

**CONSTITUTIONAL RIGHTS OF CANDIDATES OF LEGISLATIVE
MEMBERS ELECTED BY POLITICAL PARTIES RECALL**

THESIS

**BY:
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SIN 16230083**



**CONSTITUTIONAL LAW DEPARTEMENT (SIYASAH)
SYARI'AH FACULTY
STATE ISLAMIC UNIVERSITY MAULANA MALIK IBRAHIM MALANG**

2020

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2020

STATEMENT OF THE AUTHENTICITY

In the name of Allah,

With consciousness and responsibility toward the development of science, the writer declares that thesis entitled:

CONSTITUTIONAL RIGHTS OF CANDIDATES OF LEGISLATIVE MEMBERS ELECTED BY POLITICAL PARTIES RECALL

Is truly the writer's original work which can be legally justified. If this thesis is a proven result of duplication or plagiarism from another scientific work, it as a precondition of degree will be stated legally invalid.

Malang, 5th June 2020

Writer,



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Elected By Political Parties Recall

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**CONSTITUTIONAL RIGHTS OF CANDIDATES OF LEGISLATIVE MEMBERS
ELECTED BY POLITICAL PARTIES RECALL**

Telah dinyatakan lulus dengan nilai : A

Malang, 6 Agustus 2020

Dekan.



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MOTTO

“Adil ialah menimbang yang sama berat, menyalahkan yang salah dan membenarkan yang benar, mengembalikan hak yang empunya dan jangan berlaku zalim di atasnya. Berani menegakkan keadilan, walaupun mengenai diri sendiri, adalah puncak segala keberanian.”

(Buya Hamka)



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From all the teaching, advice, guidance, and helps of service for us to finish this thesis, then with all humility, the writer will express the gratitude which is unequaled to:

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7. All lecturers at Syariah Faculty of the State Islamic University of Maulana Malik Ibrahim Malang who have provided learning to all of us. With sincere intentions, may all of their charity be part of worship to get the pleasure of Allah SWT.
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9. Various parties which cannot be mentioned by one writer, who have provided very useful assistance in the preparation of this thesis. May Allah SWT give a worthy reply. Aamiin.

With the completion of this thesis report, the hope that knowledge which we have gained during our studies can provide the benefits of living in the world and the hereafter. As a human who has never escaped fault, the author is very hopeful for the forgiveness, criticism, and suggestions from all parties for future improvement efforts.

Malang, 5th June 2020

Writer,

Safinatun Najah
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TRANSLITERATION GUIDANCE

A. General

The transliteration guide which is used by the Syariah Faculty of State Islamic University Maulana Malik Ibrahim of Malang is the EYD plus. This is used based on the Consensus Directive from the Religion Ministry, Education and Culture Ministry of The State of Republic Indonesia, dated January 22, 1998, No. 158/1987 and 0543.b/U/1987, which is also stated in The Arabic Transliteration Guide Book, INIS Fellow 1992.

B. Consonant

Arab	Latin	Arab	Latin
ا	A	ط	Th
ب	B	ظ	Zh
ت	T	ع	‘
ث	Ts	غ	Gh
ج	J	ف	F
ح	H	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	ه	H

ش	Sy	ء	،
ص	Sh	ي	Y
ض	Dl		

The Hamzah which is usually represented by an alif, when it is at the beginning of the word, henceforth it is transliterated following its vocal pronouncing and not represented in writing. However, when it is in the middle or end of a word, it is represented by a coma facing upwards (‘), as oppose to a comma (,) which replaces the ‘ain “ع”.

C. Vocal, Long Pronounce, and Diphthong

In every written Arabic text in the Latin form, its vowels fathah is written with “a”, kasrah with “i”, and dlommah with “u, whereas elongated vowels are written such as:

Elongated (a) vowel = â for example قال becomes qâla

Elongated (i) vowel = î for example قِيلَ becomes qîla

Elongated (u) vowel = û for example دون becomes dûna

Especially for the pronouncing of *ya' nisbat* (in association), it cannot be represented by "i", unless it is written as "iy" to represent the *ya' nisbat* at the end. The same goes for sound of a diphthong, *wawu*, and *ya'* after fathah it is written as "aw" da "ay". Study the following examples:

Diftong (aw) = و for example قول becomes qawlun Diftong (ay)

= ي for example خَيْر becomes khayrun

D. Ta' Marbûthah (ة)

Ta' marbûthah is transliterated as “t” if it is in the middle of the word, but if it is *Ta' marbûthah* at the end of the word, then it is transliterated as “h”. For example, الرسالة للمدرسة will be *al-risalat li al-mudarrisah*, or if it happens to be in the middle of a phrase which constitutes *mudlaf and mudlaf ilayh*, then the transliteration will be using “t” which is joined with the previous word.

E. Auxiliary Verb and Lafadh Al-Jalalah

Auxiliary verb “al” (اَلْ) written with lowercase form, except if it located at the beginning of word, while “al” in lafadh jalâlah which located in the middle of two words or being or become *idhafah*, it removes from writing. Study the following:

1. Al-Imâm al-Bukhâriy said ...
2. Al-Bukhâriy explains, in the prologue of his book ...
3. MasyâAllâhkânawamâ lam yasya” lam yakun.

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ABSTRAK

Safinatun Najah, NIM 16230083, 2016. Judul Hak Konstitusional Calon Anggota Legislatif Terpilih Atas *Recall* Oleh Partai Politik. Skripsi. Jurusan Hukum Tata Negara. Fakultas Syari'ah. Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Irham Bashori Hasba, M.H.

Kata Kunci: Calon Legislatif Terpilih; Hak Konstitusional; *Recall*.

Pasal 420 Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu menegaskan bahwa penetapan calon terpilih anggota DPR, DPRD Provinsi, dan DPRD Kabupaten/Kota didasarkan atas perolehan kursi partai politik peserta pemilu di suatu dapil, dan penetapan caleg terpilih berdasarkan suara terbanyak yang diperoleh masing-masing calon yang tercantum dalam surat suara. Namun, fenomena penggantian caleg terpilih kembali terjadi pada Pemilu tahun 2019. Sejumlah partai politik mengganti kadernya yang telah berhasil menjadi calon anggota legislatif terpilih tanpa memperhatikan hak konstitusional yang dimiliki mereka yang telah berhasil memenangkan suara terbanyak dari konstituennya. Adapun penelitian ini bertujuan mengkaji hak konstitusional calon anggota legislatif terpilih yang batal dilantik sebab dipecat atau di-*recall* oleh partai politiknya, serta konstruksi pengaturan terhadap pemecatan anggota partai politik yang berdampak pada status hukum calon anggota legislatif terpilih.

Metode penelitian yang digunakan dalam penelitian ini adalah penelitian hukum normatif. Hal ini bertujuan untuk memperoleh kejelasan secara normatif dengan mengidentifikasi dan menganalisis kelemahan yang terdapat dalam hukum yang mengatur terkait ketentuan penggantian caleg terpilih yang di-*recall* oleh partai politiknya. Dalam penelitian ini menggunakan dua pendekatan yaitu pendekatan perundang-undangan dan pendekatan konseptual. Adapun sumber hukum dalam penelitian ini adalah sumber hukum primer dan sumber hukum sekunder.

Hasil dari penelitian ini adalah calon anggota legislatif terpilih berhak untuk dilantik. Apabila ada penggantian, prosedurnya harus sesuai dengan undang-undang yang mengatur. Akan tetapi, jika penggantian calon terpilih akibat diberhentikan partai politiknya dengan alasan melanggar AD dan ART tidak dapat serta merta dibenarkan. Karena klausula “melanggar AD dan ART.” belum diberi kejelasan dan batasan sehingga pengaturannya cenderung mengandung muatan politis dan berpotensi menghilangkan hak konstitusional calon anggota legislatif terpilih.

Sehingga direkomendasikan adanya batasan serta perlindungan hukum yang jelas bagi calon legislatif terpilih. Dengan demikian judicial review dalam ketentuan Pasal 16 UU Nomor 2 Tahun 2011 tentang Partai Politik perlu dilakukan, yang selanjutnya dilakukan revisi.

ABSTRACT

Safinatun Najah, SIN 16230083, 2016. Constitutional Rights Of Candidates Of Legislative Members Elected By Political Parties Recall. Thesis. Department of State Constitutional Law. Syariah Faculty. Maulana Malik Ibrahim Islamic State University. Lecturer: Irham Bashori Hasba, MH.

Keyword: Constitutional Rights; Elected Legislative Candidates; Recall.

Article 420 of Law Number 7 the Year 2017 concerning Elections confirms that the determination of elected candidates for members of the DPR, Provincial DPRD and Regency / City DPRD is based on the acquisition of seats of political parties participating in the electoral district, and the determination of selected candidates based on the majority of votes obtained by each candidate listed in the ballot. However, the phenomenon of replacing elected candidates again occurred in the 2019 elections. Some political parties replaced their cadres who had succeeded in becoming elected legislative candidates without regard to the constitutional rights of those who had won the most votes from their constituents. The purpose of this study is to examine the constitutional rights of elected legislative candidates who were canceled because they were fired or recalled by political parties and construction of arrangements for the legal status of elected legislative candidates who are recalled by their political parties.

The research method used in this study is normative legal research. This aims to obtain a normative clarity by identifying and analyzing weaknesses contained in the laws governing the provisions regarding the replacement of elected candidates who are recalled by their political parties. In this study using two approaches, namely the statutory approach and the conceptual approach. The sources of law in this study are primary legal sources and secondary legal sources.

The result of this research is that elected legislative candidates have the right to be appointed. If there is a replacement, the procedure must be following the governing law. However, if the replacement of elected candidates due to the dismissal of political parties on the grounds of violating the AD and ART can not necessarily be justified. Because the clause "violates AD and ART." not yet given clarity and limitations so that the arrangements tend to contain political content and potentially eliminate the constitutional rights of elected legislative candidates.

So that there is a need for clear boundaries and legal protection for elected legislative candidates. Thus the judicial review in the provisions of Article 16 of Law Number 2 of 2011 concerning Political Parties needs to be carried out, which will then be revised.

الملخص

سفينة النجاح. 16230083 , 2016 . عنوان الحقوق الدستورية للمرشحين للأعضاء التشريعية المنتخبين من قبل الأحزاب السياسية يذكر. بحث الجامعي. قسم القانون الدستوري. كلية الشريعة. جامعة مولانا مالك إبراهيم الإسلامية الحكومية مالانج. المشرف : ارحام بصري هسبا الماجستير.

الكلمات الرئيسية: الحقوق الدستورية. المرشحون التشريعيون المنتخبون ؛ اعد الاتصال.

تؤكد المادة 420 من القانون رقم 7 لسنة 2017 بشأن الانتخابات أن تحديد المرشحين المنتخبين لعضوية المجلس التشريعي الشعبي ، ومجلس النواب الإقليمي للمقاطعات ، ومجلس ريجينسي الإقليمي / مجلس المدينة الإقليمي التمثيلي يقوم على اكتساب مقاعد الأحزاب السياسية المشاركة في الدائرة الانتخابية ، وتحديد المرشحين تم انتخابه بناءً على أغلبية الأصوات التي حصل عليها كل مرشح مدرج في بطاقة الاقتراع. ومع ذلك ، ظهرت ظاهرة استبدال المرشحين المنتخبين مرة أخرى في انتخابات عام 2019 ، واستبدل عدد من الأحزاب السياسية كوادهم الذين نجحوا في أن يصبحوا مرشحين تشريعيين منتخبين بغض النظر عن الحقوق الدستورية لأولئك الذين حصلوا على أكبر عدد من الأصوات من ناخبهم. الغرض من هذا البحث هو فحص الحقوق الدستورية للمرشحين التشريعيين المنتخبين الذين تم إلغاؤهم بسبب طردهم أو استعادتهم من قبل أحزابهم السياسية ، وكذلك كيفية سبل الانتصاف القانونية لأولئك الذين تم استدعاؤهم كمرشحين للمشرعين المنتخبين.

طريقة البحث المستخدمة في هذه الدراسة هي البحث القانوني المعياري. ويهدف هذا إلى الحصول على وضوح معياري من خلال تحديد وتحليل نقاط الضعف الواردة في القوانين التي تحكم الأحكام المتعلقة باستبدال المرشحين المنتخبين الذين يتم سحبهم من قبل أحزابهم السياسية. في هذه الدراسة باستخدام نهجين ، وهما النهج القانوني والنهج المفاهيمي. مصادر القانون في هذه الدراسة هي المصادر القانونية الأولية والمصادر القانونية الثانوية.

نتيجة هذا البحث أن المرشحين التشريعيين المنتخبين لهم الحق في التعيين. إذا كان هناك بديل ، يجب أن يكون الإجراء وفقا للقانون الحاكم. ومع ذلك ، إذا كان استبدال المرشحين المنتخبين بسبب فصل الأحزاب السياسية على أساس انتهاك النظام الأساسي واللوائح الداخلية لا يمكن تبريره. لأن البند "ينتهك النظام الأساسي والميزانية المحلية". لم تُعطِ الوضوح والقيود حتى الآن بحيث تميل الترتيبات إلى احتواء المحتوى السياسي وربما تلغي الحقوق الدستورية للمرشحين التشريعيين المنتخبين.



