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Submission date: 24-Dec-2019 08:25PM (UTC+0700)

Submission ID: 1238259909

File name: Manuscript_Complete_Sugianto_Rev.docx (42.03K)

Word count: 4943

Character count: 26483

THE ROLE OF INDONESIAN CONSTITUTIONAL COURT IN THE PRESIDENT IMPEACHMENT PROCESS BASED ON INDONESIAN 1945 CONSTITUTION

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ABSTRACT

The term of the discharging President / Vice President position is not easy as public expected. The mechanism must be based on the existing laws or regulations. If the regulation of President or Vice President impeachment are based on the Amendment of the 1945 Indonesian Constitution, especially as cited in the Article of 7B, the Constitution is not related with law and constitution enforcement. This research using normative method (legal research) that is intended to examine the principles and legal requirements. In addition, this research using a comparative approach in order to make comparisons with the other countries in terms of dealing with impeachment institutions for impeachment the President / Vice President position. The purpose of this research is to find out the problems that appeared after the Amendment of 1945 Indonesian Constitution that is related to the law enforcement, specifically to President of the Republic of Indonesia impeachment in the Indonesian state system. The impeachment mechanism must go through the Indonesian Legislative Assembly opinion and then convey it to the Constitutional Court to conduct a process of examining and adjudicating. After that, the results from the Constitutional Court will be proposed to the People Consultative Council to be taken to plenary forum about the President and Vice President impeachment according to the 1945 Constitution of the Republic of Indonesia.

Keywords: president/vice president, constitution, impeachment, court.

INTRODUCTION

The role of Constitutional Court on the President impeachment according to the 1945 Constitution of the Republic of Indonesia (hereinafter the author will name the Amended 1945 Constitution for the Result of Amendment 1945 Constitution of the Republic of Indonesia and the 1945 Constitution for the not amended 1945 Constitution of the Republic of Indonesia) within the framework of law and constitutional enforcement, becoming an interesting problem to do the research. Because the decision of the Constitutional Court is not completed by the executing agency, as is the case with the Supreme Court and the judicial bodies below it. The research of the existence of Constitutional Court decisions on Presidential impeachment according to the Amended 1945 Constitution within the framework of law enforcement and constitution are important, at least for several reasons.

First, the Third Amendment of Indonesian 1945 Constitution (November 9, 2001), among others, made changes to Chapter IX concerning the Judicial Power in Indonesia. Before the amendment the chapter was only consist from two articles, that are Article Number 24 and Article Number 25, but after the amendment then it is consist from 5 articles, regarding to the Article Number 24, Article Number 24A, Article Number 24B, Article Number 24C and Article Number 25. The changes referred to put provisions about the independence of judicial power. These changes indicate to guarantee the constitutional that the independence of judicial power principal is getting stronger. The amendment to Article 24 also no longer places the Supreme Court as a single top authority in the judicial power because of the Constitutional Court presence with the constitutional authority stipulated in Article 24C (Fadjar, 2006).

Second, the Constitutional Court as pointed in Article Number 24C on the Paragraph (1) from the 1945 Constitution amendment, the court has the authority to adjudicate from the first and final level whose final decision is to examine the lower regulation or law toward the Constitution, decide to disputes over the authority of state institutions that the Constitution gave, decide to dismiss the political parties, and decide upon election disputes. However, unfortunately that authority cannot be fully exercised properly, for example is the Constitutional Court Decision Number 5 / PUU-V / 2007 concerning Judicial Review of the Law of the Republic of Indonesia Number 32 of 2004 about Regional Government toward the 1945 Constitution of the Republic of Indonesia, which is the decision relates to the permit for nominating a regional head and individual deputy regional head. The implementation of the Constitutional Court's decision has not been implemented by the Indonesian General Election Commission (KPU) in the holding of regional head elections in Indonesia, even though the Article No. 117 of the Law of the Republic of Indonesia and Article Number 22 in 2007 concerning the Implementation of General Elections states that the KPU has the authority to form KPU regulations as implementation of laws and regulations, and the Constitutional Court as mentioned above is from the laws and regulations. In this case the Law of the Republic of Indonesia Number 32 in 2004 about Regional Government between the Constitutional Court decision Number 5 / PUU-V / 2007 with the Law of the Republic of Indonesia Number 32 in 2004 concerning Regional Government becomes inseparable.

