

PROCEEDING



Paper of International Seminar

FACULTY OF LAW SEBELAS MARET UNIVERSITY

CHALLENGE OF THE CONSTITUTIONAL COURT TO REINFORCE DEMOCRACY AND HUMAN RIGHTS: BETWEEN POLITICAL PRESSURE AND GOOD JUSTICE SYSTEM DEVELOPMENT

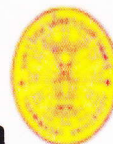
THE SUNAN HOTEL, SOLO
OCTOBER 1th -2th , 2011



Mahkamah Konstitusi RI



Hanns
Seidel
Foundation



CPG THAMMASAT
UNIVERSITY

ISBN 979-978-3456-95-1

PROCEEDING

PAPER OF INTERNATIONAL SEMINAR

Advisor

Prof. Dr. Hartiwiningsih, S.H., M.Hum.

Guarantor

Dr. Hari Purwadi, S.H., M.Hum.

Editorial Vice Director

Sunny Ummul Firdaus, S.H., M.H.

Secretary of Editorial Director

Rosita Candrakirana, S.H., M.H.

Editorial Aboard

Ayub Torry Satriyo Kusumo, S.H., M.H.

Dr. Kunderu S, S.Pd., M.Sc

CONTENTS

	Pages
Editorial Staff.....	i
Preface.....	ii
Time Schedule.....	iii
The Participants of Call for Papers.....	iv-vi
Contents.....	vii-viii
Protection of Parliamentary Minorities in Germany Henning Glaser	1-3
German Constitutional Law vs. Constitutional Reality Nils Wagenknecht	4-6
Some Critical Problems in The Operation of The Constitutional Court's Power and Challenge in order to Reinforce Human Rights and Democratic Constitutional State Widodo Eka Tjahjana	7-17
Green Constitution as Strengthening Environmental Law Norms in Indonesia I Gusti Ayu Ketut Rahmi Handayani	18-28
The State Law and Hajj Implementation Phenomenon Muh. Hudi Asrori S	29-49
The Configuration of Indonesian Constitutional Court Judges in The Political and Legal Perspective Aries Harianto	50-55
Protection of Women's Rights as one of The Protection of Human Rights Gayatri Dyah Suprobowati	56-73
Constitutional Court versus Neokleptokratisme Siti Marwiyah	74-77
The Protection of Workers' Constitutional Rights in Outsourcing Based on Law on Manpower Fanny Tanuwijaja	78-82
Emancipation and Contingencies Measuring Constitutional Court <i>Rechtpositie</i> as Sentra Collective Legal Awareness Post-Ratification of Act. No. 8 of 2011 Arief Hidayat and Ayub Torry Satriyo	83-101
Human Rights in The Constitution and Implementation Perspective (Between Hope and Reality) Rosita Indrayati	102-108
Ultra Petita Urgency for The Constitutional Court in Maintaining The Constitution of The Progressive Law Perspective Mulyanto	109-117
The Constitutional Court Functions in The Protecting The Indigenous Peoples Constitutional Rights Dominikus Rato	118-122
The Rights for Environmental on Laws and Society Perspective (Principle of Human Rights) Dinarjati Eka Puspitasari	123-128

THE CONFIGURATION OF INDONESIAN CONSTITUTIONAL COURT JUDGES IN THE POLITICAL AND LEGAL PERSPECTIVE¹

**The Study of Legal and Political Problems on
The Dismissal of President and/ or Vice President**

Aries Harianto²

Lecturer at Faculty of Law - Jember University

Abstract

Nine of Indonesian Constitutional Court judges representing the legislative body, President and Supreme Court as the proposer have caused legal and political problems in the implementation of their role. This problem occurred when the Indonesian Constitutional Court judges deal with the problem on the dismissal of president and/ or vice president. It may in turn cause a conflict of authority between Indonesian Constitutional Court with the Public Court in a concrete level; which will trigger the issuance of decisions that may diminish the fundamental legal values.

Key Words: *judge, authority, Public Court, Constitutional Court, Supreme Court, Fundamental Legal Values.*

A. Preface

Politics and Law are closely interrelated. Both of them are the 'two face of a coin', which define and complete each other. Law and politics have the same level of position. Law cannot be defined as part of political system and politics cannot be defined as part of law either. However, often the political policy plays more important role in determining the legal materials applied in the state. Constitutional objective principles are often blackened by subjective interests of political actors to strengthen their political position. It may cause the failure of the constitutional principles realization into what they should be, even these constitutional principles are often manipulated or misused.³

¹ Represented in International Forum Seminar themed: *Challenge of The Constitutional Court to Reinforce Democracy and Human Rights : Between Political Pressure and Good Justice System Development*, Universitas Sebelas Maret, Solo on 1-2 October 2011

² email : aries_pro69@yahoo.co.id

³ Muliadi, _____, *Politik Hukum* : Modul Mata Kuliah pada Program Magister Ilmu Hukum Program Pasca Sarjana Universitas Jayabaya, Hal 23.

