

Conference Paper

Power Reduction in Constitutional Democracy

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ORCIDSurohmat: <https://orcid.org/0000-0003-2485-6375>**Abstract.**

The study of constitutional democracy essentially refers to the first two basic conceptions, relating to the journey of democratizing power and law in the life of the state, which is theoretically a study of state power to exercise people's sovereignty in a constitutional democratic socio-political system. Second, with regard to the limitation of the power of the holder of the exercise of popular sovereignty which is espoused in a democratic and constitutional state constitution. This article aims to analyze the principle of implementing popular sovereignty. The 1945 Constitution of the Republic of Indonesia also affirms that Indonesia is a state of law. With a linear understanding, it can be explained that all state administration must be fully based on law. On that basis, the 1945 Constitution of the Republic of Indonesia before affirming Indonesia as a state of law, first affirmed the position of state sovereignty which is in the hands of the people as a source of legitimacy. This means that the choice of the rule of law in Indonesia depends on the sovereignty that is in the hands of the people or a democratic rule of law.

Keywords: constitutional democracy, people's sovereignty, constitutional law

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Published 5 January 2024Publishing services provided by
Knowledge E

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Selection and Peer-review under the responsibility of the 4th INCLAR Conference Committee.

1. Introduction

The construction of Indonesia's statehood after the amendment to the 1945 Constitution of the Republic of Indonesia has normatively emphasized the notion of constitutional democracy as the basis for state administration. This is stated in Article 1 Paragraph 2 of the 1945 Constitution of the Republic of Indonesia which states that Sovereignty is in the hands of the people and is carried out according to the Constitution. Meanwhile, in Paragraph 3 of the same article, it is stated that the State of Indonesia is a state of law. The formulation of the two paragraphs agreed upon in the third amendment is a new milestone in the affirmation of Indonesia's constitutional democracy.

Placing the people as the holders of state sovereignty is a manifestation of democracy[(The idea of "democracy" has existed in ancient Greece (6th to 3rd century BC) which can be referred to the state (polis) of Athens and the thoughts of Aristotle, Plato and so on. Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*. (Jakarta: PT Gramedia, 1982),

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5-67.)) which in classical theories of democracy is formulated and comes from the word “demos” which means “people and” kratos or cratein “which means government or power. While in terms, democracy is the basis of state life that puts the people in a position of power (government or role by people) so that at the last level the people provide provisions about their lives, including in assessing state policy because that policy determines people’s lives. Democracy can be justified as a government of, by, and for people.

The manifestation of popular sovereignty is also expressly limited by the Constitution as formulated in Article 1 Paragraph 2 above. Limiting people’s sovereignty with the Constitution is a way to prevent the absolutism of popular sovereignty which has the potential to give birth to anarchy. Therefore, democracy in the context of the administration of the Indonesian state starts from the agreements contained in the Constitution. Compliance with the implementation of sovereignty in the Constitution is what is then known as constitutional democracy. Constitutional democracy is believed to be a solid foundation for the administration of the state and an open road for the realization of Indonesia’s national ideals[(The purpose of the establishment of the Indonesian state is stated in the Preamble of the 1945 Constitution, paragraph 4, which reads “... an Indonesian government that protects all Indonesians and all Indonesian bloodshed and to promote public welfare, enlighten the nation’s life, and participate in implementing world order based on independence, lasting peace and social justice ...”)].

In addition to affirming the principle of implementing popular sovereignty, the 1945 Constitution of the Republic of Indonesia also affirms that Indonesia is a state of law. With a linear understanding, it can be explained that all state administration must be fully based on law. The concept of a state of law (rechstaat or rule of law) itself in a constitutional study has a similar meaning to constitutional democracy, because basically the constitution is the highest law in a state of law. However, the rule of law does not always mean democratic, because a monarchy may also adopt the principle of the rule of law[(In a democratic rule of law, Julius Stahl put forward several main underlying elements, namely (a) Based on human rights according to individualistic views (John Locke, cs); (b) To protect human rights, it is necessary to trias politica Motesquieu with all the variations of its development; (c) The government is based on the law (wetmatig bestuur) in the material Rechtsstaat and the principle of doelmatig bestuur is added in the Sociale vergorgingsstaat; (d) If in running the government it is still felt to violate human rights, it must be tried in an administrative court. In Padmo Wahjoyo, “The Principles of the State of Law and Its Embodiment in the National Legal

System, in Moh. Busyro Muqoddas, et.al., (Pen), Politik Pembangunan Hukum Nasional. (Yogyakarta: UII Press, 1992), 40-41.]. On that basis, the 1945 Constitution of the Republic of Indonesia before affirming that Indonesia as a state of law, first affirmed the position of state sovereignty which is in the hands of the people as a source of legitimacy. This means that the choice of the rule of law in Indonesia depends on the sovereignty that is in the hands of the people or a democratic rule of law.

Franz Magnis Suseno argues: “the rule of law means that state power is bound by law. The state of law is not always a democratic state. Monarchist or paternalistic governments also obey the law. But a democracy that is not a state of law is not democracy in the true sense of the word.” Then, citing Lobkowics’ opinion, he said that democracy is the safest way to maintain control over the rule of law[(Frans Magnis-Suseno, Mencari Sosok Demokrasi, Sebuah Telaah Filosofis (Jakarta: Gramedia, 1997), 58. See also Nicolaus Lobkowics, “Was das Staat von Einer Pavianherde Unterscheidet” (Deutsche Tagespost, 19 November 1994), in Frans Magnis- Suseno, Op. cit.]. Following Magnis’ logic, it can be interpreted that democracy, apart from being a way of producing regulations, is also a means of controlling law enforcement.

