

THE COMPARISON OF *RECALL* RIGHT OR AN INTER-TIME IMPEACHMENT MECHANISM BETWEEN AMERICAN AND INDONESIAN LAW SYSTEMS

Ibnu Elmi Acmad Slammat Pelu
Faculty of Sharia, Institute Islamic University Palangka Raya
ibnu.elmi@iain-palangkaraya.ac.id

Abstract

This is a study of legal thought regarding regulation of the use of recall right or inter-time impeachment as political parties' authority accommodated in MD3 Law. This recall authority has indirectly harmed the spirit of people's sovereignty as the embodiment of a democratic state. To study, it was conducted by applying normative research methods (doctrinal research), and other regulations of written legal materials. Furthermore, it was based on three stages in conducting comparative construction, namely: (1) the descriptive phase, (2) the identification phase and (3) the explanatory phase. Based on the results through library research, the researchers found similarities between recall rights accommodated by Indonesia comparing to the implementation in the United States of America. Additionally, this similarity of recall right regulatory system concept can be used as a thought basis for legal constructions based on the actual legal protection of people's sovereignty in Indonesian laws.

Keywords: *Legal Protection; People's Sovereignty; Recall Right.*

A. INTRODUCTION

In Indonesia, the term of *Recall* of state administration system refers to an inter-time impeachment. Meanwhile, an expert, BN Marbun emphasised that *Recall* in political dictionary was defined as¹ "A process of replacing members of People's Representative Council [henceforth (DPR)] and/or Regional People's Representative Council [henceforth (DPRD)] by the political party that carries." On the other hand, the *recall* right by the political party is also interpreted as a tenure impeachment of a parliament member (DPR/DPRD).² Recognition of the *recall* right mechanism by political parties cannot be separated from juridical reasons. Following the rules of Article 239 Sec. (1), further description regarding the details are in Article 239 Sec. (2) of Law Number 17 of 2014. Hence, a nomenclature-review stated that a *recall* (or that of 'PAW' in Indonesian) carried out through the proposal of Political Parties emerges new problems, in forms of

1 Farida R., Mekanisme Penggantian Antar Waktu Anggota Dewan Perwakilan Rakyat dan Implikasinya dalam Konsep Perwakilan Rakyat, *Jurnal Cita Hukum*, Vol.6 No.11, 2013, page.198.

2 Muhamad Aljebra Aliksan Rauf, Marten Bunga, and Hardianto Djanggih, Hak Recall Partai Politik Terhadap Status Keanggotaan Dewan Perwakilan Rakyat Dalam Sistem Ketatanegaraan Indonesia, *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* Vol.7 No.4, 2018, page.443.

disagreement.³ The different opinion occurs due to the use of nomenclature in Article 239 paragraph (2) D, in which a political party is able to perform a *recall* with the proposal submitted.

In this regard, Nike K. Rumokoy argued that it was the regulatory content that caused problems. Problems emerged with the legitimacy that sovereignty belonged to the people (represented by members of Parliament), yet it was shifted to political parties' votes. In a sense that the elected people's representatives were not substantially responsible for political parties but for the people who voted for them [henceforth (voters)]. Even so, political-party function in Indonesia takes an important element in the state administration system. Indonesia as a legal state, the position of political-party power should be limited, especially those that served as the top leader in the parliament at that time. The supervision in executive and legislative realms is a form of *separation of power with checks and balances*.⁴

Taking a look at the event of oath of office performed by the people's representatives, it actually has a crucial legal relationship not only to the party that carries, but also to the voters. Nevertheless, the authority of a *recall* granted to political parties has indirectly harmed the people's sovereignty.