CHAPTER I

PRELIMINARY

A. Background

Democracy means government by the people as a whole (Greek; demos) and not by any part, class, or interest in it. This understanding of its growth and development is then simplified by saying that democracy is the power of the people, by the people, and for the people. That means that the zeal of democracy places the people as the highest authority. The term democracy arises in Athens and is part of the standard division of regime forms whose powers are distinguished by one person (monarchy), several people (aristocracy), and many people (democracy).¹

Besides democracy has many meanings and multiple interpretations, in its growth and development, democracy has various typologies. The development of a typology of democracy shows good things for the study of democracy. This understanding is recorded in the work of Giovanni Sartori, Thomas Meyer, John T Ishiyama, and David Held who managed to find several typologies of democracy that have existed and developed in several countries. One of them is a representative democracy.²

¹Muhtar Haboddin dan Muh Arjul, *Pengantar Ilmu Politik*, (Malang: UB Press, 2016), 250.

²Haboddin dan Muh Arjul, *Pengantar Ilmu Politik*, 252.

Representative democracy has old historical roots in political studies. As John T Ishiyana said, representative democracy is rooted in the work of ancient nations. Beginning in the 5th century BC, the Ancient Romans developed a new system of government called representative democracy. Specifically, in a representative democracy, government decisions are made by elected representative groups. Thus, the starting point for representative democracy is the election of people's representatives by the people. Therefore, the most important political basic right for the people is the right to choose. This right includes the right to choose and be chosen.³ This means that anyone has the right to designate himself as a representative of the people because it is a citizen's right which is also regulated in Clause 28 D paragraph (3) of the 1945 Constitution which reads "Every citizen has the right to get the same opportunity in government."⁴

In a representative democracy that has power over public decisions are its representatives, not the community or constituents. This understanding was put forward by the founder of the American state, James Madison, philosophers John Locke, and Alexis de Tocqueville who said they preferred a representative democratic system, where decisions were not made directly by citizens but representatives who were more knowledgeable and elected by the people. In other words, representative democracy, state power is exercised by

³Haboddin dan Muh Arjul, *Pengantar Ilmu Politik*, 253.

⁴UUD 1945

representatives of the people chosen by the people for a certain period of position. These representatives are responsible for the people and are obliged to provide accountability and at the end of their terms of office can be re-elected.⁵

In the concept of a modern state in the world, especially after many colonies have gained independence, many countries have recognized and applied the principles of a democratic state. Indonesia is also one of the countries that applies the principle of democracy that upholds the sovereignty of the people as reflected in the administration of a democratic state government.⁶

One way or means to establish the people who will represent the people in running a democratic government is to hold elections. The election is the process of choosing people to fill specific political positions. These positions varied from the president, representatives of the people at various levels of government, to the village head.⁷ Thus, elections become one of the instruments in realizing popular sovereignty that propose to form a lawful government and a means of articulating people's aspirations and concerns.

Article 22 E paragraph (2) of the 1945 Constitution concerning public elections reads "General elections shall be held to elect members of the People's

⁵Haboddin dan Muh Arjul, *Pengantar Ilmu Politik*, 253.

⁶Bolin (eds.), *Iuris Muda: Bunga Rampai Ilmu Hukum Masyarakat Yuris Muda Airlangga* (Yogyakarta: Harfeey, 2019), 94.

⁷Fajlurrahman Jurdi, *Pengantar Hukum Pemilihan Umum*, (Jakarta: Prenada Media Group, 2018), 1.

Legislative Assembly, the Regional Representative Council, the President and Vice President, and the Regional People's Representative Council".⁸ This shows that the recruitment process of membership of representative institutions in Indonesia is based on political parties so that there is not a single part of the people's representatives who is not bound to a political party. It can be said that political parties have a central and prominent position and role in each system of people's sovereignty. Political parties can be called the pillars of democracy because they play an important role as a connector among the state government and its citizens. As stated in Clause 22 E paragraph (3) of the 1945 Constitution which states that "Participants in the general election to elect members of the People's Legislative Assembly and members of the Regional People's Legislative Assembly are political parties."⁹

Democratic elections will encourage competition within the framework of gaining power and placing the best cadres in parliament. Through elections, MPs gain legitimacy to act on behalf of the people's interests. This means that any decision taken at the level of the political system involving members of parliament will be accepted and followed by the people. Besides, the democratic political system requires representative political leadership. To get

⁸UUD 1945

⁹Muhamad Aljebra Aliksan Rauf, Marten Bunga, Hardianto Djanggih, "Hak Recall Partai Politik Terhadap Status Keanggotaan Dewan Perwakilan Rakyat dalam Sistem Ketatanegaraan Indonesia", *Jurnal Magister Hukum Udayana*, Vol. 7 No. 4 (Desember, 2018), 447.

a representative member of parliament, the electoral system can be done through two systems of members of parliament.¹⁰ Namely a mechanical selection system; which is divided into a district and proportional systems, and organic election systems.

In legislative elections, nominations indeed only come from political parties. The method of nominating a legislative election in which the party has full power to propose a list of candidates for legislative candidates to the election organizer, so the political parties have full authority to consider these names. In the case of political parties joining in the election, candidates can be selected and put forward by political party officials, can also be selected by party management, or elected by party members openly and competitively as preliminary elections. However, many parties also conduct closed selection and rely on the power of "personal".¹¹

Requirements that must be fulfilled to submit themselves as candidates for legislative members are contained in Clause 240 paragraph (1) of Law Number 7 of 2017 about General Election. One of the requirements mentioned is to become a part of a political party contesting the election. Each legislative candidate deputizes the aspirations of the people of their respective chosen

¹⁰Irma Fitriana, Muhtar Haboddin, Andi Setiawan, *Kajian Tentang Parlemen*, (Malang: UB Press, 2017), 8.

¹¹Aisah Putri Budiatri (eds), *Personalisasi Partai Politik di Indonesia Era Reformasi*, (Jakarta: Pustaka Obor Indonesia, 2018), 160-161.

regions. So they are responsible for the constituents who have chosen it. However, a prospective member of the DPR or DPRD who will be elected by a majority vote can be dismissed from his position if it violates the statutes / ART of a political party that promotes him to become a legislative member. In Clause 16 paragraph (1) letter d of Law Number 2 of 2011 about Political Parties, political parties may recall their members because the member violates the AD and ART of political parties. When a person gets the sack as a member of a political party, it will be followed by termination of affiliation in the people's representative institution, and the more tragic, if a member of the political party concerned moves or becomes a member of the different political party, then he will be recalled from the fellowship of the DPR.¹²

In addition to the provisions in the Election Law, according to Clause 239 paragraph (2) letters d, g and letter h of Law Number 17 of 2014 about People's Consultative Assembly, People's Representative Council, Regional Representative Council, and Regional People's Representative Council, political parties have the right to propose termination between time or better known as recall, as well as being given special authority by the law to dismiss

¹²Muhamad Aljebra Aliksan Rauf, Marten Bunga, Hardianto Djanggih, "Hak Recall Partai Politik Terhadap Status Keanggotaan Dewan Perwakilan Rakyat dalam Sistem Ketatanegaraan Indonesia", *Jurnal Magister Hukum Udayana*, Vol. 7 No. 4 (Desember, 2018), 444.

a member of a political party which will lead to the dismissal of someone as a member of the DPR as well.¹³

Ahead of the appointment and inauguration of DPR and DPRD members from the 2019 election results, there were several replacement candidates elected from political parties. Some elected candidates who get popular votes are replaced at the time of the election of elected candidates. There are replaced before the inauguration. There are at least two political parties that have replaced elected candidates, namely the Indonesian Democratic Party of Struggle (PDIP) and the Gerindra Party.¹⁴ Of the two parties, a total of ten elected legislative candidates were canceled. Three cancellation cases were carried out before the stipulation of the General Election Commission Decree (KPU Decree) and seven cases occurred after the issuance of the KPU Decree and before the inauguration. Cases of replacement of selected candidates occur in the electoral district (electoral district) of South Sumatra I House of Representatives, electoral districts of West Kalimantan I DPR RI, electoral districts of West Java 11 DPR RI, electoral districts of Central Java 1 DPR RI, electoral districts 2 Regional Representatives Council

¹³Muhamad Aljebra Aliksan Rauf, Marten Bunga, Hardianto Djanggih, "Hak Recall Partai Politik Terhadap Status Keanggotaan Dewan Perwakilan Rakyat dalam Sistem Ketatanegaraan Indonesia", *Jurnal Magister Hukum Udayana*, Vol. 7 No. 4 (Desember, 2018), 444.

¹⁴Moh. Dani Pratama Huzaini, "Penggantian Calon Legislatif Terpilih Oleh Partai Politik Menyalahi Undang-Undang Pemilu", <https://www.hukumonline.com/berita/baca/1t5db7bcecc6c55/penggantian-calon-legislatif-terpilih-oleh-partai-politik-menyalahi-undang-undang-pemilu/>, diakses 5 Februari 2020.

(DPRD) South Sulawesi Province, the electoral district of West Sulawesi Province, and electoral district of Maluku Province.

Of the ten cases, one candidate was replaced due to death, one candidate resigned, and seven candidates were dismissed as party members. And from the record of the Association for Elections and Democracy (Perludem), some of the dismissed candidates did not know about the party's sacking, and the rest knew but did not know the reason for the dismissal.¹⁵

This phenomenon is very close to the issue of "dowry political parties" where the elected candidates must pay a large cost to political parties if they still want to continue the process until they are appointed as members of the legislature. If the person concerned is not willing, instead of violating the Statutes / By-Laws, a political party with its recall right may be able to replace the chosen candidate with his chosen person. Arrangements related to the replacement of elected candidates have indeed been accommodated in legislation. If the elected candidates are dismissed from their political parties on the grounds of violating the Statutes / By-Laws, then it is necessary to ensure that they have been given the space to exercise their right to defend.

Misriyani Ilyas is one of the elected candidates from the Gerindra Party who was fired by her party one day before the inauguration of members of the

¹⁵Amalia Salabi, "Penggantian Caleg Terpilih oleh Partai, Inkonsistensi Sistem Pemilu", <https://rumahpemilu.org/penggantian-caleg-terpilih-oleh-partai-inkonsistensi-sistem-pemilu/>, diakses 24 Februari 2020

South Sulawesi Province DPRD. He has been elected as the elected candidate because he won the most votes in his constituency of 10,057. However, one day before his inauguration, Misriyani got a letter from Gerindra stating that he was dismissed from the party. Upon his dismissal, Misriyani was canceled as a DPRD member. Misriyani tried to clarify with Gerindra DPP, but she did not get an answer.¹⁶

The Political Party Law indeed contains rules regarding the dismissal of its members. However, the existing rules have not been able to answer the allegations or accusations posted to political parties if there are members who are fired. Moreover, if the dismissal of members of the political party will affect their status as elected candidates for the legislature which results in the replacement of the elected candidates before the inauguration of the legislative members. The phenomenon of replacing legislative candidates elected by political parties before the inauguration eliminates their constitutional rights as citizens elected by people. So, in cases like this, there is still a vacuum of legal norms.

Build upon the description that has been explained above, the writer is interested in taking the title of the research "**Constitutional Rights of**

¹⁶KPU Nilai Ketentuan Pemecatan Anggota Partai di UU Parpol Perlu Dipertegas, Kompas.com, 28 Oktober 2019, 21:34 WIB <https://nasional.kompas.com/read/2019/10/28/21340751/kpu-nilai-ketentuan-pemecatan-anggota-partai-di-uu-parpol-perlu-dipertegas?page=2>

Candidates of Legislative Members Elected by Political Parties Recall"

which will later be outlined in the form of the thesis of the author.

B. Problem Formulation

1. What are the constitutional rights of elected legislative candidates who are recalled by their political parties?
2. How is the construction of the arrangements for the legal status of elected legislative candidates who are recalled by their political parties?

C. Research Objectives

1. To find out the constitutional rights of elected legislative candidates who are recalled by their political parties.
2. To find out the construction of arrangements for the legal status of elected legislative candidates who are recalled by their political parties.

D. Research Benefits

The yield of this research are expected to give theoretical and practical uses, including the following:

1. Theoretically, this research can be an additional knowledge and knowledge relating to the constitutional rights of candidates for members of the People's Legislative Assembly are elected upon recall by their political parties, so that it can be used as ongoing research in academia and society.
2. Practically, this research is expected to provide information for legal practitioners, the general public, and other researchers in assessing the

constitutional rights of elected candidates for DPR members for recall by political parties.