The affirmation of the principle of constitutional democracy and the principle of the rule of law is what differentiates Indonesia’s constitutional understanding before and after the amendment to the 1945 Constitution of the Republic of Indonesia[(Constitutional changes that occur in a country are always followed by pros and cons. Both those who support the constitutional amendment and those who oppose it have their own arguments to justify their opinion. What must be remembered is that the constitution is the nation’s political agreement, as cited by K.C. Wheare: Constitution, when they are framed and adopted, tend to reflect the dominant beliefs and interests, or some compromise between conflicting beliefs and interests, which are characteristic of the society at that time... A constitution is indeed the resultant of parralelogram of force -political, economic, and social- which operates at that time of its adaptation. K.C. Wheare, The Modern Constitution. (London-New York-Toronto: Oxford University Press, 3rd Impression, 1975), 67.]. However, in fact, constitutional understanding has been the political choice of the founders of the nation since the beginning of the Republic of Indonesia. It’s just that the various limitations of the consensus contained in the 1945 Constitution (to mention the unamended Constitution) and various deviations have made the Indonesian people live under the authoritarianism of the New Order which failed to answer the proposition of the presence of a country, namely protecting the rights of citizens and creating people’s welfare. The historical basis of Indonesian constitutionalism can clearly be traced in various debates at the Investigative Agency

for Preparatory Work for Independence (BPUPKI), the sessions of the Constituent Assembly. The amendments to the Constitution which were carried out after the fall of Suharto were clearly the nation's collective effort to correct past failures and design a stronger future for state administration.

The founding fathers or founding peoples of Indonesia (the term used by Prof. Soetjipto Rahardjo), from the beginning had agreed to establish a state based on law (*rechtstaat*). Even though there are several other opinions that want a state other than the rule of law, in the end, with full awareness, they agree that the Indonesian state is a state based on law (rule of law)[(Supomo, for example, wants the Indonesian state to be an integralistic state, which of course has an influence on the formation of laws. In the end, however, Supomo gladly accepted that the state of Indonesia was founded by law. For more details, see Marsilam Simandjuntak, *Pandangan Negara Integralistik: Sumber, Unsur, dan Riwayatnya dalam Persiapan UUD 1945*. (Jakarta: Pustaka Utama Grafiti, 2003)]. When a country bases its stance on law, everything related to state administration must have a legal basis.

The problem that becomes a challenge in the implementation of constitutional democracy in Indonesia is how to ensure that the principle of constitutional supremacy in the implementation of popular sovereignty by the holders of power in the legislative, executive, and judicial fields can be implemented within the corridors of the Unitary State of the Republic of Indonesia (NKRI) which adheres to the rule of law.

The supremacy of the constitution can not only be seen as a matter relating to the constitutional substance of the implementing agency for people's sovereignty, but it is also more focused on the firmness of the substance of power that is constitutionally held/owned by the legislative, executive, and judicial institutions. Therefore, a study of "The power of implementing people's sovereignty in the framework of constitutional democracy based on the 1945 Constitution of the Republic of Indonesia" with a search based on the *trias politica*, especially the theory of the separation of state powers, is an important thing to do.

Based on the construction of the formulation in the 1945 Constitution of the Republic of Indonesia, namely Article 1 Paragraph (2), there is no institution holding people's sovereignty, but what is referred to as "...and implemented according to the Constitution". Therefore, the approach used by the 1945 Constitution of the Republic of Indonesia is not an institutional approach but a substantial approach, in this case the "execution of state power based on the Constitution.

During the period of implementing constitutional democracy based on the 1945 Constitution of the Republic of Indonesia, at least the practice of administering the state

and government by the executor of popular sovereignty showed several problems, including:

1. The process of law formation that does not have a standard of completion (the duration of discussion of a bill into a law is not uniform: there are bills that take a little time and there are also bills that take too long).
2. Implementation of the supervisory function of the House of Representatives (DPR) (with the formation of a special committee and panja) which intersect or intersect with the duties and functions of law enforcement.
3. The existence of the Supreme Court and the Constitutional Court as independent judicial authorities.
4. Institutional Effectiveness of the Regional Representative Council (DPD) as a people's representative institution based on a district/local/regional representation system.
5. Implementation of the functions and rights of the DPR to conduct a fit and proper test on the recruitment of public officials in state institutions.
6. The role of political parties in the context of strengthening the presidential system with a multi-party system.

The existence of the problems mentioned above, in principle, was caused as a consequence of a change in substance to the 1945 Constitution as outlined in the 1945 Constitution of the Republic of Indonesia. Amendments to the 1945 Constitution as stated in the normative provisions contained in the 1945 Constitution of the Republic of Indonesia are based on the constitutional cuts of power The People's Consultative Assembly (MPR) as the institution holding and implementing people's sovereignty to state institutions based on a system of separation of powers that places all state institutions (main state institutions - the main organ according to Jimly Ashshiddiqy's term)[(The 1945 Constitution recognizes six high/highest state institutions, namely the MPR, DPR, President, MA, the Supreme Audit Agency (BPK) and the Supreme Advisory Council (DPA). Of the six state institutions, only the MPR is uniquely Indonesian. While the other five came from the institutional blueprint (copy-paste) from the Dutch East Indies era. Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*. (Jakarta: Konstitusi Press, 2005), Cet. Ke-1, 167-168)] which has an equal position.

The reduction of the power of the holder and executor of popular sovereignty which was originally owned by the MPR was replaced by the existence of a number

of authorities, even though authority does not arise from the existence of power? The absence of the term “power” in the formulation in Chapter II of the 1946 NRI Constitution became a problem for the presence of the MPR as a state institution, even though the MPR has three powers as stated in Article 3 of the 1945 Constitution of the Republic of Indonesia. the powers and/or actions of the legislative, executive, and judicial institutions which are constitutionally institutions that firmly hold/have power in accordance with the branching of the trias politica. Therefore, the focus of studies on constitutional democracy is no longer focused on the MPR, but on the powers held by the legislative, executive, and judicial institutions. This is an institution which, according to the Constitution, is the actual implementing agency of people’s sovereignty. The next concern is how the constitutional basis of the implementation of popular sovereignty (namely the Constitution and the State of Law) within the framework of a Unitary State in the form of a Republic by institutions holding power can strengthen constitutional democracy in Indonesia.