Nowadays there is a thought that law is a political result that every character of legal product is determined by the power or configuration of political system. This perspective is based on the reality that every legal product can be viewed as crystallization from political interacting among politicians. In other words, the legislative activity (forming legislation) is more about accommodating the political decisions rather than operating the real legal activities that the legislative body is closer to political aspect to the legal one.⁴

Concrete indicator of this fact can be learned in one of the provisions in the Constitution of 1945 Article 24C Sub-article 3 and Acts No. 24 2003 about Constitutional Court Article 18 Sub-article (1) which says that the existence of nine judges of the Constitutional Court are the representation of the House of Representative, President and Supreme Court. This fact may cause legal and political problem, especially when they have to face the dismissal of president and/ or vice problem. This problem occurs when we pay closer attention on the Acts No.24 2003 about Constitutional Court Article 10 Sub-article (3) which contains the reason of dismissal as a result of the major criminal offense that may be charged with 5 (five) years in prison or more. In order to reveal the material truth of the criminal offense accused, we have to understand the problem through Public Court, not Constitution Court level. Therefore there is a debate which stimulates the academic interpretation: whether Constitutional Court examines House of Representative's opinion or also has the authority to "adjudicate" President and/or Vice President.⁵

Based on the legal provision, Constitutional Court has the authority to do "adjudication". Regarding the configurations of Constitutional Court judges, this process of justice is full of political considerations, not legal consideration.

⁴ Satjipto Rahardjo, 1983, *Permasalahan Hukum Indonesia*, Aksara, Cet.ke 3, hal 14

⁵ Jimly Assidiqy, 2005, *mekanisme Impeachment dan Hukum Acara Mahkamah Konstitusi : Kerjasama Mahkamah Konstitusi Republik Indonesia dengan Konrad Adenauer Stiftung, Jakarta, Hal 2*

B. Problem to Discuss

Based on the previous illustration, legal issues as a problem to discuss that will be the focus of this study is: *What is the legal and political implication of the configuration of Indonesian Constitutional Court judges, based on the Constitution of 1945 Article 24C Sub-article 3 and Acts No.24 2003 about the Constitutional Court Article 18 Sub-article (1) related to the dismissal of President and Vice President?*⁶

C. Discussion

The constitution of 1945 of The Republic of Indonesia has provided the reasons and procedure to dismiss the president and or the vice president in term, namely in Article 7A and 7B, as follows:

Article 7A

The President and/or Vice President may be dismissed from his/ her position during his/ her term by the People's Consultative Assembly based on a proposal from the House of Representative, either when proven guilty of violating the law by betrayal toward the state, of corruption, of bribery, of any other major felony, or because of disgraceful behavior, as well as when proven no longer to fulfill the conditions as President and/or Vice President. Meanwhile, the procedure to dismiss the president is as provided in article 7B as follows:

Any proposal for the dismissal of the President and/or the Vice-President may be submitted by the House of Representative to the People's Consultative assembly only by first submitting a request to the Constitutional Court to issue a decision on the opinion of the HoR that the President and/or Vice- President has violated the as mentioned on article 7A.

Based on the above provision, therefore there are two kinds of Constitutional Court decision, as follows:

1. If the constitutional Court decides that the president and Vice President are not proven to have violated law by committing betrayal to the state, corruption, bribery, and any other major offense or other disgraceful acts and or not proven that the President or Vice President are no longer fulfilling the conditions as

⁶ This legal content occurred and used as a study in the *Program Pengayaan Materi (PPM)*-Doctoral Program of Law Science Universitas Brawijaya Malang, 18 Augsts 2011 on Law Political subject who is guided by Prof. Dr. Isrok, S.H., M.

President and/or Vice President, the decision shows that the proposal has been rejected.