Third, to safeguard the constitution, the Constitutional Court has the authority to handle constitutional cases. As stated in the Amended 1945 Indonesian Constitution, especially in the Article number 24C, paragraph (1) and (2) of, as follows:

- a. Reviewing the law against the Constitution;
 - b. Disputes over the authority of state institutions;
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- c. Dissolution of political parties;
- d. Disputes over election results;
- e. Deciding on the opinion of the legislative (house of representatives) regarding alleged violations by the President and/or Vice President (hereinafter named impeachment)

Before the amendment of the 1945 Indonesian Constitution, the impeachment process was not explicitly stated in its articles, both concerning which state institution has the authority to impeachment, its reasons, and its procedures. In the practice of constitutionality in Indonesia there have been 2 (two) impeachments to the President, namely the impeachment of President Soekarno in 1967 and the impeachment of President Abdurrahman Wahid (Gus Dur) in 2001 (Fadjar, 2006).

The Purpose and the Use of the Research

General purpose of this research is to find out the problems that appeared from the provisions stipulated in Article 7B of the Amended 1945 Constitution and related to law enforcement and the Constitution of the Republic of Indonesia specifically relating to the President of the Republic of Indonesia impeachment, so that the verdict will be realized the Constitutional Court has an existence as a decision at the first and last level in the framework of an independent judicial authority in Indonesian constitutionality.

Specific purposes of this research are to find out the existence of the Constitutional Court decision in impeachment the President based on the provisions of Article 7B of the Amended 1945 Constitution, to find out the alignment on Article 7B with Article 24 from the Amended 1945 Constitution in the framework of law enforcement and justice carried out by independent judicial power.

THEORETICAL FRAMEWORK

Theoretically the meaning of impeachment according is if the government figure has a personal error, then the person concerned can be personally overthrown by the legislature without involving the members of his cabinet (Syafiie & Azikin, 2007). Meanwhile according to Echols & Shadily (2003) impeachment is the claim; accusation; or indicate to responsibility. In addition, according to the Black Law Dictionary (1990) impeachment is a criminal proceeding against a public officer, before a quasi-political court, instituted by a written accusation by the House of Representative of the United States to the Senate of the United States against the President, Vice President, or an officer of the United States, including federal judge.

Referred to Black Law Dictionary above, ¹⁰impeachment in the United States, is the impeachment of the President and Vice President (as well as other civil / public officials), as listed in Article II Section 4 of the United States Constitution. Meanwhile, the institution who have the right to carry out impeachment is the Senate as stated in Section 3 Article I which reads "The Senate shall have the sole power to try all impeachments". While the impeachment of the President ¹and other public officials in the Republic of South Korea, was ³carried out by the Korean Constitutional Court based on the National Assembly suggestion (Fadjar, 2006).

With the meaning of impeachment above, this research will use several theories as a tool to analyse data, such as: the state concept or theory, and the state of law theory in the framework of the constitutional decision.

The term of state in Ancient Greece was still a policy or *The Greek State*. In the first period there was a place on the top of a hill but after a long time many people who lived in that place established a place to live together and then the place is surrounded by wall to guard from enemy (Gautama, 1973). In the view of Socrates (470-399 BC) "The State is not an organization that is made for people for the sake of their personal interests, but the country as a governance arrangement that objective, contained justice for the public, and not only serve the needs of the rulers of the State." According to Hans Kelsen (as cited by Soewandi, 1957) that "the State is a unitary law or norm ordering (*behoren ordening*), namely a procedure that provides guidelines for human behavior what should be implemented, and not implemented so that the country is identical with law; *staatslehre* is identical to *Rechtslehre*, *staatlehre* equals the object rather than *rechtlehre*.