E. Conceptual Definition

1. Constitutional rights are rights that must be fulfilled by the state to each of its citizens because these rights are guaranteed by the constitution. Because these rights are belonging in the constitution it becomes part of the constitution so anyone must respect it. Also, because constitutional rights are part of the constitution it must be protected. Therefore, there must be a legal avenue as a mechanism to realize the protection so that the right owner can defend his rights in the event of a violation. Legal avenues or mechanisms that can be carried out either in the form of a judicial mechanism (through the judicial process) or non-judicial (outside the judicial process).¹⁷
2. Elected Legislative Members are people nominated by political parties except for the Regional Representative Council (DPD) who are directly chosen by the people by general elections to later occupy the leadership seat in the legislative institution if they get the most votes in an electoral area.
3. Recall or commonly referred to as Inter-Time Replacement is the process of replacing members of the House of Representatives who sit in

¹⁷Meirina Fajarwati “Upaya Hukum Untuk Melindungi Hak Konstitusional Warga Negara Melalui Mahkamah Konstitusi”, *Jurnal Legislasi Indonesia*, Vol. 13 No. 03 (September, 2016), 326.

parliament, the intended replacement process is of course preceded by the dismissal process.¹⁸

4. Political Parties are national organizations formed by groups of Indonesian citizens voluntarily based on the same will and ideas to fight for and stand up the political interests of members, society, nation, and state, and maintain the integrity of the Unitary Republic of Indonesia based on the Pancasila and the 1945 Constitution of the Republic of Indonesia.¹⁹

F. Study Methods

1. Kind of Study

This study is a normative legal study. The normative legal study is a legal study that put law as a norm building system. The norm system that is built is about the foundation, norms, principles of legislation, court decisions, agreements, and doctrines.²⁰ Normative legal research functions to provide juridical arguments when there is emptiness, obscurity, and norm conflicts. This means that normative legal research plays a role in maintaining critical aspects of legal science as a normative science that is sui generis.²¹

¹⁸Ni'matul Huda dan Imam Nasef, *Penataan Demokrasi dan Pemilu di Indonesia Pasca Reformasi*, (Jakarta: Kencana, 2017), 177.

¹⁹Undang-Undang Nomor 2 Tahun 2011 tentang perubahan atas Undang-undang Nomor 2 Tahun 2008 tentang Partai Politik

²⁰Mukti Fajar dan Yulianto Ahmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, (Yogyakarta: Pustaka Pelajar, 2017), 33.

²¹I Made Pasek Dinatha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*, (Jakarta: Prenada Media Group, 2017), 12.

2. Research Oncoming

In this research, the authors used a statute approach. A statute approach is an approach that is done by checking all relevant laws and regulations related to legal issues. The resulting legal analysis will be more accurate if assisted by one or more other approaches that are suitable for enriching legal considerations that are corresponding relevant to the legal problems faced.²²

In addition to using the approach that has been described above, in this study also uses a conceptual approach (conceptual approach). The conceptual approach is usually used to describe and analyze problems in research that start from the existence of empty norms. This means that in the current legal system there are no or no norms of legislation that can be applied to legal events or concrete legal disputes.²³ For researchers, the formation of new laws and regulations with new norms is also considered urgent because of the development of the situation that requires it.

3. Data Sources

The data source used by the author is the major legal material. Major legal material is legal material that has authoritative.²⁴ Major legal material

²²Jonaedi Efendi dan Johnny Ibrahim, *Metode Penelitian Hukum Normatif dan Empiris*, (Depok: Prenada Media Group, 2018), 134.

²³I Made Pasek Dinatha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*, 159.

²⁴Zainuddin Ali, *Metode Penelitian Hukum*, (Jakarta: Sinar Grafika, 2017), 47.

is composed of legislation related to research. As for this study, the primary ingredients used are:

- a. Law Number 2 of 2008 about Political Party (Supplement to the State Gazette of the Republic of Indonesia Number 4801)
- b. Law Number 2 of 2011 about Amendment to Law Number 2 of 2008 about Political Party (Supplement to the State Gazette of the Republic of Indonesia Number 5189)
- c. Law Number 17 of 2014 About the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council (Supplement to the State Gazette of the Republic of Indonesia Number 5568)
- d. Law Number 7 of 2017 concerning General Elections (State Gazette of the Republic of Indonesia of 2017 Number 182)
- e. KPU Regulation Number 5 the Year 2019 Regarding Determination of Elected Candidate Pairs, Determination of Obtaining Chairs, and Determination of Elected Candidates in General Elections.

In addition to the relevant laws, news related to the cases used in this matter is also the primary material of this research.

In addition to primary materials, researchers also use secondary legal materials consisting of research results which in this case relate to the discussion of the author, and the work of legal people from within and

outside the country that can provide an argument of the major legal material in the form of books and journals.²⁵

4. Data Collection Method

Collecting data in this study by collecting data sourced from legal materials in the form of legislation or study studies of writings, both from books, journals, or newspapers, and other materials bound to the recall of political parties. Towards its members. And analysis of related cases.

5. Data Processing Methods

Processing of legal materials is carried out through several stages, including namely:

a. Editing

Editing is the process of researching back notes, files, information collected by data seekers.²⁶ This aims to eliminate errors and correction of the data that has been collected.

In the process of editing data obtained by the authors of the excavation process of primary, secondary, and tertiary legal materials.

The author makes edits by sorting and setting aside irrelevant information for use in the subject matter. For example in legislation, not all articles and paragraphs in regulations relating to the research theme

²⁵Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, 2006), 52.

²⁶Amiruddin dan H. Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Pers, 2006), 45.

are included in the theoretical study and discussion, but only a few important points. In the editing process aims to find out whether the legal materials are complete, clear, and following the data needed by researchers so that it is easier to conduct a review of the legal materials that have been collected.

b. Classifying

Gather legal materials and classified them according to the research theme. The classification is carried out by the author aims to classify legal material so that it can be read, examined, and understood easily. This classification is also done based on the source of the acquisition of legal material, namely the separation between primary and secondary legal material, and also the separation between the literature data of books, articles, journals, magazines, newspapers, and so forth.

c. Verifying

Considering the importance of the position of legal material, the validity of the collected law becomes very vital. So, the step that must be done by the researcher is verifying (checking) that is checking back all legal materials that have been collected and classified according to the research theme so that the author is easy to analyze to obtain a research result. This verification process aims to determine the validity of whether it is valid and following what is expected by the author. The

implementation of the legal material inspection technique is based on certain criteria. 4 criteria can be used, namely: the degree of trust, tranquility, dependability, and certainty.

d. Analyzing

The next step is to analyze. The researcher analyzed the data and then described it as a result of this research. In normative research, the steps of analysis have specific characteristics that must be met from the law, namely:

- 1) Do not use statistics because of their nature which is a pure legal study
- 2) The theory of pragmatic truth can be used practically in people's lives
- 3) Full of values
- 4) Must be with relevant theory.²⁷

G. Previous Research

Previous research aims to find differences and similarities in this study with several other related research titles and as a form of the originality of this study. The research in question includes:

1. Roseno Pamungkas S. Putra, *Implementasi Hak Recall Oleh Partai Politik Menurut Undang-Undang Nomor 17 Tahun 2014 Tentang Majelis*

²⁷Roibin, dkk, *Pedoman Penulisan Karya Ilmiah Tahun 2015*, (Malang, Fakultas Syariah UIN Malang, 2015), 23.

Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah (Studi Recall terhadap Fahri Hamzah oleh PKS), Fakultas Hukum Universitas Islam Indonesia Yogyakarta, 2016.

This thesis discusses the use of the right of recall carried out by PKS (Social Welfare Party) to one of its cadres, Fahri Hamzah by referring to Law Number 17 of 2014 About the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, and the House of Representatives Area. Equality with the author that is equally discussing the recall rights possessed by political parties. The difference in this thesis is that in his case the recalled member was appointed and served as a legislative member.

2. Moh. Khalilullah A. Razaq, *Hak Recall Partai Politik Terhadap Anggota Parlemen Dalam Sistem Ketatanegaraan Indonesia (Studi Atas Kasus Lily Chodidjah Wahid dan Achmad Effendy Choirie)*, Fakultas Syari'ah dan Hukum Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2014.

This thesis discusses the intermittent dismissal of part of the House of Representatives from the National Awakening Party who are at odds with their parties when making decisions in parliament related to Century Questionnaire Rights and the Taxi Mafia. Equality with the author that is equally discussing party members who removed membership from his

party. The difference is, in the case study of this thesis, members who are dismissed from the party in the middle of the term of office of their legislative members and because they are at odds with their political parties.

3. Dessy Ariani, *Hak Recall Partai Politik Dalam Sistem Perwakilan di Indonesia di Era Reformasi (Analisis Yuridis dan Politis terhadap Putusan Mahkamah Konstitusi No. 08/PUU-IV/2006 dan No. 38/PUU-VIII/2010)*, Fakultas Hukum Universitas Islam Indonesia, 2012.

This thesis discusses the right to recall political parties because of the 1945 Constitution and the principle of democracy in the method of representation in Indonesia. Equality with the author that discusses the recall rights possessed by political parties. The difference, this study analyzes MK Decision No. 08 / PUU-IV / 2006 and No. 38 / PUU-VIII / 2010.

Table 2.1

Differences and Similarities Research

No.	Researcher	Title	Similarity	Difference
1.	Roseno Pamungkas S. Putra, Skripsi, Fakultas Hukum Universitas Islam Indonesia Yogyakarta, 2016	Implementasi Hak Recall Oleh Partai Politik Menurut Undang-Undang Nomor 17 Tahun 2014 Tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah (Studi Recall terhadap Fahri Hamzah oleh PKS)	Discusses recall rights held by political parties	In his case, the recalled member was appointed and served as a legislative member
2.	Moh. Khalilullah A. Razaq, Skripsi, Fakultas Syari'ah dan Hukum Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2014	Hak Recall Partai Politik Terhadap Anggota Parlemen Dalam Sistem Ketatanegaraan Indonesia (Studi Atas Kasus Lily Chodidjah Wahid dan Achmad Effendy Choirie)	Discussing party members who have been removed from their party membership	The case in this thesis is, members who are dismissed from the party in the middle of their legislative term and because they are at odds with their political parties.

3.	Dessy Ariani, Tesis, Fakultas Hukum Universitas Islam Indonesia, 2012	Hak Recall Partai Politik Dalam Sistem Perwakilan di Indonesia di Era Reformasi (Analisis Yuridis dan Politis terhadap Putusan Mahkamah Konstitusi No. 08/PUU-IV/2006 dan No. 38/PUU- VIII/2010	Discusses recall rights held by political parties.	Analyzing MK Decision No. 08 / PUU-IV / 2006 and No. 38 / PUU- VIII / 2010
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H. Systematics Discussion

A thesis is arranged systematically divided into four (4) chapters. Each chapter consists of several sub-chapters whose purpose is to explain the scope and scope of the problem under study in more detail. The sequence and layout of each chapter and the subject matter are as follows:

CHAPTER I. PRELIMINARY

This preliminary section is divided into several sub-chapters such as background, problem formulation which consists of two questions, research objectives, research benefits, research methods which are divided into five points (types of research, research approaches, data sources, data collection methods, and methods data processing), previous research, and finally the systematic study.

CHAPTER II. REFERENCES REVIEW

In section two, the references review discusses several theoretical studies of justice theory, legislation theory.

CHAPTER III. RESEARCH RESULTS AND DISCUSSION

In this section, the data gained from the results of the study literature are then edited, clarified, verified, and analyzed to respond to the question formulation that has been set. As for the answers to the formulation of the problem in this study, namely the description of the constitutional rights of political party members who are recalled by their political parties and the legal protection of elected legislative candidates who are recalled according to statutory regulations.

CHAPTER IV. CLOSING

This chapter is the last chapter that contains conclusions and suggestions. The conclusions in this chapter are not a summary of the research carried out, but rather a brief answer to the formulation of the problem that has been determined in the introduction. The number of points in the conclusion must be the same as the number of problem formulations. Suggestions are proposals and suggestions to related parties or parties who have more authority over the theme being studied for the public good in the future, and proposals for future research in the future.

CHAPTER II

REFERENCES REVIEW

A. Justice Theory

1. Understanding of Justice Theoretics

Rawls put forward an idea in his book "A Theory of Justice" that the theoretics of justice is a method for studying and producing justice. There are thinking procedures to produce justice. Rawls put forward a theory of how to achieve public conception, that is, there must be a well-ordered community and moral man who are both bridged by the original position. For Rawls, every person is a moral subject, free to initiate the principle of goodness, but it can be contradictory if the society is not well organized. So that people are well organized, they must look at the original position.²⁸

Rawls's main objective is to provide the construct of fairness that generalizes and elevates the social contract expressed by Locke, Rousseau, and Kant to a higher level of abstraction. However, Rawls believes that contracts are not the only way to understand certain people or to establish a certain form of government. However, the thought that marks it is that the fundamental of justice for the elementary structure of society is the goal of

²⁸Jazim Hamidi, Adi Sugiharto, Muhammad Ihsan, dkk, *Membedah Teori-Teori Hukum Kontemporer*, (Malang: UB Press, 2013), 198.

the contract. These are fundamental that free and rational people will accept to pursue their importance in the original position when explaining the basic framework of their society. These principles will govern all further agreements; they determine the types of social cooperation that can be entered into and the forms of government that can be established. This perspective on the principle of justice is called justice as fairness.²⁹

2. Justice as Fairness

Volunteering of all components of the community to receive and comply with available social stipulation is only probable if the community is well-organized in which justice as fairness is the foundation for the principles of regulating the institutions in it.

