

## Disobedience of Constitutional Court Decision as a Reason for Impeachment of President and Vice President

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**Abstract:** This article discusses disobedience of the Constitutional Court Decision Number 91/PUU-XVIII/2020 which was carried out by the Government by issuing Minister of Home Affairs Instruction Number 68 of 2021 Concerning Follow-Up of the Constitutional Court Decision Number 91/PUU-XVIII/2020 Regarding the Formal Review of Law Number 11 of 2020 concerning Job Creation which in essence states that it remains guided and implement Law Number 11 of 2020 concerning Job Creation and its Implementing Regulations. This instruction from the Minister of Home Affairs has violated one of the rulings stating that the legally binding force of Law Number 11 of 2020 concerning Job Creation must be temporarily suspended for 2 (two) years or until the process of its formation has been repaired. This study uses a statutory approach and a conceptual approach and is also evaluated descriptively and qualitatively. The conclusion of this paper is that disobedience to the constitution by the Government will have a juridical impact on not realizing legal certainty, impacting people's distrust of the Constitutional Court, as well as a bad example given by the President in terms of constitutional awareness, so that it is appropriate for the DPR RI to file an impeachment process against the president

**Keywords:** Constitutional, Disobedience, Impeachment.

**Abstrak:** Tulisan ini membahas mengenai pembangkangan Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 dilakukan oleh Pemerintah dengan mengeluarkan Instruksi Menteri Dalam Negeri Nomor 68 Tahun 2021 Tentang Tindak Lanjut Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 Atas Pengujian Formil Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja yang pada pokoknya menyatakan tetap mempedomani dan melaksanakan Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja beserta Peraturan Pelaksanaanya. Instruksi Menteri Dalam Negeri ini telah melanggar salah satu amar putusannya

menyatakan kekuatan hukum mengikat Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja haruslah ditangguhkan sementara waktu selama 2 (dua) tahun atau sampai dengan telah diperbaikinya kembali proses pembentukannya. Penelitian ini menggunakan pendekatan Perundang-undangan dan pendekatan konseptual dan juga dievaluasi secara deskriptif kualitatif. Kesimpulan tulisan ini yaitu pembangkangan konstitusi yang dilakukan oleh Pemerintah ini akan memberikan dampak yuridis tidak terwujudnya kepastian hukum, memberikan dampak ketidakpercayaan rakyat terhadap Mahkamah Konstitusi, serta contoh buruk yang diberikan oleh Presiden dalam hal kesadaran berkonstitusi, sehingga patut kiranya bagi DPR RI untuk mengajukan proses pemakzulan terhadap presiden

**Kata Kunci:** Pembangkangan, Konstitusi, Pemakzulan.

## Introduction

Every country is led by a head of state and head of government who is the main command in governing all aspects of life in the country. Indonesia, which is a democratic country, plays an important role in its development as a developing country.<sup>1</sup> The President and/or Vice President have a strategic role in leading a country by taking actions that can make the country they lead more advanced. The president's position as head of state and head of government in Indonesia shows that the president's power is essentially very large. The position of the president who has great power must also be accompanied by the ethics of the office itself as a guideline for how a president should behave, what is inappropriate, and what is appropriate to carry out.<sup>2</sup>

However, the President's position is not untouched by the law, in the Indonesian

context a President can be impeached for legal reasons, not just political reasons.<sup>3</sup> The People's Consultative Assembly (MPR), which amended the constitution in the reform era, agreed to complicate the process of presidential impeachment by preventing House of Representatives (DPR) politicians from dismissing a President and/or Vice President for political differences.<sup>4</sup> In Indonesian history, two presidents have been impeached: President Soekarno in 1967 and President Abdurrahman Wahid in 2001. Cases of presidential impeachment, such as those of Soekarno and Abdurrahman Wahid, show that the president is not a position that cannot be legally or politically accountable. No one in this state of law has the right to immunity or immunity from the law.<sup>5</sup>

Before the amendment of the 1945 Constitution, the Special Session could dismiss the president immediately without any due process of law where the MPR could

<sup>1</sup> Gani, Iskandar A., et al. "The Constitutional Court's Protection and Fulfilment of the Citizens' Rights: Constitutional and Islamic Law Perspectives." *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8.1 (2024): 317-338.

<sup>2</sup> Putu Eva Ditayani Antari, "The Interpretation of Misconduct Act as A Reason to Dismiss President: An Ethical Approach," *De Jure: Jurnal Hukum dan Syar'iah* 13, no. 1 (28 Juli 2021), <https://doi.org/10.18860/j-fsh.v13i1.12122>.

<sup>3</sup> Hanta Yuda A. R., *Presidensialisme setengah hati : dari dilema ke kompromi* (Jakarta: Gramedia Pustaka Utama, 2010), 186.

<sup>4</sup> Syamsuddin Haris, *Pemilu, dan Parlemen Era Reformasi* (Jakarta: Yayasan Pustaka Obor Indonesia, 2014), 200.