This practice has become a trap for political parties to force their cadres to be accountable to them, instead of the voters. And it is open in UUMD3 which guarantees and regulates the inter-time impeachment mechanism (PAW) or commonly called as *recall*. This authority also unconsciously slackens the spirit of reform and the mechanism of legislative elections which are directly carried out with the intention of channeling the people's sovereignty in a pure manner. Instead, the election is an activity that accommodates the people's sovereignty over their representatives, as a means of delegating the people's rights to their representatives to be carried out through applicable government regulations.⁵

However, others argue that *recall* is a common mechanism that functions as an instrument of membership control of the People's Representative Council (DPR),⁶ By meeting one of the *recall* requirements to impeach membership, then it is a form of supervision. Thus, if the recall practice is abolished, then there is no other mechanism to punish the DPR/DPRD members who make mistakes.

The implementation of Indonesian Positive Law has regulated *Recall* for DPR members, yet it is thought that there is a reflection of legal politics that amputates or distorts people's sovereign rights into party's sovereignty by granting *recall* authority to political party proposals. To enrich the analysis and the reasons for carrying out legal reforms related

3 Article 239 Sec. (2) of Law No. 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council and the Regional Representative Council.

4 Nike K Rumokoy, *Kajian Yuridis Tentang Hak Recall Partai Politik dalam Sistem Ketatanegaraan Indonesia*, *Jurnal Hukum Unsrat*, Vol.20 No.1, 2012, page.53

5 ASS Tambunan, *Pemilu Di Indonesia, Susunan Dan Kedudukan MPR, DPR Dan DPRD* Binacipta, Bandung, 1996, page.3

6 See Chapter 239 Sec (2) No. 17 Year 2014 about UUMD3.

to the *recall* mechanism for DPR members, the researchers will enrich by conducting a comparative study of *recall* rules between Indonesian and American legal systems.

B. RESEARCH METHODS

This study was based on *doctrinal research* method or normative study that considered legal studies on a concept then being developed based on basic doctrines that were believed by developers and conceptors.⁷ The focus of this study observed the norm system as a building support of an existing law,⁸ the use of other written legal materials as well as secondary regulations with referring to literature studies.⁹ This study also involved legal principles and implementation of positive legal rules or norms. The study was conducted by applying *statue approach*, *conceptual approach* and *historical approach*.¹⁰ Then it was analyzed descriptively qualitatively. As a reference in conducting a coherent analysis on the legal-issue substances on the comparison of *recall* rights, it perceived American legal rules comparing to Indonesian positive law principles as a guarantee of protection and recognition of people's sovereignty.

C. RESULTS AND DISCUSSION

1. The Comparison of Regulation and Implementation of Recall Rights in the United States and Indonesia

In conducting comparative study, the researcher used Kamba's view explaining that the basic reasons for similarities and differences were normal in a sense of legal comparison. However, it is important to note that functional and problem-solving approaches were necessary in cross-cultural comparisons. Three stages were applied, namely:¹¹

Firstly, *the descriptive phase*, the researchers themselves who described institutions, concepts and norms based on observed system regarding regulation and mechanism of *recall* rights in the United States and Indonesia. Additionally, the regulation of *recall* right in the United States refers to Article 1, Sec. 5 (2); "*Each house may determine the rules of, The President, Vice President and all civil officers of the United States are removed through the process of "impeachment" which is governed by the United States Constitution.*" This article provided an understanding that each chamber of the parliament independently authorized to determine the rule of its working procedures, in this case, a punishment to the representatives performing disorderly behaviors and attitudes with a condition that two-third of members of parliament votes

7 HS Salim dan E.S Nurbani, *Penerapan Teori Hukum Pada Tesis Dan Disertasi*, PT. Raja Grafindo Persada, Jakarta, 2013, page.11

8 Fajar Mukti, *Dualisme Penelitian Hukum Normatif Dan Empiris*, Pustaka Pelajar, Yogyakarta, 2010, page.34

9 Ibrahim J, *Teori Dan Metodologi Penelitian Hukum Normatif*, Revision Edition Banyumedia Publishing, Malang, 2013, page.46

10 Peter Mahmud M, *Penelitian Hukum*, Kencana, Jakarta, 2010, page.94

11 WJ Kamba, *Comparative Law, International and Comparative Law Quarterly*, Cambridge University Press, Vol.23 No.3, 1974, page.134

must meet. Then, it can be understood that the provisions of this article focused on parliament power of each elected chamber to perform a *recall* based on two-third of the vote and voting mechanism, instead of the parties that carry, as occurred in Indonesia.