2. If the Constitutional Court decides that the president and Vice President are proven to have violated law by committing betrayal to the state, corruption, bribery, and any other major offense or other disgraceful acts and or proven that the President or Vice President are no longer fulfilling the conditions as President and/or Vice President, the decision shows that the proposal has been approved. As learning the reasons and process of the dismissal of President or Vice President in term as illustration above, next there are some follow up problems affecting the process and final result of Indonesian People's Consultative assembly in the dismissal of the President and or the Vice President in term based on the provision on article 24C sub article 3 of The Constitution of 1945 of the Republic of Indonesia, as well as Act No No.24 of 2003 about Constitutional Court Article 18 sub article (1) mention that the Constitutional Court has 9 (nine) justices approved by the President with the following details: 3 (three) judges proposed by the HoR, 3 by the President, and 3 by the Supreme Court. Considering the configuration of the Constitutional Court judges, politically there is a wide open possibility that the judges from the three representations will fight for the interests of the proposing bodies.

In terms of President and Vice President dismissal, the judges proposed by the President will tend to be on the President side, and those proposed by the House of Representative will tend to be on theirs, as a part of Logrolling Politics. Accordingly, the president can utilize two pathways namely the pathways with the justices whose appointment is proposal by the president and the pathway of his/ her party in the House of Representative. Conversely, the HoR will use the pathway of the justices proposed by the

HoR and the HoR pathway itself. However, the appointment of the 9 (nine) justices are approved by Presidential Decree; therefore, with the Logrolling Politics, their decision can be based on the President's interests.

Beside that, the obligation of Constitutional Court based on the provision on Article 24C sub article 2 is to examine whether the opinion of the HoR about the notion that the President and/ or the Vice President have been proven or not proven to violate the law as provided on Article 7A the Constitution of 1945 is more to find the "Material truth" rather a political interest. Further, It can be concluded that the reasons of dismissal in Indonesia can be divided into three groups

1. Criminal Offenses, in terms of betrayal toward the state, corruption, bribery, and other major offenses.
2. Violation on the constitutional law and state administration law (No longer meeting the requirement to be the president or vice president)
3. Violating Ethical Norm (committing decadent deeds)

It is a bit weird if the Constitutional Court as the Body of Constitutional Court is in charge of doing the trial for criminal cases such as treachery, corruption, bribery, and other major offenses. Supposedly, criminal offenses are under the authority of public court under the Supreme Court. That situation is a picture of the overlapping authority of the judicial bodies which in turn will be potential to trigger inter judicial bodies conflict. That condition is getting less conducive due to the involvement of political configuration in the judicial process.

Criminal law process regarding the verification of major offenses committed by the related figure should be the authority of Public Court. Therefore, the reason of prosecution or accusation must be regarding the criminal law, namely dealing with the certain major offenses. IN the judicial process of the criminal offense, there are some verifications

regarding: (a) whether the offense as accused is true or, and (b) whether the person can take the responsibility on the accusation. In terms of the first, the verification must be conducted by the court. The most appropriate body for that is the Supreme Court since the '*impeachment*' deals with the very high function.

