

**The constitutional court function of the Indonesian state
concerning system for the implementation impeachment of
the president and/or vice president**

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Abstract

Impeachment is an accusation or indictment of the President or another country's high officials from his position. Impeachment is not new in the history of Indonesian constitution, but the change in the Constitution has caused a change in the constitutional system as well as related to the mechanism of the dismissal of the President and / or Vice President. how is the Impeachment reviewed globally, the history of impeachment in Indonesia and the implementation of impeachment in other countries, the impeachment process of the president according to the 1945 Constitution of the Republic of Indonesia. The process of impeachment in Indonesia after changing the constitution goes through three stages, namely impeachment in the House of Representatives, the Court The Constitution, and the People's Consultative Assembly.

Keywords: *Impeachment, Constitutional Court, Government*

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1. Introduction

Before the amendment to the 1945 Constitution the regulation on Indonesia as a rule of law was contained in an explanation that said "Indonesia is a state based on law (rechtsstaat), not based on mere power (machtsstaat)". From this regulation it can be understood that the state including the government and other state institutions in carrying out any action whether it is their responsibility or obligation, or their rights or authority, must refer to the applicable legal rules or in other words must be legally accountable. "The definition of the rule of law proposed by Muktiar'as, is a state whose structure is regulated as well as possible in the law, so that all powers of the instruments of government are based on law. People must not take actions that are against the law.(Ranadireksa, 2009)

In Indonesia the case of dismissal of the President and / or Vice President follows a mixed process, namely the political process and the "previlegiatum forum." the people through political judgment and decisions. Whereas the previlegiatum forum is in a special court system, namely the Constitutional Court, which is essentially a violation of the law specified in the constitution with a legal ruling. The court forum (previlegiatum forum) is needed because it is not possible to try these officials in an ordinary court so that the court can proceed fairly and impartially. The dismissal of the President and / or Vice President is a special mechanism which is certainly expected to only occur in exceptional cases, or even is expected to never occur. A President and / or Vice President is a central figure of a country who, of course, is expected to never violate the law. However, if the violation occurs, the President and / or Vice President must still be legally responsible.

The period of Indonesia's transition to a democratic ideal is one of the processes that has become an important stage of Indonesia's development. One aspect that is part of the process of Indonesia's transition to democratic ideals is a change in the state administration which includes the process of changing the Indonesian constitution in 1945 (the 1945 Constitution). The 1945 Constitution has undergone fundamental changes from the First Amendment in 1999 to the Fourth Amendment in 2002. In Article 83 paragraph (1), (2) and (3) of Law Number 24 Year 2003 concerning the Constitutional Court. Republic of Indonesia. (Asshiddiqie, 2003) :

- (1) If the Constitutional Court is of the opinion that the application does not meet the requirements referred to in Article 80, the ruling states that the application cannot be accepted.
- (2) If the Constitutional Court decides that the President and / or Vice President are proven to have violated the law in the form of treason against the state, corruption, bribery, other serious crimes, or despicable acts and / or is proven that the President and / or Vice President no longer meets the requirements as President and / or Vice President, the verdict states that it justifies the opinion of the DPR.
- (3) If the Constitutional Court decides that the President and / or Vice President are not proven to have violated the law in the form of treason against the state, corruption, bribery, other serious crimes, or despicable acts and / or are not proven that the President and / or Vice President are no longer fulfilling the requirements of President and / or Vice President, the verdict states that the application is rejected.

If you look a little at the history of Indonesian state administration with regard to the impeachment of the dismissal of President Abdurrahman Wahid, it is seen that it is only based on political interests, starting with the non-acceptance of explanations conveyed by the President in the First and Second Memorandum in the case of buloggate and bruneigate, which finally made the President take political action with issued a Presidential Decree declaring the dissolution of parliament and will soon hold a general election, the decree finally made members of the Parliament accelerate the Third Memorandum with the agenda of revoking the president's mandate, when referring to MPR Decree Number III / MPR / 1978, the dismissal of President Abdurrahman Wahid did not fully follow the existing rules, the dismissal is impressed only against the Presidential Decree, so that the mechanism that has been arranged is not implemented as it should.