<sup>5</sup> Taufiqurrohman, AH Asari, et al. "The Role of Islamic Law, Constitution, and Culture in Democracy in the UAE and Indonesia." *AHKAM: Jurnal Ilmu Syariah* 24.1 (2024).

impeach the President if he was proven to have committed a criminal act, betrayed the country, and was no longer able to carry out his duties.<sup>6</sup> Until now, the impeachment of President Soekarno and President Abdurrahman Wahid is still debated on whether the reason or process of impeachment was constitutional.<sup>7</sup> This is because at that time the politicization factor became very dominant in the impeachment process. Political beliefs and interests of political parties can influence decisions made about impeachment. The regulation on the reasons for the dismissal of the President and/or Vice President after the amendment of the 1945 Constitution of the Republic of Indonesia is regulated in Article 7A which states "The President and/or Vice President may be dismissed during his/her term of office by the People's Consultative Assembly on the proposal of the House of Representatives, either if proven to have violated the law in the form of treason against the state, corruption, bribery, other serious criminal acts, or disgraceful acts or if proven to no longer qualify as President and/or Vice President".<sup>8</sup>

Article 7B of the 1945 Constitution of the Republic of Indonesia regulates the process of dismissal of the President and/or Vice President during the term of office by 3 (three) state institutions, namely the DPR, the

Constitutional Court, and the MPR.<sup>9</sup> The Constitutional Court was formed to ensure that the Constitution as the highest law can be enforced as it should, therefore, the Constitutional Court is usually called the guardian of the Constitution.<sup>10</sup> The Constitutional Court has an important role in supervising the constitutional system in Indonesia so that it meets the democratic criteria that the nation aspires to, by enforcing the principle of checks and balances.<sup>11</sup>

In the two articles in the 1945 Constitution of the Republic of Indonesia above, it is not explicitly stated that violation of the order of the Constitutional Court Decision in the case of Testing Laws against the 1945 Constitution of the Republic of Indonesia can be a reason for the President and/or Vice President to be impeached, while the act of ignoring the order of the Constitutional Court Decision can be interpreted as a form of Constitution Disobedience.<sup>12</sup> The practice of ignoring the order of the Constitutional Court Decision by the Government can be seen in the Instruction of the Minister of Home Affairs Number 68 of 2021 concerning the Follow-up to the Constitutional Court Decision Number 91 / PUU-XVIII / 2020 on the Formal Testing of Law Number 11 of 2020 concerning Job Creation, which states that it continues to guide and implement Law Number 11 of 2020 concerning Job Creation and its

<sup>6</sup> Abdul Gani Abdullah, "Laporan Akhir Tim Pengkajian Hukum tentang Impeachment dalam Sisten Hukum Tata Negara" (BPHN, Desember 2005), 30.

<sup>7</sup> Hamdan Zoelva, *Pemakzulan Presiden di Indonesia* (Jakarta: Sinar Grafika, 2011), 13.

<sup>8</sup> Suhartono, Slamet. "Eksistensi Fatwa Majelis Ulama Indonesia dalam Perspektif Negara Hukum Pancasila." *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 12.2 (2017): 448-465.

<sup>9</sup> Zada, Khamami. "Sharia and Islamic state in Indonesia constitutional democracy: an Aceh experience." *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 23.1 (2023): 1-17.

<sup>10</sup> Zada, K., et al. "Constitutionalizing Sharia: Identity and Independence of Islamic Politics Among Students. *JURIS (Jurnal Ilmiah Syariah)*, 21 (2), 195-206." (2022).

<sup>11</sup> Ivana Eka Kusuma Wardani, "Peran Mahkamah Konstitusi dalam Mengawal Prinsip Checks and Balances Terhadap Dewan Perwakilan Daerah di Indonesia," *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 2, no. 2 (13 Desember 2019): 239-52, <https://doi.org/10.24090/volksgeist.v2i2.2883>.

<sup>12</sup> Novendri M. Nggilu, "Menggagas Sanksi atas Tindakan Constitution Disobedience terhadap Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 1 (1 April 2019): 43, <https://doi.org/10.31078/jk1613>.

Implementation Regulations.<sup>13</sup> This is inversely proportional to the order of the Constitutional Court Decision Number 91 / PUU-XVIII / 2020 which suspends the binding force of Law Number 11 of 2020 concerning Job Creation and its Implementing Regulations temporarily and imitatively for 2 (two) years, especially regarding the implementation of regulations that become the legal basis or reference in making policies/actions that are strategic and have a broad impact.<sup>14</sup>

In previous research conducted by Muhammad Fauzan<sup>15</sup> entitled "The Authority of the Constitutional Court in the Presidential Impeachment Process According to the Constitutional System of the Republic of Indonesia," the author discusses the authority of the Constitutional Court in the process of impeaching the president of the Republic of Indonesia. The Constitutional Court has the authority to decide the opinion of the DPR RI regarding violations of the law committed by the President and/or Vice President.<sup>16</sup> The Constitutional Court can also dissolve political parties and decide on electoral disputes.<sup>17</sup> The author discusses why the Constitutional Court was given the authority,

by questioning why laws were previously considered indefensible and conflicts between state institutions were resolved politically. This article argues that the Constitutional Court should have the authority to test laws that contradict the Constitution because many laws are contrary to the spirit of the Constitution. In addition, this article notes that there was no institution to test laws against the Constitution due to the strong position of the President before the amendment of the Constitution.<sup>18</sup> Further, this article states the establishment of a Constitutional Court is essential to prevent political decisions and maintain the supremacy of the Constitution. In addition, research conducted by Farid Wajdi and Andryan<sup>19</sup> entitled "The Nature of the Constitutional Court Impeachment Decision on the Legal Status of the President and/or Vice President" in which the authors discuss and study the impeachment process in Indonesia, especially the President and Vice President. This study explains that impeachment decisions do not always result in the dismissal of the President or Vice President, because the MPR RI has the final say. <sup>20</sup>The research also discusses how the