While state law is a term that carries with a relatively long history of thinking. State law is a concept that is formed of two syllables, the state and the law. This word equivalent shows the form and nature of the complementary contents between the state on the one hand and the law on the other. The aim of the state is to maintain law order (*rechtsorde*). Therefore, the state needs the law and vice versa the law is implemented and enforced through state authority (Gautama, 1973). State of Law is translated as *rechtsstaat* or the rule of law. ³Muhammad Yamin stated that Indonesia is a state of law (*rechtsstaat*, government of law) (Yamin, 1982). Besides the use of the word *rechtsstaat*, the term rule of law is also used as stated by Mauro Cappelletti (1971).

⁹Sri Soemantri (1992) explained that the most important elements from the state of law are:

1. Government in carrying out its duties and responsibilities should be based on law or legislation;
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2. There are guarantees of human rights (citizens);
3. The distribution of power;
4. There is supervision from judicial bodies (*Rechterlijke Controle*)

Based on the above conceptual framework, in the state of law the government must base its policies on laws which oriented to the public interest. Then, when the government made serious violations, such as violating the constitution, the government then will have a penalty, one of them the head of government can be impeached.

Impeachment and punishment of public officials involves reversing the procedure of the constitutional rules that are normal, where individuals who have high positions (those elected in the election, ratification, or appointed) and because generally have great power, demands for impeachment and punishment against them are brought up because the reason that they have committed a serious violation of their official position. The United States for example, where federal impeachment is limited to those who may have committed "Treason, Bribery, or other high crimes and misdemeanours" (Erskine, 2008).

METHOD

This research used qualitative method with a descriptive analysis approach. Research data was obtained through literature study, such as from Indonesian constitution (The 1945 Constitution), laws and books which discussed the form of law state and the impeachment process. Apart from that, sources from the mass media which are informed the impeachment phenomena that ever happened in Indonesia are also used to complete the data. Various research data that has been obtained are then filtered with triangulation techniques, this is to make sure that the data was obtained are credible-tested data.

DISCUSSION

Impeachment Procedures

Impeachment procedures after the third Amendment of Indonesian 1945 Constitution are reinforced in the Amended 1945 Constitution through the provisions of Article number 7A and 7B, which clearly confirm:

- a. Impeachment can be carried out the President and / or Vice President in their term of period;
- b. Impeachment can be done for two reasons, if the President and / or Vice President:
 - 1) Violated the 1945 constitution, such as betrayal the state, corruption, bribery, other serious crimes, or despicable acts;