The study of constitutional democracy, essentially refers to the first two basic conceptions, relating to the journey of democratizing power and law in the life of the state, which is theoretically a study of state power to exercise people’s sovereignty in a constitutional democratic socio-political system; second, with regard to the limitation of power of the holder of the exercise of popular sovereignty which is espoused in a democratic and constitutional state constitution.

2. METHODOLOGY/ MATERIALS

This article is a doctrinal research with a conceptual approach related to constitutional democracy after the amendment to the 1945 Constitution of the Republic of Indonesia. The analysis was carried out qualitatively with the parameters of the concept of democratization of power and law and the concept of limiting power.

3. RESULTS AND DISCUSSIONS

3.1. Democratization of Power and Law

Conceptually, constitutional democracy is essentially a conception that contains a line of thought regarding the democratization of power and law in the process of state life, which then gives birth to a constitutional construction as contained in a constitution. The

democratization of power and law that is wrapped in one understanding of constitutionalism[(According to Carl J. Friedrich, constitutionalism is the idea that government is a collection of activities carried out on behalf of the people, but which is subject to certain restrictions intended to guarantee that the power needed to govern is not abused by those who are tasked with governing. See Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (5th edition: Wadsworth, Mass: Blaisdell Publishing Company, 1967) in Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*. (Jakarta: PT Gramedia, 1982), 56-57.)] is what experts later call the term constitutional democracy.

Constitutional democracy certainly cannot be separated from the existence of a constitution in a country. From the presence of this constitution, then emerged the term constitutionalism. Charles Howard McIlwain[(See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*. (Ithaca, New York: Cornell University Press, 1966), 146.)], said that the understanding of constitutionalism requires the presence of two fundamental elements, namely legal limits on power and full political accountability from the government to the governed. Another opinion, expressed by Soetandyo Wignjosoebroto[(Irfidhal Kasim, et.al, *Hukum: Paradigma, Metode dan Masalah Hukum: Paradigma, Metode dan Masalah : 70 tahun Prof. Soetandyo Wignjosoebroto*. (Jakarta: ELSAM, 2002), 454.)], is that the idea of constitutionalism contains two essences, namely first, of course, the classical concept of the rule of law, which teaches that universal legal authority transcends political authority, (and not vice versa), which at the same time implies the victory of pluralism. on monism[(Monism is a metaphysical and theological concept that there is only one substance in nature. Monism is opposed to dualism and pluralism. In dualism there are two substances or realities while in pluralism there are many realities. <http://id.wikipedia.org/wiki/Monism>)]. The second is the concept that emerged in a more recent era, namely freedom as a natural human right, which still cannot be taken over at any time, by any power anywhere in the life of the state (inalienable), and which must be maintained and maintained so that its existence is maintained. remain intact, intact and unblemished due to the occurrence of violations therein (inviolable).

William G. Andrews said that under constitutionalism, two types of limitations impinge on government. Power prescribe and procedures prescribed[(William G. Andrews, *Constitutions and Constitutionalism*. (Princeton, New Jersey: Van Nostrand Company, 1968), 13)]. With the existence of constitutionalism, the government is subject to restrictions on two things, namely the power to prohibit and the procedures that have been established. The idea of modern constitutionalism was then developed with an elaboration which

states that a political system can be called constitutional if it contains at least four things: (1) legal procedures that give authority to officials; (2) effective limits on the use of power; (3) institutionalized procedures to ensure the accountability of officials; and (4) a system of legal guarantees for the rights of citizens[(Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought*, (Boston: Little Brown and Company, 1960), 388-389)].

In the perspective of democracy and law, the presence of the constitution is one thing that becomes the basis or guideline for the administration of the state and government, and that is a discussion of power. According to Jack H. Nagel, the discussion of power always includes two aspects, namely(Miriam Budiardjo, *Aneka Pemikiran tentang Kuasa dan Wibawa*. (Jakarta: Sinar Harapan, 1986), 14.): the scope of power and the domain of power. The issue of the scope of sovereignty refers to activities within the function of sovereignty which include two focuses, namely (a) who holds the highest power in the state; and (b) what is controlled by the highest power holder. While the range of sovereignty talks about who is the subject and holder of sovereignty. In general, Nagel's framework of thought can generally be used as a reference to seek an understanding of people's sovereignty, especially the question of who holds the highest power in the state[(Sovereignty of the people is one of five kinds of sovereignty that exist in Legal Science, namely: (a) Sovereignty of God; (b) Sovereignty of the King; (c) State Sovereignty; (d) the Rule of Law; and (e) People's Sovereignty. Conceptually, the new sovereignty was formulated consciously and systematically by a French thinker, Jean Bodin. He is the one who associates sovereignty with the state so that sovereignty is an attribute of the state. In this sense, sovereignty is seen as expressing the capacity to carry out obligations and has the right and ability to take action. See Miriam Budiardjo, *Aneka Pemikiran tentang Kuasa dan Wibawa*. (Jakarta: Sinar Harapan, 1986), 14.)].

The theory of state power is a state theory which states that state power must be absolute. The state is an institution whose position is above the people. He plays an absolute role in determining what is good and should be for his people[(A description of this can be found in Arief Budiman, *Teori Negara: Negara, Kekuasaan dan Ideologi*. Cet. I. (Jakarta: PT Gramedia Pustaka Utama, 1997), 8.)]. Meanwhile, the notion of people's sovereignty was born because of the development of the implementation of absolute state power, but it turns out to be vulnerable to abuse of power. Among the thinkers who understand popular sovereignty is John Locke. He stated that in human society there are basic human rights that cannot be violated by the state and are not handed over to the state. For Locke, this basic right must even be protected by the state and become a limitation for absolute state power. The natural rights of John Locke consist

of the right to life, the right to freedom and the right to private property which in its later development these basic rights increased in number and became the main concept in thinking about democracy. In modern countries, the concept of popular sovereignty has a central place. The issue that is most frequently raised in this concept is the issue of limiting state power. In principle, the state is still run by certain people, but these people must have legitimacy and control from the people. Therefore, thoughts that were previously only in the form of general theories and concepts, developed into thoughts that began to explore institutional issues.