When talking about the social provisions governing shared life, Rawls is emphasizing efforts to formulate principles governing the division of rights and obligations between all members of society. The emphasis on the issue of rights and obligations, which is based on a concept of justice for social cooperation, shows that Rawls's theoretics of justice focuses on how to distribute rights and obligations equally in society so that everyone has the opportunity to benefit from it and in reality, and bear the same load. Therefore, to ensure a balanced division of rights and responsibility, Rawls

²⁹John Rawls, *Teori Keadilan Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara*, terj. Uzair Fauzan dan Heru Prasetyo, (Yogyakarta: Pustaka Pelajar, 2011), 12-13.

also stressed the benefit of a fair agreement among all members of the community. Only fair agreements can encourage social cooperation. The fair agreement is the key to understanding Rawls's formulation of justice. An equitable agreement can just be reached by a neutral procedure. For Rawls, justice as fairness is "pure procedural justice". In this case, what is required by those embroiled in the process of formulating the construct of justice is only a fair procedure to guarantee a fair result.³⁰

In Rawls's view, the main subject of justice is the base fabric of society. The base fabric is a large institution that manages a system of social cooperation, and this system of cooperation then arranges the regulation of rights and obligations as well as the distribution of benefits generated. The concept of Rawls justice has an interest in how large institutions must distribute basic rights and obligations as well as the distribution of benefits in a social partnership. What is meant by large institutions, for example, are political constitutions, economic principles, and social rules. Through the principles of justice, Rawls offers a system that arranges the basic structure in social cooperation, and indirectly he then organizes the processes that run

³⁰Iqbal Hasanudin, "Keadilan Sosial: Telaah atas Filsafat Politik John Rawls" *Refleksi*, Volume 17 Nomor 2 (Oktober, 2018), 195.

in community organizations. Among the principles of justice is that everyone involved in social cooperation must be free, rational, and equal.³¹

3. Default Position

Justice as fairness compiled by Rawls is a kind of "contract theory" which implies a certain abstraction, namely an abstraction regarding the gathering of rational, free, and equal people to accept the principles of justice from an initial fair position of equality or default position. Rawls explains that an essential feature of this situation (the default position) is the veil of ignorance, that is, no one knows his spot, occupation or social status in society, nor does anyone know his wealth, intelligence, strength, and sort of in the distribution of natural assets and abilities. Round the "veil of ignorance", the participants chose the principles of justice. Rawls explained, the purpose of the election was behind the "veil of ignorance", ie so that no participant could design principles that favored his particular conditions. Thus the principles of justice chosen are the result of an agreement or a fair bargain. Rawls asserted that the election behind the "veil of ignorance" guarantees justice for all parties regardless of class, sex, position, religion, and their views because such an election was agreed in a fair ideal situation. As Franz Magnis-Suseno analyzes, Rawls achieves such

³¹Sunaryo, "Amartya Sen tentang Teori Keadilan John Rawls: Kritik Pendekatan Komparatif atas Pendekatan Institusionalisme", *Respons*, Vol 23 No 1 (Juli, 2018), 14.

neutrality by departing from two assumptions which he considers to be valid everywhere. First, everyone wants their interests to be guaranteed. Second, it is rational, meaning that it can act not merely emotionally, but based on its importance.³²

Rawls also illustrates that in this default position all parties are also assumed to behave mutually carelessly with the interests of other parties. Here it is intended that all parties strive earnestly to fight for what is considered best for themselves. At the same time, they are also seen as not knowing what each other can get for themselves. This picture at a glance shows the caricatures of people who are opposed to the spirit of cooperation that is at the core of the concept of justice as fairness. However, Rawls's portrayal of mutual disregard among people in the original position is more of a supposition so that all parties in the default position can free themselves from envy towards what others might get. For this reason, everyone must focus only on what is best for themselves.³³

4. Principles of Justice

Rawls states two fundamentals of justice which he trust will be chosen in the initial position (default position). Because he believes that all parties

³²Alfensius Alwino, "Diskursus Mengenai Keadilan Sosial: Kajian Teori Keadilan Dalam Liberalisme Locke, Persamaan Marx, Dan Justice As Fairness Rawls" *Melintas*, Volume 3 No 32 (Maret, 2016), 318.

³³Iqbal Hasanuddin, "Keadilan Sosial: Telaah atas Filsafat Politik John Rawls", 197.

will be rational, and as rational persons, all parties will prefer to choose the principle of justice it offers rather than the principle of benefits (utilitarianism).³⁴

There are two fundamentals of justice according to John Rawls. The two fundamentals of justice are as follows: First, everyone has the same right to the most basic freedoms, the same freedom for all people.³⁵ In this principle include:

- a. Independence to take part in political life (voting rights, right to run in elections)
- b. Independence of oration (including independence of the press)
- c. Independence of belief (including religious beliefs)
- d. Independence to be yourself
- e. The right to retain the private property.³⁶

Second, social and economic dissimilarity must be regulated in such a way that:

- a. It can be intended to advantage everyone

³⁴John Rawls, *Teori Keadilan Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara*, terj. Uzair Fauzan dan Heru Prasetyo, (Yogyakarta: Pustaka Pelajar, 2011), 72.

³⁵John Rawls, *Teori Keadilan Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara*, terj. Uzair Fauzan dan Heru Prasetyo, 72.

³⁶Damanhuri Fattah, "Teori Keadilan Menurut John Rawls" *Jurnal Tapis*, Vol 9 No 2 (Desember, 2013), 35.

- b. All positions and positions are disclosed to everyone (the principle of distributive justice).³⁷

Both principles intend to regulate how rights and obligations are implemented, how social and economic benefits are distributed, and to organize society fairly. To guarantee its effectiveness, the two principles must be regulated serially (serial order). That is, the first principle must precede the second principle. In other words, the same principle of freedom must be prioritized over the principle of difference.³⁸ With this arrangement, Rawls asserted that basic rights and freedoms cannot be exchanged for social and economic benefits. This means that the second principle of justice can only get a place and be applied if the first principle of justice has been fulfilled. In other words, the application and implementation of the second fundamental of justice should not conflict with the first fundamentals of justice. Therefore, the basic rights and freedoms in the concept of special justice have a top priority over social and economic benefits.³⁹

³⁷John Rawls, *Teori Keadilan Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara*, terj. Uzair Fauzan dan Heru Prasetyo, 76.

³⁸John Rawls, *Teori Keadilan Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara*, terj. Uzair Fauzan dan Heru Prasetyo, 78.

³⁹John Rawls, *Teori Keadilan Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara*, terj. Uzair Fauzan dan Heru Prasetyo, (Yogyakarta: Pustaka Pelajar, 2011), 250.

B. Legislative Theory

1. Utilitarianism

The elementary thought of the welfare state dates back to the 18th century when Jeremy Bentham introduced the idea that the government commits to ensure the greatest happiness of the greatest number of its citizens. Bentham uses the term 'utility' to define the construct of bliss or well-being. Based on the fundamental of utilitarianism that he expanded, Bentham argues that anything that may cause extra happiness is something nice. Otherwise, anything that causes ache is poor.⁴⁰

Bentham defines utility as something that can be owned and can bring benefits, benefits, pleasure, and happiness, or something that can prevent damage, displeasure, crime, or unhappiness. The value of this benefit exists at the individual level which results in individual happiness (happiness of individual) and society (happiness of community).⁴¹

2. Legislation

Bentham's theory is generally considered to be more about the philosophy of law and moral philosophy, but not only on those two things but also gives guidance to the careful legislators. Therefore, to examine this

⁴⁰M. Ilham F. Putuhena, "Politik Hukum Perundang-Undangan: Mempertegas Reformasi Legislasi yang Progresif" *Jurnal Rechtsvinding*, Vol 2 No 3 (Desember, 2013), 376.

⁴¹Khazanah, "Jeremy Bentham" *Padjajaran Jurnal Ilmu Hukum*, Volume 2 Nomor 2 (Agustus, 2015), 416.

theory further it will be guided by the principles of legislation or what is commonly called the theory of legislation. In this theory put forward, Jeremy Bentham sees utilitarianism (usefulness) as one of the elements studied as a principle of legislation. According to this theory, there are many principles of legislation that can be used as guidelines, including the fundamental of benefits, the fundamental of asceticism, the arbitrary fundamental, the fundamental of sympathy and antipathy.⁴²

For Bentham, the goal of the legislation is to result in happiness for society. On this excuse, legislation has to fight to reach four objectives:

- a. To serve livelihood (to serve a living)
- b. To gain abundance (to provide abundant food income)
- c. To set security
- d. To reach equality.⁴³

Jeremy Bentham said that humans will act to get maximum happiness and reduce suffering. The size of the good or bad actions of a human being depends on whether the act brings happiness or not. Lawmakers should be able to produce laws that can reflect justice for all individuals. By relying on this principle, these laws should be able to provide the greatest happiness for the community. In this teaching, a doctrine was developed that, it is only

⁴²Jeremy Bentham, *Teori Perundang-Undangan Prinsip-Prinsip Legislasi, Hukum Perdata dan Hukum Pidana*, terj. Nurhadi MA, (Bandung: Nusamedia & Nuansa, 2006), 38.

⁴³Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence)*, (Jakarta: Kencana, 2017), 61-62.

so that everyone will get the opportunity to realize the most happiness, everyone is of full value, no one has more value. This legal theory aims to realize what is useful or following the benefits (effective).⁴⁴

According to Bentham, lawmakers in drafting laws must involve the discovery of means to bring about "good". The legislator must consider the fact that the actions he wishes to prevent are "bad" or "evil". A law can only be accepted as law if the law aims to achieve the goals of abundance, protection of status and ownership, and to minimize injustice.⁴⁵

Building the quality of national legislation products is very important to realize the objectives of the State as a welfare state as mandated in the constitution, so how to produce progressive quality legislation is a big responsibility for state actors (Government, Parliament, and DPD).⁴⁶

⁴⁴Jazim Hamidi, M. Adi Sugiharto, M. Ihsan, dkk, *Membedah Teori-Teori Hukum Kontemporer*, (Malang: Universitas Brawijaya Press, 2013), 191.

⁴⁵Achmad Ali, *Menguk Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence)*, (Jakarta: Kencana, 2017), 62.

⁴⁶M. Ilham F. Putuhena, "Politik Hukum Perundang-Undangan: Mempertegas Reformasi Legislasi yang Progresif" *Jurnal Rechtsvinding*, Vol 2 No 3 (Desember, 2013), 377.

CHAPTER III

RESEARCH RESULTS AND DISCUSSION

A. Constitutional Rights of Citizens

1. Citizens' Constitutional Rights in Elections

Constitutional rights are rights assured by the constitution or constitution, whether the guarantee is expressly stated or implied. Because these rights are included in the constitution, those rights become part of the constitution, so that all branches of power in the government are obliged to respect them.⁴⁷ Meanwhile, the rights of citizens are rights possessed by citizens. The citizens are citizens of a country determined based on statutory regulations. Maruarar Siahaan believes that constitutional rights, in extension to the rights stipulated in the Basic Law, are also rights arising from State obligations and obligations of citizens because the rights and obligations of one another cannot be separated.⁴⁸

Amendments to the 1945 Constitution stipulated that the right to vote or vote has been recognized as a natural right possessed by every human being, especially as citizens who are guaranteed constitutionally by the

⁴⁷I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, 111-112.

⁴⁸Ahsin Thohari, *Hak Konstitusional Dalam Hukum Tata Negara Indonesia*, (Jakarta: Erlangga, 2016), 14.

State. Provisions regarding the right to vote and be chosen (including the right to nominate and be nominated) contain the principle of equality for all citizens, so that discrimination is not justified due to differences in ethnicity, language, culture, religion, and ancestry. The provisions of the 1945 Constitution require the state to comply all lines of human rights of all citizens indirect elections as active voting rights (electing) and passive voting rights (elected), namely the election of legislative members (DPR, DPD, and DPRD), the Presidential and Election elections Regional Head in Indonesia.⁴⁹

The right to vote (active suffrage) is the right of citizens to elect their representatives in a general election. The participation of citizens in elections is a draw of conclusion-making activities, namely whether to vote or not to vote in elections. While the right to be elected (passive suffrage) is the right of citizens to be elected as members of a Consultative Body or People's Representative in an election.⁵⁰

According to the classical understanding, there are several rights attached to the status of citizens. Among them are called the *Politiekstaatkundige rechten* or political rights in the sphere of

⁴⁹Felani Ahmad dan Hernadi Afandi, "Jaminan Perlindungan Hak Pilih dan Kewajiban Negara Melindungi Hak Pilih Warga Negara dalam Konstitusi (Kajian Kritis Pemilu Serentak 2019)", *Jurnal Sasi*, Volume 25 Nomor 1, (Juni, 2019), 83.

⁵⁰C.S.T. Kansil, *Hukum Tata Pemerintahan Indonesia* (Jakarta: Ghalia Indonesia, 1985), 2-5.

constitutional law, what is intended is the right to participate in the Government and Representative bodies by using active and passive voting rights. By itself, every citizen who meets the specified conditions has the right to choose and be chosen. Namely, no DPR and DPRD members may be appointed, all must be elected.⁵¹

The provisions governing the right to choose and be chosen are Clause 27 Paragraph (1) which reads

"All citizens are at the same position in law and government and are obliged to uphold the law and government with no exception."⁵²

Clause 28D Paragraph (3),

"Every citizen has the right to have the same opportunity in government."⁵³

Clause 28E Paragraph (3).

"Everyone has the right to freedom of association, assembly, and expression."⁵⁴

This is also regulated in Clause 43 Paragraph (1) of Law Number 39 the Year 1999 about Human Rights.

⁵¹Syaifullah Yophi Ardiyanto, "Tinjauan terhadap Putusan Mahkamah Konstitusi Nomor 22-24/PUU-VI/2008 Mengenai Suara Terbanyak dalam Rangka Perwujudan Kedaulatan Rakyat", *Jurnal Konstitusi*, Vol. 11 No. 1, (Juni, 2009), 98.