- 2) No longer fulfilling the requirements as President and / or Vice President, referred to the Article number 6 from the Amended 1945 Constitution. While the requirements to be the president and vice president are: must be Indonesian citizen since his/her birth, never accept other citizenship based on his/her own desire, never betray the country, spiritually and physically capable to do the duties and obligations as President and Vice President;
- c. There are three state institutions involved in the president or vice president impeachment process:
- 1) Indonesian Legislative Assembly or the House of Representatives (DPR), as the proponent of the Impeachment motion to the Constitutional Court;
 - 2) The Constitutional Court as an institution that checks, hears and decides the opinion / motion of the impeachment of the DPR;
 - 3) The People's Consultative Council (MPR) as an institution that decides on the proposal of the DPR for impeachment the President and / or Vice President.
- d. The procedures or mechanisms of impeachment are follows:
- 1) The DPR holds a plenary session to discuss proposals / impeachment motions from members in the framework of the supervisory function with a quorum at least 2/3 the number of members; there is no minimum requirement for the number of members to submit proposals for impeachment to DPR plenary forum.
 - 2) The impeachment proposal from the House of Representatives only can be submitted to the Constitutional Court if it was approved by a minimum of 2/3 of the House of Representatives members;
 - 3) After fulfilling the provisions in point 1) and point 2), DPR submits the impeachment application to the Constitutional Court. The opinion regarding the impeachment to the President and / or Vice President according to the provisions of Article number 80 of the Constitutional Court Law must be clear, and 2/3 of the legislative members are agree to made a decision of impeachment, minutes of DPR plenary meetings, and alleged evidence which is the reason for impeachment;
 - 4) The Constitutional Court is obliged to examine, hear and decide on legislative opinion regarding the impeachment proposal within a maximum period of 90 (ninety) days after the request for impeachment the DPR is recorded in the Constitutional Case Registration Book; if the President and / or Vice President resigns, the request for the DPR is nullified;
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- 5) The proceedings at the Constitutional Court have not been adequately regulated in the Law of the Constitutional Court, so it must be still further regulated in the Constitutional Court Regulation which is suitable with the provisions of Article number 86 of the Constitutional Court Law;
- 6) The decision of the Constitutional Court has three possibilities, there are:
- a) DPR petition cannot be accepted if it does not comply the provisions of Article 80 of the Law of the Constitutional Court;
 - b) DPR petition are rejected if impeachment is not proven;
 - c) The opinion of DPR is justified if the impeachment is proven;
- 7) If the opinion of DPR is justified by the Constitutional Court, DPR shall hold a plenary session to continue the proposal for impeachment the President and / or Vice President to the People's Consultative Assembly (MPR);
- 8) MPR must convene to decide on the proposal of DPR for impeachment the President and / Vice President no longer than 30 (thirty) days after receipt proposal from DPR;
- 9) The President and / or Vice President that proposed by DPR for impeachment are given the opportunity to give an explanation at the MPR plenary session with a minimum of $\frac{3}{4}$ of the members, while the MPR decision on impeachment by the DPR is at least $\frac{2}{3}$ of the total attended members.

Based on the description above, the case of impeachment the President and / or Vice President, the Constitutional Court states that the opinion of DPR regarding the impeachment submitted is proven, if he considers the statement above, according to the Constitutional Court ruling cannot be executed or to be the final decision as the basis for impeachment of the President or Vice President, in relation to deciding the impeachment must be based on MPR decision with the general provisions of $\frac{2}{3}$ of MPR members and agreed with at least $\frac{2}{3}$ of the MPR members. It means that the decision of the Constitutional Court cannot be used as a basis for impeachment, but only a legal basis, while the impeachment decision remains with the authority of MPR members.

As stated above, the opinion of the author of the Constitutional Court decision based on Article 7B of the Amended 1945 Constitution have not had a strong existence. With the refusal of the Constitutional Court decision by the MPR, the implication has two injured institutions: The Constitutional Court which has stated that the President and / or Vice-President have been proven to have violated the law in the form of treason, or corruption, or bribery, or other serious crimes or despicable acts, and other institutions are the President and

/ or Vice-President² who remain in his position that have been proven have violated the law in the form of treason, or corruption, or bribery, or felony, or despicable acts.

In relation, the law enforcement and constitution is not in line with the constitution if the arrangements for the President and / or Vice President impeachment² are based on provisions as stipulated in the Amended 1945 Constitution. Because if it refers to the intended provisions, then there will be a President and / or Vice-President⁶ of Indonesia who carry out his position as President and / or Vice President¹ who has committed no crime or committed treason against his own country.

Impeachment and Trias Politica in Indonesian Law System

In the state of law, the definition of power is limited by law as well as the law is supreme compared to the existing power tools (Manan & Magnar, 1993). This means that the state theory based on the law contain the essence that the law is "supreme" and the obligation for each state or government administrator to submit to the law (subject to the law). There is no power over law (above to the law), everything is under the law (under the rule of law). In this case, there must be no arbitrary power (misuse of power) (Manan, Lembaga Kepresidenan, 1999). Therefore, state theory based on the law contain elements of supervision over power so that arbitrariness does not occur.