Issues relating to this Impeachment still require some more in-depth research, especially relating to whether the Impeachment process is subject to the principles and principles contained in criminal law and criminal procedure, or should a separate procedural law be prepared? ; the relation between the Impeachment process and the principle of *nebis in idem* in criminal law; the relation between the Impeachment process and the principle of equality before the law; and the relation between the Impeachment process and the principle of supremacy of law.

2. Method

This research is a normative legal research (normative juridical), which is a research conducted and aimed at written legislation and various literature relating to the problems in the article. The research in this article was carried out with an inventory of positive law relating to law in the field of State Administrative Law concerning the impeachment of the President (Impeachment). The data used in this thesis research are secondary data. The secondary data referred to are legal books, magazines, scientific

papers or other books related to this article. Such as legal seminars, magazines, related scientific papers and several sources from internet sites related to the above problem. As for the method of data collection using the method (Library research), namely conducting research with various reading sources such as: legislation, books, magazines, internet, scholars opinions and other materials related to the formulation of the problem that the author has determined. Secondary data that have been obtained are then analyzed qualitatively in a qualitative way to address the problems in this paper.

3. Finding and Result

Impeachment as a monitoring and enforcement system

In a presidential system of government as a means of oversight of the president which is often used by the parliament and opposition politicians to provide an oversight and provide a threat to the person who will commit an offense. The term Impeachment comes from the word "to impeach", which means to hold accountable. If the charges are proven, then the penalty is removal from office, or dismissal from office. In other words, the word "Impeachment" itself is not a termination, but only a prosecution based on violations of the law committed. Therefore, said Charles L. Black, "Strictly speaking, 'Impeachment' means 'accusating' or 'charge'." That is, "the word Impeachment in Indonesian can be interpreted as an indictment or accusation". (Asshiddiqie, 2007) Thus it is clear that an impeachment process or impeachment is an indictment of a system given to public officials in this case the President and / or Vice President to overthrow his position because he has committed gross violations and things that are not justified by the Regulations -invitation. Through its five constitutional authorities, the Constitutional Court oversees the Undang-undang Dasar 1945 in order to realize the ideals of the rule of law and a democratic state. (Fadjar, 2006) With the imposition of additional criminal sanctions in the form of revocation of the right to vote and be elected in public office against perpetrators of criminal acts of corruption will be able to give rise to what is the goal of punishment, namely the Retaliation and deterrent effect. (Amrullah, 2017)

3.1. Understanding Impeachment and its application in Indonesia in accordance with the Undang-undang Dasar 1945.

The existence of reforms, led to the amendment of the 1945 Constitution so that it also automatically changed the Indonesian constitutional system. Amendments to the 1945 Constitution have also regulated the mechanism for dismissing the President and / or Vice President. If we look at the history of Impeachment in Indonesia. Before the amendment to the constitution 1945, the MPRS dismissed President Soekarno, namely the political process in Parliament was carried out first and then the legal process in court. Although it was never carried out by President Sukarno it was another matter, but the 1967 MPR Decree Number XXXIII clearly determined that after Sukarno became an ordinary citizen then the legal process would be settled in court. After the amendment to the Undang-undang Dasar 1945, the mechanism of impeachment of the President and / or Vice President is carried out according to the Undang-undang Dasar 1945. The political process and legal proceedings proceed at the same time as the flow determined by the constitution. Which is, the opinion of the DPR must first go through the *privilegium forum* in the Constitutional Court in order to maintain the position of President and / or Vice President which can be dismissed on subjective grounds. after a Constitutional Court ruling verifies the opinion of the DPR, the Court then returns it to the DPR to be proposed / not proposed to the MPR.

