



## Original Article

### CHECKS AND BALANCES IN THE IMPEACHMENT MECHANISM OF THE PRESIDENT OR VICE PRESIDENT FROM A CONSTITUTIONAL LAW PERSPECTIVE

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#### ABSTRACT

**Background.** There are changes to the mechanism following the amendment of the Indonesian 1945 Constitution, regarding the President's or Vice President's impeachment. After the amendment, the impeachment process can be initiated by the House of Representatives to the Constitutional Court by including strong allegations of violations committed by the President or Vice President. After that, the Constitutional Court will make a decision which will later be discussed in a parliamentary session of the People's Consultative Assembly. Looking at the impeachment mechanism above, a new question arises as to whether this mechanism is by the supremacy of constitutional law.

**Research Method.** This research is written to find the impeachment mechanism outlined in the 1945 Constitution according to the supremacy of constitutional law, by focusing on the function of checks and balances through qualitative methods.

**Findings.** The results of this research show that the impeachment mechanism is not by the 1945 Constitution due to the existence of political mechanisms.

**Conclusion.** The checks and balances process has not taken place in a balanced manner because the Constitutional Court's decision on the indictment is inexplicit or binding on both the People's Consultative Assembly and the 1945 Constitution.

**Keywords:** Checks and Balances, Effectiveness, Impeachment, Mechanism.

#### BACKGROUND

As a State of Law (*Rechtsstaat*), the Unitary State of the Republic of Indonesia adheres to the basis that law is absolute and supreme power. This can be proven through the country's constitution, the 1945 Constitution, as the highest rule underlying the course of Indonesia as a State which also states "The State of Indonesia is a state of law" in Article 1 number (3). Through this basis, it can be understood how Indonesia runs as a State, where all elements in it (both government and institutions) carry out operations, decisions, obligations, responsibilities, and authorities, by continuing to refer to the rules contained in applicable law.

As a State of law, Indonesia is ruled by laws and not by people. Thus, every related element such as state instruments and citizens must comply with existing rules and laws, including the President as the head of state and government. However, before the change, the 1945 Constitution gave a large portion of power to the President of the Republic of Indonesia, and this resulted in abuse and deviation committed by the leader of this country, until it was realized through authoritarian, KKN, closed, and centralist government. Thus, there was a fundamental change in the 1945 Constitution, which also rearranged the portion of the President's power in Indonesia. In this regard, history records that there have been two dismissals (impeachments) of the President of Indonesia, carried out against President Soekarno and President Abdurahman Wahid. President Sukarno was considered guilty of his inability to handle G30SPKI events along with the economic and moral decline of society. In subsequent impeachments, President Abdurahman Wahid was removed because he was considered unable to provide accountability in the MPR Special Session for issuing a declaration of dissolution of the MPR and being unable to implement the provisions of the MPR and Indonesian Law.

Before the amendment, the impeachment of the President was associated with MPR Decree Number IC / MPR / 2000, so this can be interpreted that the MPR is the institution authorized to dismiss the President and Vice President by two ways of dismissal: First, it does not involve the Constitutional Court (MK) provided that the two leaders of the country have been proven to have violated both the 1945 Constitution, regulations, directions, and harmed Indonesian citizens. Second, the dismissal of the President or Vice President during his term of office is based on the decision of the Constitutional Court (MK)[1].

However, the impeachment regulations against the President as above have changed since the amendment of the 1945 Constitution. In this amendment, there are regulations regarding the institutional system and power relations between the legislature, executive, and judiciary. Some of the most major changes can be seen through the position of the People's Consultative Assembly (MPR) and the formation of the DPD in 2022 which holds a special function in creating regulations (draft laws) on regional autonomy[2]. In addition, amendments to the 1945 Constitution also brought Indonesia to adopt the Presidential system which can be seen from the changes to 5 points in the 1945 Constitution without changing several bases such as the preamble to the 1945 Constitution, the form of the Republic of Indonesia, the affirmation of the Presidential government, the explanation of the contents of normative matters of the 1945 Constitution which were included in the trunk (articles) and changes using addendums[3].