The most attention-grabbing theme of the theory and concept of people's sovereignty is how people's sovereignty is exercised. This theme is important because it is vulnerable to abuse of power if there is no control over it. In the concept of absolute state power, this problem does not arise because it has been resolved by handing over absolute power to a certain person or group of people. In the concept of popular sovereignty, the implementation is complicated because it is impossible to hand over the power of state administration to the entire community, this can cause delays in the implementation of state power, even worse, namely the emergence of chaos for the implementation of state life. The institutional mechanism for the implementation of popular sovereignty in the context of preventing abuse of power has actually been thought up by John Locke. Locke separates the legislative, executive, and judicial aspects of a political system [(Ibid, 34)]. These two aspects should not be held in one hand so that abuse of power can be avoided. The system of government according to Locke consists of a king who has executive power and a parliament that has legislative power. This system is called a constitutional monarchy or parliamentary monarchy [(Ibid)].

The executive body has the prerogative which is determined in line with the public interest, in this case all the people, whose implementation is delegated to their trusted representatives in the legislature. This, according to Locke, resulted in the executive depending on the legislature and the legislature depending on the people. Locke also actually added one more institution in the state, which he called federative power. This institution has the function of administering power regarding matters of war and peace, making agreements and alliances as well as whatever is needed in dealing with parties outside the country [(Deliar Noer, *Pemikiran Politik di Negeri Barat*. (Jakarta: Mizan, 1997), 122)]. This power is also subject to the legislature, but as Locke himself pointed out, this federative function should actually also be carried out by the executive, so it appears that Locke himself did not consider this institution important to be strictly separated.

Locke's framework of thought was further developed and reaffirmed by Montesquieu, known as the trias politica concept [(Montesquieu separates the institutionalization of state power into three functions, namely executive power, legislative power and judicial power. With a clear separation of powers, it is hoped that the freedom of each institution in exercising its power is guaranteed)]. The rationale of Locke and Montesquieu in modern times then experienced a very rapid development. Institutional mechanisms that previously had not touched technical and operational issues continued to undergo improvements. However, the issues raised remain unchanged, namely the limitation of state power in the context of people's sovereignty (democratization). The position of the people in the theory of popular sovereignty is trying to be placed in such a way in the discussion of institutionalization in the state administration, so that the concentration of power on one person or one institution is expected to be avoided. The emergence of the concept of a balance of power against executive power allows the availability of a control mechanism in the administration of state life and at the same time increases public participation in determining public policy [(Koesnadi Hardjosoemantri, Pembatasan Kekuasaan Presiden RI: Kajian Terhadap Mekanisme Pelaksanaan Kekuasaan Presiden RI Dalam Hukum Positif Indonesia. Laporan Akhir Tim Kajian Bidang Hukum. (Jakarta: Masyarakat Transparansi Indonesia, 1999), 32.)]. Thus, limiting power is one of the functions of constitutionalism, where the state is based on a constitutional system and the rule of law, namely a state based on law (*rechtsstaat*) and not based on mere power (*machsstaat*). More specifically, democratic and constitutional government is based on the basic law or constitution of a country [(Maruarar Siahaan, Undang-Undang Dasar 1945 Konstitusi Yang Hidup. (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), 72.)].

Discourse on democracy and constitution when viewed from the historical aspect, emerged in the 19th century and the beginning of the 20th century, which was driven by, among others, Western European legal experts such as Immanuel Kant (1724-1804) and Frederich Julius Stahl by using the term *Rechtsstaat*. As for the Anglo Saxon jurists such as A.V. Dicey uses the term rule of law [(Moh. Mahfud M.D., Demokrasi dan Konstitusi di Indonesia, (Yogyakarta: Liberty, 1993), 21.)]. Stahl suggested at least 4 (four) elements of *rechtsstaat*, namely (1) guarantees for human rights; (2) there is a division of power (*scelding van macht*); (3) government based on statutory regulations (*wet matigheid van heit bestuur*); and (4) the existence of an independent state administrative court. Meanwhile, Dicey describes the characteristics of the rule of law as follows: (1) the rule of law, in the sense that there should be no arbitrariness so that a person can only be punished if he violates the law; (2) equal standing before the law for ordinary

people as well as for officials; and (3) the guarantee of human rights by laws and court decisions. Based on the juridical formulation, the most basic of these understandings is the limitation of state power with the aim of protecting the freedom of citizens. In other words, the position and role of the ruler or the state are also constantly being redefined, shifting from the position and role of the “night watchman” or “firefighter” towards a larger and decisive position and role [(Ibid, 19-20)].

As a model of democracy [(According to Adi Sulistiyono, that by using the framework of positive freedom and negative freedom which refers to Kelsen’s opinion, which makes the idea of freedom as the basis for distinguishing between autocracy and democracy in terms of making the rule of law, where Kelsen’s view is a normative aspect of the conception of democracy because it sees freedom in relation to the formation of the rule of law, juristic democracy can be divided into 2 models of democracy, namely constitutional democracy and participatory democracy. See <http://adisulistiyono.staff.uns.ac.id/files/2009/07/reformasi-Hukum-di-idonesia.doc>. In relation to the democratic model, there is also the term deliberative democracy)], constitutional democracy is basically a democratic model that emphasizes representative institutions and constitutional procedures. Democracy is characterized by free competition which opens up opportunities for sustainable constitutional changes. These changes were implemented through general elections which gave birth to a people’s representative institution. Thus, in the management of the state, the rule of majority applies. In the end, constitutional democracy emphasizes fully on the procedural aspects so as to ignore morals. This is parallel to a free market economy or laissez-faire which believes there is a hidden hand in regulating the operation of the mechanism. Constitutional democracy requires a “minimum state” [(The term ‘minimal state’ comes from Robert Nozick. His thinking is based on the assumption that there is no society or political entity other than individuals – “there are only individual people with their own individual lives.” By reviving the teachings of Locke and J.S. Mill, Nozick said, “a minimal state limited the narrow protection against force, theft, fraud, enforcement of contracts, and so on, is justified; and that the minimal state is inspiring as well as right. In this context, Nozick believes that the state “grows by an invisible-hand process and by morally permissible means, without anyone’s rights being violated.” Robert Nozick, *Anarchy, State, and Utopia*. (New York: Basic Books Inc.), 119,)] that gives complete freedom to individuals by limiting the power of the state as much as possible. From a legal point of view, this concept of democracy is known as a formal law state [(In Arief Budiman’s view, such a state configuration is the nature of a pluralist state, namely a state that is not independent and only acts as a filter for various desires