In the context of the use of impeachment in a legal process in Indonesia, this can be interpreted in terms of an activity in violation of the law, which is not only due to an interpretation of the political dynamics that arise. Nevertheless, in practice the implementation of the Impeachment institution is aimed not only at the power of the President and / or Vice President as head of state or head of government but at every level of position in the structure of state government both in the form of a presidential system and in parliamentary government systems.(Soimin, 2009)

In a state order where each State regulates a process and mechanism of impeachment that might be possible in a history of the state. Considering that there are no humans who are perfect in leading so mistakes can occur in the process of leading the State. Impeachment can happen to anyone and any country because this is a legitimate mechanism and system and there must be regulation in each country for the sake of creating legal certainty and legal order. Provisions regarding the Impeachment of the president and / or vice president are usually regulated in the constitution used by a country. The description of the reasons that can justify the implementation of the Impeachment and how the mechanism of the Impeachment is carried out is generally explained in the constitution. This is because impeachment is an important and crucial part in a country's state administration system. That is why in almost all democratic countries the provisions regarding the Impeachment are clearly and explicitly regulated in the constitution.(Asshiddiqie, 2010)

The implementation of the Impeachment that occurred during the leadership of the old order, the new order and even the reforms have not been in accordance with the provisions contained in the constitution of the State of Indonesia, such as First President Ir Soekarno, Second President Jend (Retired) Soeharto and KH Abdurahman Wahid which in the context of impeachment that has been happened at that time not yet in accordance with the rules of correct application. The impeachment that occurred at that time still prioritized the political factor towards the intervention of the authorities in the government circle where there was so much pressure and dynamism of the political aspects that this political factor made it a process of continuing impeachment.

Indeed, we know in advance that impeachment or impeachment is a mechanism of indictment of the mistakes of State Officials in this case the President and / or Vice President in the context of criminal or prime violations both in terms of betrayal of the State, scandal, corruption and others in accordance with statutory regulations laws that apply. This makes a problem difficult because there is an uncertainty in the process of implementing law enforcement, even though we know that in the context of law enforcement, it must prioritize the principles of legality and honesty in all actions that can occur to every state official. The excitement of different perceptions between President Abdurahman Wahid and the House of Representatives regarding the reasons for his dismissal prompted the eyes of the MPR to immediately form an institution that could resolve fairly if such a dispute occurred in the future. President Abdurahman Wahid was dropped in the Special Session of the People's Consultative Assembly because it was considered to have seriously violated the direction of the state, while the President considered that the basis used by the People's Consultative Assembly was not strong and unconstitutional. (Marwan, 2004)

In the Undang-undang Dasar 1945 in which it regulates the forms and systems of the State that describe the Indonesian government system is adhering to a presidential system, the executive institution is held by the President as the head of the State as well as the head of government, although in the historical period of the Indonesian

constitution the President did not play a role as he should, although Indonesia adheres to presidential governmental systems often applying them like a parliamentary government system. The position of president is only a symbol of the head of state. In a parliamentary system, the Prime Minister can imply an Impeachment, but that is through a mechanism of no-confidence motion by the parliament which is often based solely on political reasons. With the wrong system and implementation so that impeachment during the era of the old order, the new order and even reforms are not in accordance with the status of *grund gesetz* in Indonesia is the Undang-undang Dasar 1945.

The dismissal process can only be carried out after a constitutional process is preceded through the Constitutional Court (MK) which will examine, try and decide upon the DPR's opinion that the President and / or Vice President have committed violations of the law in the form of betrayal of the state, corruption, bribery, other serious crimes, misconduct, or no longer qualify as President and / or Vice President. The possibility of dismissal of the President and / or Vice President during his term of office by the People's Consultative Assembly on the proposal of the DPR is technically referred to as Impeachment.

The dismissal of President Abdurrahman Wahid was seen as only grounded in political interests, beginning with the lack of acceptance of the explanation given by the President in the First and Second Memorandums in the case of buloggate and bruneigate, which finally led the President to take political action by issuing a Presidential Decree declaring the dissolution of parliament and immediately holding general elections, the decree finally made members of the DPR accelerate the Third Memorandum with an agenda to revoke the mandate of the President, when referring to MPR Decree Number III / MPR / 1978, the dismissal of President Abdurrahman Wahid did not fully follow the existing rules, the dismissal seemed to be only against Presidential Decree, so that the mechanism that has been arranged is not implemented as it should.