D. CLOSSURE

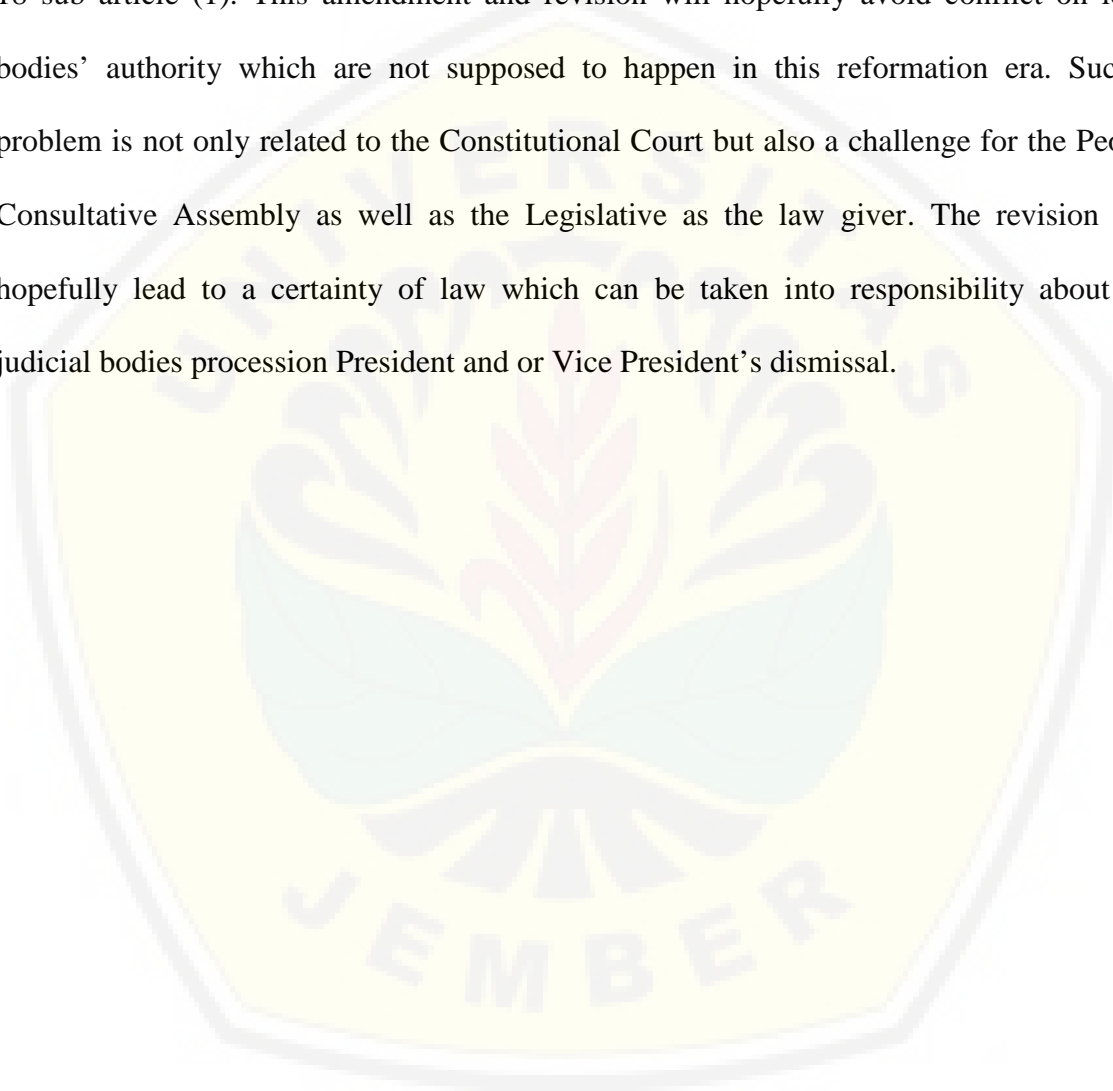
1. Conclusion

Based on the study and analysis above, it can be concluded the availability of justice configuration on the Constitutional Court of RI regarding the representation of the legal and politics proposer may cause trouble if confronted to the presidential dismissal problem. The legal matter post the Constitutional Court of RI to implement the authority of public court in terms of finding the material truth to proof the allegation of criminal offence committed by the President and Vice President. The condition may create a not conducive situation in building the legal supremacy in Indonesia, even it opposes the spirit of equality before the law.

Meanwhile, politically, due to the heterogeneity of the origin and interest of the bodies recommending them, therefore, so as to produce the decision of Constitutional Court which supposedly reflects and uphold the basic values of law namely Efficacy, justice and certainty, the judges will be attracted to a political interest which often opposes the purpose of law itself. The process of dismissal of President and Vice President will lead to a new problem with strong political essence. It may even subordinating law. Therefore, the mandates of Constitution of 1945 as the statsfundamentalnorm, place the law as a means to realize the dream of justice and welfare which surely are still only dreams.

2. Suggestion

So as to support the commitment and consistency of Constitutional Court of RI as the guardian of constitution as well as to build the constitutional awareness and culture, it is urgent to do an amendment to the constitution of 1945 especially on article 24 C sub article (3) and revision on the Act number 24 of 2003 about Constitutional Court Article 18 sub article (1). This amendment and revision will hopefully avoid conflict on legal bodies' authority which are not supposed to happen in this reformation era. Such a problem is not only related to the Constitutional Court but also a challenge for the People Consultative Assembly as well as the Legislative as the law giver. The revision will hopefully lead to a certainty of law which can be taken into responsibility about the judicial bodies procession President and or Vice President's dismissal.



REFERENCES

Isrok, Course Handout: Politik Hukum, Material Enrichment Program-Doctorate of Law Program Brawijaya University Malang, 18 August 2011 on Political Law Course.

Jimly Assidiqy, 2005, mekanisme Impeachment dan Hukum Acara Mahkamah Konstitusi : A Cooperation between Constitutional Court of the Republik Indonesia and Konrad Adenauer Stiftung, Jakarta

Muliadi, _____, *Politik Hukum* : Course Module of Master of Law Program Jayabaya University Postgraduate Department.

Satjipto Rahardjo, 1983, *Permasalahan Hukum Indonesia*, Aksara, 3rd Edition

Constitution of 1945 of the Republic of Indonesia

Act No.24 of 2003 about Constitutional Court

