atau Wakil Presiden Menurut UUD 1945 (Antara Realitas Politik dan Penegakan Konstitusi)", *Jurnal Konstitusi*, Vol. 7, No. 4, August 2010, Jakarta: Sekjen dan Kepaniteraan MK, page. 141.

¹⁵ Eko Noer Kristianto, *op.cit.*, page 337.

¹⁶ Ahmad Syahrizal, *op. cit.*, page 107.

¹⁷ Formation of Constitutional Court relates to organ theory (organ established with its role and function). Formation of Constitutional is affected by working effectivity of existed parliamentary members, which are filling problems, integrity, and other working mechanisms. Filling

problem appears when alot of manipulations happen in mechanism of parliamentary members election, when it does not become a problem anymore, problem of integrity appears from parliamentary members and becomes an obstacle. See Agung Laksono, "Dewan Perwakilan Rakyat Republik Indonesia Pasca Amandemen Undang-Undang Dasar 1945", *Jurnal Majelis*, Vol. 1 No.1. Agustus 2009, Jakarta: Sekretariat Jenderal Majelis Permusyawaratan Rakyat Republik Indonesia, page 47.

¹⁸ Bambang Sutyoso, "Kewenangan Mahkamah Konstitusi Dalam Pemakzulan Presiden dan/atau Wakil Presiden Di Indonesia", *Jurnal Konstitusi*, Vol. 7 No. 1 February 2010, Jakarta: Sekjen dan Kepaniteraan MK, page 95.

¹⁹ See Dinoroy Marganda Aritonang, "Penerapan sistem Presidensial di Indonesia Pasca Amandemen UUD 1945", *Jurnal Mimbar Hukum*, Vol. 22. No. 2, Juny 2010, Yogyakarta: Faculty of Law Gadjah Mada, page 397.

decision in the form of justisil decision.²⁰ Based on Article 83 of Law No. 24 Year 2003 concerning Constitutional Court, there are three possible decisions that may be imposed by the Constitutional Court are states the petition can not be accepted, states justify the opinion of House of Representatives and states the application is rejected.

At the level of decision-making to states the President and/or Vice President have violated the law or not as described on Article 7A UUD NRI 1945, in a plenary session of House of Representatives is certainly a political factor enough to influence, because the impeachment process can be continued depending on the political interests of the House of Representative's member, According to Article 7B paragraph (2) UUD NRI 1945, the opinion of House of Representatives that the President and/or Vice President have violated the law or do not qualify anymore as President and/or Vice President is in order to implement the control function of House of Representative. The control function according Article 20 A (2) UUD NRI 1945 consists of Interpellation Rights, Inquiry and Express the opinion Rights. If look at the content of article 7B paragraph (2) UUD NRI 1945, the control function referred to in this Article is the right to express opinions. However, in the context of the dismissal of the President and/or Vice President because they have violated to the law, then the uses of Right to Express the opinion must be preceded by the use of inquiry rights to investigate whether the President and/or Vice President were actually violated the law.

Inquiry rights according to Law No. 17 Year 2014 concerning People's Consultative Assembly, House of Representatives, Regional Representatives Council, and Assembly at provincial is the right of House of Representatives to conduct an investigation on the implementation of a law and/or the Government policy with regard to the

important things, strategically, and have broad impact on society, nation and state that allegedly discord to the law regulations.

The function of inquiry rights in this case is a form control of the House of Representative to the President. House of Representative control against President is a form of checks mechanism and balances between state institutions.²¹ This is as ada-gium propounded by Lord Acton are "Power tends to corrupt, absolute power corrupts absolutely".²² This inquiry rights if the president proved to have violated can continue on the Rights Express Opinion which is a form of official opinion as defined in Article 7A UUD NRI 1945. Rights Express Opinion will be brought on Constitutional Court to be examined and decided, if Constitutional Court decided to the President and/or Vice to President proven to have violated to the law, next will be proposed by House of Representatives to People's Consultative Assembly.

That Constitutional Court's decision is only binding on House of Representatives as an applicant of impeachment as meant in Article 19 paragraph 5 of the Constitutional Court Regulation Number 21 Year 2009 concerning Guidelines Litigation Proceedings In Breaking the House of Representatives Opinion Regarding Alleged Violations by President and/or Vice President. Constitutional Court Regulation explicitly mentions "Court decisions shall be final and legally binding for the House of Representative as applying". The problem is that the Constitutional Court ruling is only binding on the House of Representative, so that MPR is not bound by a decision of the Constitutional Court.

Involvement of Constitutional Court in impeachment process is different in each country, it depends on governmental system used by its country and authority given by Constitution to Constitutional Court in impeachment process. Several countries, such as Thailand in impeachment process is conducted towards state offi-

²⁰ Laica Marzuki, "Pemakzulan Presiden/Wakil Presiden Menurut Undang-Undang Dasar", *Jurnal Konstitusi*, Vol. 7, No. 1, February 2010, Jakarta: Sekjen dan Kepaniteraan MK, page 20.

²¹ Irfan Nur Rachman, "Politik Hukum Pengaturan Right to Vote and Right to be Candidate dalam Undang-Undang Pasca Putusan Mahkamah Konstitusi", *Jurnal Konstitusi*,

Vol. 10, No. 2, June 2013, Jakarta: Sekjen dan Kepaniteraan Mahkamah Konstitusi, page 313.

