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The Rights Of The Constitutional Court's Decision On The House Of Representatives 'Representatives About The President's Prospective And / Or The President's Vice Representatives According To The State Basic Law Of The Republic Of Indonesia Year 1945

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ABSTRACT: This study examined the rights of the constutional court's decision on the house of representative's representatives about on the president prospective and/ or the president's vice private vocational school by the state basic state of the Republic of Indonesia year 1945. The purpose of this study is to find out the mechanism of the Constitutional Court in examining, adjudicating and deciding the opinion of the People's Legislative Assembly that the President and / or Vice President have violated the law in the form of treason against the state, corruption, bribery, other serious criminal acts, disgraceful acts, and / or the opinion that the president and / or the vice president no longer meets the requirements as President and / or Vice President. And also To find out the decision of the Constitutional Court as a binding judicial institution on the opinion of the House of Representatives followed up by the MPR as a political institution that the President and / or Vice President has violated the law in the form of treason, corruption, bribery, other serious crimes, disgraceful acts and / or the opinion that the president and / or vice president no longer fulfill the requirements as President and / or Vice President.

Keywords: President,Vice President, Constituional court's, President prospective, house of representative

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I. INTRODUCTION

In any country, the position of president is vital in determining the nation's future journey, including its constitutional life. The presidential power is attributively obtained based on the constitution. [1] The president's power in derivatives is obtained through the transfer of power in the form of granting power (Mandaatsverlening) and by delegating powers and responsibilities (delegatie). [2] Even though the power of the President as the holder of government authority (executiceheavy) is not explained in detail in the 1945 Constitution. [3] Thus, the President's power is not without limits because the Elucidation of the 1945 Constitution (before the amendment) states that the President's power is not unlimited. [4]

The position of the President as the head of state as well as the head of government which is unclear in terms of his authority can develop into a negative direction in the form of abuse of authority. [5] Based on the 1945 Constitution (the 1945 Constitution) the Indonesian government system formally emphasizes the presidential system rather than the parliamentary system. One of the characteristics of the tenure of presidential administration the president is determined by the Constitution.

[1] Suwoto Mulyosudarmo, *Transition of Power: Theoretical and Juridical Studies of Nawaksara's Speeches* (Jakarta: PT Gramedia Pustaka Utama, 1997), page. 53 et seqq.
[2] Ibid., page 62 et seqq
[3] Bagir Manan, 2006, *Presidential Institute,* Edited Revision, Yogyakarta, FH UII Press page. 28
[4] Ibid, page 117.
[5] Diponegoro, Semarang, 2008, see also Anom Surya Putra, Constitutional Law Transition Period, Nuance of Intellectuals, Bandung, 2003, page 10. (in Muni 'Datun Ni'ah Analysis of Juridical Impeachment of President and / or Vice-President In Indonesian State Administration, DIH, Journal of Legal Studies, February 2012, vol.8, no. 15, p.48-59), page 48 .

Prior to the amendment to the 1945 Constitution, the basis of the impeachment law was found in the Elucidation of the 1945 Constitution and explained in more detail in the Decree of the People's Consultative Assembly (TAP MPR). [6] In the General Elucidation of the 1945 Constitution the pre-amendments stated that:

a. In exercising its power, the concentration of power and responsibility is entirely in the hands of the president
b. The MPR has the highest authority, while the president must carry out the State Policy Guidelines (GBHN) set by the MPR.
c. The President is elected by the MPR, submits and is accountable to the MPR[7]

Whereas in the MPR Decree No.III / MPR / 1978 stated that:

1. The President is subject to and is accountable to the MPR and at the end of his term must provide a report on accountability for the mandate given by the MPR.
2. In his term of office the President can be held accountable in front of the MPR Special Session in connection with the implementation of the state direction set by the 1945 Constitution and the TAP MPR. [8]

From the experience of constitutional reasons for the dismissal of the President, due to violations of the law both criminal law and constitutional law or constitutional violation including violation of the oath of office. [9] But the impeachment of President Soekarno and President Abdurrahman Wahid were both dismissed by the MPR without clear but more legal reasons based on political decisions. That is, the inspection and dismissal were only in the MPR plenary meeting not in judicial hearings. Whereas in the presidential system adopted by Indonesia, the President may not dissolve parliament as well as the parliament may not drop the President. These two constitutional experiences have led to serious constitutional debates because the impeachment mechanism used contains many weaknesses, especially stemming from the constitution that has not clearly regulated the impeachment mechanism, including actions that can lead to a president being impeached. The controversy over the dismissal of the president does not infrequently lead to political conflicts that not only involve political elites, but also lower-level community groups, so that chaotic situations between elements of society that both support and reject impeachment cannot be avoided. According to Moh.Mahfud MD (2003: 212) MPR Special Session who dropped Gus Dur from the perspective of constitutional procedures, was flawed, but must be accepted as a political reality. This is the same as a legal problem when Bung Karno issued a decree on 5 July 1959 or when he issued a Presidential Decree which dissolved the House of Representatives as a result of the General Election.

The 1945 Constitution has several weaknesses both conceptually, systemically and technically with regard to the dismissal of the President / Deputy President during his term of office. In Article 1 paragraph (2) of the 1945 Constitution before the changes are mentioned ― Sovereignty is in the hands of the people and is carried out entirely by the People's Consultative Assembly. The construction of popular sovereignty places the MPR as the full implementer of people's sovereignty. The MPR is positioned as the highest state institution, the DPR, the President, the DPA, the BPK and the Supreme Court state institutions. In the position of the highest state institution, the President is subject and responsible to the MPR. The functional relationship has logical consequences for the mechanism of dismissal of the President / Vice President during the term of office. The PR is a single institution that determines the fate of the President. The position of the President depends on the dynamics of internal political forces in the MPR. The mechanism of dismissal of the President / Vice President as such can lead to instability of government that affects democratic and constitutional life of the nation and state. [10]

After four times the amendment to the 1945 Constitution, the provisions explicitly regulate the dismissal of the President and / or vice-president in his term by the People's Consultative Assembly (MPR) at the suggestion of the House of Representatives (DPR). [11] The process of impeachment in Indonesia goes through processes in 3 state institutions directly. The first process in the DPR through its supervisory rights conducts "investigation" on the allegation that the President and / or Vice President carry out actions that can be categorized as an act that is classified as impeachment reasons. The Plenary Meeting of the House of Representatives agreed to state that the President and / or Deputy President had taken actions that were

[6] Indarwati, Dismissal of President (Impeacment) in the State Administration System in Indonesia, Thesis, Postgraduate of Widyagama University Malang, 2005, page 25.
[7] See Suwoto Mulyosudarmo, Kompas Daily, July 14, 2001
[8] Ibid, page 1.
[9] Zoe Iva Hamdan, "Impeachment President", (Jakarta: Constitution Press, 2005), page 117
[10] Bagir Manan, Renewal of the 1945 Constitution, Paper presented at National Law Seminar VII, Jakarta, 1999, page 10.
[11] Trubus Rahardiansah, Indonesian Government System Theory and Practice in Political and Legal Perspectives, Trisakti University, Jakarta.2011, page 347.

classified as reasons for impeachment so that the DPR Plenary Meeting decision was brought to the Constitutional Court. Before finally the impeachment process is handled by the People's Consultative Assembly (MPR) to get the final word on the fate of the President and / or Vice President. [12]

The problems regarding the Impeachment mechanism above require a constitutional solution so that a legal certainty is based on the principle of the rule of law so that it becomes the aspired law (Ius constituendum) in the future, moreover the MK position has a very strategic role as one of the judicial power holders whose decision binding, first and last. Therefore, this issue can provide an understanding of the need for more in-depth research in perfecting the Impeachment process in Indonesia so that there will be no repetition of historical errors such as Impeachment processes in the previous President's period. So that the urgency of an ideal Impeachment mechanism is needed so that the throne of the Constitutional Court is one of the main pillars of the principle of the rule of law, namely an independent judicial power in upholding law and justice can be enforced.

