

CHAPTER I

INTRODUCTION

A. Background

In the administration of a government, every action or decision taken must be followed and not contrary to the constitution. The protection of fundamental rights means that when a breach of the constitution occurs, the rights holder must be given legal remedies to maintain his or her rights, which are guaranteed by the constitution.¹ Miriam Budiardjo believes that the constitution is a charter that states the nation's ideals and the basis of the nation's state organization, in which there are various basic rules concerning sovereignty, distribution of power of state institutions, ideas, state ideology, economic problems, and so on.² The constitution is a law that is higher or even higher and most basic because the constitution itself is a source of legitimacy or the basis for validating other forms of laws and regulations.³

Law is an expression of the will.⁴ In constitutional government, government officials must exercise their positional powers within the limits determined by law and when they do not do so when they abuse their authority by deliberately

¹ Chakim, M, L, "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions", *Constitutional Review*, Vol. 5, No. 1 (2019), p. 96-97

² Harvelian, A., Safa'at, M, A., Widiarto, A, E., & Qurbani, I, D, "Constitutional Interpretation of Original Intent on Finding The Meaning of Social Justice In The Constitutional Review", *Yustisia Jurnal Hukum*, Vol. 9, No. 3 (2020), p. 348-361

³ SH Jimly Asshiddiqie, 2021, *Konstitusi dan Konstitusionalisme Indonesia*, Bengkulu, Sinar Grafika, p. 18

⁴ Latifiani, D., & Ilyasa, R, M, A, "The Position of Moral Values in Law", *Diponegoro Law Review*, Vol. 6, No. 1 (2021), p. 51-61

depriving people of their constitutional rights they can be prosecuted with criminal offenses.⁵ In this case, all actions taken by the government must be in line with the constitution. Each country has a different constitution. Indonesia has the form of a unitary state, this is based on Article 1 paragraph (1) of the 1945 Constitution⁶ which reads: "the state of Indonesia is a unitary state in the form of a republic." Meanwhile, South Korea is based on the constitution of the Republic of Korea Chapter I: General Provisions Article 1 Number (1) The Republic of Korea shall be a democratic republic.⁷

In addition, each country also has similarities and differences in its constitutional structure. In Indonesia the executive power is held by President and Vice President.⁸ Meanwhile in South Korea the executive power is held by President and Prime Minister.⁹ In Indonesia the legislative power is held by People's Consultative Assembly (MPR), House of Representatives (DPR), Regional Representative Council (DPD).¹⁰ Meanwhile in South Korea the legislative power is held by National Assembly (NA). In Indonesia the judicial power is held by Supreme Court (MA), Constitutional Court (MK), and Judicial Commission

⁵ Eckstein, P. F., & Colby, M, "Presidential Pardon Power: Are There Limit and, If Not, Should There Be?", *Arizona State Law Journal*, Vol. 51, No. 71 (2019), p. 71-75

⁶ Suharto, R, B, "Strengthening the law in order to keep existence the unitar state of the republic of Indonesia", *International Journal of Law Reconstruction*, Vol. 4, No. 1 (2020), p. 34-43

⁷ M, P, H, Wijaya and M, Z, Ali, "Legislation Impediments in Reorganising Government Bodies in Indonesia", *Bestuur*, Vol. 9, No. 1 (2021), p. 1-12

⁸ Wutoy, M., Waruwu, E., Ndraha, A, B., & Al Hadad, A, "Application on the Presidential Threshold Concept in the Presidential and Vice Presidential Election System and its Impact on the Indonesia Constitutional System", *Journal of Digitainability Realism & Master (DREAM)*, Vol. 1, No. 3 (2022), p. 46-55

⁹ Lim, Y., & Roh, J, 2020, *Political institutions in Korea In Routledge Handbook of Korean Politics and Public Administration*, England, Routledge, p. 21.