²² See Jamin Ginting, "Perjanjian Internasional dalam Pengembalian Aset Hasil Korupsi di Indonesia", *Jurnal Dinamika Hukum*, Vol. 11, No. 3, September 2011, Purwokerto: Faculty of Law Universitas Jenderal Soedirman, page 436.

cial, especially the Prime Minister, which actually has no authority strong. This is appear in the Thai Constitution mentioned in Section 270 itself is not strong. In Section 270 Constitution of The Kingdom of Thailand 2007 stated: "... President of the Constitutional Court ..., may be removed from office by the Senate."

Authority filed impeachment in the Thailand constitution by senate amounted no less than $\frac{1}{4}$ of all Senate members have already filed impeachment to public officials, the impeachment may also be filed by at least 20,000 citizens of Thailand who already have vote right that signed a petition for filed to the Thailand Senate. The filing of an impeachment in Thailand has a distinction in the process, for the post which is not a political office, so that's the authority to check fall to Attorney General of Thailand, while for political office the authority to check fall in Thailand Supreme Court. In a process the one who has political office when impeached will be examined by the Criminal Division's Supreme Court, and if the crime is corruption of political officials then checked by the Corruption Eradication Commission (KPK). After being examined by Supreme Court, then the decision issued is final.

As in Thailand, South Korea was a lot of public office that can be impeached, in accordance Article 65 Constitution of The Republic of Korea 1987 states that: "In case the President, ..., the National Assembly may pass motions for their impeachment." For filing impeachment to public officials other than the president must be filed by $\frac{1}{3}$ of Parliament members, while president must be filed by $\frac{2}{3}$ of the number of Parliament members. During the impeachment process is carried out, the officials concerned must be disabled from his position and the decision of an impeachment not only cause the officer lost his job, but can also be prosecuted in a civilly or criminal liability.

The impeachment based on UUD NRI 1945 be done because there was lawlessness and misconduct that was done by the President and/or

Vice President, therefore the impeachment completion should be through legal liability, not political accountability. The Constitutional Court decision in Article 24C paragraph (2) UUD NRI 1945 can be given strong legitimacy as the authority of Constitutional Court which is regulated in Article 24C paragraph (1) UUD NRI 1945, which indicates that the Constitutional Court's decision is final. Thus the Constitutional Court decision should be the Parliament institutional opinion no longer be a proposal which was taken at the plenary meeting of the Assembly.

The plenary meeting of the Assembly should be the Parliament proposal legalization forum that has proved a foul through the decision of the Constitutional Court. Therefore, the quorum system in a plenary session of the Assembly must be disregarded because of differences in the context of the plenary meeting to another, in order to minimize the political process into the legal process. This is in accordance with Article 1 (3) UUD NRI 1945 which states that Indonesia is a country of law (*rechtstaat*) is not a state based on power alone (*machtstaat*).²³

Based on the description above, required norm completeness in Article 24C paragraph (2) UUD NRI 1945 which states that Constitutional Court decision into alleged violations of law by the President and/or Vice President shall be final and binding not only on Parliament as stated in PMK No. 21 Year 2009, however bind well to the MPR, because Constitutional Court decision is *erga omnes* means legal effects binding everyone. The Assembly Entanglement in the Constitutional Court's decision should be realized in the reflection of Article 7B paragraph (5), (6) and (7) the Constitution was changed to UUD NRI 1945 to authorize/upheld the ruling of the Constitutional Court. Thus the legal liability embodiment to president of the offense can not be separated because of the political process alone. More than that to implement in Indonesia as a state of law must be minimized so that the elements in the main political impeachment case against the president who violated the law.

²³ Compare to Lisdhani Hamdan Siregar, "Implikasi Putusan Mahkamah Konstitusi dalam Pemakzulan Presiden dan/atau Wakil Presiden di Indonesia", *Jurnal Konstitusi*, Vol.

9, No. 2, June 2012, Jakarta: Sekjen Kepaniteraan MK, page 290.

Conclusion

Based on the statement above, one purpose establishment of the Constitutional Court in order to avoid unconstitutional process impeachment, even though the authority of Constitutional Court in the process impeachment was not effective due to the norms in UUD NRI 1945 concerning impeachment. The fact that although has set explicitly in UUD NRI 1945, impeachment procedure still has quite complicated problems, where Article 7B paragraph (7) UUD NRI 1945 has not quite provide the answer whether the Assembly should be bound by the decision of the Court. Thus it should be, first, upheld the ruling of Constitutional Court related to violation of the law and misconduct that was done by the President and/or Vice President, the second plenary meeting of the Assembly only aims to ratify the Constitutional Court decision, to minimize the political process of impeachment, so that the synchronization between Constitutional Court decision and a Assembly decision, because the Court decision is *erga omnes*.

Recommendations

UUD NRI 1945 needs to be changes related impeachment, because, *first*, gives broad authority to Parliament related inquiries and investigation of law violations of law or misconduct committed by the President and/or Vice President, *Second*, it need for completeness norm in Article 24C paragraph (2) UUD NRI 1945 which states that the Court decision on alleged law violations and misconduct by the President and/or Vice President is final and binding not only on Parliament as stated in PMK No. 21 Year 2009; *Third*, the Constitutional Court ruling binds to Assembly, because the Constitutional Court's decision is *erga omnes* means legal effects binding on everyone.

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