of interest-groups in society. Every state policy is not an initiative that arises from the independence of the state, but is born from the process of fully absorbing people's aspirations through parliament. Arief Budiman, *Teori Negara: Negara, Kekuasaan dan Ideologi*. Cet. I. (Jakarta: PT Gramedia Pustaka Utama, 1997)] or a night watch state [(In its development, restrictions on the function of the state "night watchman" are not only in the political field, but also in the economic field. In the economic field, there is a *laissez faire*s notion which postulates that the state must allow or free its citizens to manage their respective economic interests so that the economic situation in the country becomes healthy. For more, see Jimly Asshiddiqie, *Gagasan Keadulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia: Pergeseran Keseimbangan antara Individualisme dan Kolektivisme dalam Kebijakan Demokrasi Politik dan Demokrasi Ekonomi selama Tiga Masa Demokrasi, 1945-1980-an*. (Jakarta : Disertasi Fakultas Pascasarjana Universitas Indonesia, 1993), 230.)].

Constitutional democracy guarantees the implementation of a state that adheres to the constitution, on the other hand, all state actions that can harm the people as the holder of the highest power are still considered permissible as long as they do not conflict with the constitution. The dilemma of constitutional democracy cannot be avoided, but as the adage has long been familiar to our ears, democracy is the best of bad choices. Democracy is considered the best system among the existing systems.

3.2. Limitation of Power

In the context of the state, *trias politica* is an effort to limit the power of each branch of state power based on a pattern of separation of powers [(The term "separation of power" in Indonesian is a translation of the words separation of power based on the theory of *trias politica* or the three functions of power, which in Montesquieu's view, must be distinguished and separated structurally in organs that do not interfere in each other's affairs. Legislative power is only exercised by the legislature, executive power is only exercised by the executive branch, and similarly, judicial power is only exercised by the judicial branch of power. So in essence, one organ can only have one function, or vice versa one function can only be carried out by one organ. See Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid II*. (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, Cetakan Pertama, Juli 2006), 15.)] and/or power sharing which in turn gives birth to different functions of each power holder. This is clearly stated by Jimly Ashshiddiqie, that: "Efforts to limit power are also carried out by establishing restrictive patterns in the internal management of state power itself,

namely by making distinctions and separation of state power into several different functions. In this connection, the one who can be considered the most influential in his thinking in distinguishing the functions of power is Montesquieu with his trias politica theory, namely the legislative branch of power, the executive or administrative branch of power, and the judicial branch of power”[(Jimly Asshiddiqie, Pengantar Ilmu Hukum Tata Negara Jilid II. (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, Cetakan Pertama, Juli 2006), 12.)].

All efforts to divide and differentiate and even separate the functions of power into several branches, are basically in order to limit power itself so that it does not become a source of arbitrariness (button of power)[(Ibid, 14.)]. Because if there is no separation of powers, then a government will tend to be tyrannical. This is certainly not wanted by the people in a country.

The doctrine of separation of power or the division of power is generally ascribed to Montesquieu with his trias politica. However, in its development, there are many versions commonly used by experts regarding the terms separation and division of power [(In fact, the initial concept of this can be traced back to the writings of John Locke, “Second Treaties of Civil Government” (1690) which argues that the power to establish the rule of law should not be held by those who apply it By the French legal scholar, Baron de Montesquieu (1689-1755), who wrote based on the results of his research on the British constitutional system, John Locke’s thoughts were continued by developing the concept of trias politica which divided state power into three branches of power, namely the legislative, executive, and judicial. Ibid., 15.)]. However, in its development, the three branches of power in the trias politica cannot be maintained as a matter that only concerns the exclusive power of one power-holding institution, as quoted by Janedri M. Jaffar, that: “The phenomenon of the formation of the European Union (European Union), is an example of a fairly basic change in the characteristics of the theory of state structure. Likewise with the classical conception of the three functions of power which we know as the trias politica from Baron de Montesquieu, which consists of legislative, executive, and judicial functions. Almost all countries in the world are of the view that such a conception is considered irrelevant today, considering that it is no longer possible to immediately maintain that the three functions only deal exclusively with one of the powers referred to above” [(Janedri M Jaffar dalam Kata Pengantar Penerbitan Buku “Pengantar Ilmu Hukum Tata Negara Jilid II, Jimly Asshiddiqie, (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, Cetakan Pertama, Juli 2006), v.)].