¹⁰ Sabrina, D, F., & Ristawati, R, "The Implementation of Good Governance in The Presidential Election in Indonesia", *Yuridika*, Vol. 36, No. 2 (2021), p. 256-267

(KY).¹¹ Meanwhile in South Korea the judicial power is held by Supreme Court, Constitutional Court.¹²

This state institution in carrying out its duties must comply with the constitution. However, it is not uncommon for these state institutions to take actions that are suspected of being unconstitutional. As happened several times ago, there was a case where Aswanto was impeached as a judge at the Constitutional Court by the DPR before his term ended because he often rejected the proposed laws submitted by the DPR.¹³ Impeachment is a process of formally imposing charges by a legislature against a high-ranking state official.¹⁴ Judges, including judges of the constitutional court, are expected to make decisions based on the law and the constitution, not to please any particular political or legislative body. The independence of the judiciary is a fundamental principle of the Indonesian constitutional system, as enshrined in Article 24B of the Constitution, which states that "the judiciary shall be independent and impartial."¹⁵

Therefore, if Judge Aswanto is being impeached solely because he consistently rejected the drafted laws proposed by the DPR, without any valid and legal grounds, then it would be a violation of the principle of judicial independence

¹¹ Sari, N., Wardana, D. J., & Iskandar, H, "Dismissal Of The President In The Unitary State Of The Republic Of Indonesia", In *Journal Universitas Muhammadiyah Gresik Engineering, Social Science, an Health International Conference (UMGESHIC)*, Vol. 1, No. 1 (2021), p. 239-248

¹² Cheng, T, J, & Kim, E M, 2019, *Making democracy: generalizing the South Korean case In The Politics of Democratization*, England, Routledge, p. 125

¹³ Fitri Chusna Sarifa, 2022, *Sosok Aswanto, Hakim MK yang Mendadak Diberhentikan karena Kerap Anulir Produk DPR*, <https://nasional.kompas.com/read/2022/10/01/11284301/sosok-aswanto-hakim-mk-yang-mendadak-diberhentikan-karena-kerap-anulir>, (December 11, 2022)

¹⁴ Whittington, K, E, "A formidable weapon of faction? The law and politics of impeachment", *Wake Forest L. Rev.*, Vol. 55, No. 5 (2020), p. 381-386

¹⁵ Blahuta, R. I., "Impartiality in court proceedings", *Informatologia*, Vol. 55, No. 1 (2023), p.65-75

and could be considered a violation of the constitution. This action is suspected to be contrary with the constitution. Therefore the author is interested in conducting research on this issue because this is a current issue in Indonesia that raise pros and cons and society. The author is also interested to comparing this issue with South Korea because South Korea and Indonesia has a lot of similarities such as have the same legal system which is civil law system.

Indonesia and South Korea are presidential representative democratic republic where the president is the head of state¹⁶. And also South Korea has a good legal system of law enforcement that can be a reference for mechanism of improvement of law enforcement of unconstitutional action taken by a member of the DPR in Indonesia.

B. Research Problem

1. How is the law handled the unconstitutional action taken by members of the parliament in Indonesia and South Korea?
2. What are the similarities and differences in the legal implications of unconstitutional actions taken by a member of the parliament in both countries?

¹⁶ Cahyawati, D. P., Chandranegara, I. S., Burhanuddin, N., & Yani, A, "Comparative Presidential's Role, Systems and Constitutional Practice Between Indonesia and South Korea", *Jurnal Dinamika Hukum*, Vol. 23, No. 1 (2023), p. 141-160

C. Objectives of Research

1. To understand the concept of regulation on the Code of Ethics of the member of parliament in Indonesia and South Korea
2. To analyze the legal implications of unconstitutional actions taken by a member of the parliament in both countries
3. To improve the mechanism of law enforcement of unconstitutional action taken by a member of the parliament

D. Benefit of Research

1. Theoretical Benefits

This study contributes to knowledge in the field of Constitutional Law regarding legal implications for the parliament who commit unconstitutional actions (a comparative study of Indonesia vs South Korea)

2. Practical Benefits

The research will recommend to the parliament and the President a better mechanism and law enforcement of unconstitutional action taken by a member of the parliament in both countries.