⁵²UUD 1945

⁵³UUD 1945

⁵⁴UUD 1945

"Every citizen has the right to be elected and to vote in general elections based on equal rights through direct, general, free, secret, honest, and fair voting following statutory provisions."⁵⁵

These provisions become the legal basis for every Indonesian citizen to have the freedom to participate in determining their representatives, both to sit in the legislative body and as the leader of the executive body which is carried out through elections. That way, every citizen who will exercise these rights in every election must be free from anything that can cause fear and all forms of discrimination to channel their right to choose and be chosen in each election process. It can be interpreted that the right to be chosen as part of the right to vote is Human Rights (HAM) which can be implemented in democratic elections.⁵⁶

2. Constitutional Rights of Legislative Members and Candidates for Legislative Members

a. Constitutional Rights of Legislative Members

Legislative institutions are institutions that represent the people of Indonesia in drafting laws and overseeing the implementation of laws by the executive body, whose members are chosen by way of public elections. Political structures that fall into this denomination are the

⁵⁵Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia.

⁵⁶Hilmi Ardani Nasution dan Marwadianto, "Memilih dan Dipilih, Hak Politik Penyandang Disabilitas dalam Kontestasi Pemilihan Umum: Studi Daerah Istimewa Yogyakarta" *Jurnal HAM*, Volume 10 Nomor 2, (Desember, 2019), 163.

People's Consultative Assembly, the Level I and Level II House of Representatives, the House of Representatives, and the Regional Representative Council.⁵⁷

The House of Representatives (DPR) as a legislative body has several rights attached to the legislative institution which is generally known in the people's representative institutions. That right is needed for the daily execution of the assignment and competency of the DPR.⁵⁸

Parliamentary or representative institutions' rights can be distinguished between institutional rights and individual rights of MPs. Parliamentary rights as representative institutions are exercised by parliamentary equipment, while the rights of MPs are carried out by MPs themselves as state officials.⁵⁹

The rights attached to members of the DPR are regulated and determined in the constitution. The institutional rights of the DPR are determined by the 1945 Constitution and Law Number 17 of 2014 About the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council, furthermore pointed to as MD3 Law.

⁵⁷M Jafar, "Perkembangan dan Prospek Partai Politik Lokal di Propinsi Nanggroe Aceh Darussalam", *Tesis*, 2009, 2.

⁵⁸Afan Gaffar, *Politik Indonesia Transisi Menuju Demokrasi*, (Yogyakarta: Pustaka Pelajar, 2006), 291.

⁵⁹Afan Gaffar, *Politik Indonesia Transisi Menuju Demokrasi*, 174.

Clause 20A paragraph (2) of the 1945 Constitution states that the institutional rights or institutional rights of the DPR are as follows:

"In carrying out its functions, in addition to the rights stipulated in other articles of this Basic Law, the House of Representatives has the right of interpellation, the right of inquiry and the right to express an opinion."

Furthermore, in Clause 79 paragraphs (1), (2), (3) and (4) of Law Number 17 of 2014 concerning MD3, it explains in more detail the institutional rights of the House of Representatives, as follows:

Article 79

- 1) Parliament has the right
 - a. Interpellation
 - b. A questionnaire, and;
 - c. Express an idea
- 2) The right of interpellation as pointed to in paragraph (1) letter a is the right of the DPR to asking information from the Government regarding important and strategic Government policies and comprehensive impacts on the life of society, nation, and state.
- 3) The right of inquiry as pointed to in paragraph (1) letter b is the right of the DPR to inquire the implementation of the law and/or Government policy relating to significant, strategic matters, and comprehensive impacts on the life of society, nation and state allegedly reverse to statutory regulations.
- 4) The right to express an opinion pointed to in paragraph (1) letter c is the right of the DPR to deliver an idea on:
 - a. Government policies or regarding incredible events that occur in the country or internationally;
 - b. Follow-up on the implementation of the interpellation right as pointed to in paragraph (2) and the inquiry right as pointed to in paragraph (3), or

- c. Allegations that the President and/or Vice President violated the law either in the form of betrayal of the state, corruption, baksheesh, another serious crime, or despicable acts, and/or the President and/or Vice President no longer qualify as President and/or Vice President.⁶⁰

Whereas the individual rights of part of the House of Representatives (DPR) are expressly determined in Clause 20A paragraph (3) of the 1945 Constitution which states:

"In addition to the rights stipulated in other articles of this Constitution, every member of the House of Representatives has the right to ask questions, submit proposals and opinions, as well as the right to immunity."⁶¹

Clause 20A paragraph (4) of the 1945 Constitution stipulates that further provisions about the rights of DPR members are organized in the law. This means that the rights of DPR members can be further regulated in other laws. As such, the number of DPR members' rights can be increased, as long as it is determined by law.⁶²

Further regulations regarding the rights of DPR members are included in Law Number 17 of 2014 about MD3, which is clarified in Article 80 as follows:⁶³

- a. submit a draft law;

⁶⁰Undang-Undang Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah

⁶¹UUD 1945

⁶²Jimly Assidqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi*, (Jakarta: Bhuana Ilmu Populer, 2007), 178-179.

⁶³Sirajuddin, Winardi, *Dasar-Dasar Hukum Tata Negara Indonesia*, (Malang: Setara Press, 2015), 104.

- b. ask a question
- c. convey proposals and ideas
- d. pick and be chosen
- e. self-fortress
- f. get immunity
- g. get protocol
- h. get financial and administrative
- i. supervise
- j. proposing and promoting electoral development programs, and
- k. socializing the law.

b. Constitutional Rights of Candidates for Elected Legislative Members

Representative institutions are an important element in the Indonesian constitutional system, so candidates with certain human resources and quality are needed to hold this position. The people's trust becomes the main part, the quality of legislative members represented through their performance in carrying out their functions and duties is a driving force for the emergence of trust from the community. The

quality of the MPs is determined not only by the formal requirements in statutory regulation but also by the professionalism of the candidates.⁶⁴

Public awareness becomes important in the process of selecting people's representatives following the fundamentals of democracy and the values included in the 1945 Constitution and Pancasila, as well as the need for consistency in development for the welfare of people's lives through empowering people who are just and prosperous and upholding human rights. For this reason, as the basis for proportions to elect people's representatives in legislative elections, there are 12 (twelve) criteria for an ideal candidate for the DPR, including:⁶⁵

- 1) Faithful to the 1945 Constitution and Pancasila
- 2) Leadership
- 3) Discipline
- 4) Integrity
- 5) Moral
- 6) Ethics
- 7) Dedicated
- 8) Knowledge

⁶⁴A. M. Fatwa, *Melanjutkan Reformasi Membangun Demokrasi*, (Depok: Raja Grafindo Persada, 2004), 85.

⁶⁵Muhammad Anwar Syarifuddin Amrullah, "Aplikasi Pendukung Keputusan Pemilihan Bakal Calon Anggota Legislatif oleh Partai Politik di Indonesia dengan Metode AHP", *Industrial Engineering Journal*, Vol. 5 No. 2 (Oktober, 2016), 5.

- 9) Broad insight
- 10) Physically and mentally healthy
- 11) Work ethic
- 12) Religious

Besides having the qualities to channel the aspirations of the people, a legislative candidate must be a member of a political party. Furthermore, Article 240 of Law Number 7 of 2017 concerning Election regulates more fully the requirements of prospective candidates for DPR, Provincial DPRD, and Regency / City DPRD who are Indonesian citizens who fulfill the following requirements:⁶⁶

- 1) Has been 21 (twenty-one) years or more
- 2) Obeying God Almighty
- 3) Residing in the region of the Unitary Republic of Indonesia
- 4) Can converse, read, and/or draw up in Indonesian
- 5) The lowest educated graduate of high school, madrasah aliyah, vocational high school, madrasah aliyah vocational, or another border school
- 6) Loyalty to Pancasila, the 1945 Constitution of the Republic of Indonesia, the Unitary State of the Republic of Indonesia, and Unity in Diversity
- 7) Never been sentenced to prison based on a court judgment that has gained permanent legal constrain for committing an offense threatened with imprisonment of 5 (five) years or more, except that overtly and notification the public that the person concerned is a former punish
- 8) Physically, mentally, and free from narcotics abuse
- 9) Recorded as a voter
- 10) Compliant to be on duty full time
- 11) Resign as regional head, deputy regional head, state civil agency, members of the Indonesian National Army, members of the Indonesian National Police, directors, commissioners, supervisory

⁶⁶Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu

- boards and employees of state-owned and/or regionally-owned business entities, or another agency whose budget is sourced from state finances, which is stated in an irrevocable letter of resignation
- 12) Compliant to not praxis as a public accountant, advocate, notary public, land deed official, or not carrying out the be on duty of supplying stuff and services relational to state finance and other work that could create a contravention of importance with the duties, authority and rights as members of the DPR, Provincial DPRD, and regency/city DPRD following legal provisions
 - 13) Willing to not hold concurrent positions as other state officials, directors, commissioners, supervisory boards and employees of state-owned enterprises and/or regionally-owned enterprises and other entities whose budgets are sourced from state finances
 - 14) Become a member of the Election Contesting Political Parties
 - 15) Proposed only in 1 (one) representative institution
 - 16) Proposed only in 1 (one) constituency.

Furthermore, Article 420 of Law Number 7 the Year 2017 About General Election states that the determination of the number of seats gained by political parties uses the Sant Lague system in which the total vote acquisition of each political party is divided by the dividing number 1,3,5,7 and so on so that the number of seats for each political party is determined by the acquisition of the highest number of votes based on the highest rank, then after knowing the number of each political party, the seats are filled by elected candidates who get the most votes based on the KPU's determination. This matter is also regulated in Clause 20 paragraph (1) of KPU Regulation Number 5 of 2019 which says:

"The determination of elected candidates for DPR members is based on the acquisition of Political Party seats and the valid votes of the candidates listed in the DCT DPR members for each electoral district, which are conducted in an open plenary meeting."

And in paragraph (2) states:

"The determination of elected candidates for members of the DPR in each electoral district as referred to in paragraph (1), is based on the ranking of the first, second, third and so many valid votes obtained by each candidate for the DPR following the acquisition of Political Party seats in the constituency concerned."

Normatively, starting from the requirements, vote counting, and the determination process, the process and stages have been regulated in the Election Law itself, so that it becomes mandatory for an elected candidate to be appropriately appointed.⁶⁷

B. Constitutional Rights of Candidates for Elected Legislative Members recalled by Political Parties

1. Legislative Member Recall System

Etymologically, the word recall in English contains several meanings. According to Peter Salim (in *The Contemporary English-Indonesia*), namely remembering, recalling, withdrawing, or canceling. Interim Replacement (PAW) or commonly associated with recall is defined as the process of withdrawal or replacement of DPR members by the parent organization, in this case, a political party.⁶⁸

⁶⁷Redaksi Rakyat Maluku, "Pakar Hukum Tata Negara Sebut Caleg Terpilih Wajib dilantik", <https://rakyatmaluku.com/2019/09/pakar-hukum-tata-negara-sebut-caleg-terpilih-wajib-dilantik/>

⁶⁸BN. Marbun, *Kamus Hukum Indonesia*, (Jakarta: Pustaka Sinar Harapan, 2006), 417.

The recall is an English word, which is composed of the word "re" which means back, and "call" which means to a summons. If this word is put together, then the word recall will mean to be called or called back. The word recall is a term that is found in the political science dictionary used to describe an event of withdrawal of a person or several representatives who sit in a representative institution through the electoral process, by the people who voted for it. So in this context recall is a right that is owned by the voter of the person he chooses.⁶⁹

Inter-Time Replacement (PAW) or recall is also interpreted as the process of withdrawing part of the people's representative institutions to be dismissed and replaced with other members before the term of office for the member who is withdrawn or recalled.⁷⁰ Inter-Time Replacement (PAW) is a process of withdrawal or replacement of the DPR by political parties as to the organization that carries it. The right to recall or Interim Replacement (PAW) owned by political parties is regulated in Clause 12 letter h of Law Number 2 of 2008 about Political Parties. Recall functions as a control mechanism of political parties that have representatives who sit as members of parliament.

⁶⁹Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi*, (Yogyakarta: FH UII Press, 2011), 159.

⁷⁰Mahfud MD, *Politik Hukum di Indonesia*, (Jakarta: Rajawali Pers, 2009), 318.

Right of recall or Interim Replacement (PAW) is defined by several experts, one of whom is Mh. Isnaeni who said: The Right to Interim Replacement is generally a 'sword of Damocles' for each member of the DPR. With the right of recall, members of the DPR will wait for more for instructions and guidance from their faction leaders than for activities. Doing high activity without the blessing of the faction leader is most likely to make a fatal mistake that can result in recalls. Therefore, for the safety of its membership, it is better to wait for what the factional leaders have instructed.⁷¹

Moh. Hatta also once said: The Right to Interim Replacement (PAW) is contrary to democracy, especially with Pancasila democracy. Party leaders have no right to cancel their members as a yield of the election. But in fact, party leaders feel more powerful than their constituents. The right of interim replacement only exists in communist and fascist states which are authoritarian.⁷² As for Moh. Mahfud MD defines Interim Time Replacement as the right to displace members of representative institutions from their positions so that they no longer have fellowship status in the institution.⁷³

⁷¹M. Isnaeni, *MPR-DPR sebagai Wahana Mewujudkan Demokrasi Pancasila*, (Jakarta: Yayasan Idayu, 1982), 57-58.