The doctrine of the separation of powers as imagined by Montesquieu, is considered by experts as an unrealistic view and far from reality. Criticism of Montesquie’s thinking

regarding the trias politica was expressed by several other thinkers. This is inseparable from Montesquieu's view which is considered by experts as Montesquieu's mistake in understanding the English constitutional system which he made the object of study to reach a conclusion regarding his trias politica in his book *L'Esprit des Lois* (1748). There is not a single country in the world that truly reflects Montesquieu's picture of such a separation of power. In fact, the structure and the British state administration system which he made the object of research in completing his book also did not adhere to the separation of powers system as he imagined. Some scholars have even criticized Baron de Montesquieu that his view is "an imperfect understanding of the eighteenth-century English Constitution" [(O. Hood Phillips, Paul Jackson, and Patricia Leopold, *Constitutional and Administrative Law*, (London: Sweet & Maxwell, 2001) 12 in Jimly Asshiddiqie, *Ibid*, 17)]. It was even stated by O. Hood Phillips, Paul Jackson, and Patricia Leopold, that the pros and cons that arose among scholars regarding Montesquieu's views occurred in the fields of Political Science and Legal Science [(See for example G.H. Sabine on this controversy in *A History of Political Theory*, (New York: Holt, Rinehart and Winston, 1961), 559; See also John Alder and Peter English, *Constitutional and Administrative Law*, (London: Macmillan, 1989), 53-54.)].

The existence of these pro and contra views has led to conclusions for legal experts in Indonesia who conclude that it is as if the term separation of power used by Montesquieu itself cannot be used. This conclusion occurs, because the use of the term separation of powers is usually identified with Montesquieu's trias politica theory, and it is as if the term separation of powers is only used by Montesquieu. In fact, the term separation of powers itself is a general concept, just as the concept of power sharing is also used by many scholars with different meanings [(Jimly Asshiddiqie, *Op.cit*, 18.)].

In addition to the separation of powers, there is a term that is also often used as a counterpart to the concept of separation of power, namely the term division of power as a translation of the words division of power or distribution of power. There are also scholars who actually use the term division of power as a genus, while separation of power is a form of species. In fact, Arthur Mass, for example, distinguishes the notion of the division of power into two meanings, namely: (a) capital division of power, and (b) territorial division of power. The first definition is functional, while the second is regional or regional [(*Ibid*, 18.)].

O. Hood Phillips and colleagues stated that the issue of separation of powers (distribution of some government authority to several different institutions), has so far been practicable and desirable. The separation of powers is a matter of political theory and

must be distinguished from issues relating to constitutional lawyers, to what extent a separation is provided for by the constitution. As stated in the paragraph below:

“The question whether the separation of power (i.e. the distribution of the various powers of government among different organs), in so far as is practicable, is desirable, and (if so) to what extent, is a problem of political theory and must be distinguished from the question which alone concerns the constitutional lawyer, namely, whether and to what extent such a separation actually in any given constitution” [(O. Hood Phillips, Paul Jackson, and Patricia Leopold, *Constitutional and Administrative Law*, (London: Sweet & Maxwell, 2001), 12 in Jimly Asshiddiqie, *Ibid*, 19)].

Strictly speaking, Separation of power is defined by O. Hood Phillips and others as the distribution of the various powers of government among different organs. In other words, the word separation of power is identified with the distribution of power. Therefore, the terms separation of powers, division of powers, distribution of powers, and the terms separation of powers and division of power actually have the same meaning, depending on the context of the understanding adopted. For example, in the United States constitution, the terms separation of power and division of power are also used interchangeably. However, the term division of power is used in the context of the division of power between the federal and the states, or according to Arthur Mass's understanding related to the notion of the territorial division of powers. Meanwhile, the term separation of powers is used in the context of the division of power at the federal government level, namely between the legislature, the executive, and the judiciary. This last division is what Arthur Mass calls the capital division of power.

Thus, the term separation of powers itself is already commonly used among experts, not only in an absolute sense as in Montesquieu's view, but also includes new meanings that have developed in practice during the 20th century which are slightly different. Many also include notions that sometimes there is also the term division of powers or distribution of powers.

To get a more detailed explanation, the author tries to quote the opinion of G. Marshall, where the limitation of the definition of separation of powers can be based on the characteristics of the doctrine of separation of powers into five aspects, namely [(G. Marshall, *Constitutional Theory*, (Clarendon: Oxford University Press, 1971), ch. 5.): (a) differentiation; (b) legal incompatibility of office holding; (c) isolation, immunity, independence; (d) checks and balances; and (e) co-ordinate status and lack of accountability.

The following is an explanation of each of these aspects [(Alder and English, *op. cit.*, 57-59. in Jimly Asshiddiqie, *Ibid*, 21-22.References)]: *First*, the doctrine of separation of powers distinguishes the functions of legislative, executive, and judicial powers. The

legislator makes the rules, the executor implements them, while the court assesses the conflicts or disputes that occur in the implementation of the rules and applies the norms of the rules to resolve conflicts or disputes. *Second*, the doctrine of separation of powers requires that people who hold positions in the legislature may not hold concurrent positions outside the legislative branch. However, in the practice of a parliamentary system of government, this is not consistently applied. The cabinet government ministers in the UK are actually required to come from those who sit as members of parliament. *Third*, the doctrine of separation of powers also stipulates that each organ may 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*, in the doctrine of separation of powers, what is also considered the most important is the principle of checks and balances, in which each branch controls and balances the power of the other branches of power. With the balance that controls each other, it is hoped that there will be no abuse of power in each of these independent organs. Then the last, *fifth*, is the principle of coordination and equality, namely all organs or (higher) state institutions that carry out legislative, executive and judicial functions have an equal position and have a coordinative relationship, not subordinate to one another.

3.3. CONCLUSION AND RECOMMENDATION

From what the author has stated above, it can be drawn a common thread that constitutional democracy is a system that tries to regulate the distribution of authority to state institutions in carrying out their authority and provides limits on these authorities in order to avoid abuse of authority and the wheels of government run well. Without restrictions in the form of a constitution, democracy which is chosen as a system within the state will not be able to work properly and can even lead to authoritarianism.

Constitutionally, the implementation of people's sovereignty is carried out according to the Constitution as confirmed in Article 1 Paragraph (2) of the 1945 Constitution as a result of the Amendment. This is clearly a limitation that forms the basis for implementing people's sovereignty, especially by the power holders, namely the DPR as the holder of the power to form laws, and the President as the holder of government power as well as by the Supreme Court and the judicial bodies under it, and by the Supreme Court. The constitution of each as the perpetrators of judicial power.