The *recall* that occurred in Indonesia referred to the MD3 Law, Article 239 Sec. (1) that DPR members performed a *recall* due to:

- a. Pass away;
- b. Resign; or
- c. Impeached.

Furthermore, Article 239 of MD3 Law, Sec. (2) stipulates that DPR members are impeached as referred to Sec. (1) C, if:

- a. Unable to carry out his/her duties continuously or permanently unable to serve as DPR member for 3 (three) consecutive months without any information;
- b. Violate the oath/promise of office and the DPR code of ethics;
- c. Found guilty based on a court decision obtaining permanent legal force for committing a crime with 5 (five) years or more imprisonment;
- d. Proposed by the political party in accordance with legislation provisions.

The nomenclature for proposing political parties accommodated in Article 239 Sec. (2) D, is then believed to be able to amputate the guarantee of people's sovereignty. When examined in detail, several American states do not provide space for political parties in proposing the impeachment of the People's representative. On the contrary, the space for *recall* rights is given as voters' authority in carrying out impeachment of elected legislators who are impeached before their tenure ends (known as "impeachment" for executive officials, and punishment by the legislature), also by voters through "*recalls*" procedure.

There is recognition for the people to employ this *recall* authority. While impeachment is an internal legislature authority regarding their power over the process and their own members, and *recall* is a distinctive process excluding the legislature itself that is performed by the people through special election. Considering that provisions for state or local officials became popular in the "progressive movement" particularly in western states and plains in the early 20th century.¹²

Historically, the practice of implementing a *recall* mechanism by voters has been going on since 1911 in the United States. In practice, *recall* was used by voters to express their dissatisfaction with their elected representatives as stated in the California Constitution Article II, Section. 13-19; Elections Code § 11000 et seq.¹³ Based on

12 Mitau, G. Theodore, *State and Local Government, Politics and Processes*, 90 -93 (Charles Scribner's Sons 1966); Comment, The Use and Abuse of Recall: A Proposal for Legislative *Recall* Reform, *67 Nebraska Law Review* 617, 1988, page. 621.

13 The Great Seal of the State of California, *Procedures for Recalling State and Local Officials*,

literature review conducted by the researchers, a *Recall* mandates people's initiatives undertaken in many states in the USA including California, Los Angeles and Colorado.

Secondly, *the identification phase*, at this stage, the researchers identified similarities and differences between the legal system regarding the regulation and mechanism of *recall* rights in the USA and Indonesia. After going through *the descriptive phase*, it was found similarities in regulating *recall*. This case was stated in the American legal system in *Article 1, Sec. 5 (2)* was later passed down by the state in California Constitution Article II, Secs. 13-19; Elections Code § 11000 et seq. Meanwhile, in Indonesian legal system, it is regulated in Article 239 Secs. (1) and (2) of MD3 Law. The difference was that *recall* of DPR members can be proposed by a political party in accordance with the applicable provisions.¹⁴

Article 239 Sec. (2) D of MD3 Law stated that it was proposed by a political party in accordance with the provisions of legislation. In contrast to the *recall* regulation in USA, that the first stage originated from the voters who proposed petition to the People's representatives in Parliament. Additionally, the parliament responded by approving or vice versa. Once the approval was obtained, the next stage was a vote to decide which member was dismissed from his/her position.

Thirdly, *the explanatory phase* is an effort to review the legal system, its concepts and institutions from both similarities and dissimilarities point of views. This study found dissimilarities in regulating a *recall*, due to the legitimacy of determining *Recall Rights* in Indonesian legal system belongs to political parties. Meanwhile, in American legal system, the regulation of *recall* is a right owned by the *constituent*, instead of political party that carries the people's representatives. Furthermore, in the USA, a *recall* can be performed into two procedures. *First*, senators are required to collect signatures from other senators as a form of agreement to replace those who are deemed incompetent to do the duties as senator. The results of those collected signatures are then directed to the honorary board to be accounted for. *Second*, through the *impeachment* mechanism, the implementation of procedures through the mechanism of re-election on the basis of *recall* news to members who are no longer trusted to carry out their duties. Similar to the first method, by collecting signatures, yet the voters vote the rights by providing a photocopy of the Identity Card (KTP) then adjusted to the number of voters' divisors. In this sense, there are two components are involved, which are (1) involving the Honorary-Board method and (2) *constituent recall* method or the people themselves who elect their representatives.