<sup>13</sup> Mohammad Fandrian Hadistianto dan Siti Rohmah, "Paradoks Implementasi Kebijakan Upah Minimum Pasca Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020," *Jurnal Ilmu Hukum* 12, no. 1 (7 Maret 2023): 175, <https://doi.org/10.30652/jih.v12i1.8436>.

<sup>14</sup> Andari Yurikosari dkk., *Masalah-masalah hukum pasca Putusan Mahkamah Konstitusi No.19/PUU-XVIII/2020* (Depok: PT Rajawali Buana Pusaka, 2022), 24.

<sup>15</sup> Muhammad Fauzan, "Kewenangan Mahkamah Konstitusi Dalam Proses Impeachment Presiden Menurut Sistem Ketatanegaraan Republik Indonesia," *Jurnal Dinamika Hukum* 11, no. 1 (1 Februari 2011), <https://doi.org/10.20884/1.jdh.2011.11.1.66>.

<sup>16</sup> Fikriawan, Suad, Syamsul Anwar, and Misnen Ardiansyah. "The Paradigm of Progressive Judge's Decision and Its Contribution to Islamic Legal Reform in Indonesia." *Al-Manahij: Jurnal Kajian Hukum Islam* 15.2 (2021): 249-262.

<sup>17</sup> Amrullah, Amrullah, and Ahmad Rizki. "Tinjauan Maqashid Syariah terhadap Putusan Mahkamah Konstitusi Nomor 22/Puu-Xv/2017 tentang Permohonan Batas Usia Kawin." *El-Ushrah: Jurnal Hukum Keluarga* 3.1 (2020): 115-124

<sup>18</sup> Antari, Putu Eva Ditayani. "The Interpretation of Misconduct Act as A Reason to Dismiss President: An Ethical Approach." *De Jure: Jurnal Hukum dan Syar'iah* 13.1 (2021).

<sup>19</sup> Farid Wajdi dan Andryan Andryan, "Sifat Putusan Impeachment MK Terhadap Status Hukum Presiden dan/atau Wakil Presiden," *Jurnal Penelitian Hukum De Jure* 20, no. 3 (29 September 2020): 301.

<sup>20</sup> Hasan, Ahmadi, Anwar Hafidzi, and Yusna Zaidah. "Modern Law Aspect on Procedural Decision of Sultan Adam Law." *Al-Ahkam* 29.2 (2019): 159-166.

ideal impeachment mechanism should be, which should place the Constitutional Court in a decisive position rather than justifying. One of the issues that arose in this previous study was what the ideal form of the impeachment process should be. According to this research, this mechanism should place the Constitutional Court in a significant position rather than simply justifying the decision of the DPR RI.<sup>21</sup> With the two previous articles above, it can be concluded that the novelty in this article is to see how the implications of the government's negligence, in this case the President and/or Vice President, towards the Constitutional Court's decision which is final and binding.<sup>22</sup>

Ignoring the order of the Constitutional Court's decision can be interpreted as a form of defiance of the Constitution.<sup>23</sup> The practice of defiance of the Constitution will result in extraordinary legal implications, including providing examples of bad state practice from a President, legal uncertainty in state life, the ineffectiveness of the functions and mechanisms of checks and balances carried out by the Constitutional Court as the guardian of the constitution against the Government.<sup>24</sup> Therefore, it is interesting to study how the actions of the President and/or Vice President who disobey the Constitutional Court Decision can be a reason for impeachment.

## Method

This research is normative legal research and uses secondary data sources derived from primary, secondary, and tertiary legal materials. In addition, this research uses a statutory approach and a conceptual approach.<sup>25</sup> The data collected, which includes primary, secondary, and tertiary legal materials, is analyzed using theoretical instruments or concepts.<sup>26</sup>

## Result and Discussion

### *Impeachment in Indonesia and its Comparison in Various Countries*

The Constitutional Court as one of the Judicial Power institutions was born with the main objective of maintaining the spirit and mandate of the 1945 Constitution of the Republic of Indonesia. The Court itself is the first and final level judicial institution and has a function as a court of law, namely adjudicating the legal system and the justice system itself.<sup>27</sup> The Constitution gives 4 (four) authorities and 1 (one) obligation to the Constitutional Court as stipulated in Article 24 C of the 1945 Constitution of the Republic of Indonesia which is then further emphasized and elaborated in Article 10 of Law No. 24 of 2003 concerning the Constitutional Court. Specifically the impeachment of the President and/or Vice President can be found in the provisions of Article 10 paragraph (2) of Law No. 24 of 2003

<sup>21</sup> Sarpini, Sarpini. "Prosedur Menyelesaikan Kasus Hukum Dengan Ijma'." *El-Mashlahah* 9.1 (2019).