II. STATEMENT OF THE PROBLEM

a. What is the mechanism of the Constitutional Court in examining, adjudicating and deciding on the Opinion of the People's Legislative Assembly that the President and / or Vice President have violated the law in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts, and / or the opinion that the president and / or the vice president no longer meets the requirements as President and / or Vice President?

b. Does the Constitutional Court's ruling as a judicial institution have binding power over the opinion of the People's Legislative Assembly can be ignored by the People's Consultative Assembly as a political institution that the President and / or Vice-President have violated the law in the form of treason against the state, corruption, bribery, other serious crimes, or acts disgraceful, and / or the opinion that the president and / or vice president no longer fulfill the requirements as President and / or Vice President?

c. How to defend the Constitutional Court's ruling as its authority in examining, adjudicating and deciding the opinion of the House of Representatives that the President and / or Vice President have violated the law and no longer fulfill the requirements as President and / or Vice President contrary to parliamentary decisions?

d. How to realize the nature of the authoritative Constitutional Court ruling in examining, adjudicating and deciding the opinion of the House of Representatives that the President and / or Vice President have violated the law and no longer fulfill the requirements as President and / or Vice President?

III. THEORETICAL FRAMEWORK

A. Theories and Concepts and the Scope of the State of Law

1. State of Law

The term Negara Hukum is a direct translation of the term Rechtsstaat and there are at least two great traditions of the idea of the rule of law in the world, namely; The State Law of the Continental European tradition is called Rechtsstaat and State Law in the Anglo Saxon tradition called the Rule of Law. 18 State Law (Rechtsstaat) Continental European tradition according to Friedrich Julius Stahl repairs from the view of Immanuel Kant. [13]

Elements that must be in Rechtsstaat [14] first, recognition of human rights (grondrechten); second, separation of powers (scheiding van machten); third, governance is based on law (wetmatigheid van het bestuur); and fourth, justice administration (administratieve rechtspraak). While the elements contained in the

[12] Prof. Dr. Jimly Asshiddiqie, S.H. RESEARCH REPORT "Impeachment Mechanism and Procedural Law of the Constitutional Court" Cooperation of the Constitutional Court of the Republic of Indonesia with Konrad Adenauer Stiftung, Jakarta, 2005, page 3.

[13] Padmo Wahjono, Legal Development in Indonesia, (Jakarta: Ind-Hill Co., 1989), page 30.

[14] Jimly Asshiddiqie, National Development Law Agenda in the Globalization Century, Mold I, (Jakarta: Balai Pustaka, 1998), page 90. Regarding the insights contained in Rechtsstaat, see A. Hamid S. Attamimi, anan The role of the Presidential Decree of the Republic of Indonesia in the Implementation of State Government: A Study of Presidential Decision Analysis that Functioned in the Period of Pelita I-Pelita IV , Doctoral dissertation, (Jakarta: Faculty of Postgraduate University of Indonesia, 1990), pages 139.

Rule of Law[15]; first, supremacy of law, second, equality before the law, third, constitution based on human rights (constitution based on human rights).[16]

The basic conditions for democratic governance under the Rule of Law concept are first, constitutional protection, second, the free and impartial judicial power,[17] third, free elections, fourth, freedom of expression, fifth, freedom of association and opposition, and sixth, citizenship education.[18] Free judicial power is a very important pillar both in the State of the Law of the Rechtsstaat tradition and in the Rule of Law tradition. In other words, the existence of a free and impartial judicial power is an important condition for both the legal state's traditions.

The main characteristic of the concept of the rule of law is that there are four elements that must be possessed and characterize the rule of law (rechtsstaat), namely the protection of human rights, the distribution of power, government based on law, and state administrative court[19] The International Commission of Jurists proposes three important characteristics that are considered as a characteristic of the rule of law: first, the state must submit to the law, second, the government respects individual rights, and third, the judiciary is free and impartial[20]

Consistency in the application of the principle of rule of law in a country gives birth to a theory of legality that is firmly adhered to by all modern law countries. The legality theory requires respect for the principles of law and legislation in all actions and policies of the state. In the field of criminal law, this theory requires that criminal sanctions can only be imposed if there have been rules or norms of criminal law before criminal acts are committed. Likewise in the legal field, the consistency and respect for existing constitutional law norms is a principle that must applied in political and state life.

IV. INDONESIAN STATE LAW

One sub-system of the Indonesian Government system is the principle of the rule of law and the constitutional system[21] Yamin explained the meaning of the rule of law in the explanation of the 1945 Constitution, namely in the state and society of Indonesia, the one in power rather than the human being as it applies in the old Indonesian countries or in a foreign country that exercises colonial rule before the day of the proclamation, but Indonesian citizens in an atmosphere of independence that is controlled solely by state regulations in the form of legislation that they make themselves[22] Furthermore, Yamin also stated that the basis of the rule of law is not the same as the state of customary law or religious law, and is very different from the state of power, because in the Republic of Indonesia, the written state regulation governs which reads: "the Indonesian Nationality was drafted in an Indonesian Constitution.[23] This view shows a narrow view of the rule of law, which is only in the sense of due process of law, which means that all government actions and policies are carried out based on the applicable law.

The Constitution of the United States of Indonesia and the Provisional Constitution The Republic of Indonesia explicitly lists Indonesia as a legal state[24] substantially in the articles which characterize the modern

[15] According to Richard H. Fallon, Jr., there is actually no definite understanding of the Rule of Law. Richard H. Fallon, Jr., "The Rule of Law as a Concept in Constitutional Discourse", in Columbia Law Review, Volume 97, Number 1, 1997, pages 1-2.

[16] A.V. Dicey, An Introduction to Study of the Law of the Constitution, 10th edition, (London:English Language Book Society and MacMillan, 1971), pages 223-224

[17] According to A.W.Bradley, the court has an important role in the Rule of Law tradition, because its interpretations of the laws and regulations will determine the decisions that will be taken in a country. A.W. Bradley, "The Sovereignty of Parliament - Form or Substance?", In Jeffrey Jowell and Dawn Oliver, eds., The Changing Constitution, 4th edition, (Oxford: Oxford University Press, 2000), pages 34

[18] South East Asian and Pacific Conference of Jurist, Bangkok, February 15-19, 1965, The Dynamic Aspects of the Rules of Law in the Modern Age, (Bangkok: International Commission of Jurist, 1965), pages 39-45.

[19] Jimly Asshiddiqie, Indonesian Constitution and Constitutionalism, Secretariat General of the Constitutional Court of the Republic of Indonesia, Jakarta, 2006, page 141

[20] See A.V.Dicey, Introduction to the Study of the Law of the Constitution, Ninth Edition, MacMillan and Co.London, 1952, pages 202—203

[21] See Explanation of the 1945 Constitution, State Gazette of the Republic of Indonesia Number.7, February 15, 1946.

[22] Muhammad Yamin, Discussion of the 1945 Constitution, Fourth Volume, Prapanca Foundation Publisher, 1960, pages 253

[23] Ibid

[24] Article 1 paragraph (1) UUDS 1950 and Article 1 paragraph (1) and in Preamble (4th sentence) RIS Constitution 1949

state of law with the principle of the division of state power which includes five state instruments, namely (1) president and vice president, (2) ministers, (3) people's representatives; (4) the Supreme Court, and (5) the Financial Supervisory Board, the guarantee of broader human rights, and due process of law (Article 7- Article 43 of the RIS Constitution) and the guarantee of free and independent judicial power. In commenting on the provisions of the articles concerning the equipment of this country, Muhammad Yamin[25] stated that the division of work for all five state equipment [26] for the three branches of government (executive Article 82 Article 88 of the Indonesian Constitution, Legislative Article 89 Article 100, and Judicature Article 101 Article 108) really relate the meeting with the teachings of trias politica in state law.