The implementation of sovereignty by institutions holding/acting power based on the 1945 Constitution The results of the Amendment no longer rely on centralized sovereignty (central source of democratic policy) but rather on the substance of people's

sovereignty which is held by institutions holding/acting power is limited by constitutional provisions. the meaning of the implementation of people's sovereignty is limited by what is known as the supremacy of the constitution in the corridor of the Unitary State of the Republic of Indonesia which adheres to the rule of law.

The supremacy of the constitution is not merely seen as a matter relating to the constitutional substance of the implementing agency for people's sovereignty, (which is indicated by (i) the distinction between constitutional legal norms and other legal norms; (ii) the attachment of the authorities to the Constitution. and (iii) the existence of an institution that has the authority to examine the constitutionality of laws and legal actions of the Government), but is also more focused on the firmness of the substance of power that is constitutionally held/owned by the legislative, executive, and judicial institutions.

References

- [1] The idea of "democracy" has existed in ancient Greece (6th to 3rd century BC) which can be referred to the state (polis) of Athens and the thoughts of Aristotle, Plato and so on. Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*. (Jakarta: PT Gramedia, 1982), 5-67.
- [2] The purpose of the establishment of the Indonesian state is stated in the Preamble of the 1945 Constitution, paragraph 4, which reads "... an Indonesian government that protects all Indonesians and all Indonesian bloodshed and to promote public welfare, enlighten the nation's life, and participate in implementing world order based on independence, lasting peace and social justice ...".
- [3] In a democratic rule of law, Julius Stahl put forward several main underlying elements, namely (a) Based on human rights according to individualistic views (John Locke, cs); (b) To protect human rights, it is necessary to trias politica Motesquieu with all the variations of its development; (c) The government is based on the law (wetmatig bestuur) in the material Rechtsstaat and the principle of doelmatig bestuur is added in the Sociale vergorgingsstaat; (d) If in running the government it is still felt to violate human rights, it must be tried in an administrative court. In Padmo Wahjyo, "The Principles of the State of Law and Its Embodiment in the National Legal System, in Moh. Busyro Muqoddas, et.al., (Pen), *Politik Pembangunan Hukum Nasional*. (Yogyakarta: UII Press, 1992), 40-41.
- [4] Frans Magnis-Suseno, *Mencari Sosok Demokrasi, Sebuah Telaah Filosofis* (Jakarta: Gramedia, 1997), 58. See also Nicolaus Lobkowics, "Was das Staat von Einer Pavianherde Unterscheidet" (Deutsche Tagespot, 19 November 1994), in Frans

Magnis- Suseno, Op. cit.

- [5] Constitutional changes that occur in a country are always followed by pros and cons. Both those who support the constitutional amendment and those who oppose it have their own arguments to justify their opinion. What must be remembered is that the constitution is the nation's political agreement, as cited by K.C. Wheare: Constitution, when they are framed and adopted, tend to reflect the dominant beliefs and interests, or some compromise between conflicting beliefs and interests, which are characteristic of the society at that time... A constitution is indeed the resultant of parralelogram of force -political, economic, and social- which operates at that time of its adaptation. K.C. Wheare, *The Modern Constitution*. (London-New York-Toronto: Oxford University Press, 3rd Impression, 1975), 67.
- [6] Supomo, for example, wants the Indonesian state to be an integralistic state, which of course has an influence on the formation of laws. In the end, however, Supomo gladly accepted that the state of Indonesia was founded by law. For more details, see Marsilam Simandjuntak, *Pandangan Negara Integralistik: Sumber, Unsur, dan Riwayatnya dalam Persiapan UUD 1945*. (Jakarta: Pustaka Utama Grafiti, 2003)
- [7] The 1945 Constitution recognizes six high/highest state institutions, namely the MPR, DPR, President, MA, the Supreme Audit Agency (BPK) and the Supreme Advisory Council (DPA). Of the six state institutions, only the MPR is uniquely Indonesian. While the other five came from the institutional blueprint (copy-paste) from the Dutch East Indies era. Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*. (Jakarta: Konstitusi Press, 2005), Cet. Ke-1, 167-168
- [8] According to Carl J. Friedrich, constitutionalism is the idea that government is a collection of activities carried out on behalf of the people, but which is subject to certain restrictions intended to guarantee that the power needed to govern is not abused by those who are tasked with governing. See Carl J. Friedrich, *Constitual Government and Democracy: Theory and Practice in Europe and America* (5th edition: Wledham, Mass: Blaisdell Publisting Company, 1967) in Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*. (Jakarta: PT Gramedia, 1982), 56-57.
- [9] See Charles Howard Mcllwain, *Constitutionalism: Ancient and Modern*. (Ithaca, New York: Cornell University Press, 1966), 146.
- [10] Ifdhal Kasim, et.all, *Hukum: Paradigma, Metode dan Masalah Hukum: Paradigma, Metode dan Masalah : 70 tahun Prof. Soetandyo Wignjosoebroto*. (Jakarta: ELSAM, 2002), 454.
- [11] Monism is a metaphysical and theological concept that there is only one substance in nature. Monism is opposed to dualism and pluralism. In dualism

there are two substances or realities while in pluralism there are many realities.
<http://id.wikipedia.org/wiki/Monism>