To carry out impeachment after the amendment, there must be a proposal submitted by the People's Representative Council as a representative of the people to the People's Consultative Assembly, by first requesting the Constitutional Court to investigate violations of the law such as corruption, bribery, reprehensible acts, treason against citizens and other serious crimes and decide opinions on them. In addition to these violations, there are also conditions where the President and Vice President are considered unable to lead again. Submission of the above conditions is required to obtain the support of at least 2/3 of the number of DPR members present, and the MPR has a decision-making limit, which is no later than nine days after the DPR's request to the Constitutional Court.

After the amendment of the 1945 Constitution, the involvement of the Constitutional Court (MK) in impeachment is listed in Article 24C paragraph (2). In its perspective, the Constitution explains that in the impeachment process, the DPR which has status as legal standing must submit a proposal to the Constitutional Court[4]. The Constitutional Court will then prove whether it is true that misappropriation has been committed by the President and Vice President by weighing legal proportions. If it is proven, then this mandate will be delegated to the MPR[5]. Furthermore, this evidence will be carried out through the Plenary Session. In this session, the President was allowed to explain in true detail the prejudices that were the material for the DPR's submission of impeachment. Then, at the time of the decision, this hearing must be attended by at least three-quarters of all new members an impeachment decision can be taken by the MPR, and this is about. The 1945 Constitution, as the basis of this mechanism, elaborates that 2 main things are grounds for impeachment, namely justification reasons and also combined political support[6].

The above constitutional practices are proof that Indonesia, which is a state of law, still prioritizes procedural law enforcement. This can be seen from the effort of legal relevance to the submission of alleged violations first, and this is very different from Article 1 paragraph (3) of the 1945 Constitution which is *expressis verbis*, which outlines that the State of Indonesia is a State with strong laws[7].

By law, there is an intention on the effectiveness of the separation of article 24C paragraph (2) with paragraph (1). In this case, there is a meaning to the mechanism that has been outlined in article 7B, namely that even though the legal mechanism in the Constitutional Court (MK) has ended, the constitutional system process still occurs. Referring to the effectiveness of the separation above, Permadi in states that this description is not in line with the characteristics of democracy, where legal decisions should be final and cannot be changed by any policy[8].

In the context of impeachment itself, after the amendment, the President is declared no longer required to give accountability to the MPR. Thus, with the legitimacy of the President, where the position of the President is equal to other institutions, checks and balances are needed that ensure the President's accountability when a violation occurs. With the checks and balances that occur, there is certainly a balancing force that can ensure accountability runs well. Based on the discussion above, this study was conducted to discuss the mechanism of impeachment according to the principle of the supremacy of constitutional law as outlined in the 1945 Constitution.

## **RESEARCH METHOD**

Reference to normative juridical (normative law) on the division of powers (*Trias Politica*) and impeachment is carried out in this study. To complement this research, the author chooses a concept approach combined with a legal approach to produce a study centered on three things: theory, principles, and application that describes the state of the political system and state in Indonesia in the current era[9]. In presenting the data, this study is equipped with two data sources: primary and secondary. The primary data studied is the Law relating to impeachment, namely the 1945 Constitution Articles 7A and 7B. Then, secondary data in the

form of journals, books, articles, and dictionaries discussing impeachment were used in sharpening the results of this study.

## **FINDINGS**

### **Checks and balances procedure based on the 1945 Constitution**

In Indonesia, checks and balances came at the same time as the amendment of the 1945 Constitution, where the institutional system that originally adopted the distribution of power became the separation of power. This change in the institutional system is what makes the Indonesian system, which was originally subordinative, equal. Because of this equal position, it is expected that the mechanism of checks and balances will occur so that each institution can supervise while balancing the power of other institutions. This is possibly inseparable from the spirit of reform, where the constitutional system is desired to transform into an increasingly accountable and not dominated by certain parties. Moreover, after the amendment, several new institutions were born, namely the DPD (Regional Representative Council), the Constitutional Court, and the Judicial Commission.