According to Oemar Seno Adji, the rule of law principle, namely the rights of judges who are free and impartial, the issue of legality, both material and formal, can be useful materials in the preparation and content of our legal state doctrine. An overlapping and "congruence" between the concept of rule of law and our rule of law will not be included here, but it sometimes shows deviations that are not very disturbing.[27] Assurance of human rights must be placed in a balanced position with social responsibility and public interest. [28]

V. THE CONCEPT OF A DEMOCRATIC RULE OF LAW IN INDONESIA

In the 21st century there is no country that considers itself as a modern state without mentioning itself as a state based on law. According to Scheltema, the elements of rechtstaat are legal certainty, equality, democracy, and government that serve the public interest. Rechtstaat was born in the 19th century, although his insights have long existed long ago. Rechtstaat was born after the growth of understanding of the sovereign state and the development of the theory of agreement regarding the formation of the state and the agreement on the use of its power. This country model was applied in the Netherlands, Germany and France. The rechtstaat concept emerged from Friedrich Julius Stahl inspired by Immanuel Kant. According to Stahl, the rechtstaat elements were:

1. Protection of human rights;
2. Separation or division of powers to guarantee those rights;
3. Government based on laws and regulations; and
4. State administration court.

The 1945 Constitution as the constitution of the State of Indonesia is the supreme law of the land. After the amendment to the 1945 Constitution, it was formulated in the body of the state concerning the concept of the rule of law, which was previously only included in the pre-amendment to the 1945 Constitution. From the emphasis of the amendments to the 1945 Constitution, the concept of the rule of law is the norm in the 1945 Constitution. The 1945 Constitution as the constitution of the State of Indonesia attempts (procedures and mechanisms) to protect the people against the abuse of State power. According to Carl Schmit, the constitution is considered to be the highest political decision. Therefore, the constitution has the highest position in a country's legal order.

According to Bagir Manan, the concept of a modern rule of law is a combination of the concept of a legal state and a welfare state. In this concept, the state or government is not merely the guardian of public security or order, but also carries the responsibility for realizing social justice and general welfare for the sake of prosperity of the people. Thus the rule of law which is based on a democratic system can be called a democratic rule of law (democratische rechtstaat). In the modern law state, according to the work of the Republic of Indonesia's Constitutional Commission, there are conceptually three main characters of a constitution, namely:

a. a constitution is a supreme law of the land
b. a constitution is a frame work for government
c. a constitution a legitimate way to grant an limit powers of government officials

The concept of the Indonesian State is idealized to realize a democratic rule of law. These provisions can be seen in Article 1 of the 1945 Constitution, namely the sovereignty of the people in the hands of the people carried out by the Constitution, and the State of Indonesia is a rule of law. Consequently, all acts of state power must always adhere to the law, in realizing democracy based on laws (constitutional democracy), or democratic rule of law (democratische rechtstaat).

[25] Muhammad Yamin, Proclamation and Constitution of the Republic of Indonesia, Ghalia Indonesia, Jakarta, 1951, page 121

[26] Article 44 of the Indonesian Constitution

[27] Oemar Seno Adji, op. Cit., Pages 26

[28] Ibid., pages 27

VI. HANS KELSEN'S THEORY OF LAW

Constitutional Law in Dutch known as staatsrecht or state law (state law) covers 2 meanings, namely staatsrecht in ruimere zin (in the broad sense) and staatsrecht inengere zin (in the narrow sense). Staatsrecht in engere zin or the Law of the State in a narrow sense is usually called the Constitutional Law or Verfassungsrecht distinguished between broad and narrow notions. The law of constitution in the broadest sense (in ruimere zin) includes the Constitutional Law (verfassungsrecht) in the strict sense and the State Administration Law (verwaltungsrecht).[29] The right term for constitutional law as a science (constitutional law) is Verfassungslehre or constitutional theory. The term "Law of State Administration" is identical to the notion of "Constitutional Law" translation of Constitutional Law (English), Droit Constitutionnel (France), Diritto Constitutionale (Italy), or Verfassungsrecht (Germany). In terms of language, Constitutional Law is usually translated as "Constitutional Law". However, the term "Administrative Law" if translated into English, the word used is Constitutional Law. [30] Therefore, Constitutional Law can be said to be identical or referred to as just another term from "Constitutional Law.[31]

The rules and institutional framework that exist according to positive constitutional law related to the norms of state administration, state institutions, and the relationship between the state and citizens is no longer in accordance with the development of aspirations and people's lives. Various theoretical studies emerged and new alternatives. Positive State Law and then experience "de-sacralization". One important theory in the field of Constitutional Law is the legal theory proposed by Hans Kelsen. Many opinions say the existence of the Constitutional Court was introduced by Hans Kelsen. The implementation of constitutional rules regarding legislation according to Hans Kelsen can only be guaranteed effectively if there is an organ other than the legislature that is given the task of examining the constitutionality of a legal product. For this purpose a special organ can be held such as a special court called constitutional court which controls and can abolish the whole constitution which is unconstitutional so that it cannot be applied by other organs. [32] Kelsen's thinking encouraged the establishment of an institution called "Verfassungsgerichtshoft" or Constitutional Court which stood alone outside the Supreme Court, and this model is often called "The Kelsenian Model 12"[33]

Hans Kelsen's thinking includes three main problems, namely about the theory of law, state and international law. These three problems are not separated and interrelated and are developed consistently based on formal legal logic. This formal logic has long been developed and has become the main characteristic of Neo-Kantian philosophy and then developed into a structuralism stream. [34] The general theory of law developed by Kelsen includes two important aspects, namely the static aspect (nomostatics) seeing actions governed by law and nomodinamic aspects of seeing laws that govern certain actions. This approach is then called "The Pure Theory of Law" gets its own place because it is different from the other two poles of approach, namely between the natural law school and empirical positivism.

This theory seeks the foundations of law as the basis of validity, not on meta-juridical principles, but through a juridical hypothesis, namely a basic norm, which is built with logical analysis based on actual yuristic thinking. The pure theory of law is different from analytical jurisprudence in that the pure theory of law is more consistent in using its methods related to the problems of basic concepts, legal norms, legal rights, legal obligations, and the relationship between state and law.[35]

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[29] Moh. Kusnardi and Harmaily Ibrahim, Introduction to Indonesian Constitutional Law, printed by Fifth, (Jakarta: Center for the Study of Constitutional Law, Faculty of Law, University of Indonesia, 1983), pages 22

[30] Miriam Budiardjo, Basics of Political Science, (Jakarta: Gramedia Pustaka Utama, 1992), pages 95

[31] Compare this with Bagir Manan, Development of the 1945 Constitution, (Yogyakarta: FH-UII Press, 2004), page 5

[32] Hans Kelsen, General Theory of Law and State, translated by: Anders Wedberg, (New York: Russell & Russell, 1961), pages 157

[33] Also called "the centralized system of judicial review." See Arend Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, (New Hampshire and London: Yale University Press, 1999), pages 225

[34] Zoran Jelić, A Note On Adolf Merkl's Theory Of Administrative Law, Journal FactaNiversitatis, Series: Law and Politics, Vol. 1, Number 2, 1998, page 147. Compare this with MichaelGreen, Hans Kelsen and Logic of Legal Systems, 54 Alabama Law review 365 (2003), pages 368

[35] Kelsen, General Theory, Op Cit., pages. xiv - xvi.