The dismissal of President Sukarno and President Abdurrahman Wahid showed that the legal basis, reasons and mechanism for dismissing the President were unclear, so that the dismissal of the President was based on the subjective views and judgments of members of the DPR, so that the MPR could dismiss the President at any time without a clear reason. During the period of re-enactment of the Undang-undang Dasar 1945 until the resignation of President Soekarno in 1967 during the leadership of the old order, arrangements for Impeachment were still not made as clearly as it is today. The impeachment process during President Soekarno's leadership did not go through the due process of law but only through a quick mechanism where there was a withdrawal of the mandate by the Provisional People's Consultative Assembly (MPRS) through MPRS Decree Number XXXIII / MPRS / 1967 where in the motion it was said that the majority of the members could not accept a responsibility of President Soekarno which was explained at the time, which he named Nawaksara, regarding the causes of the G 30S / PKI incident. So that impeachment at that time was still far from the correct juridical foundation in accordance with the proper implementation of State administration law. Another example also occurred in the era of KH Abdurrahman Wahid's leadership where in its implementation again there was a process that was passed regarding the impeachment of the president at that time, where there was a provision that was not fully obeyed by members of the People's Consultative Assembly when conducting Impeachment of President KH Abdurrahman Wahid. Because, at that time the majority of MPR members gave their political views related to the

interpretation that the MPR could make an accelerated Memorandum when there were coercive circumstances but the coercive conditions here were even multiple interpretations so that legal certainty was still biased and gray. However, what is real is "that the MPR can dismiss the president from his position at any time (right hem op elk gewenst moment solitude) or can impose a dismissal sentence (op straffe van ontslag)". (Mahendra, 1996)

3.2. Mechanism of Impeachment According to Article 7A of the 1945 Constitution of the Republic of Indonesia Republic of Indonesia Amendments and Implications

The Impeachment process is the implementation of the DPR's oversight function which according to the Constitution must go through the Constitutional Court. Therefore, the applicant in the Impeachment case is the DPR itself which asks for opinions that have been decided according to political mechanisms. In article 2 paragraph 1 of the Constitutional Court Regulation (PMK) Number 21 of 2009 concerning Guidelines for Procedure in Deciding DPR Opinions Regarding Alleged Violations by the President and / Vice President it is said that the Party requesting the Constitutional Court's decision on the DPR's opinion is the DPR represented by the DPR leadership who can appoint his attorney. So the conclusion is not arbitrary members of Parliament who can submit applications to the Court.

Then in article 2 paragraph 2 PMK No.21 of 2009 explained about who is the party requested in the case of Impeachment namely "is the President and / or Vice President who can be accompanied and / or represented by their legal counsel". (Abdul Latif, 2009). Furthermore Article 24C of the NRI Constitution gives authority to the Constitutional Court as a *prevelegiantum* forum justice to prove the DPR's allegations of violations of the President relating to certain legal violations and the fulfillment of conditions as President and / or Vice President. Certain acts as referred to in Article 7A contain the character of criminal juridical aspects, so they are also subject to the principles of criminal law in general. One of the principles that appears in the formulation of Article 7A is the principle of formal legality as well as the principle of material legality. The application of formal legality principles appears in the categorization of several criminal acts regulated in the Criminal Code, such as betrayal of the state, and serious criminal offenses, as well as non-criminal offenses regulated outside the Criminal Code, such as corruption, bribery and other serious criminal offenses. The reason for impeachment based on no longer fulfilling the conditions as PRESIDENT and OR VICE PRESIDENT is based on two categories:

- a. The reason for impeachment is because the requirements of the PRESIDENT and OR VICE PRESIDENT are not fulfilled as stipulated in Article 6 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, namely: 1) Indonesian citizens since their birth and have never received another nationality of their own accord, 2) have never betrayed the country, and 3) are able spiritually and physically to carry out their duties and obligations as PRESIDENT and OR VICE PRESIDENT.
- b. The reason for impeachment is because the requirements of the PRESIDENT and OR VICE PRESIDENT are not fulfilled as stipulated by the Law on Election of PRESIDENT and OR VICE PRESIDENT.