⁷²Deliar Noer, *Mohammad Hatta; Suatu Biografi Politik*, (Jakarta: LP3ES, 1989), 305-306.

⁷³Moh. Mahfud MD, *Perkembangan Politik Hukum, Studi tentang Pengaruh Konfigurasi Politik terhadap Produk Hukum di Indonesia*, (Yogyakarta: FH UGM Press, 1993), 324.

Recall arrangements in the history of the constitution of the Republic of Indonesia began since the issuance of Law Number 10 of 1966 About the Position of the MPRS and DPR-GR. This law was born a few months after the new order took the political platform to substitute the old order. The addition of recall rights in Law Number 10 of 1966 was used in the condition of cleansing members of parliament who were still loyal to the old order led by Sukarno.⁷⁴

In the reform era, several laws are governing the recall system of legislative members. Law Number 31 of 2002 about Political Parties, and Law Number 22 of 2003 about the Composition and Position of the MPR, DPR, DPD, and DPRD are the first products of the Act in the reform era which regulates the recall mechanism. Then the formation of Law Number 2 of 2008 about Political Parties to Law Number 2 of 2011 concerning Amendment to Law Number 2 of 2008 about Political Parties, as well as Law Number 17 of 2014 about MPR, DPR, DPD, and DPRD further strengthens the existence of recall in the treasury of the Republic of Indonesia today.⁷⁵

⁷⁴Ni'matul Huda, "Recall Anggota DPR dan DPRD dalam Dinamika Ketatanegaraan Indonesia", *Mimbar Hukum*, Volume 23, Nomor 3, (Oktober, 2011), 464.

⁷⁵Ni'matul Huda, *Recall Anggota DPR dan DPRD dalam Dinamika Ketatanegaraan Indonesia*, 465.

a. Recall System in Legislation

In Indonesia, recall is interpreted as the Dismissal and Interim Replacement of DPR members during their tenure as legislative members. The basic provisions for the dismissal of DPR members are included in Clause 22B of the 1945 Constitution of the Republic of Indonesia which states:

"Members of the People's Legislative Assembly can be dismissed from their positions, the terms and procedures of which are governed by the Law."

The parliament has to noise the aspirations of the people as the origin of the parliamentary word, namely *le parole* which when translated into English means to speak or speak out. The right of recall must be used objectively and based on clear, concrete parameters and not multiple interpretations.⁷⁶

The regulation on recall or what is usually also referred to as temporal change (PAW) regulated in Clause 239 paragraph (2) of Law Number 17 the Year 2014 concerning the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, and the Regional People's Representative Council, states that

⁷⁶Nike K. Rumokoy, "Kajian Yuridis Tentang Hak *Recall* Partai Politik dalam Sistem Ketatanegaraan Indonesia" Vol XX No 1 (Maret, 2012), 5.

a member of the legislature may terminate his membership through termination between times, if:⁷⁷

- a. Not competent to carry out tasks in a sustainable or incompetent to stay as a member of Parliament for 3 (three) continued months sine any information;
- b. Breaking the imprecation/promise of occupation and the ethics code of the DPR;
- c. Declared guilty based on a court judgment that has gained permanent legal force due to a criminal act that is threatened with imprisonment for 5 (five) years or more;
- d. Proposed by political parties following statutory provisions;
- e. No longer complying the requirements as a candidate for DPR member following the provisions of the legislation regarding the general election of members of DPR, DPD, and DPRD;
- f. Violate the prohibition provisions as regulated in this law;
- g. Dismissed as a part of a political party following statutory provisions;

or

⁷⁷Undang-Undang Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah

h. Become a part of another political party.⁷⁸

The mechanism of recall or dismissal of intermittent times by political parties to legislative members regulated in Law Number 17 of 2014 is quite simple, after the party issues a decree (SK) regarding the dismissal of a council, then a proposal is submitted to the leadership of the DPR, no later than seven The day since the acceptance of the termination proposal, the DPR leadership will submit the proposal to the President to obtain the inauguration of the dismissal. The President will inaugurate it no later than 14 (fourteen) days from the receipt of the proposal to dismiss parts of the DPR from the leadership of the DPR. There is no verification or testing process for the proposal.⁷⁹

b. Analysis of Recall Systems According to Legislative Theory

Bentham's theory is generally considered to be more about the philosophy of law and moral philosophy, but not only on those two things but also gives guidance to the careful legislators. Therefore, to explore this theory further, it will be guided by the principles of legislation. In this theory put forward, Jeremy Bentham sees utilitarianism (usefulness) as one of the elements studied as a principle of legislation. Because the purpose of the legislation is to produce

⁷⁸Undang-Undang Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah

⁷⁹Yusril Ihza Mahendra, *Dinamika Tata Negara Indonesia*, (Jakarta: Gema Insani Press, 1996), 151.

happiness for the community.⁸⁰ The existence of a recall system in-laws and regulations only seems to have a real impact on recalled legislators and recalled political parties, not the wider community. Because the recall system is only bound to these two parties. The recall is the control mechanism that a political party has over its members. Although the recalled members are people's representatives, the element of benefits is not felt directly by the community. So that the regulation of recall does not see utilitarianism as a principle of legislation as stated by Jeremy Bentham.

According to Jeremy Bentham's legislation theory, lawmakers in drafting a law must involve finding means to bring about "good". The legislator must consider the fact that the actions he wishes to prevent are "bad" or "evil".⁸¹ Members of political parties may be dismissed from political parties if they die, resign in writing, become members of other political parties, or violate the constitution and by-laws.⁸² Of the several criteria that have been mentioned in the law, members of political parties dismissed for violating the AD and ART are not an attempt to realize the "good" and prevent the "badness" referred to in

⁸⁰Jeremy Bentham, *Teori Perundang-Undangan Prinsip-Prinsip Legislasi, Hukum Perdata dan Hukum Pidana*, terj. Nurhadi, (Bandung: Nusamedia & Nuansa, 2006), 38.

⁸¹Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence)*, (Jakarta: Kencana, 2017), 62.

⁸²Pasal 16 Undang-Undang Nomor 2 Tahun 2011 tentang Partai Politik

Jeremy Bentham's theory, because dismissal, for this reason, is thick with political content.

A law should be able to provide as much happiness as possible for most people. In this theory it is taught only so that everyone will get the opportunity to bring about the most happiness, everyone has full value (volwaardig), no one has more value. The recall that has been enacted by law as a political party's right cannot yet be said to provide maximum happiness for some people. However, it is not a problem if the right of recall is in the hands of political parties as long as the replacement of DPR members is carried out following the terms and conditions stipulated in the law, and is carried out objectively and based on clear, concrete, and non-interpretible parameters.

2. Justice in Recall and the Constitutional Rights of Elected Candidates for Legislative Members recalled by Political Parties

a. The Rights and Powers of Political Parties in the Recall System

Political parties obtain constitutional recognition in the Constitution of the Republic of Indonesia, through the provisions of Clause 6A paragraph (2) and Clause 22E paragraph (3) of the 1945 Constitution which regulates the election of President and Vice President and the election of members of the House of Representatives

(DPR) and the Regional House of Representatives (DPRD).⁸³ For political parties that have won seats in representative institutions, political parties have the right to form factions at the level of the House of Representatives, Provincial Regional House of Representatives, Regency / City Regional House of Representatives in accordance with statutory regulations; propose a change of time between its fellow in the House of Representatives and the Regional House of Representatives in accordance with statutory regulations; propose the dismissal of its fellow in the House of Representatives and the Regional House of Representatives in accordance with statutory regulations; propose pairs of candidates for president and vice president, candidates for governor and vice governor, candidates for regent and vice-regent, and candidates for mayor and vice mayor in accordance with statutory regulations; and obtain financial assistance from the State Revenue and Expenditure Budget / Regional Revenue and Expenditure Budget in accordance with statutory regulations.⁸⁴

According to Law Number 2 of 2011 about Amendments to Law Number 2 of 2008 about Political Parties, which are referred to as Political Parties are national organizations and are established by a

⁸³Pasal 6A ayat (2) dan Pasal 22E ayat (3) UUD 1945

⁸⁴Markus Gunawan, *Buku Pintar Calon Anggota dan Anggota Legislatif (DPR, DPRD, & DPD)*, (Jakarta Selatan: Transmedia Pustaka, 2008), 9.

group of Indonesian citizens voluntarily based on equality of desires and ideals for a fight for and defend the political importance of fellows, society, nation, and state, and defend the integrity of the Unitary Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia.⁸⁵

Internally, the AD / ART position that has been ratified through a notarial deed is located as a political party constitution. Its very high position is also reflected in the mechanism of changes to the Statutes / By-Laws that must be carried out by the highest organs of political parties which are generally manifested in the form of a congress or conference of the political parties concerned.⁸⁶

The construction of the recall arrangement as explained above shows how great the authority of political parties is. The recall is very clearly a political party hegemony. This makes it clear that the positive law constructs recall into the rights of political parties.⁸⁷

Article 12 letter g of Law Number 2 of 2008 about Political Parties states that political parties have the right to:

⁸⁵Undang-Undang Nomor 2 Tahun 2011 Tentang Perubahan atas Undang-Undang Nomor 2 Tahun 2008 Tentang Partai Politik

⁸⁶Hestu Cipto Handoyo, *Hukum Tata Negara Indonesia Menuju Konsolidasi Sistem Demokrasi*, (Yogyakarta: Universitas Atmajaya Yogyakarta, 2009), 267.

⁸⁷Ni'matul Huda dan Imam Nasef, *Penataan Demokrasi dan Pemilu di Indonesia Pasca Reformasi*, 186.

"g. proposes a change of time between its members in the House of Representatives and the Regional House of Representatives following statutory regulations; "

Furthermore, Article 16 paragraph (1), paragraph (2), and paragraph (3) of Law Number 2 of 2011 about Political Parties states:

Paragraph (1)

"Members of Political Parties are terminated from political parties if:

- a) Death;
- b) Resign in writing
- c) Become a member of another Political Party; or
- d) Violating AD and ART "

Paragraph (2)

"The procedure for terminating the membership of a Political Party as referred to in paragraph (1) shall be regulated in the Statutes and By-Laws"⁸⁸

From the juridical provisions above, the right of recall is a right granted by law to a political party to dismiss its fellows from affiliation in the people's representative institutions through dismissal between time through the mechanism of recall. This shows that the recall mechanism is a prerogative of political parties.⁸⁹

However, political party articles of association only explain various types of sanctions that can be imposed on members ranging

⁸⁸Undang-Undang Nomor 2 Tahun 2011 Tentang Perubahan atas Undang-Undang Nomor 2 Tahun 2008 Tentang Partai Politik

⁸⁹Abdul Tayib, "Implementasi *Recall* Oleh Partai Politik Terhadap Anggota DPRD Menurut Undang-Undang Nomor 17 Tahun 2014 Tentang MPR, DPR, DPD, DPRD" *Unizar Law Review*, Volume 1 Issue 2, (Desember, 2018), 206.

from a verbal, written reprimand to termination of membership, political party articles of association do not explain the criteria for actions that result in the termination of all levels of membership, thus legislation the legislation gives political parties great authority to terminate intermissions of members of the DPR, so violations that might only be given written sanctions can result in the dismissal of all levels of membership at the will of the party's elite concerned, this results in council members being afraid to voice aspirations which are different from his party, so he is no more than a mouthpiece of the party in parliament. The legislation provides too much authority to parties in terms of dismissal between members of the DPR so that it has the potential to violate the constitutional rights of board members.⁹⁰

The Constitutional Court ruled that the right to dismiss is the right of the political party. One effort to empower political parties is to give political parties the right or authority to enforce behavior in imposing discipline on their fellows so as not to deviate. Political parties must be protected from pragmatic behavior (practical and useful to the public)

⁹⁰M Izzi Nouruzzaman, "Hak Pemberhentian Antar Waktu (PAW) Oleh Partai Politik ditinjau dari Prinsip-Prinsip Hak Asasi Manusia" *Skripsi* Fakultas Hukum Universitas Mataram 2018, 46.

party cadres who only use political parties as vehicles or stepping stones to becoming members of the legislature.⁹¹

Based on historical experience, when political parties are given the authority to conduct PAW, the authority can be used by political party leaders to silence DPR / DPRD members so that their duties as carrying out people's aspirations become dull and ineffective because of the threat of recall from political parties. Conversely, based on historical experience also when political parties are not given the authority to do PAW, many members of the DPR / DPRD who commit violations, both legal and ethical, without being able to be directly dealt with by the political parties concerned so that they can damage the image, not just the image the political party concerned, but also the image of the DPR / DPRD wherein the person concerned is also a member of the DPR / DPRD serving as the people's representative.⁹² Based on this, the Court remained in its stance that political parties were authorized to conduct PAW for their members who served as fellows of the DPR / DPRD based on the provisions defined in the Act (vide Clause 22B of the 1945

⁹¹Hak Parpol dalam Menyikapi *Recall*, Kompas, 28 September 2006, https://books.google.co.id/books?id=cKURrVQIpycC&pg=PA89&dq=hak+recall+yang+dimiliki+partai+politik&hl=id&sa=X&ved=0ahUKEwjYgv-_wpfoAhXN6nMBHV6wDukQ6AEITzAF#v=onepage&q=hak%20recall%20yang%20dimiliki%20partai%20politik&f=false

⁹²Putusan MK RI No. 38/PUU-VIII/2010 tentang Pengujian UU No. 27 Tahun 2009 tentang MPR, DPR, DPD dan DPRD dan UU No. 2 Tahun 2008 tentang Partai Politik.