B. History and Development of Democracy

1. The History of Democracy

The concept of democracy was originally born from the thought of the relationship between state and law in Greece. The concept of democracy is practiced in state life in the 3rd century BC to the 6th century AD political decisions based on mutually agreed procedures. At that time direct democracy could be carried out because Ancient Greece was still a city state (state city) with a population of approximately 400,000 people. [36]

2. The Theory of Democracy

Democracy is a term that is universal but there is no one democratic system that applies to all nations or all countries --- the term may be the same but the content and the way of its realization can vary from one country to another - in people's lives modern- contemporary.[37] The difference between the contents and the way of manifesting democracy is caused by two things. First, because of the differences in cultural glasses used by every nation in looking at democracy. Secondly, because of the nature of dynamic democracy, it means that democracy continues to experience change according to the needs and demands of the times.

Henry B. Mayo, as quoted by Miriam Budiardjo, formulated the six values of democracy, noting that these details do not mean that every democratic society adheres to these detailed values. These democratic values are:

1. Resolve disputes peacefully and institutionally
2. Ensuring peaceful change in a society that is changing
3. Organizing leadership changes regularly
4. Limiting the usage of minimum violence
5. Recognize and consider the existence of diversity in society
6. Ensure the upholding of justice.[38]

Miriam Budiardjo asserted that to implement democratic values it is necessary to establish several institutions, namely responsible government; people's representative councils that represent groups and interests in society, political parties; free press and free justice system.

3. Understanding Democracy

The concept of democracy is accepted by almost all countries in the world due to their belief that this concept is the most superior governance compared to other governance. Abraham Lincoln said democracy is government of the people, by the people and for the people.

Direct rule of the people called direct democracy was practiced in ancient Greece, namely in the city of the city ("Polis or CityState") about 200 years before Christ. At that time, the Ancient Greek countries were only as large as the City Territory (Polis) with a relatively small population that allowed the people to gather in an lesecclesia‖ to discuss the problems faced in the process of organizing government. [39]

The implementation of direct democracy in its development found several weaknesses so that the implementation of direct democracy along with the development of political life and state administration tends to be abandoned and developed into a system of representative democracy, where the people in delivering their aspirations are no longer carried out directly but manifested through a system of representation formed jointly. Direct democracy, in practice left some obstacles, among others:

a. Direct democracy cannot be practiced in countries with large regions and large populations. It can be said that the implementation of direct democracy in the country is impossible because it is impossible to form a forum for decision making in a particular place and attended by every citizen.

b. Direct democracy requires a high level of public participation. While in today's living conditions, most people have a high level of activity and will certainly focus on their work and busyness so that they do not have enough time to learn all the issues related to the lives of citizens to be decided together. With these conditions, the possibility of citizens being able to actively participate in any issue that requires decision making by citizens must be very small.

c. Direct democracy at the beginning of its development was limited only to certain groups who were called citizens. For example the implementation of direct democracy in Athens in the past did not involve women and slaves because they were not categorized as citizens.

d. Direct democracy can encourage the creation of a tyranny of the majority government system. On the one hand, the majority can support the creation of a stable government so that the government program can run well, but on the other hand, the majority can also lead to violations of minorities. Minorities can be seen from

[36] Mahmuzar, Indonesian Government System According to the 1945 Constitution of the Republic of Indonesia Before and After the Amendment, Nusamedia, Bandung, 2010, pages 21

[37] Rafael Raga Maran, Introduction to Political Sociology, Rineka Cipta, Jakarta, 2001. Page 202.

[38] Miriam Budiardjo, Basics ..., Op.Cit., Pages 62-63

[39] See Moh. Kusardi and Bintan R. Saragih, State Science, Gaya Media Pratama, Jakarta, 1988, page 85

ethnic groups, religions, even certain groups of economies. In American history, violations of the rights of minorities can be seen in times of oppression of blacks by whites.[40]

Sri Soemantri saw democracy from two sides, namely in a material and formal sense, with details:

a. Democracy in the material sense, is a democracy that is influenced by the philosophy or ideology adopted by a nation or state. In this connection, it is known for the Pancasila Democracy, Guided Democracy, Liberal Democracy, Socialist Democracy, and so on in terms of democracy seen from its contents.

b. Democracy in the formal sense is a form of democracy, that is, its realization can be in the form of direct democracy or indirect democracy.[41]

C. Constitutional Theory and Concept

1. Constitutional Theory

The existence of the constitution in modern countries has become a necessity to provide guarantees for the human rights of its citizens. The guarantee of human rights of these citizens is translated into the constitution into a constitutional system, whereby the state is divided into several power structures with authority that is clearly limited in the constitution. In some of the literature on constitutional law and political science, the study of the scope of constitutionalism consists of:[42]

a. Anatomy of power (political power) is subject to law

b. There are guarantees and protection of human rights

c. Free and independent judiciary

d. Accountability to the people (public accountability) as the main joint of the principle of popular sovereignty

The constitution can be interpreted in a narrow sense and in a broad sense. The constitution in a narrow sense is the result of the selection of legal regulations governing state government and has been realized in a document. While the constitution in the broad sense according to Bolingbroke in his essay On Parties is a collection of laws, institutions, and customs, drawn from the principles of certain ratios that form a general system, with which the community agrees to be governed. [43]

A constitution can only guarantee human rights and limit the power of the government, if the constitution is functional to eliminate the gap between constitutional law and reality constitutionally, in this case there are four functions of the constitution, namely: [44]

a. Transformation Function

That a constitution functions a transformation if the constitution is able to convert power into law which consists of three issues, namely:

1. Power is formalized in terms called legal power, authority and competence. So, power is not exercised without law. This is intended to provide effective restrictions on the holders of power of a country.
2. The transformation of political establishment and desire into norms and values that have the force of law will be able to provide a guarantee for the future.
3. The arrangement and arrangement of political institutions in accordance with the political views of the era to become political institutions according to the constitutional law.

b. Information Function

Whereas a constitution is an information about legal provisions determined by the influence of transformation with the help of the constitution. What is transformed is the codified information in the legal codification the character is based on the level of understanding of the cultural group

c. Regulation Function

That the constitution is a regulation of behavior and the process of taking power and powers, so that the constitution has a normative influence as a rule in a country

d. Canalization Function

Whereas the constitution contains guidelines on how legal and political problems must be solved. In addition, the constitution also shows that legal and political issues must be resolved based on certain objectives and principles, such as equality, state principles, the rule of the law, and others.

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[40] Tom Lansford, Democracy: Political System of the World, Marshall Cavendish, 2007, pages 13-14

[41] Sri Soemantry, Bunga Rampai ..., op. Cit., Page 9-10

[42] Dahlan Thaib, Jazim Humidi, Ni'matul Huda, Theory and Constitutional Law, PT. Raja Grafindo Persada, Jakarta, 2004, pages 1-2

[43] K.C.Wheare, Modern Constitutions, Eureka Library Surabaya, 2003, page 3-4

[44] Followed by Paper A Mukhtie Fadjar, Critical Review of the Implementation of Authority and Role of the Constitutional Court in Building a Culture of Legal Awareness, at a Seminar in Brawijaya University, June 15, 2005, page 3-5

2. Constitution

The constitution of a partially binding basic law applies on the basis of the highest authority or the principle of sovereignty adopted in a country. If the country adheres to the people's sovereignty, then the source of the constitution's legitimacy is the people. If that applies is the understanding of the sovereignty of the king, then the king determines whether a constitution is valid or not. This is what experts say is called constituent power which is an authority that is outside and at the same time above the system it regulates. On that basis, in democratic countries, it is the people who are considered to determine the enactment of a constitution.[45]

3. Constitutionalism

The basis of constitutionalism is the general agreement or consensus among the majority of the people regarding the idealized building with regard to the state.[46]Consensus that guarantees the establishment of constitutionalism in modern times is generally understood to rely on three elements of agreement, namely as follows:[47]

a. Agreement on goals or ideals together (*the general goals of society*, *general acceptance of the same philosophy of government*)

b. Agreement on the rule of law as the basis of government or state administration (*the basis of government*)

c. Agreement on the form of institutions and administrative procedures (*the form institutions and procedures*)

The Constitution regulates two interrelated relations with one another, first, the relationship between government and citizens, and the second relationship between one Government institution and another Government institution. Therefore, the constitution is intended to regulate three important things, namely (1) determine the limitation of the power of state organs, (2) regulate relations between state institutions with one another, and (3) regulate the power relations between state institutions with citizens.