In brief, the impeachment procedure can be described as follows; First, the termination proposal can be submitted by the Parliament to the MPR only by first

submitting a request to the Court to examine, hear, and decide upon the OPR's opinion that the President violates the provisions contained in Article 7 A of the 1945 Constitution. Submitting a DPR's request to the MK can only be done with the support at least 2/3 of the total number of DPR members present at the plenary session which is attended by at least 2/3 of the total DPR members. (Isra, 2007)). As explained earlier, the 1945 Constitution prior to the amendment, although not explicitly and completely, has stipulated the provisions regarding the dismissal of the President and / Vice President during his term of office. These provisions are regulated in the Elucidation of the 1945 Constitution. Part VII Elucidation of the 1945 Constitution states: "If the DPR considers that the President has truly violated the state guidelines set by the Constitution, or by the MPR, the DPR may be invited to conduct a Special Session, in order to hold the President accountable for his actions. However, as expressed by Denny Indrayana, there is no regulation in any part of the 1945 Constitution which explicitly states that the consequence of the Special Session is the removal of the President.

Further arrangements regarding the authority of the MPR to dismiss the President during his term of office are stipulated in the MPR Decree. The MPR's Tap is the Tap. MPR Number III / MPR.1978 concerning Position and Working Relations of State Higher Institutions. In Article 4 Tap. The MPR is regulated regarding the power of the MPR to remove the President from his position before the end of his term of office, in the event that the President violates the state policy. Subsequent dismissal procedures are also regulated in Tap. MPR governing the Composition and Position of the MPR. In accordance with Article 7A of the 1945 Constitution, there are only two groups of reasons for the dismissal of the President and / or Vice President that the DPR can ask the Court to decide whether the DPR's opinion is true or not, namely the reason for violating the law or no longer fulfilling the requirements of President and / or Vice President . The reason for violating the law was determined limitatively by the 1945 Constitution, namely only in violation of the law in the form of betrayal of the State, corruption, bribery, other serious crimes, or despicable acts. The Court's decision on the DPR's opinion consisted of three possibilities. First, the Court's decision states that an application cannot be accepted if the application does not meet the requirements. Second, the decision of the Constitutional Court's decision states that it justifies the opinion of the DPR if the President and / or Vice President are proven to have carried out the alleged actions. Third, the decision of the Constitutional Court's decision states that the petition is rejected if the President and / or Vice President are not proven to have carried out the alleged actions.

The existence of reforms, led to the amendment of the 1945 Constitution so that it also automatically changed the Indonesian constitutional system. Amendments to the 1945 Constitution have also regulated the mechanism for dismissing the President and / or Vice President. If we look at the history of Impeachment in Indonesia. Before the amendment to the 1945 Constitution, the MPRS dismissed President Soekarno, namely the political process in Parliament was carried out first and then the legal process in court. Although it was never carried out by President Sukarno it was another matter, but the 1967 MPR Decree Number XXXIII clearly determined that after Sukarno became an ordinary citizen then the legal process would be settled in court.

The separation of the provisions above can be argued that, the Constitutional Court has authority over the four powers granted in paragraph (1). Whereas the provision governing the obligations of the Constitutional Court is to decide upon the opinion of the DPR as stated in paragraph (2). The Constitutional Court, according to

article 7B and article 24C, has the authority not only to examine the law against the constitution but also includes. (MD, 2010)

- a. Testing of laws against the Constitution;
- b. To adjudicate authority disputes between state institutions whose authority is granted by the Constitution
- c. Decide upon the dissolution of political parties
- d. Checking and resolving disputes over election results.
- e. Since the promulgation of Law No. 12 In 2008, the Constitutional Court was given new authority, namely to examine and decide upon disputes over the results of regional head elections.

The obligation to decide upon the opinion of the DPR that the President and / or Vice President has committed certain violations according to the Constitution and / or the President and / or Vice President no longer meets the requirements. To clarify the impeachment context that will occur as well as the implications, the higher is given the impeachment proposal submitted by the Parliament to the Constitutional Court could end with the following three possibilities: First, the Constitutional Court refuses or cannot accept the DPR's opinion / proposal on impeachment. As a result, the impeachment process cannot proceed to the Special Session of the MPR; Secondly, the Constitutional Court confirmed the DPR's opinion or proposal on impeachment, then the MPR held a Special Session of the MPR which ended with the dismissal of the president; Third, the Court confirmed the opinion or proposal of the DPR regarding impeachment, but the Special Session of the MPR decided not to dismiss the President. (Siahaan, 2005). That the decision of the Constitutional Court is final and binding. This basis in relation to the authority to examine the law against the constitution, to decide on disputes over the authority of state institutions whose authority is given by the basic law, to decide upon the dissolution of political parties and to decide disputes about the results of general elections or obligations in deciding the opinion of the DPR, the decision of the Constitutional Court are final and legally binding. The impeachment of the Vice President is not only due to political reasons or mechanisms, but also through legal mechanisms. The legal mechanism referred to in Article 7B of the 1945 Constitution of the Republic of Indonesia is through a process in the Constitutional Court. The Constitutional Court is now making Constitutional Court Regulation (PMK) No. 21 of 2009 concerning the Procedures for the impeachment of the President and Vice President, so that here it increases the difficulty of impeachment of Vice President Boediono. So, the Constitutional Court Regulation (PMK) was made to avoid the politicization that occurred in the DPR, because the Constitutional Court is a special court that assesses whether the President and Vice President can be dropped or not. The Constitutional Court can overthrow or actually save the president and or the vice president.