<sup>22</sup> Noor, Salafuddin, Ahmadi Hasan, and Nuril Khasyi'in. "Review of Political Theory of Islamic Law Abul'Ala Al Maududy Positive Perspective of the Political System of Indonesian Islamic Law." *Syariah: Jurnal Hukum dan Pemikiran* 23.1 (2023): 36-49.

<sup>23</sup> Fajar Laksono Soeroso, "Pembangkangan' Terhadap Putusan Mahkamah Konstitusi," *Jurnal Yudisial* 6, no. 3 (2013),

<sup>24</sup> Aan Eko Widiarto, "Ketidakpastian Hukum Kewenangan Lembaga Pembentuk Undang-Undang Akibat Pengabaian Putusan Mahkamah

Konstitusi," *Jurnal Konstitusi* 12, no. 4 (20 Mei 2016): 735.

<sup>25</sup> Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: PT RajaGrafindo Persada, 2016), 94.

<sup>26</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Rajawali Press, 2015), 14.

<sup>27</sup> Angghie Permatasari, Lusy Liany, dan Amir Mahmud, "Disharmonisasi Antara Mahkamah Konstitusi Dan Mahkamah Agung Dihubungkan Dengan Asas Kepastian Hukum (Studi Putusan Nomor 30/PUU-XVI/2018 dan Putusan Nomor 65 P/HUM/2018 dengan Pemohon Oesman Sapta Odang)," *JURIS (Jurnal Ilmiah Syariah)* 19, no. 1 (29 Juni 2020): 97.



concerning the Constitutional Court. The juridical stage by the Constitutional Court is a sequence and begins with the political stage in the DPR RI through its opinion on violations of the President and/or Vice President, and ends with the political stage process in the MPR RI which assesses whether the DPR RI's opinion is sufficient, which is then strengthened by the decision of the Constitutional Court.<sup>28</sup> This check and balance process ensures that no institution has the sole power to impeach the President and/or Vice President. The purpose of this process is to prevent abuse of power and ensure that the impeachment of the President and/or Vice President is based on strong grounds and clear procedures.

Impeachment can be defined as a request for accountability of the President and/or Vice President for alleged actions that are contrary to the 1945 Constitution of the Republic of Indonesia.<sup>29</sup> The regulation of impeachment is important in the Presidential state system because it is part of the checks and balances carried out by the legislative body to the executive power.<sup>30</sup> The impeachment stage is a control authority granted by the Constitution to the DPR RI against the actions of the President and/or Vice President who are suspected of violating the constitution or positive law in their positions as public officials who have been given the mandate by the people.<sup>31</sup>

In the history of Indonesia before the establishment of the Constitutional Court, at least the impeachment process had been carried out against Presidents Soekarno and Abdurrahman Wahid. The impeachment process of President Soekarno began with the instability of the government caused by the granting of permission to establish the Communist Party which was not acceptable to the Indonesian people and the political elite, so President Soekarno's leadership was considered to endanger the safety and integrity of the country.<sup>32</sup> On July 5, 1966, the MPRS issued decision No. 5/MPRS/1966 which essentially asked President Soekarno to complete an accountability report regarding the events of G-30S/PKI, and the Nawaksara speech as a form of President Soekarno's accountability was considered not meeting the provisions of having violated the state direction and the provisions of the MPRS.<sup>33</sup> Furthermore, President Abdurrahman Wahid was impeached on the background of carrying out a series of policies that were considered detrimental to the state such as the investigation of Soeharto's family and cronies, dissolving the Golkar Party, dissolving the Information Department, apologizing to the families of the victims of mass murder in 1965, not attending and refusing to give account in the Special Session of the MPR RI in 2001 and the issuance of the Presidential Edict of the Republic of

<sup>28</sup> Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Jakarta: Konstitusi Press, 2005), 73.

<sup>29</sup> Catur Alfath Satriya, "Karakteristik Pemakzulan Presiden di Indonesia," *Jurnal Konstitusi* 19, no. 3 (30 Agustus 2022): 528–53, <https://doi.org/10.31078/jk1932>.

<sup>30</sup> Faisal Faturrahman Nurjamil, "Kewenangan Mahkamah Konstitusi dalam Memutus Usulan Impeachment Presiden dan/atau Wakil Presiden dalam Hukum Positif di Indonesia," *AHKAM* 2, no. 2 (24 Mei 2023): 313–26.

<sup>31</sup> Eko Noer Kristiyanto, "Pemakzulan Presiden Republik Indonesia Pasca Amandemen UUD

1945," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 2, no. 3 (31 Desember 2013): 331, <https://doi.org/10.33331/rechtsvinding.v2i3.63>.

<sup>32</sup> Elva Imeldatur Rohmah, "Mekanisme Pemakzulan Presiden Sebelum Dan Sesudah Terbentuknya Mahkamah Konstitusi Di Indonesia," *As-Shahifah Jurnal oc Constitution and Government* 2, no. 2 (2022), <https://doi.org/10.19105/asshahifah.v2i2.6955>.