4. Constitutional Democracy

Walter F. Murphy,[48] in his writings "Constitution, Constitutionalism and Democracy", affirmed that the theory of constitutional democracy was the latest of the unification of two theories, namely the theory of democracy and the theory of constitutionalism. The principle of democracy and constitutional principles that are carried out separately lead to dissatisfaction, because at one one hand, democracy with the principle of freedom that adheres to the principle of majority rule can threaten the basic rights and freedoms of minorities in a state society and can cause tyranny of the majority of minorities. At the same time democracy can also give birth to a country without a state. That is, the function of the state is very passive and without control. On the other hand, the application of the principle of constitutionalism that is too rigid can give rise to rigid state policies, and can create policies that are not desired by the people. That is because the nature of constitutionalism is respect for the rules contained in the constitutional text. Because that was born a new concept called the concept of constitutional democracy. [49]

According to Murphy, the concept of democracy and constitutionalism actually both recognize the centrality of human dignity, namely respect for the dignity of humanity, as underlying the concept. The difference between the two is how best to protect these values. [50] Through restrictions on government actions, constitutionalism tries to reduce political tensions to limit the risk of freedom and dignity arising from a political society. Here constitutionalism aims to ensure respect for the dignity of humanity. Meanwhile the theory of democracy is based on the assumption that humanity must respected for being born like that, adults enjoy a wide degree of autonomy, a status that can in principle be achieved in the modern world with its participation in government. The theory of constitutionalism seeks to limit the risk of arbitrariness in groups of people through the protection of the rights of everyone to be involved in the process of government.

[45] Astim Riyanto, Constitutional Theory, YAPEMDO, Bandung, 2009, page 18

[46] See Jimly Asshiddiqie, Indonesian Constitution and constitutionalism, General Secretariat of the Constitutional Court of the Republic of Indonesia, Jakarta, 2006, pages 25-28

[47] William G. Andrews, as quoted by Jimly Asshiddiqie, ibid

[48] Walter F. Murphy, is McCormick Professor of Jurisprudence at the Princeton University Departemne of Politics. Also the Associate Faculty at the Center of International Studies

[49] Walter F. Murphy's writing is a paper, presented at the International Conference series organized by the American Council of Learned Societes in 1989, and became the first article in a compilation book on "constitutionalism and democracy" edited by "Douglas Greenberg, Stanley Katz, as quoted earlier.

[50] Walter F. Murphy, Constitutions, constitutionalism, and Democracy, in Douglas Greenberg, Stanley Katz, op. Cit., page 6

Jonathan Riley,[51] describes constitutional democracy in reality as a complex game, involving two general levels of decision making. First, the constitutional phase or high track, which is a cooperative game, in this case the moral players collectively agree on the common good with consensus on a constitutional provision.
Second, the post-constitutional phase or the Iower track, is a non-cooperative game. In this case, the hidden things that are not explicitly stated in the constituent phase (the first phase) are revealed and every moral player freely pursues particularistic interests in competition with others under the constitutional provisions agreed upon in the first phase (constitutional phase).[52]

D. Check and Balances in the Theoretical Perspective

The legal dictionary defines the principle of check and balances as a system of rules which confirms the existence of a mechanism of mutual control between branches of power both legislative, executive and judicial branches designed to prevent the concentration of power in one branch so that it dominates another branch of power. Butterworths Concise Australian Legal Dictionary defines Checks and Balances as follows; A system of rules diversifying the membership of, and usually countervailing controls interconnecting the executive, legislative, judicial, and governmental branches.

The principle of separation of powers divides the responsibilities of the legislative, executive, and judicial governments, while the principle of supervising and balancing has the function of preventing the branches of power from abuse of power, such as abuse for specific purposes, and political compromise. The principle of separation of powers divides the responsibilities of the legislative, executive, and judicial governments, while the principle of supervising and balancing has the function of preventing the branches of power from abuse of power, such as abuse for specific purposes, and political compromise. But the branch of judicial power can cancel the legal product with its judicial review function, namely the right to test whether a law is contrary to the constitution.

Trias politics as a doctrine was first put forward by John Locke and Montesgrean interpreted as a separation of powers (separatist of powers). According to John Locke, state power is divided into three powers, namely: legislative power, executive power and federative power, each of which is separated from each other.

According to Miriam Budiardjo (2003: 151) Triassic politics is the assumption that state power consists of three kinds of power: First legislative power or the power to make laws (in new terminology is often called rule making function); the two executive powers or the power to implement the law (in new terminology are often called rule application functions); the three judicial powers or the power to adjudicate for violations of the law (in new terminology are often called rule adjudication funtions). Trias politica is a normative principle that power-power (or functions) should not be left to the same person to prevent abuse of power by the ruling party. Thus, it is hoped that the rights of citizens are more secure.
After changing the 1945 Constitution for four times, there was a shift in the concept of restrictions on Indonesian power. Jimly Asshiddiqie said Indonesia's constitutional system adheres to the doctrine of separation of powers supported among others:

1. There is a shift in legislative power from the hands of the President to the DPR.
2. the adoption of a constitutional testing system of the law as a legislative product by the Constitutional Court. Where previously the law could not be contested, the judge could only apply the law and should not judge the law.
3. It is recognized that the implementing agency of popular sovereignty is not only the MPR, but all state institutions, either directly or indirectly, are the incarnation of popular sovereignty.
4. The MPR is no longer located as the highest state institution, but as an equal state institution with other state institutions such as the BPK
5. The relations between state institutions are controlling each other in accordance with the principle of checks and balances.

1. **Check and Balances System**

In the Trias Politica doctrine, both in terms of separation of powers and division of powers, the principle that must be held is that judicial power in the rule of law must be free from the interference of the executive body.[53] This is intended so that judicial power can function appropriately for the sake of law enforcement and justice and guarantee human rights. Through the principle of freedom of judicial power, it is expected that impartial decisions and solely based on legal norms and justice and the conscience of judges can

[51] See Jonathan Riley, Constitutional Democracy as a Two-State Game, in John Ferejohn, Jack N. Rakove, et. Al. (Editor), Constitutional Culture and Democratic Rule, Cambrige University press, Cambridge, United Kingdom, 200, page 147
[52] Ibid
[53] Budiardjo, op.cit.

manifested.[54] Thus, judicial power or judicial power has a very important role, because it holds the power to handle and resolve conflicts in all its derivations that occur in the life of a country. The three branches of power must not exceed the limits of their respective authorities which have been given by the constitution. In this framework, there is a need for a teaching on checks and balances system among state institutions that presupposes equality and supervises one another, so that there is no institution that is more powerful than others.

2. Implementation of the Post-Amendment Principle of the 1945 Constitution of the Republic of Indonesia

Checks and balances can be divided into two: internal in certain branches of power and checks and balances between branches of power. The implementation of internal checks and balances in the legislative branch of power in Indonesia is seen in the mechanism of relations between the MPR, the DPR and DPD. Based on the formulation of the provisions of Article 1 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia which reads: Sovereignty is in the hands of the people and is carried out according to the Constitution, it is seen that sovereignty is returned to the people to be carried out on its own on the basis of the constitution. This provision eliminated the highest state institution beforehand, namely the MPR which had been regarded as the full holder of popular sovereignty. Thus the supremacy principle of the MPR has changed with the principle of balance between state institutions (checks and balances).