By perceiving the historical study of Indonesian-Constitution history, it will be clear,¹⁵ that providing chamber to constituent as a

2020, page.2,

14 See Chapter 239 Sec (2) letter d UUMD3.

15 *Mempertanyakan Hegemoni Penggantian Antar Waktu PAW*, Anggota DPR Di Tangan Partai Politik, <http://www.hukumonline.com>, accessed on Desember, 19 2021.

holder's of people's sovereignty in *recall* mechanism is appropriate method to Indonesian constitutional system. Since, in practice, the elected people's representatives in Indonesia originates from the candidates who get the most votes. Therefore, by adopting this mechanism, a clear relationship between the people and their representatives occurs. Consequently, the *Constituent Recall* mechanism is in line with Indonesia's constitutional practice. This provision should be regulated in a law legitimizing that the people as voters have the right to *recall*, instead of political parties. This idea can provide a guarantee of protection and recognition for the people's sovereignty willing that their interests are accommodated by the People's representatives instead of being harmed by the parties carrying them.¹⁶

2. A Critical Study and the Relevance of *Recall* Rights that Distort People's Sovereignty

The researchers also conducted a critical study towards the *recall* regulation in Article 239 Sec. (1) and (2) D MD3 Law, by referring to Mac Iver's view who attempted to distinguish the types of law, as follows:¹⁷ "The constitution is a law that is over politics, while other laws and regulations under the constitution are under political power, indicating a strong relevance between political and legal relations, the nature of those influences each other. So the presence of the law cannot be separated from the politician results in it".

The study criticizes the *recall* regulation as stated in Article 239 Secs. (1) and (2) D MD3 Law. Based on the method of *critical legal studies*,¹⁸ it can be used as an analytical tool in criticizing the flow of legal processes in Indonesia. This view can be directed to be a rational construction to analyze the formation and application of legal doctrines that have been functioning and implementing in policy systems and social activities. However, this study has not been sufficiently developed in the surrounding environment due to the pattern of tendencies that lead to positivist textual research.¹⁹ Legal politics as legal policy²⁰ reflected in Article 239 Sec. (2) D MD3 Law received criticism from Harun Al Rasyid stating that:²¹ Parliament members can be recalled

16 Jimly Asshiddiqie, *Penguatan Sistem Pemerintahan Dan Peradilan*, Sinar Grafika, Jakarta, 2015, page.66-67

17 Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis Dan Sosiologis)*. Dalam *Tulisan Hukum Sebagai Kenyataan Dalam Masyarakat*, PT. Toko Gunung Agung. Tbk, Jakarta, 2002, page.66

18 *Critical legal studies* initially developed in the United States in the 1970s as a coalition of *post-realist* from legal theorists. In this case, if American legal realism can be considered as *jazz jurisprudence*, then *critical legal studies* can be labelled as *rock jurisprudence*. The first *critical legal studies* conference was also held in the United States in 1977, followed by a *critique du droit* in France and a *critical legal conference* in England.

19 Kasim Idfhal, *Wacana Gerakan Studi Hukum Kritis*, 6th ed., *Wacana Jurnal Ilmu Sosial Transformatif*, 2000, page.29-30

20 A Syaukani, Imam & Thohari, Ahsin, *Dasar-Dasar Politik Hukum*, Raja Grafindo Persada, Jakarta, 2004, page.31

21 Minutes of the Session of the Constitutional Court Case No. 008/PUU-IV/2006 concerning the Review of Law Number 22 Year 2003 concerning the Composition and Position of the MPR,

with the proposed submission of a list of candidates from political parties, which is then known as the term of *recall*. The election of people's representatives in the parliament is a representation of the embodiment of people's sovereignty, which has now become apparent with the existence of a *recall* mechanism by political parties. The right of leadership of a political party to recall the members has created a gap between the people's sovereignty rights turning into the rights of political parties. Muhammad Hatta argued that²² Communist countries in their constitutional system only recognize the *recall* rights of political parties, since the historical view is that parties are everything.