The establishment of the Constitutional Court as a balancing institution and its strong role in the impeachment process is proof that the Constitutional Court acts as an institution that has the power to prove violations committed by the President and Vice President. The formation of the Constitutional Court is also based on the philosophy of good governance as well as substantive justice that equips it, to carry out the role of guardian and interpretation of the constitution while presenting constitutional supervision[10]. With the Constitutional Court, the impeachment of the President during his leadership period will be considered to have a strong basis and apply through a valid decision[11]. This decision then holds a nature that should be binding on another institution, namely the MPR. In this case, the decision of the Constitutional Court must be followed up by the MPR as a joint institution of the DPR and DPD which is also a symbol of people's representation.

The above mechanism is a reflection of Indonesia as a democratic country that ensures that power is not centered in one point, but must be divided. Therefore, referring to the division of power in the form of 3 (three) institutions: legislative, executive, and judicial, it can be said that the checks and balances procedure runs by existing procedures. Although the three institutions have different functions, they still carry out supervisory functions with each other. This is by the concept of legislative and executive control when included in the context of impeachment, which means that if indeed impeachment is carried out, there is already interference by the judiciary (MK) in the control process[12].

Checks and balances are closely related to the role of one institution, the House of Representatives, which represents the will of the people. Thus, there is a strong relationship between people's sovereignty and law. When the law becomes a symbol of the power of the people, it can be said that there is sovereignty in the law itself, and this can be referred to as legal consciousness. Rousseau referred to legal consciousness as a volunteer general or the general will as the supreme leader. From a philosophical perspective, the general will can be understood as a conception of power that cannot be exercised individually or by each

individual. Thus, it can be concluded that the law becomes the supreme sovereignty when the law responds to the expression of popular sovereignty as its general will[13]

Separation of powers to create checks and balances is also a principle carried out by Indonesia as a state of law to maintain balance between the three state institutions with their control functions[14]. This principle is also applied to strengthen democratic government so that the rule of law that guarantees the realization of human rights (in the context of the will of the people) is implemented. This mechanism is by the 1945 Constitution, especially in Article 1 paragraph (2) which states that sovereignty is in the hands of the people, so that the people have the power to determine power, such as the motto of the state with the democratic system itself. In addition to reflecting a democratic state, the rule of law is also a characteristic of the rule of law that emphasizes the judicial control system.

This concept is a concept that is more suitable to be applied than the system that applies in the new order. When the power of the new order came to power, a system of distribution of power was applied, which is a concept where power is divided, so that the power holder at that time could not be removed by force but could be negotiated together with other institutions[15]. Indeed, this system is still based on Pancasila democracy and the 1945 Constitution, especially in Article 24 paragraph (2) which states that the Supreme Court exercises jurisdiction and the judiciary is carried out by the Religious Court, General Court, and Military Court. However, reflecting on history, this system causes power overlap, where one institution has stronger power than another so that the will of the people is not channeled through representative institutions such as the DPR. Thus, it can be concluded that for the context of a democratic country that truly represents the will of the people in Indonesia, separation of power is chosen and reflected in the amendment. This is also reinforced by Asshiddiqie's opinion which states that to bring about checks and balances, state power is better shared and separated from each other[16]. Furthermore, Asshiddiqie elaborated that in this system, state power or institutions are allowed to be controlled by being regulated, limited, or supervised. The above description concludes that the procedures of checks and balances carried out in a constitutional system can avoid actions that will harm the people and the state such as tyrannical intentions, dominating power to efforts to hegemony. Thus, if one or more of these violations begin to appear, then the effort can be dealt with immediately as well as possible.

## **DISCUSSION**

### **Impeachment Procedure under the 1945 Constitution**

Impeachment means "summoning" and/or "blaming" to hold accountable. According to Jimly Asshiddiqie, the word impeachment, or impeachment, is a loanword from Arabic which means to be demoted from office. According to Black's law dictionary, impeachment means "A criminal proceeding against a public officer, before a quasi-political court, instituted by a written accusation called "articles of impeachment[17]", so that the charges given to the President must go through criminal elements, mainly through prosecution carried out by the senate in semi-political courts[18]. As a motion sought to demand recognition of

ongoing violations of the law through abuse of rights, the context of impeachment refers to accusations against senior officials of violations committed by administrative authorities[19].