<sup>33</sup> M. Saoki Oktava dan Riska Ari Amalia, "Paradoks Pemakzulan Presiden/Wakil Presiden Dalam Prinsip Negara Hukum," *Media Keadilan: Jurnal Ilmu Hukum* 10, no. 2 (31 Oktober 2019): 199, <https://doi.org/10.31764/jmk.v10i2.2249>.

Indonesia on July 23, 2001.<sup>34</sup> President Gusdur's dismissal case by Parliament because he had violated the constitution, but in reality it is not so, because the court has decided that he didn't violate the constitution, however, His ousting was more like issues of political or power aspects dominant legislature.<sup>35</sup>

The two experiences above prove that impeachment can be carried out against a President and/or Vice President by the MPR RI on the proposal of the DPR RI, because they have been proven to have violated the law in the form of betrayal of the state, corruption, bribery, other serious criminal acts, or misconduct or if they are proven to no longer qualify as President and/or Vice President, without going through judicial procedures and therefore very dominant political factors in determining. After the reformation and the establishment of the Constitutional Court, the impeachment process has never been conducted. Currently, to initiate the impeachment process of the President and/or Vice President, the DPR RI must submit a motion of no confidence against the President and/or Vice President. The motion of no confidence must be approved by 2/3 (two-thirds) of the absolute majority of the members of the DPR RI. After the no-confidence motion is approved, the DPR RI forms a Special Committee to investigate the alleged violation of the Constitution which is the basis for impeachment. The Special Committee conducts the investigation and makes recommendations to the House of Representatives. If the DPR RI agrees to proceed, the impeachment process will proceed to the Constitutional Court for

further processing. The Constitutional Court will decide whether there is a constitutional violation that qualifies for impeachment. If the Constitutional Court decides that there is a constitutional violation, then impeachment can be carried out with the approval of at least 2/3 (two-thirds) of the members of the House of Representatives. Furthermore, impeachment can be carried out with the approval of at least 2/3 (two-thirds) of the members of the MPR RI.

Impeachment as a form of accountability of the President and/or Vice President does not only exist in Indonesia. Several countries also have impeachment mechanisms that are certainly different from Indonesia. For comparison, impeachment systems that exist in several countries include:

#### 1. United States of America

Impeachment in the American system can not only be addressed to the President and/or Vice President, but also to public officials, as Article II Section 4 of the United States Constitution determines "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors". The reasons for impeachment in America are similar to the reasons that apply in Indonesia, namely treason, bribery, or other high crimes and misdemeanors.<sup>36</sup>

#### 2. Brazil

<sup>34</sup> Arie Sulistyoko, "Pemakzulan Presiden Dalam Persepsi Konstitusi (Studi Kasus Presiden Abdurrahman Wahid)," *Syariah Jurnal Hukum dan Pemikiran* 16, no. 1 (10 Oktober 2017): 47, <https://doi.org/10.18592/sy.v16i1.1431>.

<sup>35</sup> Bustamin Bustamin dan Rony Jaya, "Urgensi Checks And Balances Ketatanegaraan Indonesia

Dan Islam," *JURIS (Jurnal Ilmiah Syariah)* 18, no. 2 (30 Desember 2019): 221.

<sup>36</sup> Syofyan Hadi, "Impeachment Presiden Dan/Atau Wakil Presiden (Studi Perbandingan Antara Indonesia, Amerika Serikat, Dan Filipina)," *DiH: Jurnal Ilmu Hukum* 12, no. 23 (9 Februari 2016): 1-15, <https://doi.org/10.30996/dih.v12i23.883>.

The mechanism of impeachment in Brazil has determined the grounds on which a President can be impeached as per the Brazilian Constitution of 1988, namely if a President goes against the Federal Constitution relating to 7 (seven) impeachable offenses, as stipulated in Art 85, namely the actions of the president who seeks to commit resistance to the federal constitution are included in impeachable offenses or crimes de responsibility, especially those against; 1) Existence of the Union, 2) Free exercise of the powers of the Legislature, Judiciary, Public Ministry and constitutional powers of the units of the Federation, 3) Exercise of political, individual and social rights, 4) Internal security of the country, 5) Probity in administration, 6) Budgetary law, and 7) Compliance with laws and court decisions. And general criminal offenses.<sup>37</sup>

### 3. German

According to the German constitution, impeachment of the president can only be imposed based on violation of the constitution or Federal Law, provided that it is proposed by  $\frac{1}{4}$  (fourth) of the members of the House of Representatives or  $\frac{1}{4}$  of the votes in the Bundesrat (senate).<sup>38</sup>

### 4. Italia

The Italian Constitution states that the President can be impeached if he commits high treason against the state and an attack on the constitution or violates the constitution. High treason is defined as when the President of Italy breaches his duty of loyalty or betrays the Republic, including in relations with foreign states, while an attack on the constitution occurs when the President of Italy, behaves in a manner disloyal to constitutional values and constitutional institutions.<sup>39</sup>

### 5. South Korea

The South Korean Constitution, especially Article 165, states that the president can be impeached from office for violating the constitution or other acts in carrying out the obligations of his office. The impeachment process in Korea begins with a motion made by the National Assembly with the approval of the majority of National Assembly members and approved by at least  $\frac{2}{3}$  of the National Assembly members. With the approval of the motion by parliament, the president must be inactive from office until the Constitutional Court decides to impeach the president or not impeach the President.<sup>40</sup>

<sup>37</sup> Edi Prabowo, "Mekanisme Pemakzulan (Impeachment) Presiden: Studi Pbandingan Negara Indonesia dan Brasil," *JIL: Journal of Indonesian Law* 1, no. 1 (26 Januari 2021): 119–44, <https://doi.org/10.18326/jil.v1i2.119-144>.