The relation with the matters above, it is also said that law originates from the state. But in daily life it turns out that the law comes from the state authorities, namely the Government. The government regulates people's life through their politics. Law aims to create fair rules based on real human rights. The law control people's life so if conflicts are going to happen, they can be immediately overcome by hang on to the applicable law (Muchsin, 2004).

Norms, including legal norms are created to overcome chaos, arbitrariness, the strong oppress the weak, rich people extort the poor and so on. Norms or rules are a benchmark or measure or guideline the way of acting in life (Purbacaraka & Soekanto, 1979). While the meaning of law is a social phenomenon, that means a symptom in society (Wignjodipuro, 1989).

Theoretically, the legal objective according to Van Apeldorn, which was condemned by Utrecht (1953) is to regulate public order in a fair and peaceful manner. Whereas according to Van Kant (as cited by Utrecht, 1953), the law aims to protect the interests of each human being and it cannot be disturbed, and according to Utrecht, the law is tasked with ensuring legal certainty (*rechtszekerheid*) in human relations (Utrecht, 1953).

Legal Development means development and community renewal. This opinion departs from the view of the function of law in society which can be returned to the basic question: what is the purpose of the law? The answer to this question is that in the final analysis the main purpose of the law, if it is to be reduced to just one thing is order (Kusumaatmadja, 2002). Aside from order, law is the achievement of justice that varies in different sides and standard according to society and its time. To achieve people's life ordinance, organized the society is needed. Related to the law enforcement, a legal sociologist Satjipto Rahardjo said in his book "Law Enforcement Issues" that law enforcement is a social process which is not a closed process, but a process that involves the environment. Therefore, law enforcement will exchange actions with their environment, which can be called an exchange of actions with human, social, cultural, political and so on (Rahardjo, 2007).

A legal regulation applies sociologically when the legal regulation is recognized or accepted by the community to whom the legal regulation is intended (according to "*Anerkennungstheorie*", "*The Recognition Theory*"). This theory is contrary to "*Machtheorie*", "*Power Theory*" which states that legal regulations have sociological behaviour when forced, the authorities valid, accepted or not by citizens³⁴. Then a rule of law can be said philosophically valid if the rule is appropriate or not contrary to the legal ideals of a society as the highest positive value in the philosophy of life. In terms of the philosophy of Indonesian people's life. For example, which is used as a measure surely is the philosophy of Pancasila, which in legal studies is known as the source of all legal sources in the context of Indonesian society, nation and state (Asshiddiqie, 1995).

Related to the matters above, ¹ in order to maintain the rule of Indonesian law in accordance with Article 24 Paragraph (1) of the Third Amendment to the Indonesian 1945 Constitution, the judicial body has an independent power to conduct justice, maintaining law and justice. Power in the field of law and justice in *trias politica* lesson from John Locke (England) and Montesquieu (France) is called *judicial* authority. Besides, *trias politica* lesson in a country are also *executive* and *legislative* powers. But in Indonesia is not familiar with the power classification lesson such as *trias politica* as the opinion from Muhammad Yamin that "The 1945 Constitution does not recognize the *trias politica* lesson that divides government work tasks or state equipment into three pieces of equipment (organ) or three offices (function). But the 1945 Constitution firmly implements *trias politica* which divides government work or state equipment for the basic implementation of several divisions or separation of powers with the aim to smooth the work and for the protection of citizens of the Republic of Indonesia as a

law state. This division is suitable with the personal culture of the Indonesian people” (Marpaung, 1999)

The implementation of the *trias politica* in Indonesia is carried out by the highest institutions and high state institutions, namely the People's Consultative Assembly, President, Indonesian Legislative Assembly, Supreme Advisory Council, Supreme Audit Agency and Supreme Court (Asshiddiqie, 1995). Whereas in the Amendment to the 1945 Constitution, the existence of the Supreme Advisory Council was abolished and the judicial power was added to the Constitutional Court (Muchsin, 2004).