In line with Hufron's opinion, Marsillam Simanjuntak stated that in the concept of impeachment, there is an interaction of legitimacy or crime under the supervision of the court as a public authority to resolve the existence of slander against neglect in the constitutional concept. Furthermore, this impeachment system exists based on the evaluation of the previous President's power which was declared absolute in the 1945 Constitution before the amendment, so that the adjustment of the President's power was deemed necessary through impeachment[20].

However, when examined again, before the amendment, the impeachment process carried out against the country's leaders (both the President and his deputy) occurred by interfering in political formation, so that the President could be unilaterally impeached. This was proven by the impeachment of two former Presidents of Indonesia, namely President Soekarno in 1967 and President Abdurrahman Wahid in 2001. In the impeachment of these two former Presidents, history records that both were impeached based on MPR decisions without a suitable legal basis. Moreover, this decision was colored by a purely political decision through the MPR Plenary Meeting[21]. At this time, through article 4 of TAP MPR No. III / MPR / 1978, the MPR has the power to dismiss the President and Vice President through the contents of the elaboration that regulates the position and working relations of the highest institutions between high state institutions. In this article, it is stated that the MPR can dismiss active state leaders at their request, violations of state direction, and reasons for the President who is considered unavailable. This regulation also explains the mechanism of impeachment before the constitutional amendment, namely the waiver of two consecutive warnings. In the mechanism, the first warning letter will contain a warning of alleged violations committed by the President and Vice President. Only, if this letter is ignored after approximately 3 months, then a second warning letter will be issued. In this mechanism, if the President does not respond, the MPR will conduct a session to determine the decision whether the President will be impeached or not[22].

Reflecting on the two cases above, both the arbitrariness of the power of the President and the People's Consultative Assembly with its political formation, amendments to the 1945 Constitution are needed to ensure that the system of checks and balances runs properly so that everything runs by legal mechanisms. In the amendment, there is an impeachment mechanism for the President and Vice President in the middle of their term of office through the explanation of rules that enhance this regulation. Kristyanto explained that the President and Vice President can be removed if proven to have violated the law for treason, criminal acts, corruption, or other violations of law by the regulations of the country they lead[19]. One of the violations discussed in the law is treason, a violation of the law that is categorized as criminal and threatens state security. This is an action that moves the masses to overthrow the legitimate government. Although the Criminal Code does not explain the division of existing crimes, there are two crimes against the state, namely domestic crimes (*hoog verraad*) and crimes abroad (*landverraad*).

The impeachment mechanism after the amendment is a logical consequence that strengthens the position of the Indonesian nation as a democratic country that adheres to the Presidential

system, by the 1945 Constitution. One thing that is essential in this change is the position of the Constitutional Court which also has power over the position of President or Vice President. However, what must be considered is that the decision of the Constitutional Court against the leader of this country is still non-binding, and is returned to the DPR which is then heard together with the MPR. In this case, the decision of the Constitutional Court will be used as a reference that proves the DPR's allegations in the MPR session by the impeachment procedure. However, in the plenary session, the MPR is not the only absolute institution that can decide and is needed because it requires a DPR reporting procedure to the Constitutional Court first. Then, in the termination mechanism, attendance is required by at least 3/4 of the total members and approved by at least 2/3 of the total members present.

The above mechanism reflects that the idea of an institution that functions as control over the Indonesian constitution is not basic in constitutional amendments as reflected in paragraph 19 paragraph (5) of Constitutional Court Regulation (MK) Number 21 of 2009 which contains "decisions that have been issued by the Constitutional Court (MK) are juridically final and binding for the House of Representatives (DPR) as the party submitting the application". Through this point, it is understandable that the decision of the Constitutional Court should be juridically binding[23].