<sup>38</sup> Adella Anindia, Rosmini, dan Poppilea Erwinta, "Perbandingan Konstitusional Pengaturan Impeachment Presiden Antara Indonesia Dengan Jerman," *Risalah Hukum*, 30 Desember 2021, 65–84, <https://doi.org/10.30872/risalah.v18i2.600>.

<sup>39</sup> Muhammad Zulhidayat, "Perbandingan Konstitusional: Pengaturan Impeachment Di Indonesia Dan Italia," *Jurnal Hukum Replik* 7, no. 1 (31 Maret 2020): 1, <https://doi.org/10.31000/jhr.v7i1.2543>.

<sup>40</sup> Ryan Muthiara Wastia, "Mekanisme Impeachment Di Negara Dengan Sistem Presidensial: Studi Perbandingan Mekanisme Impeachment Di Indonesia Dan Korea Selatan," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 31, no. 2 (3 Juni 2019): 237.



## Disobedience of Constitutional Court Decision as Ground for Impeachment

Indonesia positions and recognizes the 1945 Constitution as the Constitution which is the basic law that not only contains the highest norm (een hoogste normen) but is a constitutional guideline (een constitutional richtsnoer) for the people in general and the Government as an execution institution in the life of society and the state.<sup>41</sup> As a state of law, the supremacy of the constitution must be upheld by the Government, in the sense that it is not allowed to ignore the order of the Constitutional Court Decision which is the guardian and the sole interpreter of the constitution.<sup>42</sup> This paper will be devoted to constitutional disobedience by the Government against the order of the Constitutional Court Decision Number 91 / PUU-XVIII / 2020 on the formal testing of Law Number 11 of 2020 concerning Job Creation which can be used as a basis for impeaching the President and/or Vice President.

In essence, the Constitutional Court Decision Number 91 / PUU-XVIII / 2020 states that the formation of Law Number 11 of 2020 concerning Job Creation is formally flawed because it is not based on definite, standardized, standardized methods and methods, as well as the systematics of law formation related to changes in substance after the joint approval of the DPR RI and the President, and is contrary to the principles of the formation of laws and regulations, and the Constitutional Court orders to postpone

all policies that are strategic and have a broad impact prohibits the issuance of other implementing regulations and considers it necessary to provide a time limit for the legislators to improve the procedures in the formation of Law Number 11 of 2020 concerning Job Creation for 2 (two) years from the time this decision is pronounced. If within 2 (2) years, no improvements are made, the law becomes permanently unconstitutional.<sup>43</sup> The Constitutional Court Decision Number 91/PUU-XVIII has 2 (two) implications, namely:<sup>44</sup>

1. Give two orders to the legislators, in this case, the Government together with the DPR RI to formulate standard rules related to the use of omnibus and meaningful participation in the improvement process;
2. Limiting the implementation of Law Number 11 of 2020 on Job Creation by prohibiting the Government from issuing new implementing regulations and issuing strategic and impactful policies based on the law.

The Constitutional Court Decision Number 91 / PUU-XVIII / 2020 responded by issuing the Minister of Home Affairs Instruction Number 68 of 2021 concerning a Follow-up to the Decision of the Constitutional Court Number 91 / PUU-XVIII / 2020 on the Formal Testing of Law Number 11 of 2020 concerning Job Creation, dated December 21, 2021, which in essence ordered all Regions to continue to guide Law Number 11 of 2020 concerning Job Creation and all its derivative

<sup>41</sup> Mariyadi Faqih, "Nilai-Nilai Filosofi Putusan Mahkamah Konstitusi Yang Final dan Mengikat," *Jurnal Konstitusi* 7, no. 3 (20 Mei 2016): 097, <https://doi.org/10.31078/jk734>.

<sup>42</sup> Johannes Suhardjana, "Supremasi Konstitusi Adalah Tujuan Negara," *Jurnal Dinamika Hukum* 10, no. 3 (15 Oktober 2010), <https://doi.org/10.20884/1.jdh.2010.10.3.96>.

<sup>43</sup> Aldys Rismelin Alrasyid dan Sunny Ummul Firdaus, "Mengkaji Inkonstitusional Bersyarat

Putusan MK Nomor 91/PUU-XVIII/2020 Terhadap Kedudukan Omnibus Law," *Sovereignty: Jurnal Demokrasi dan Ketahanan Nasional* 1, no. 3 (2022), <https://doi.org/10.13057/sovereignty.v1i3.163>.