The mechanism of checks and balances between branches of power can be seen from the relationship between the executive and legislative institutions. The checks and balances mechanism is institutionalized in the superstructure of political institutions, namely the separation of powers between the executive and the legislature, each of which is held by the president and the legislature. The President as the holder of executive power has strong legitimacy because he was directly elected by the people through the election. Although the parliament functions as the holder of legislative or legislative power, the president still has the right to submit a bill and discuss the bill with the DPR for mutual agreement.

The more balanced principle of checks and balances between state institutions is seen in the relationship between legislative and judicial power. If Article 20 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that The People's Legislative Assembly holds the power to form laws ‖ so as to create a balance of power (checks and balances) the Constitutional Court (MK) is functioned as the holder of judicial power that one of its authorities (judicial review) reviews whether the laws that have been made are contrary to the constitution or Constitution. The principle of checks and balances between state institutions (branches of power) can also be seen in terms of the role of the judiciary, namely the Constitutional Court when the DPR wants to impeach the president (impeachment). The process of dismissing the president begins with a request from the House of Representatives to the Constitutional Court to examine, hear, and decide the opinion of the House of Representatives that the president / vice president has violated the law. The violation of the law is in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts. Dismissal can also be requested if the House believes that the president / vice president no longer meets the requirements as president and / or vice president. The next impeachment process is in the MPR. The dismissal session must be attended by at least 3/4 MPR members. The new president is declared to have stopped if at least 2/3 of the MPR members present agreed. In the process of the MPR, which was the last process, the president / vice president was given the opportunity to defend himself. In conclusion, the process of impeachment in Indonesia starts from the political process, then continues into the legal process, and then closes with the political process. This arrangement is intended to avoid arbitrary practices as far as possible in terms of dismissing the president and realizing the principle of checks and balances.

E. Judicial Power and Judicial Review

1. The Concept of Judical Power

Judicial power is one of the branches of state power developed by Montesquieu. Judicial power in several countries can be classified based on the distinction between rule of law and administrative law. Countries that develop rule of Iaw apply common law state systems, such as the United Kingdom and the United States, which can be recognized by the full freedom of the judiciary from its administrative intervention (executive). Whereas countries that develop prerogafive states, such as France, allow certain parts of the law (administrative law) to be controlled by the executive. [55]

Based on the trias politica doctrine, the position of judicial power that is free or independent from the intervention of other branches of power becomes a necessity in order to enforce law and justice and to provide guarantees of human rights. Thus, judicial power can freely exercise control over other state powers to prevent

[54] Budiardjo, op.cit, pages 227

[55] C.F. Strong, Op. cit.,page 287

the occurrence of instrumentation that puts law into a part of power. There are three parameters that a judicial power has an independent position, namely:[56]

a. Institutional Independence

The independence of judicial power here is something that is related to the independence of the judiciary, to measure that the judicial institutions are independent can be seen from:

1. there is no dependence (influence each other) of the judiciary in carrying out their duties with other branches of state power;
2. there is no formal hierarchical relationship with other branches of state power.

b. Independence of the Judicial Process

The independence of the judicial process here starting primarily from the process of case review, verification to the verdict handed down, is absolutely no intervention from other branches of state power.

c. Independence of Judges

The independence of judges here can be seen from the ability and resilience of judges in maintaining the moral and professional integrity of their professional freedom in carrying out their duties and authorities which are far from interference from other parties in every judicial process

2. Judicial Review

The Constitutional Court as a testing institution has experienced a long history and obtained a clear form and substance after John Marshall's Supreme Court under John Marshall examined and decided on William Marbury's case which at the end of the administration of President Thomas Jefferson was appointed judge but his decision letter was not submitted by the new government to him. Marbury sued under the Judiciary Act of 1789, where according to the law The Supreme Court has the right to use the Writ of Mandamus to order that the government submit the decision letter to the appointment, but the Supreme Court does not use this authority. The Supreme Court actually canceled the law because the views were against the constitution. Marshall considered that time was not feasible to decide the case because it was considered to have a conflict of interest --- previously he was the secretary of state who signed the appointment of Marbury. Marshall might see it as a case with a unique opportunity - the chance to win the authority of judicial review - and was seen as Marshall's brilliant ability to avoid danger. Outwardly he seemed to oppose the danger, where he moved in one direction while the opponent looked another direction.[57]

Jimly Asshiddiqie divided into two types of judicial review, namely concrete norm review and abstact norm review. [58] Concrete norm review can be in the form of: (a) testing of concrete norms for administrative decisions (beschikking), such as in the Administrative Court (state administrative court); (b) testing of concrete norms in the general justice level, such as testing of first-level judicial decisions by appellate courts, testing of appellate court decisions by the cassation court and testing of judicial decisions by the Supreme Court. [59] The second type of judicial review is abstract norm review, which is the authority of product legislation which is the task of the Constitutional Court which is inspired by John Marshall's decision in the Marbury vs. Case Madison in America. Part of the authority of this abstract review is still left to the Supreme Court in the form of the authority of product legislation testing under the law.

Judicial review runs as it should only in countries that embrace the rule of law and not the supremacy of parliament. In a country that adopts parliamentary supremacy system, the legal products produced cannot be contested, because parliament is a form of representation of popular sovereignty.[60] Judicial review or contitutional review consists of 2 (two) main tasks covering: First, guaranteeing the functioning of the democratic system in the relationship of the balance between the roles of legislative, executive, and judicial power so as not to centralize power by one branch of power over other branches of power; Second, protect each individual citizen from abuse of power by state institutions that harm basic rights guaranteed in the constitution. [61]

[56] Bambang Sutiyoso and Sri Mastuti Puspitasari, Developmental Aspects of Judicial Power in Indonesia, UII Press, Yogyakarta, 2005, pages 52-54

[57] Erwin Chemerinsky, Constitutional law, Principles and Policies, Aspen Law and Business, 1997, pages 38

[58] See Jimly Asshiddiqie, Principles of Post-Reformation Indonesian Constitutional Law, (Jakarta: Bhuana Ilmu Populer (BIP), 2007), page 590.

[59] Ibid

[60] Zainal Arifin Hoesein, op.cit., page 52-53

[61] Jimly Asshiddiqie I, *loc.cit*

3. The Moment of the Institutionalization of the Constitutional Court

The Constitutional Court was first introduced by Hans Kelsen (1881-1973) constitutional expert and professor of Public Law and University of Vienna Administration. Kelsen stated that the implementation of constitutional rules regarding legislation can be effectively guaranteed only if an organ other than the legislature is given the task of examining whether a legal product is constitutional or not, and do not enforce it if according to this organ the product of the legislative body is unconstitutional. For that purpose, according to Kelsen, it is necessary to establish a special court organ in the form of constitutional court, or supervision of the constitutionality of laws which can also be given to ordinary courts. [62]

The establishment of the Constitutional Court is encouraged and influenced by factual conditions such as: First, the consequences of the realization of a democratic state of law and a democratic state based on law. The fact shows that a decision reached democratically is not always in accordance with the provisions of the Constitution as the highest law. So that it is necessary for the competent authority to examine the constitutionality of the law. Secondly, after the Second Amendment and Third Amendment of the 1945 Constitution, it has changed the power relations by adopting a separation of powers system based on the principle of checks and balances. State institutions and all their provisions have the potential for disputes between state institutions so that the paradigm changes in the MPR Supremacy. Constitutional supremacy required a separate institution to resolve the dispute. Third, the impeachment of President Abdurrahman Wahid by the MPR in the Special Session of the People's Consultative Assembly in 2001 inspired the thought of finding legal mechanisms used in the dismissal process of the President and / or Vice President so as not only eyes based on political reasons. For that, it was agreed the need for legal institutions that are obliged to first assess the legal violations committed by the President and / or Vice President that could cause the President and / or Vice President to be terminated in his term.