In the case of impeachment of the president and / or vice president the impeachment process can be carried out, it does not have to wait for the criminal law process to finish, because impeachment is a domain of state law that is different from the realm of criminal law which adjudicates the alleged abuse of authority and criminal acts of corruption. If the DPR wants and decides to propose impeachment to the Constitutional Court before law enforcement officials prove guilty, the Constitutional Court can accept and decide whether or not guilty. The verdict is only wrong or not, without punishment, or the sentence handed down to the MPR in the form of impeachment. Likewise, if the legal process proves Boediono guilty but the DPR does not propose impeachment, the Constitutional Court still cannot impeach. So,

impeachment in this reform era by adopting a different constitutional system, because the constitution is different. When President Abdurrahman Wahid was impeached the constitutional basis was the 1945 Constitution which allowed a President to be easily impeached, so that President Abdurrahman Wahid's fall was purely due to political times and not through the legal process. The current impeachment with the 1945 Amendment (the 1945 Constitution of the Republic of Indonesia) impeachment is more difficult, so it is very difficult to bring down the current and future President, due to the long mechanism in achieving it. So, the impeachment stage through the political process was continued which was then continued with the legal process then the political process returned. The stages of the impeachment process require a long time, the political process requires a long time and the legal process requires a long time. Therefore, there is a need for a process of refinement and explanation as well as a clear but uncomplicated mechanism so that from the reformation era to BJ Habibie's leadership to President Soesilo Bambang Yudhoyono and or Vice President Boediono to the present Presoden Joko Widodo and KH Ma'ruf Amin must focus more and ratify all legislation that is still unclear, including in the context of the impeachment.

4. Conclusion

The dismissal of the President and / or Vice President is a special mechanism which is certainly expected to only occur in cases according to the Article 7A & 7B of the Constitution or even expected to never occur. A President and / or Vice President is a central figure of a country who, of course, is expected to never violate the law. However, if the violation occurs, the President and / or Vice President must still be legally responsible. The initial mechanism of the dismissal process starts from the authority of the House of Representatives (DPR) by using the Right to Express Opinion. In relation to this right is due to the supervisory function given to the DPR. The juridical process of following up the opinion of the DPR by first asking the Constitutional Court to examine, hear, and decide whether or not the DPR's income could lead to a president who had only been through a political process has now become a legal process. Then with the privilegium forum is how the opinion of the DPR which is an opinion of a political statement becomes a legal opinion according to the Constitution Article 7A & 7B. This is intended as a consequence of the Indonesian constitutional system which adheres to the principle of rule of law. The existence of the decision of the Constitutional Court then the opinion of the DPR has become a legal opinion. The impeachment process of the President and / or Vice President uses 2 (two) processes, namely the political process in the DPR and MPR institutions, and the privilegium forum process in the Constitutional Court with the DPR-MK-DPR-MPR channel. Final decision making should rest with the judiciary, that is, the Constitutional Court. This is intended to minimize problems with the mechanism for dismissing the President and / or Vice President. So, the MPR only needs to dismiss the President and / or Vice President. In the subsequent amendments to the 1945 Constitution, this mechanism of dismissal should only use the term "impeachment". The process of dismissing the President and / or Vice President is commonly called Impeachment or impeachment. The word Impeachment is the process of dismissing state officials.

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