- [12] William G. Andrews, *Constitutions and Constitutionalism*. (Princeton, New Jersey: Van Nostrand Company, 1968), 13
- [13] Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought*, (Boston: Little Brown and Company, 1960), 388-389.
- [14] Miriam Budiardjo, *Aneka Pemikiran tentang Kuasa dan Wibawa*. (Jakarta: Sinar Harapan, 1986), 14.
- [15] Sovereignty of the people is one of five kinds of sovereignty that exist in Legal Science, namely: (a) Sovereignty of God; (b) Sovereignty of the King; (c) State Sovereignty; (d) the Rule of Law; and (e) People's Sovereignty. Conceptually, the new sovereignty was formulated consciously and systematically by a French thinker, Jean Bodin. He is the one who associates sovereignty with the state so that sovereignty is an attribute of the state. In this sense, sovereignty is seen as expressing the capacity to carry out obligations and has the right and ability to take action. See Miriam Budiardjo, *Aneka Pemikiran tentang Kuasa dan Wibawa*. (Jakarta: Sinar Harapan, 1986), 14.
- [16] A description of this can be found in Arief Budiman, *Teori Negara: Negara, Kekuasaan dan Ideologi*. Cet. I. (Jakarta: PT Gramedia Pustaka Utama, 1997), 8.
- [17] Ibid, 34
- [18] Ibid
- [19] Deliar Noer, *Pemikiran Politik di Negeri Barat*. (Jakarta: Mizan, 1997), 122
- [20] Montesquieu separates the institutionalization of state power into three functions, namely executive power, legislative power and judicial power. With a clear separation of powers, it is hoped that the freedom of each institution in exercising its power is guaranteed
- [21] Koesnadi Hardjasoemantri, *Pembatasan Kekuasaan Presiden RI: Kajian Terhadap Mekanisme Pelaksanaan Kekuasaan Presiden RI Dalam Hukum Positif Indonesia*. Laporan Akhir Tim Kajian Bidang Hukum. (Jakarta: Masyarakat Transparansi Indonesia, 1999), 32.
- [22] Maruarar Siahaan, *Undang-Undang Dasar 1945 Konstitusi Yang Hidup*. (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), 72.
- [23] Moh. Mahfud M.D., *Demokrasi dan Konstitusi di Indonesia*, (Yogyakarta: Liberty, 1993), 21.
- [24] Ibid, 19-20.

- [25] According to Adi Sulistiyono, that by using the framework of positive freedom and negative freedom which refers to Kelsen's opinion, which makes the idea of freedom as the basis for distinguishing between autocracy and democracy in terms of making the rule of law, where Kelsen's view is a normative aspect of the conception of democracy because it sees freedom in relation to the formation of the rule of law, juristic democracy can be divided into 2 models of democracy, namely constitutional democracy and participatory democracy. See <http://adisulistiyono.staff.uns.ac.id/files/2009/07/reformasi-Hukum-di-idonesia.doc>. In relation to the democratic model, there is also the term deliberative democracy.
- [26] T
- [27] In Arief Budiman's view, such a state configuration is the nature of a pluralist state, namely a state that is not independent and only acts as a filter for various desires of interest-groups in society. Every state policy is not an initiative that arises from the independence of the state, but is born from the process of fully absorbing people's aspirations through parliament. Arief Budiman, *Teori Negara: Negara, Kekuasaan dan Ideologi*. Cet. I. (Jakarta: PT Gramedia Pustaka Utama, 1997)
- [28] In its development, restrictions on the function of the state "night watchman" are not only in the political field, but also in the economic field. In the economic field, there is a *laissez faire*s notion which postulates that the state must allow or free its citizens to manage their respective economic interests so that the economic situation in the country becomes healthy. For more, see Jimly Asshiddiqie, *Gagasan Keadulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia: Pergeseran Keseimbangan antara Individualisme dan Kolektivisme dalam Kebijakan Demokrasi Politik dan Demokrasi Ekonomi selama Tiga Masa Demokrasi, 1945-1980-an*. (Jakarta : Disertasi Fakultas Pascasarjana Universitas Indonesia, 1993), 230.
- [29] The term "separation of power" in Indonesian is a translation of the words separation of power based on the theory of *trias politica* or the three functions of power, which in Montesquieu's view, must be distinguished and separated structurally in organs that do not interfere in each other's affairs. Legislative power is only exercised by the legislature, executive power is only exercised by the executive branch, and similarly, judicial power is only exercised by the judicial branch of power. So in essence, one organ can only have one function, or vice versa one function can only be carried out by one organ. See Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid II*. (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, Cetakan Pertama, Juli 2006), 15.

- [30] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid II*. (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, Cetakan Pertama, Juli 2006), 12.
- [31] *Ibid*, 14.
- [32] In fact, the initial concept of this can be traced back to the writings of John Locke, "Second Treaties of Civil Government" (1690) which argues that the power to establish the rule of law should not be held by those who apply it. By the French legal scholar, Baron de Montesquieu (1689-1755), who wrote based on the results of his research on the British constitutional system, John Locke's thoughts were continued by developing the concept of *trias politica* which divided state power into three branches of power, namely the legislative, executive, and judicial. *Ibid.*, 15.
- [33] Janedri M Jaffar dalam *Kata Pengantar Penerbitan Buku "Pengantar Ilmu Hukum Tata Negara Jilid II*, Jimly Asshiddiqie, (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, Cetakan Pertama, Juli 2006), v.
- [34] O. Hood Phillips, Paul Jackson, and Patricia Leopold, *Constitutional and Administrative Law*, (London: Sweet & Maxwell, 2001) 12 in Jimly Asshiddiqie, *Ibid*, 17.
- [35] See for example G.H. Sabine on this controversy in *A History of Political Theory*, (New York: Holt, Rinehart and Winston, 1961), 559; See also John Alder and Peter English, *Constitutional and Administrative Law*, (London: Macmillan, 1989), 53-54.
- [36] J
- [37] *Ibid*, 18.
- [38] O. Hood Phillips, Paul Jackson, and Patricia Leopold, *Constitutional and Administrative Law*, (London: Sweet & Maxwell, 2001), 12 in Jimly Asshiddiqie, *Ibid*, 19.
- [39] G. Marshall, *Constitutional Theory*, (Clarendon: Oxford University Press, 1971), ch. 5.
- [40] Alder and English, *op. cit.*, 57-59. in Jimly Asshiddiqie, *Ibid*, 21-22.