<sup>44</sup> Antoni Putra, "Implications of Conditional Unconstitutional Decisions in The Constitutional Court Decision," *Jurnal Konstitusi* 20, no. 1 (25 Maret 2023): 58-77, <https://doi.org/10.31078/jk2014>.

regulations. This has at least negated the Constitutional Court Decision Number 91/PUU-XVIII/2020 which states that the binding legal force of Law Number 11 of 2020 concerning Job Creation is postponed for a period of 2 (two) years or until improvements have been made to the stages of its formation, and postpones all policies that are strategic and have a broad impact.<sup>45</sup> Furthermore, Article 4 of Law Number 11 of 2020 on Job Creation states that the land acquisition cluster which includes regulations on land acquisition, strengthening Management Rights (HPL), and the Land Bank (BT) is a strategic policy, but the Government issued Presidential Regulation Number 113 of 2021 concerning the Structure and Implementation of the Land Bank, specially issued on December 27, 2021, after the Constitutional Court Decision Number 91/PUU-XVIII/2020 dated November 25, 2021. This certainly violates the order issued by the Constitutional Court, specifically postponing all policies that are strategic and have a broad impact, and prohibiting the issuance of other implementing regulations.<sup>46</sup> Therefore, Presidential Regulation Number 113 of 2021 on the Structure and Implementation of the Land Bank issued by the Government in secret is contrary to the Constitutional Court Decision Number 91/PUU-XVIII/2020.<sup>47</sup>

In terms of testing the constitutionality of a law against the 1945 Constitution, the decision of the Constitutional Court is the first and last level of decision, therefore the

nature of the Constitutional Court's decision is final and *binding*. This is at least based on the fact that the case submitted to the Constitutional Court is a case related to state administration, so it requires legal certainty and is bound by time limitations so as not to disrupt the continuity of the state administration agenda. Legal certainty must mean that there is clarity and firmness towards the application of law in society. The decision of the Constitutional Court must be implemented by the entire community without exception, including the Government and the DPR RI, because the Constitutional Court's decision is *erga omnes*. The *erga omnes* nature of the Constitutional Court's decision implies that its binding scope does not only include the parties to the case, namely the applicant, the government, the DPR RI, or related parties in the case, but also binds all parties and all persons, state institutions, and legal entities within the territorial jurisdiction of the Unitary State of the Republic of Indonesia.<sup>48</sup> From the perspective of the function of checks and balances, the decision of the Constitutional Court is a form of correction of the products of the legislative body implemented by the President and the DPR RI and therefore must be followed up by the DPR RI and the Government through improvements to laws that are considered contrary to the 1945 Constitution or unconstitutional. Not implementing the decision of the Constitutional Court will have an impact on

<sup>45</sup> Andini Camelia dkk., "Implikasi Yuridis Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 terhadap kedudukan uu no. 11 tahun 2020 tentang cipta kerja," *Media Keadilan: Jurnal Ilmu Hukum* 14, no. 1 (2023), <https://doi.org/10.31764/jmk.v14i1.12200>.

<sup>46</sup> Widy Angga Windyantor and Frans Simangunsong, "Analisis Putusan MK NO.91/PUU-XVIII/2020 Terhadap Perpres No.113 Tahun 2021 Tentang Struktur Dan Penyelenggaraan Bank Tanah," *Jurnal Abdikarya: Jurnal Karya Pengabdian Dosen Dan Mahasiswa* 5, no. 1 (25 Juni 2022): 49-57.

<sup>47</sup> Malik Anwar dan Wulan Chorry Shafira, "Anomali Peraturan Presiden Nomor 113 tahun 2021 tentang Struktur dan Penyelenggaraan Bank Tanah Ditinjau dari Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 tentang Pengujian Formil UU Cipta Kerja," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 1 (30 April 2022): 99.

<sup>48</sup> Syawaludin dan Arif Wibowo, "Analisis Problematika Yang Terjadi Pada Putusan Mahkamah Konstitusi Yang Bersifat Final Dan Mengikat," *Jurnal Penelitian Multi Disiplin* 1, no. 2 (2022), <https://doi.org/10.58705/jpm.v1i2.64>.

the existence of laws and regulations that are invalid because they are contrary to the Constitution, so they become null and invalid for everyone.<sup>49</sup> Based on this, the decision of the Constitutional Court must be implemented by every citizen without exception because the decision has an impact on legal development in the future.

As discussed in this paper, the Constitutional Court Decision Number 91/PUU-XVIII/2020 was ignored by the Government and the DPR RI. This constitutional disobedience will have a juridical impact on the non-realization of legal certainty and the delay of constitutional rights that have been outlined in the Constitutional Court's decision.<sup>50</sup> Disobedience to the decision of the Constitutional Court or so-called disobeying of court orders is theoretically based on the final and binding nature of the Constitutional Court's decision which requires it to be followed and obeyed, therefore the actions of the Government and DPR RI that are not obedient are an act of contempt because they have gone against the legal orders in the decision.<sup>51</sup> The concept of disobeying court orders as per expert opinion, namely "Disobedience contempt" is contempt by disobedience to judgments and other orders

of the court including undertakings given by a party to the court (which at law have the same effect as court orders). It arises in both civil and criminal contexts, where a person (usually, but not always, a party to proceedings in a court) does not obey a court order."<sup>52</sup> Based on this opinion and associated with the Government's response to the Constitutional Court Decision Number 91/PUU-XVIII/2020 which was not obedient, it is not an exaggeration to say that the Government and the DPR RI have committed contempt of court.<sup>53</sup> From several literatures that have discussed constitutional disobedience, it can be concluded that it is based on several reasons, namely:

1. There are no sanctions that can be applied to ensure the parties' compliance with the Constitutional Court's decision.<sup>54</sup>
2. Lawmakers are slow or lack the political will to immediately follow up on the Constitutional Court's decision with the lawmaking process.<sup>55</sup>
3. The absence of constitutional awareness for the address of the Constitutional Court's decision itself.<sup>56</sup>

<sup>49</sup> Machmud Aziz, "Penguian Peraturan Perundang-Undangan dalam Sistem Peraturan Perundang-Undangan Indonesia," *Jurnal Konstitusi* 7, no. 5 (20 Mei 2016): 113, <https://doi.org/10.31078/jk756>.