In the next point in the 1945 Constitution, it is stated that the impeachment of the President and his deputy that can be carried out by the DPR should have obtained the approval of 2/3 of the members. However, in reality, there is still a debate going on about the extent of the power of the DPR in the context of impeaching leaders in Indonesia. Indeed, this provides evidence of the function of checks and balances, it's just that, the principle of freedom and independence of other state institutions should not be ignored. This is necessary considering that the actual function of checks and balances departs from the principle of supervision and balance to realize a democratic country free from abuse of power, which is also prone to occur in existing state institutions. Thus, as a state institution that receives the voice of the people, the DPR must follow the impeachment procedure by the provisions of the constitution and existing regulations (laws). In addition, reflecting on the period before the amendment, the DPR must prove existing violations based on strong, sufficient, and clear evidence, and no longer because of political interests (or a combination of political support). In addition, the DPR also must ensure the independence of other institutions, and in this context is the Constitutional Court, so that the Constitutional Court can decide equally without any DPR intervention or manipulation[24]. The expected situation is an ideal state where the separation of power takes place properly, and the decisions taken are truly the voice of the people's sovereignty.

The above situation should be realized because impeachment requires a clear basis, as mentioned in the 1945 Constitution, impeachment made to the President and Vice President must be related to gross violations of the Constitution. The process of proving violations of the Constitution must certainly take a complex path and consider perspectives and different factors. However, there are also countervailing factors that can be used to ensure that the determination taken is by the provisions. Some of them are constitutional provisions, the influence of the government system, human rights, and political consequences. In this case,

the Constitutional Court is the institution needed to give decisions on the President and Vice President who are proven to have committed violations.

In the next process, not only the Constitutional Court, but other institutions also have the right to examine and process actions that allegedly violate the constitution, namely the DPR. If the Constitutional Court adjudicates using the Constitution as a constitution, the DPR acts as an evidentiary institution, through a mechanism through which the President is allowed to explain the truth about the allegations brought against him.

To ensure that impeachment is carried out on the right grounds and is also fair to the executive branch that is the object, several things can be done. First, the independence and neutrality of an institution must be carried out to ensure that the process is not colored by certain political interests. Second, it is necessary to guarantee that the President and the Vice President involved have equal rights, both the right to defense and equal treatment. Furthermore, in the decision-making process, guarantees of transparency, openness, and legal certainty are needed. This must once again be done to avoid a repeat of the political interest in impeachment that has occurred to the two former Presidents of Indonesia. Regardless, the legal protection that must be afforded to the President or his impeached deputy is guaranteed by the Constitution and laws. This also prevents discrimination and unfair treatment and ensures safety and welfare through monitoring[25].

From the description above, it can be concluded that there are still contradictions in law enforcement in Indonesia, especially against the impeachment of the President and Vice President. This is especially true for the decisions of the Constitutional Court which are still not by both the supposed legal norms and the actual concrete. This condition can be seen if examined through the authority of the Constitutional Court as an institution that has the right to interpret the Basic Law, as well as being an institution that has the authority to decide cases of violations of the law of state leaders submitted by the DPR. However, the decision of the Constitutional Court turned out not to be final in the constitution and only became a comparison that later still had to be decided in the parliamentary session again.

## **CONCLUSION**

Through the discussions that have been carried out, it can be concluded that the impeachment procedure for the President and Vice President is not in line with the 1945 Constitution because there are still constitutional judicial rules that are loaded with political mechanisms. When referring to the impeachment process, it is found that the Constitutional Court's decision on violations of the President and Vice President is not binding and not explicit for the People's Consultative Assembly or the 1945 Constitution. Therefore, idealism about the importance of checks and balances still does not work well in this mechanism. Impeachment should therefore be carried out as a result of the control system of other institutions.

Reflecting on the above issue, it was found that the mechanism that runs to overcome violations committed by state leaders is a constitutional system and not a system of checks and balances. Impeachment carried out as a result of the control function has become part of the checks and balances effort, but the mechanism of indictment provided under the

amendment of the 1945 Constitution is still considered less than the idealism of the real rule of law. On the bright side, there have been corrections and changes to the 1945 Constitution about impeachment being reintroduced.

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