Roberto Mangabeira Ungger, in writing about *critical legal studies* or the critical legal studies movement (GSHK) is a method with an *inquiry* or research approach, aiming at considering elements in forms of politics, socio-culture, economy, ethnicity, gender and religion as well as the true nature of the law.²³ Through a study that relied on those two approaches:

First, *formalism* as a commitment formed on the basis of understanding a truth about collective traditions which tend to be deceitful by attempting to smuggle law and save doctrine through several other regulations. As for the relevance of this view with Article 239 Sec. (2) D MD3 Law, it opens the party's authority in proposing to *recall* DPR members, the *rationality* test of rights to *recall* by political parties, thus shifting the people's sovereignty to political parties' sovereignty. In fact, the affirmation that Indonesia upholds the people's sovereignty was stated in the 1945 Constitution of the Republic of Indonesia. Substantively, the use of *recall* rights harms the sense of justice and violates the people's sovereignty. This includes the spirit of reform that determined the election of people's representatives was on the basis of vote majority. This view justifies the reciprocal responsibility of the people's representatives to the constituents.

Second, *objectivism* about a belief in authoritative legal material/accept something in an established manner. Dealing with Article 239 Sec. (2) D MD3 Law, it opens the authority of political parties in proposing to *recall* DPR members, or a shift from state/government sovereignty to political parties' sovereignty, but it should be returned to the people's sovereignty. As a consequence, the *recall* mandated by Article 22B of the 1945 Constitution of the Republic of Indonesia is a *recall* that is performed if DPR members violated the law, instead based on parties that carry. This is in contrast to the adage which stated *vox populi vox dei* which means²⁴ The people's voice is God's voice which has a noble philosophical meaning that must be recognized, guarded and

DPR, DPD, and DPRD as well as Law Number 31 Year 2002 concerning Political Parties Against the 1945 Constitution.

22 Yusril Ihza Mahendra, *Dinamika Tatanegara Indonesia: Kompilasi Aktual Masalah Konstitusi, DPR Dan Sistem Kepartaian*, Gema Insani Press, Jakarta, 1996, page.171

23 Hamdhany Tenggara, *Critical Theory, Critical Legal Theory, Critical Legal Studies*, Bahan Kuliah Perbandingan Hukum Perdata, 2002, page.15

24 Hendri Teja et al., *Suara Rakyat Suara Tuhan*, Serambi, Jakarta, 2014, page.55

protected. In democracy realm, people's sovereignty is delegated through decisions and policies made by the legislature as a representative of the people.

3. Construction and Implementation of *Constituent Recall* in Indonesia

Based on the researcher's study on Recall regulation in Indonesia which refers to Law Number 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representatives Council and the Regional People's Representative Council, the problem is that the *recall* mechanism is largely accommodating political parties' power so that it has the potential to distort people's sovereignty.

The weakness of the regulation of the MD3 Law as mentioned above demands a form of certainty, justice and legal benefits,²⁵ through the mechanism of *checks and balances*²⁶ by taking into account the balance and harmony of one another as an effort to protect the state in the context of realizing the national interest through a legal construction of changes to the MD3 Law. This amendment was made to Article 239, Article 240, and Article 241 which regulate the *recall* of DPR members. Against Article 355, Article 356, and Article 357 which regulate the *recall* of provincial DPRD members. Regarding Article 405, Article 406, and Article 407 which regulate the *recall* of Regency/Municipal DPRD members. However, the law should be able to follow developments so that legal changes are required in line with what must be regulated and not regulated in such a way.²⁷

Regulations regarding *recall* rights for DPR and DPRD members that provide large chamber for political parties to be able to propose a *recall* to them should be changed and/or eliminated. It is the people who should have the authority to propose a *recall* as a manifestation of the people's sovereignty principle.