<sup>50</sup> Elma Saida Rahma Sari, "Implikasi Yuridis Pembangkangan Konstitusi (Constitutional Disobedience) Terhadap Putusan Mahkamah Konstitusi," 2021.

<sup>51</sup> Freidelino Paixao Ramos Alves De Sousa, "Non-compliance with Constitutional Court Decisions as an Act of Contempt of Court," *Indonesian State Law Review (ISLRev)* 4, no. 2 (20 November 2022): 52–66, <https://doi.org/10.15294/islrev.v4i2.54617>.

<sup>52</sup> RL Simmonds dkk., "Discussion Paper On Contempt By Disobedience To The Orders Of The Court," Discussion Paper (Australia: Law Reform Commission of Western Australia, November 2022).

<sup>53</sup> Fadly Ikhsan Pradana, "Putusan Mahkamah Konstitusi Yang Tidak Dilaksanakan Dalam

Penguian Undang-Undang Ditinjau Dari Asas Erga Omnes," *Indonesian State Law Review (ISLRev)* 3, no. 2 (30 Oktober 2021): 77–88, <https://doi.org/10.15294/islrev.v3i2.45660>.

<sup>54</sup> Anies Prima Dewi, "Problematisasi Putusan Mahkamah Konstitusi Dalam Penguian Undang-Undang," *Jurnal Ilmiah Mandala Education* 3, no. 2 (3 Oktober 2017): 243, <https://doi.org/10.58258/jime.v3i2.162>.

<sup>55</sup> Wicipto Setiadi, "Dukungan Politik Dalam Implementasi Putusan Mahkamah Konstitusi," *Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional* 2, no. 3 (2013), <https://rechtsvinding.bphn.go.id/view/?id=132&isi=artikel>.

<sup>56</sup> Tohadi Tohadi dan Dian Eka Prastiwi, "Rekonstruksi Hukum Dalam Mewujudkan Kepatuhan Pembentuk Undang-Undang Terhadap Putusan Mahkamah Konstitusi Sebagai Mekanisme Checks And Balances," *Jurnal Rechts Vinding: Media*

Furthermore, the address of the Constitutional Court's decision who feels unhappy with the decision of the Constitutional Court because it is considered detrimental to the political interests of the executive and legislative parties can take a form of resistance to the Constitution by ignoring the decision, rejecting the revision of the law that has been tested or even counterattacking either by reducing the authority of the Constitutional Court or seating people who are more pro to fill the vacant positions of Constitutional Court judges in the following term of office.<sup>57</sup> The possibility of this last form of resistance is allegedly the basis for the dismissal of Judge Aswanto as a Constitutional Judge who was dismissed by the DPR RI in the middle of his term of office even though for reasons that cannot be justified by law.<sup>58</sup> The fact of constitutional disobedience by the Government against the decision of the Constitutional Court Number 91/PUU-XVIII/2020 will certainly damage the order of the nation and state, have an impact on the people's distrust of the Constitutional Court, as well as a bad example given by the President in terms of constitutional awareness, so it is appropriate for the DPR RI to propose an impeachment process against the president.

## Conclusion

The Constitutional Court Decision Number 91/PUU-XVIII in one of its rulings states that the binding legal force of Law Number 11 of 2020 concerning Job Creation must be temporarily suspended for 2 (two) years or until the formation process has been improved, However, the Government has

committed constitutional disobedience by issuing the Instruction of the Minister of Home Affairs Number 68 of 2021 concerning Follow-up to the Decision of the Constitutional Court Number 91 / PUU-XVIII / 2020 on the Formal Examination of Law Number 11 of 2020 concerning Job Creation, dated December 21, 2021, which in essence clearly orders all Regions to continue to guide Law Number 11 of 2020 concerning Job Creation with all its derivative regulations. This constitutional disobedience by the Government will have a juridical impact on the non-realization of legal certainty, the delay of constitutional rights that have been outlined in the decision of the Constitutional Court, damage the order of the nation and state, have an impact on the people's distrust of the Constitutional Court, and a bad example is given by the President in terms of constitutional awareness, so it is appropriate for the Indonesian Parliament to propose an impeachment process against the president.

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<sup>58</sup> Durohim Amnan, "Legalitas Pemecatan Hakim Aswanto Di Tengah Masa Jabatan Oleh Dewan Perwakilan Rakyat," *Jatiswara* 38, no. 1 (31 Maret 2023), <https://doi.org/10.29303/jtsw.v38i1.461>.

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