After going through in-depth discussion, by examining the constitutional testing institutions of the law in various countries, and listening to the input of various parties, especially constitutional law experts, the formulation of the Constitutional Court's institution was ratified at the 2001 MPR Annual Session. concerning the institution named the Constitutional Court in Article 24 Paragraph (2) and Article 24C of the 1945 Constitution.

4. Function and Role of the Constitutional Court

The change of the division of power system with the separation of power results in a fundamental change in the format of state institutions after the 1945 Constitution amendment. Based on the Division of Power adopted previously, state institutions are arranged vertically in stages with the MPR at the top of the structure as the highest state institution. Article 1 paragraph (2) of the 1945 Constitution prior to amendment states that sovereignty is in the hands of the people and is carried out entirely by the MPR.

As a full perpetrator of popular sovereignty, the MPR is often said to be the people themselves or the incarnation of the people. Under the MPR, power was divided into a number of state institutions, namely the president, the People's Legislative Assembly (DPR), the Supreme Advisory Council (DPA), the Supreme Audit Agency (BPK), and the Supreme Court (MA) with equal status and status as a state high institution.

The main function and role of the Constitutional Court is to safeguard the constitution in order to uphold the principle of legal constitutionality. Likewise, the underlying countries that accommodate the establishment of the Constitutional Court[63] in the state administration system. In order to safeguard the constitution, the function of testing the law can no longer be avoided in its application in the Indonesian state administration because the 1945 Constitution asserts that the system of constitution is no longer the supremacy of parliament but the supremacy of the constitution. The Constitutional Court was formed with a function to ensure that there will be no more legal products that come out of the corridor of the constitution so that the constitutional rights of the citizens are maintained and the constitution itself is guarded by its constitutionality [64]

[62] This model is often referred to as The Model Arts. This model concerns the relationship between the principles of constitutional supremacy (the principle of the supremacy of the Constitution) and the principle of parliamentary supremacy (the principle of the supremacy of the Parliament)

[63] Not all countries refer to the new institution as the Constitutional Court. France, for example, refers to the Constitutional Council (Counseil Constitutionnel), Belgium calls it Constitutional Arbitration because this institution is considered not a court in the usual sense because its members are not called judges. The similarities of the 78 countries are the Constitutional Court which is institutionalized separately outside the Supreme Court

[64] Judicial review is a test right (toetsingrechts) both material and form given to judges or judicial institutions to test the validity and behavior of legal products produced by legislative and judicial executives before higher and hierarchical laws and regulations Testing is usually carried out on norms the law is a posteriori,

which is the authority of the Constitutional Court. If a law or one part of it is declared proven not in line with the constitution, then the legal product will be canceled by the Constitutional Court. So that all legal products must refer to and must not conflict with the constitution. Through the authority of this judicial review, The Constitutional Court carried out its function of guarding that there were no legal provisions that came out of the corridor of the constitution. Advanced functions other than judicial review, namely (1) decide disputes between state institutions, (2) decide on the dissolution of political parties, and (3) decide disputes over election results. Such advanced functions allow the availability of mechanisms to decide on various disputes (between state institutions) that cannot be resolved through ordinary justice processes, such as disputes over election results, and demands for the dissolution of a political party. Such cases are closely related to the rights and freedoms of citizens in the dynamics of a democratic political system guaranteed by the Constitution. Therefore, the functions of settlement of the results of the general election and the dissolution of political parties are related to the authority of the Constitutional Court.

The function and role of the Constitutional Court in Indonesia has been institutionalized in Article 24C Paragraph (1) of the 1945 Constitution which determines that the Constitutional Court has four constitutional authorities (conctitiously entrusted powers) and one constitutional obligation (constitutional obligation). The provision is affirmed in Article 10 paragraph (1) letter a to d of Act Number 24 of 2003 concerning the Constitutional Court. Four of the MK's authorities are:

1. Test the law against the 1945 Constitution
2. Disconnecting authority disputes between state institutions whose authority is granted by the 1945 Constitution
3. Decide on dissolution of political parties
4. Decide on disputes about election results

Meanwhile, based on Article 7 paragraph (1) to (5) and Article 24 C paragraph (2) of the 1945 Constitution affirmed in Article 10 paragraph (2) of Law Number 24 of 2003, the obligation of the Constitutional Court is to give a decision on the opinion of the DPR that the President and or the Vice President has committed a violation of law, or a disgraceful act, or has not fulfilled the requirements as President and or Vice President as referred to in the 1945 Constitution.

F. Understanding and History of Impeachment

Impeachment is etymologically meaning prosecution, or accusation or call for accountability[65] And it can also mean calling or claiming to ask for accountability for the alleged violation of law committed by the President and / or Vice President during his term of office[66] Based on the historical perspective of impeachment state administration was born in the era of Ancient Egypt with the term ―iesangeliaenderungan meaning "the tendency towards self-exile" then adopted the British government in the 17th century and incorporated into the constitution of the United States in the 18th century.[67]

The word "impeachment" itself means "accusation" or "charge".[68] The word "impeachment" itself means "accusation" or "charge" .213 In the United States, the indictment to dismiss the President is called Article of Justice (article of indictment) conducted by the House of Representative (DPR) against the President before the senate. Therefore, the trial to prove the indictment was carried out by the senate and the senate who dismissed or dismissed the President (to remove frombisoffice) if the charges were proven (conficted) and if the charges were not proven, the senate would release the President from the charges (acquitted). In this position, the senate acts as a special court for adjudicate extraordinarily (legislative check), both against executives and judiciaries. Management is also a political act with the termination of position and the possibility of prohibition of holding a position and not as a criminal conviction or imposition of civil compensation.[69]

In the Indonesian context, issues related to impeachment still require some more in-depth research, particularly with regard to whether the impeachment process is subject to the principles and principles contained

if done a priori it is called a judicial preview as for example it is practiced by the Constitutional Counseil (Constitutional Council) in France. Judicial review works on the basis of the existence of laws that are hierarchically arranged.

[65] Sweep, 2010 Presidential Impeachment, Purwokerto: STAIN Press, page 56

[66] Jimly Asshiddiqie, http://www.theceli.com//pub/files/ IMPEACHMENT.doc

[67] Abdul Rasyid Thalib, 2006, Authority of the Constitutional Court and its Implications in the Indonesian State Administration System, Bandung: Citra Aditya Bakti, page 24

[68] Sapuan, op.cit., page 46

[69] Michel, Nelson., (Editor), Guide to Presidency, Second Edition, Inc.Washinton Congress Quarterly D.C.1996, page.441. (See In Hamdan Zoeva's Book, Impeachment of the President of the Republic of Indonesia on Criminal Acts of Presidential Dismissal According to the 1945 Constitution Revised Edition), page 10

in criminal law and criminal procedural law, or whether a separate procedural law is required; linkage of the impeachment process with the principle of ne bis in idem in criminal law; the relationship between the impeachment process and the principle of equality before the law, and the relationship between the impeachment process and the principle of supremacy of law.

G. State Power Theory

Legal expert and state John Locke (1632-1704) that an ideal society will be achieved if these natural rights are not violated by the state. If the state commits deprivation it is considered illegitimate and will lose legitimacy, because it has deviated from its founding goal, namely to protect its natural rights. On this basis basically, the duty of the state is to establish and implement the natural law. Locke's natural law consists of: the right to life, the right to freedom and freedom and the right to property. [70]

The application of natural law in the administration of the state is intended to limit absolute power from the state (staats absolutism) which is based on ratios and then leads to limited construction of government. At this level, trias politica is still interpreted as separation of powers. According to Jhon Locke that state power must be divided into three powers, namely legislative power, executive power, and federative power, wherein each other is separate. John Locke considers that judicial power is included as executive power, because prosecuting it as uitvoering (the implementation of the law) while federative power is an act to safeguard the security of the state in relations with other countries.