Constitution) as well as those stipulated in the AD / ART of political parties that concerned. However, although political parties are authorized to conduct PAW for members who serve as members of the DPR / DPRD, in its implementation it must be following the provisions of the Law (vide Clause 22B of the 1945 Constitution) and the AD / ART of the political party concerned, so it should not be done arbitrarily authority or by breaking the law. If this is done, the members of the political party concerned can take legal action both through the state administrative court and through the general court.⁹³

b. Analysis of Justice Aspects in Recall

1) The aspect of Justice for the Elected Candidate Legislative Members recalled by their Political Parties

John Rawls explains in his theory that four important points must be considered for achieving justice as follows:

a) Original Position

Basically, in the default position all people have the same rights in the procedure of choosing principles, anyone can submit proposals, submit reasoning for their acceptance, and others. In this default position theory according to John Rawls, elected legislative candidates have the right to express opinions,

⁹³Ni'matul Huda, "Recall Anggota DPR dan DPRD dalam Dinamika Ketatanegaraan Indonesia", *Mimbar Hukum*, Voume 23 Nomor 3, (Oktober, 2011), 476.

have the right to have wealth, have the right to have an office, and are entitled to other freedoms, because all have equality. This right cannot be contested. Thus, elected legislative candidates who also double as members of political parties have the right to express their opinions. The default position is intended to create a fair procedure, such that all agreed principles will be fair.

b) The Veil Of Ignorance

To achieve fair conditions in this theory, it is not distinguished whether a person is smart or not, also in terms of ability and status, both officials and the people, all have the same role. In this veil of ignorance, the parties are positioned in a state of not knowing certain types of facts such as their position, class position or social status in society, their wealth, intelligence and strength, and so on. Also, there is a matter of conception about the benefits and things of his thought life plan. They are avoided from information about their economic and political situation, or other benefits that have been achieved. All positioned fair.

Legislative provisions regarding the recall of legislative members are made by members of the legislature themselves where they know the position and information about the political situation or other benefits that may or may have been achieved.

So, from the veil of ignorance, it can be said that the recall mechanism made by the legislative member is unfair. So that recalled members of political parties lose their constitutional rights.

c) Equal Liberty Principle

John Rawls explained in his theory that there are two fundamentals, namely the fundamental of equal liberty and the fundamental of inequality. The principle of equal liberty (equal liberty principle) that everyone has the same rights to basic freedoms that are most broad and compatible with similar freedoms for others. In this case, the basic freedoms meant include:

- a) Political independence
- b) Independence of think and expressiveness
- c) Personal freedom
- d) Freedom to own wealth
- e) Freedom from arbitrary actions.

The rules regarding recall or dismissal between the times contained in Article 239 paragraph (1) of Law Number 17 the Year 2014 concerning MD3 states that the reason for members of the DPR to stop intervals is because of death, resignation, or dismissal. Furthermore, in paragraph (2) states several criteria

for members of the DPR that can be dismissed intermittently, one of which is proposed by political parties following statutory provisions. The reason for the dismissal of a person from membership in a political party, one of which is mentioned in Article 16 paragraph (1) letter d of Law Number 2 of 2011 concerning Political Parties is if a member of the political party violates the AD and ART.

AD and ART of political parties is an organizational guideline that contains the objectives, principles, ideology, and rules of the party in full. Internally, the position of AD and ART is essentially based on the constitution of political parties. However, that does not mean that AD and ART can be used as weapons for political parties to frighten members who disagree. Because after all, as Rawls said, one of the basic freedoms that everyone has is freedom of opinion and expression.

However, AD and ART of political parties only explain various types of sanctions that can be imposed on its members ranging from verbal, written reprimands, to termination from membership. AD and ART of political parties do not explain the criteria for actions that result in the dismissal of all levels of membership, thus the legislation provides great authority to

political parties to make intermittent dismissal of their members, so violations that might only be given written sanctions can result in the dismissal of all levels of membership including membership in parliament at the will of the party's elite, this causes the legislative member who is also a member of a political party to be afraid to voice different aspirations with his party so that he is no more than a mere mouthpiece of the party in parliament. The legislation provides too much authority to parties in the case of intermittent dismissal of legislative members and elected legislative candidates that have the potential to violate constitutional rights.

d) Inequality Principle

Whereas the principle of inequality consists of two points, namely first, the principle of difference (difference principle), social and economic inequality is regulated in such a way, to obtain the maximum advantage for the most disadvantaged members of society. Second, the principle of equality of opportunity (equal opportunity principle), positions, and positions must be opened to all people in circumstances where there is an equal opportunity.

The recall system in the principle of difference can be said to be fair if it benefits the disadvantaged people. From the

provisions in the legislation, the right of recall is a right granted by law to a political party to dismiss its members from membership in the people's representative institutions through termination of time through the mechanism of recall. This shows that the existing recall mechanism is a prerogative of political parties. Political parties are free to pressure their cadres in parliament through the threat of recall. With this, the recall will only benefit the party and in many cases do not provide any benefit to the people, or can even harm the interests of the people.

Whereas the principle of equality of opportunity states that positions and positions must be opened to all people in a situation where there is an equal opportunity. About the recall system, that legislative members who have sat in parliament as well as legislative candidates who have won the most votes are then subject to recall are entitled to get their position back by filing an objection through the court following the provisions in the legislation and without the interests of the political party elite. This recall can be said to be fair.

2) The aspect of Justice for Recall Rights which is owned by Political Parties

In Rawls's theory of justice, several main ideas shape the theory. Where those concepts help explain the formation of the theory of justice as fairness. So what is known first is that this theory is a social contract theory as a result of community agreement in which the agreements are used as a principle. These principles are principles agreed upon in a fair ideal situation because they originate from the agreement of rational and moral individuals who have been formulated in the default position that have conditions without the knowledge and are assisted with a balance of reflection.

The idea of fairness as fairness must use the idea of pure procedural justice to deal with unexpected problems in certain situations. Thus, for social systems to be distributed fairly, it is important to place social and economic processes around appropriate political and legal institutions. Where institutions are the basic structure of society which distributes fair values in purely procedural. So what is needed first is that the institution is fair and following the law. A fair constitution always pays attention to freedom, equality, and fair opportunity.

The House of Representatives as an institution authorized to make laws consists of people elected in the election as people's representatives. In the 1945 Constitution states that election participants are political parties. This shows that members of the DPR are certainly also members of political parties. As Rawls said, the DPR is likened to an institution that distributes rights and obligations in society equally.

Arrangements regarding recall rights held by political parties in the law are made by members of the DPR who are members of political parties. If viewed from the original position, political parties as an organization supporting candidates for legislative members are also entitled to have protection from the behavior of cadres who only use political parties as vehicles or stepping stones to becoming legislators to damage the party's policy line. Therefore, recall is an important mechanism as a protection recommendation for political parties.

However, when viewed from the perspective of ignorance, the right to recall is unfairly granted to political parties because the mechanism and arrangement in the law are made by institutions with members who have dual status, namely as members of the legislature, also as members of political parties. Yet in this veil of ignorance, the parties are positioned in a state of not knowing

certain types of facts such as their position, class position or social status in society, their wealth, intelligence and strength, and so on. Besides, there is also a matter of conception about the benefits and things of his thought life plan. They are avoided from information about their economic and political situation, or other benefits that have been achieved.

If viewed from the perspective of ignorance of John Rawls's theory, the recall mechanism becomes unfair. Moreover, one of the reasons for the dismissal of members of political parties mentioned in the law is a violation of the AD and ART of the political party itself. In this case, the arrangement regarding recall has been arranged in such a way that the parties know all the facts about their position or position, or even the benefits that they will get.

Of the several cases that have occurred, one of which is a case for researchers, the members of political parties are dismissed for no apparent reason. So that the agreement that has been made regarding recall becomes unfairly given to political parties because the allegations of the benefits that can be obtained are difficult to avoid.

c. Recall Dispute Resolution by Parties

Before a political party recalls its members, members of the DPR have room to seek justice for the use of the political party's recall right to settle it. This is contained in articles 32 and 33 of Law Number 2 of

2011 about amendments to Law Number 2 of 2008 about Political Parties.

Clause 32.⁹⁴

- (1) Political party disputes are settled by internal political parties as regulated in the Statutes and By-Laws.
- (2) The settlement of internal political party disputes as pointed to in paragraph (1) shall be carried out by a political party court or designation establish by a political party.
- (3) The composition of the court of a political party or other designation as referred to in paragraph (2) shall be submitted by the leadership of the political party to the ministry.
- (4) The settlement of internal political party disputes as pointed to in paragraph (2) must be resolved no later than 60 (sixty) days.
- (5) Decisions of political party courts or other designations are final and internally binding in matters of disputes relating to management.

Clause 33.⁹⁵

- (1) If conflict prescription as pointed to in clause 32 is not reached, dispute resolution shall be carried out through the region court.
- (2) Decisions of region courts are first and last decisions, and can just be appealed to the Supreme Court.
- (3) The case as pointed to in paragraph (1) will be settled by the region court no later than 60 (sixty) days after the lawsuit is registered in the region court registrar and by the Supreme Court no later than 30 (thirty) days after the cassation memory is registered in the court registrar Great.

The settlement of recall disputes or Interim Replacement in the DPR and DPRD can be resolved in 2 types of courts, namely through the PTUN or the General Court depending on the substance of the dispute. Before bringing a case to a public court, the disputing party is

⁹⁴Undang-Undang Nomor 2 Tahun 2011 tentang Partai Politik

⁹⁵Undang-Undang Nomor 2 Tahun 2011 tentang Partai Politik

required to hold deliberations at the party's court. A lawsuit filed to the District Court can be carried out if in the decision making of a political party through a deliberation the party court does not get a settlement, does not follow the regulatory process that is available or unknown to the member concerned. If the dispute is not resolved, then it can go to the Supreme Court to file a further claim in the form of an appeal. This has been regulated in Law Number 2 of 2011 amendments to Law Number 2 of 2008 about Political Parties and is strengthened by permanent jurisprudence such as the decision of the Supreme Court namely the ruling Number 28K/Pdt.Sus.Parpol/2014 wherein PAW disputes between members and Political Parties must be deliberated and resolved first through an internal process, for example through a party court.⁹⁶

A lawsuit can be submitted to the Administrative Court if, in the process of implementing intermission of termination, the President or Governor has issued a Decree (SK) in the form of termination of the intermission of fellows of the DPR or DPRD so that they have permanent legal force. The plaintiff, namely a DPR member who objected to his dismissal, could sue the official who issued the relevant

⁹⁶A.A. Ngurah Agung Putra Prawira dan A.A. Istri Ari Atu Dewi, "Pengaturan Tentang Penggantian Antar Waktu (PAW) pada Anggota Lembaga Perwakilan Republik Indonesia", 10. <file:///C:/Users/ASUS/Downloads/55374-1021-133420-1-10-20191217.pdf>

decision letter. This has been regulated in Clause 1 number 10 of Law Number 51 the Year 2009 about State Administrative Court where the object of conflict in the PTUN lawsuit is the State Administration Decree (KTUN) issued by the authorized state administration official.⁹⁷

There are often misconceptions in the practice of PAW dispute resolution because there is a blurring of litigation between the lawsuit in the General Court or PTUN. It should also be noted that a lawsuit regarding PAW in PTUN is more precisely addressed to the Governor or President who has the authority to issue the inauguration decision of the DPR / DPRD PAW which is issued by the Governor (at the DPRD) and the President (at the DPR RI).⁹⁸ Whereas in the general court which issued is a political party that is considered to violate the provisions of the law. With this, it is clear that the need for internal mechanisms in political parties that are more democratic in the policies and nominations of legislative members for preventive actions so that PAW actions no longer have as much frequency as they currently do.⁹⁹

⁹⁷A.A. Ngurah Agung Putra Prawira dan A.A. Istri Ari Atu Dewi, “Pengaturan Tentang Penggantian Antar Waktu (PAW) pada Anggota Lembaga Perwakilan Republik Indonesia”, 11. <file:///C:/Users/ASUS/Downloads/55374-1021-133420-1-10-20191217.pdf>

⁹⁸Tri Cahya Indra Permana, “Model Penyelesaian Perselisihan Partai Politik Secara Internal maupun Eksternal”, *Jurnal Hukum dan Peradilan*, Volume 5 Nomor 1, (Maret, 2016), 38.