Referring to changes with idea of constructing and implementing *constituent recall* in Indonesia, it can adopt practices in the United States of America including Alaska, Arizona, California, Colorado, District of Columbia, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, Wisconsin.²⁸ Based on the researcher's review, those states previously implemented a *recall* system with voters' authority. Referring to Indonesian mechanism by adopting those states' practice, the position of the General Elections Commission becomes urgent as an election organizer. Because in *recall*

25 Muhammad Ridwansyah, Mewujudkan Keadilan, Kepastian Dan Kemanfaatan Hukum Dalam Qanun Bendera Dan Lambang Aceh, *Jurnal Konstitusi*, Vol.13 No.2, 2016, page.278

26 Mahfud MD, *Politik Hukum Baru Menuju Supremasi Hukum Dalam Saldi Isra*, Pergeseran Fungsi Legislasi, Raja Grafindo Persada, Jakarta, 2006, page.155

27 Achmad Ali and Wiwie Heryani, *Menjelajahi Kajian Empiris Terhadap Hukum*, Kencana, Jakarta, 2012, page.203

28 National Conference of State Legislatures, n.d.

practice, re-voting is needed by the people who voted for it, as evidenced by the collected signatures.²⁹ The signature serves as evidence that the voters are willing to recall the representative they have chosen. The threshold requirement for the fulfillment of voter signatures can be adjusted 25%-40% according to the voting area. This threshold practice is also widely applied in the United States, one of which is Louisiana.³⁰ The signature requirement equals between 20% and 40% of the electorate in the polling area, depending on how many conditions are met by the voters in the polling area, as similarly when referring to the 2021 Colorado Statute.³¹ The researchers assume that the regulation of *recall* mechanism reflects the legal protection and preservation of people's sovereignty in accordance with the 1945 Constitution of the Republic of Indonesia which stipulated that sovereignty is in the hands of the people and is carried out according to the law. So the *recall* authority is the *voters'* authority in recalling before their term of office ends against the elected legislator.

D. CONCLUSION

An inter-time impeachment, better known as *Recall*, is recognized as one of the authority granted to political parties over the people's representatives they carry.³² However, it is thought that this authority can harm the people's sovereignty. Because the elected people's representatives should be responsible for the constituent who elected them. This reason is reinforced by the desire for reforms that is to abolish the recall regulations by political parties as an effort to protect and guarantee people's sovereignty. This issue led researchers to conduct a study on recall mechanism by conducting several comparisons with other countries. This study was based on analysis of Legal method, one of which was comparative stage popularized by Kamba, which included a description of norms, similarities and differences as well as stages to perceive/re-examine similarities, dissimilarities between legal systems, concepts and institutions.

The critical study conducted found that the existence of *Recall* Right with proposing by political parties had a strong relevance in distorting the people's sovereignty. Furthermore, this practice was widely available in Communist countries which are in contrast to unitary states such as Indonesia. Thus, referring to Indonesian historical aspect, *recalling* mechanism applied should be based on people's aspirations relating to impeachment of DPR members, or better known as the *Constituent Recall* mechanism, by adopting its construction and implementation from the USA. The position of General Elections Commission (KPU) becomes urgent as an election organizer. Because in *recall* practice, re-voting is needed by the people who voted for it, as evidenced by the collected signatures. This

29 Ellis Andrew, *Head of Electoral Processes, International IDEA's Work on Recall and Direct Democracy.*, 2005, page.7

30 Louisiana Laws Constitution Article 10 Sec 5, n.d.

31 Constitution of Colorado, n.d.

32 As Regulated in Article 239 Sec. (1) and Elaborated Further on Other Details in Article 239 Sec. (2) of Law No. 17 of 2014 MD3 Law.

authority can be delegated to the KPU as an election pioneer. Certainly, this idea was expected to be the answer as a form of protection and guarantee Indonesian people's sovereignty.

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