In 1748, the French philosopher Montesquieu (1688-1755) develop the theory that state power must be divided into three, namely the legislative power, executive power, and judicial power that must be separated from each other, both in terms of duties and functions of the institution and institution, especially the freedom of the judiciary. Federation power by Montesqieu was included as executive power. [71]

1. Power Separation Theory

The rationale of the Trias Politica doctrine was written by Aristotle and later developed by John Lockebah, which limited the absolute power of the ruler not because of the separation of powers but human rights. Juliosudarmo (1997: p. 26) argued, John Locke in Two Treaties on Civil Government (1690), dividing state power over three branches of power, namely:

First, power forms the law (legislative); second, the power to implement the law (executive); Third, the power of the federative. Executive power according to John Locke includes the power to carry out or maintain the law, including prosecuting. Federation power is power that includes all powers that are not included in the executive and legislative powers, which include foreign relations (Kusnardi and Ibrahim, 1988: 140).

From the description above, the separation theory of power can be approached from two aspects of the approach. First in terms of its function, it limits the power so that it is not used arbitrarily. Second, in terms of its objectives, providing guarantees and protection of human rights. In the context of this theory, it is relevant to be used to find out whether the characteristics of a democratic state law, namely the limitation of power and guarantees and protection of human rights are manifested in practice.

2. Division and Separation of Power

The limitation of power in the administration of state power is one of the characteristics of the rule of law. The history of the beginning of the idea of limiting state power was considered absolutely necessary because before the function of state power was concentrated and concentrated in the hands of one person, namely the king or queen who led the country for generations and state power, it is carried out entirely depending on the king's or queen's personal will, without clear control so that the power does not oppress or negate the rights and freedoms of the people.[72]

Restrictions on state power are carried out by holding a pattern of restrictions in the internal management of state power itself, namely by making distinctions and separating state power into several different functions.[73] From the theory of power restrictions, the concept of separation and division of power adopted by countries in the world emerged, including in Indonesia.

Bagir Manan stated that the teaching of power separation (separation af power) or power division (division of power) aims to limit the power of state institutions or officials within the respective branches of power. Furthermore, Bagir Manan stated:

[70] Soehino, State Science, Yogyakarta, Liberty, 2001, pages 106-108

[71] Mariam Budiardjo, Basics of Political Science, PT. Gramedia Pustaka Utama, Jakarta, 2002, pages 151-152

[72] Jimly Asshiddique, Introduction to State Law, Rajawali Press, 2009, pages 281-282

[73] Irfan Fachrudin, ibid, pages 142-143

With the separation or division of power, it can be prevented the accumulation of power in one hand (absolute) which will lead to the implementation of arbitrary government, and the goal of good governance can be realized.[74]

Furthermore, Geoffrey Marshall describes each aspect as a feature of the doctrine of separation of powers as follows:

First, the doctrine of separation of powers is to differentiate the functions of legislative, executive and judicial power. The legislator makes a rule, the executor implements it, while the court assesses the conflict or dispute that occurs in the implementation of the rule and applies the norm to resolve conflicts or disputes.

Secondly, the doctrine of separation of powers requires people who hold positions in the legislative body to not hold concurrent positions outside the legislative branch.

Third, the doctrine of separation of powers also determines that each organ must not interfere or intervene in the activities of other organs. Thus, the independence of each branch of power can be guaranteed as well as possible.

Fourth, there is a principle of checks and balances in which each branch of power controls and compensates for the strength of other branches of power. With this controlling balance, it is hoped that there will be no abuse of power in each independent organ.

Fifth, the principle of coordination and equality, namely all organs or state institutions that carry out the legislative, executive, and judicial functions have equal positions and have a coordinative relationship, not subordinate to one another.[75]

In the separation of powers, branches In the separation of powers, one branch of power must not be intervened by another branch of power which can be seen as an activity interfering in other branches of power. In order for the other branches of power to continue to carry out their duties properly in accordance with the constitution, not to engage in constitutional violations, or to act arbitrarily, the means of control and supervision are carried out through a system of mutual control and checks and balances.

Kuntana Magnat stated that as the last impact of the theory which is a modification of the separation of powers, then the assumption that every function of government in the broad sense (legislative, executive, judicial) can only be held by a particular state organ, can no longer be. He asserted that as a result of this there is a possibility, a national organ can be entrusted with more than one function.[76]

VII. DISCUSSION

The constitutional mechanism for the dismissal of the President and / or Deputy President in his term that has been regulated by Article 7 of the 1945 Constitution of the Republic of Indonesia still creates a legal vacuum and uncertainty regarding the legal power binding on the Constitutional Court's final and final decision on the dismissal of the President and / or Vice President by DPR. Because the MPR can ignore the Constitutional Court's decision through a political decision in the MPR.

If the DPR's petition for violations of the President and / or Vice-President has been submitted to the Constitutional Court, and the Constitutional Court decides that the President and / or Vice-President are contrary to the constitution (unconstitutional), namely violating Article 7A of the 1945 Constitution then the next process at the MPR plenary session. The implication is whether the MPR as a political institution is capable of upholding the rule of law as Article 1 paragraph (3) of the 1945 Constitution, so that it implements the Constitutional Court Decision. In the perspective of the 1945 Constitution, Indonesia is a legal state but related to the Indonesian impeachment mechanism tends not to show its character as a rule of law perfectly, namely that there is no strengthening of the rule of law, such as the Constitutional Court's final and binding decision.

The main focus in this study is how to find an appropriate constitutional mechanism in realizing a legal certainty on the Constitutional Court's decision on the opinion of the House of Representatives regarding alleged violations by the President and / or the Vice-President of the Republic of Indonesia in 1945 which can reflect a harmonious constitutional order that balances the principle of the rule of law (nomocracy) and constitutional democratic principles fairly in the context of the impeachment mechanism of the President and / or the Vice President. So that the Constitutional Court's decision has binding legal force in the deliberation process in the MPR to decide on the DPR's proposal for the dismissal of the President / Vice President.

With the mechanism that can balance the principles of the rule of law and democracy, there will be a legal certainty over the Constitutional Court's final decision, binding the MPR in a decision taken to dismiss the President and / or Vice-President in his term.

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[74] Bagir Manan, Presidential Institute, Gama Media, Law Study Center (PSH) FAkultas Law University of Indonesia, Yogyakarta, 1999, page 9

[75] *Ibid*, pages 289-290

[76] Kuntana Magnar, "Relations of the House of Representatives ...", Op.Cit., page 25

Some of the above phenomena background the mindset of the author in determining the frame of mind in this study which essentially is that the nature of the Constitutional Court's decision on the opinion of the House of Representatives regarding alleged violations by the President and / or Vice President according to the 1945 Constitution of the Republic of Indonesia can be implemented consistently by the MPR in deciding based on consideration of the Constitutional Court's decision.

VIII. CONCLUSION

1. The mechanism of the Constitutional Court in examining, adjudicating and deciding the opinion of the People's Legislative Assembly that the President and / or the Vice President have violated the law in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts, and / or the opinion that the president and / or the vice president no longer meets the requirements as President and / or Vice President has been carried out in accordance with the prevailing laws and regulations
2. The Constitutional Court's ruling as a judicial institution has binding power over the opinion of the People's Legislative Assembly can be ignored by the People's Consultative Assembly as a political institution that the President and / or Vice-President has violated the law in the form of treason against the state, corruption, bribery, other serious crimes, or acts disgraceful, and / or the opinion that the president and / or vice president no longer fulfill the requirements as President and / or Vice President
3. The Constitutional Court's decision is maintained consistently and holistically according to the ruling of the Constitutional Court ruling and carried out according to the constitution.
4. The nature of the Constitutional Court's decision is realized based on the values of justice based on a just and civilized humanity. The decision of the Constitutional Court is based on the wisdom of wisdom in deliberating representatives.

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