Based on the provisions of Article 24, Paragraph (1) and Paragraph (2), of the Amended 1945 Constitution *juncto* Article number 2 of Indonesian Law Number 24/2003 regarding about the Constitutional Court. The Constitutional Court have some roles, that are:

- a. One of the state institutions that conducts judicial power;
- b. The power of an independent judiciary; and
- c. As law enforcement and justice.

Whereas the duties and functions of the Constitutional Court as stated in the General Explanation of the Indonesian Law Number 24 / 2003 concerning the Constitutional Court are to deal with constitutional or certain constitutional matters in order to safeguard the constitution (1945 Constitution) to be done by responsibility according to the wishes of people and the ideals principles of democracy. The role of Constitutional Court is to maintain the implementation of a stable state government and also to make correction from the past constitutional life experiences caused by a dual interpretation of the constitution. Therefore, in addition to being the guardian of the constitution, the Constitutional Court is also the highest interpreter of the constitution.

Based on position, duties and functions of the Constitutional Court, the Constitutional Court vision and mission are formulated in the Blue Print of the Constitutional Court as follows:

• Vision

Upholding of the constitution in order to realize the ideals of a state of law and democracy for the sake of a dignified nationality and state of life.

• Mission:

- Realizing the Constitutional Court as one of the trusted judicial powers.
- Build Indonesian constitutionality and constitutional conscious culture.

(Muchsin, 2004)

With the theory of *trias politica*, the position, duties and functions as well as the vision and mission of the Constitutional Court above, the framework of law and constitutional enforcement in Indonesia through the Constitutional Court institutions in relation to the provisions of Article 7B of the Amended 1945 Constitution, according to the author, reached to the maximum, as long as the Constitutional Court decision regarding to impeach the President and / or Vice President who is found guilty of violating the state, doing corruption, bribery, and other serious crimes, or despicable acts. The decision of impeachment the President and / or Vice President must go through People's Consultative Assembly (MPR) again. Because the result of MPR decision can be a refusal to the Constitutional Court and retain the President and / or Vice President to remain in office.

In relation to the power classification *trias politica* theory, the author think that the decision of MPR as mentioned above has entered the judicial area, which should be the competency of the judicial authority. For this reason, it will fill up a sense of justice and in line with the vision and mission of the Constitutional Court, if the provisions of Article 7B of the Amended 1945 Constitution as intended, determine that to impeach the President and / or Vice President is the initiative of the Indonesian Legislative Body asking for approval from the MPR and the one who filed and authorized to submit an impeachment was the MPR. So with the decision of the Constitutional Court, MPR no longer had to make decisions, but only ratification in impeachment the President and / or Vice President who had been proven to violate the law in the form of treason, corruption, bribery, other serious crimes, or despicable acts.

The legal procedure above illustrates that in Indonesia the principle of *trias politica* began to be well structured since entering the reform era, such as if the parliament finds a serious violation of the law committed by the president, prior to the impeachment process, the highest court institutions. The Constitutional Court will then conduct an investigation and trial to prove the presence or absence of constitutional violations committed by the president, afterwards the Constitutional Court will give the results of the trial to parliament (MPR). This procedure is considered appropriate, and therefore can avoid impeachment process that impressed arise from a subjective and political competition.

CONCLUSION

The impeachment of the President in Indonesia is governed by the Indonesian 1945 Constitution, the existence of this constitution becomes important in the context of law and constitution in a democratic country. In the impeachment process the Constitutional Court

became a judgment institution that would determine whether the president was guilty or not (ie whether the president violated the constitution or law) after the Constitutional Court had received a report from the House of Representatives regarding the existence of serious criminal law violations committed by the president. The roles of the Constitutional Court in the impeachment process of the president is something that cannot be ignored, especially when viewed from the trias politica system. This system allows a check and balance between governmental powers in a country, including how the Constitutional Court can then approve or reject complaints from the legislature regarding the president's betrayal of the state or violating heavy criminal law.

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