⁹⁹Charles Simabura, “Akuntabilitas Rekrutmen Calon Anggota DPRD Sebagai Wujud Kedaulatan Rakyat”, *Jurnal Konstitusi Andalas*, Volume 2, Nomor 1, (Juni, 2009), 11.

d. Constitutional Rights of Elected Legislative Candidates Recalled by Political Parties

The application of an open proportional system initially still uses the serial number, so that people's representatives are determined by political parties rather than by the people. At that time, candidates who gained the most votes but could not fulfill the Voter's Dividing Number (BPP) would be displaced by candidates who were at the top of the serial number. The limited open proportional system with the serial number system is an effort of political party elites to maintain a culture that is already alive, namely making the oligarchic elite led by political parties as to the most dominant factor over whether or not a candidate is elected. Such a system would certainly foster the practice of oligarchy in the body of political parties. Because the decision to determine candidates will be hegemony by only a handful of elites.¹⁰⁰

After the Constitutional Court's decision No. 22-24 / PUU-VI / 2008 was read in the case of Article 214 of Law Number 10 of 2008 about General Elections, the determination of elected legislative candidates changed to use the majority vote mechanism.¹⁰¹ Therefore, from the 2009 elections to the present, the electoral system has chosen

¹⁰⁰Syaifullah Yopi Ardiyanto, "Tinjauan Terhadap Putusan Mahkamah Konstitusi Nomor 22-24/PUU-VI/2008 Mengenai Suara Terbanyak dalam Rangka Perwujudan Kedaulatan Rakyat" *Jurnal Konstitusi*, Vol. 11 No. 1, (Juni, 2009), 108.

¹⁰¹Putusan MK Nomor 22-24/PUU-VI/2008

members of the DPR, Provincial DPRD, and Regency / City DPRD to utilize an open proportional system based on majority votes. This has now been regulated in Clause 420 of Law Number 7 of 2017 emphasizing that the determination of elected candidates for fellows of the DPR, Provincial DPRD, and Regency / City DPRD is based on the acquisition of seats of political parties joining in an electoral district, and the determination of elected candidates based on votes the most were obtained by each candidate listed on the ballot.¹⁰²

However, elected legislative candidates may not necessarily be inaugurated and immediately appointed as fellows of parliament. Candidates for legislative fellows who have gained the most votes can be replaced. Based on Clause 426 of Law Number 7 the Year 2017 about General Elections, elected candidates for fellows of the DPR, DPD, Provincial DPRD, and regency/city DPRD should be replaced if:

- a. die;
- b. resign;
- c. no longer meet the requirements to become a member of the DPR, DPD, Provincial DPRD, or regency/city DPRD
- d. proven to have committed an election crime in the form of money politics or falsification of documents based on a court decision that has obtained permanent legal force.¹⁰³

Furthermore, regarding the replacement of elected candidates, it is also regulated in Article 32 of PKPU Number 5 of 2019 that elected

¹⁰²Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu

¹⁰³Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu

legislative candidates can be replaced if the elected candidates concerned:¹⁰⁴

Paragraph (1)

- a. Die
- b. Resign
- c. No longer meet the requirements to become a member of the DPR, DPD, Provincial DPRD, or Regency / City DPRD
- d. Proven criminal offenses in the form of money politics or falsification of documents based on court decisions that have obtained permanent legal force, or
- e. Proven violation of the campaign ban as referred to in the provisions of the legislation regarding the Election campaign, based on a court decision that has permanent legal force.

Paragraph (2)

Candidates who no longer meet the requirements referred to in paragraph (1) letter c include:

- a. Candidates who are proven to still have the status of the governor, deputy governor, regent, deputy regent, mayor or deputy mayor, village head or village apparatus, state civil apparatus, members of the Indonesian National Armed Forces, members of the Indonesian National Police, members of the Indonesian National Police, directors, commissioners, supervisory boards and employees in state-owned enterprises, and/or regionally-owned enterprises, or other entities whose budgets are sourced from state finances
- b. Candidates with the status of a convict, except those convicted who did not undergo a crime in prison
- c. Candidates are dismissed or withdraw from the Political Party who nominated the candidate concerned, and/or

¹⁰⁴Peraturan KPU Nomor 5 Tahun 2019 tentang Penetapan Pasangan Calon Terpilih, Penetapan Perolehan Kursi, dan Penetapan Calon Terpilih Dalam Pemilihan Umum

- d. Candidates are still members of the DPRD from political parties that are different from the political parties that nominate the candidates concerned.

Provisions regarding candidates are not eligible, one of which is the candidate being dismissed or withdrawing from the political party that submitted it.¹⁰⁵ And the replacement is given to candidates who have the most votes underneath. So that the procedure from determining the selected candidates to their replacement has been defined in the relevant laws and regulations.

The phenomenon of replacing elected candidates again occurred in the 2019 elections. Several political parties replaced elected candidates with other candidates. Several other elected candidates were also fired unilaterally and not given a chance to defend themselves.¹⁰⁶ The replacement of the elected candidates can adjust to the mechanism stipulated in the legislation. However, some elected legislative candidates who were fired even claimed that they did not know how to sit down so they had to be fired. Some even claim to have found out that they were fired after the KPU decided.¹⁰⁷ That is candidates for legislative members who have been elected and replaced by political

¹⁰⁵PKPU Nomor 5 Tahun 2019 tentang Penetapan Pasangan Calon Terpilih, Penetapan Perolehan Kursi, dan Penetapan Calon Terpilih dalam Pemilihan Umum

¹⁰⁶Fitria Chusna Farisa, "Berkaca Kasus Mulan Jameela, Parpol dinilai Seenaknya Ganti Caleg Terpilih" <https://nasional.kompas.com/read/2019/10/28/18582931/berkaca-kasus-mulan-jameela-parpol-dinilai-seenaknya-ganti-caleg-terpilih>

¹⁰⁷Fadli Mubarak, "Kongkalikong Gerindra di balik kursi DPR Mulan Jameela" <https://www.alinea.id/politik/kongkalikong-gerindra-di-balik-kursi-dpr-mulan-jameela-b1Xom9ofy>

parties without this knowledge, contradict the constitutional rights of Indonesian citizens, namely equality before the law and justice. As a result, the person concerned was canceled and not allowed to conduct self-defense and appeal. Although the recall mechanism of legislators who have sat in parliament with legislative candidates who have been elected in elections does have a little difference, the resolution of the dispute must be shared through the internal court of political parties and if the resolution of the dispute is not reached, then the dispute resolution is done through the district court.¹⁰⁸

With the recall right held by political parties, the political party also has the authority to replace elected candidates. Because the replacement of elected candidates was returned to political parties, not the KPU. Thus, political parties can nominate whoever replaces them. This opportunity is again being used by political parties to save its flagship candidates.¹⁰⁹

All party members have their respective rights. Therefore, if the dismissal is done unilaterally, the political party has tarnished its spirit as an institution of democracy itself. With this, the problem arises that

¹⁰⁸Pasal 33 Undang-Undang Nomor 2 Tahun 2011 tentang Partai Politik

¹⁰⁹Syaifulloh Yopi Ardiyanto, "Tinjauan Terhadap Putusan Mahkamah Konstitusi Nomor 22-24/PUU-VI/2008 Mengenai Suara Terbanyak dalam Rangka Perwujudan Kedaulatan Rakyat" *Jurnal Konstitusi*, Vol. 11 No. 1, (Juni, 2009), 109.

the sovereignty of political parties can shift the sovereignty of the people.¹¹⁰

C. Construction of Regulations on the Clarity of the Legal Status of Candidates for Elected Legislative Members Recalled by Political Parties

Article 29 paragraph (1) of Law Number 2 of 2011 concerning Political Parties states that:

"Political parties are recruiting Indonesian citizens to become:

- a. Political Party Members;
- b. Prospective members of the People's Legislative Assembly and the Regional People's Representative Council;
- c. Candidates for regional head and deputy regional head; and
- d. Will be candidates for President and Vice President. "

By observing the position of political parties that have been regulated in the 1945 Constitution and Law Number 2 of 2011, it is clear that political parties are pillars of democracy that play an important role in the survival of a country. It can also be said that political parties are determinants of the progress or setbacks of a nation because the stakeholders from the central to the regions are from political parties. Political parties in our country are the main suppliers of legislators or people's representatives.¹¹¹

¹¹⁰Malicia Evendia, "Implikasi Hak *Recall* Partai Politik Terhadap Sistem Kedaulatan Rakyat", *Fiat Justitia Jurnal Ilmu Hukum*, Vol. 6 No. 3, (September-Desember, 2012), 2

¹¹¹Ichlasul Amal dan Samsurizal Panggabean, *Reformasi Sistem Multi Partai dan Peningkatan Peran DPR dalam Proses Legislatif*, (Yogyakarta: Tiara Wacana, 2012), 177.

One important function of political parties that have been mentioned in the law is political recruitment, which is the process for filling political positions. So that political parties as a recruiting organization also have the right to fire or withdraw members who commit violations. Based on Article 16 paragraph (1) letter d of Law Number 2 of 2011 concerning Political Parties, it is stated that one of the reasons political party members can be terminated from political parties is if they violate the AD and ART, which is confirmed in Article 239 paragraph (2) letter g Law Number 17 of 2014 concerning MD3 which states that a DPR member is dismissed intermittently if he is dismissed as a member of a political party following statutory provisions. Whereas Article 32 paragraph (2) letter c of KPU Regulation Number 5 of 2019 states that candidates for legislative members can be replaced if the person concerned is dismissed or withdraws from the political party who submitted it.

The reason for replacing most elected candidates is that they are dismissed from political parties. Indeed, the existing regulations opening the room for selected candidates can be replaced both before the KPU Decree is published, after the KPU Decree is published, and after the inauguration. However, no clear reason was found why the relevant candidate was dismissed from political parties. This is due to the large recall rights granted to the party. The construction of the recall arrangement shows how great the authority of political parties is.

The role of political parties as participants in the general election of DPR members and DPRD members as stipulated in Article 22E paragraph (3) of the 1945 Constitution is indeed justified and constitutionally valid if a member of a particular political party who is a member of the DPR and who nominates as a DPR member states that he resigns from party membership certain politics that carry it. However, if the reasons proposed by political parties to propose the withdrawal of members from the DPR or the replacement of elected candidates in the form of violations of the Statutes / ART of Political Parties, cannot be justified without going through a due process of law in a legal mechanism that can check the feasibility of these reasons.¹¹²

The recall criteria stipulated in article 16 paragraph (1) letter d of the Political Party Law with the clause "violates the Statutes and By-Laws." is a criterion that can be immeasurable, because it is subjective and has the potential to create arbitrariness by party oligarchs. Because AD / ART political parties only explain various types of sanctions that can be imposed on its members ranging from verbal, written reprimands, to termination from membership. AD / ART political parties do not explain the criteria for actions that result in the dismissal of all levels of membership. Thus the legislation gives too much authority to political parties to dismiss members of the DPR, including legislative candidates who are elected candidates, so violations that may only

¹¹²M. Hadi Shubhan, "Recall: Antara Hak Partai Politik dan Hak Berpolitik Anggota Parpol", *Jurnal Konstitusi*, Vol. 3 No. 4, (Desember, 2006), 39.

be given written sanctions can result in the dismissal of all levels of membership as well as a replacement against candidates who have been chosen by the will of the party's elite concerned.

If there are elected candidates who are replaced by political parties that support them, it is necessary to ensure that they have been given enough space to exercise their rights by making a defense. The process has been regulated in Article 32 of the Political Party Act. The person concerned can file a lawsuit to the District Court if in deciding for a political party through a discussion the party's court does not get a settlement, does not follow the regulatory process available, or is not known by the member concerned.

From the description above, the important construction of the replacement of elected candidates is to revise the terms of dismissal of members of political parties that impact the replacement of elected candidates in Law Number 2 of 2011 concerning Political Parties, namely by formulating provisions regarding violations of AD and ART such as what was done party members who can impact on his replacement as an elected candidate. Political parties must be protected from the pragmatic behavior of party cadres who only use political parties as vehicles or stepping stones to becoming members of parliament,

thereby damaging their party's policy lines. On the other hand, party members must also be protected from the arbitrariness of their party leaders.¹¹³



¹¹³Ni'matul Huda, "Recall Anggota DPR dan DPRD dalam Dinamika Ketatanegaraan Indonesia", *Mimbar Hukum FH UII*, Volume 23 Nomor 3, (Oktober, 2011), 431.

CHAPTER IV

CLOSING

A. Conclusion

1. Juridically, the elected legislative candidate nominated by the KPU has gone through the systemic stages of the Election process. So it becomes mandatory for someone elected candidates to be installed as appropriate. Based on Article 426 paragraph (1) of Law Number 7 of 2017 concerning Elections, the replacement of elected legislative candidates can be carried out if the person concerned dies, resigns, no longer meets the requirements, is proven to have committed the Election criminal act in the form of money politics or falsification of documents based on a decision a court that has obtained permanent legal force. Then the inauguration of the elected candidates other than the reasons stated in the regulation is not in line with existing legal norms and has the potential to eliminate the constitutional rights of the elected legislative candidates.
2. The construction of the regulation of the provisions in Article 16 of Law Number 2 of 2011 concerning Political Parties relating to the dismissal of members of political parties dismissed because of violating the Statutes and By-Laws that have not provided clear legal certainty. Because dismissal caused by violating the AD and ART is a criterion that may not be

measurable, because of its subjective nature and the potential for arbitrariness by the party. Especially if the dismissal has an impact on the termination of membership in the DPR or the replacement of elected candidates. Then this regulation needs to be reviewed and needs to be ensured if there are elected candidates who are replaced because they are fired from the party that carries it out whether they have received their rights by making a defense as the process is in the law.

B. Suggestions

1. The KPU should clarify the elected candidates whose political parties have replaced them and ensure that the reasons for their replacement are not solely due to the oligarchy of political party elites.
2. Going forward it is necessary to make regulations related to the recall mechanism by providing space for constituents as holders of sovereignty by using clear boundaries to provide legal certainty from both candidates and political parties without arbitrariness.

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