

Impeachment of the District Head in the Perspective of Direct Democracy

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Abstract- This article is a dissertation which was committed in order to reach The Doctoral Program in Faculty of Law in Brawijaya. The discussion is related to the law issue of district head's impeachment. The law issue in this research is district head's impeachment in Indonesia which is regulated in Laws 2004 No. 32 junto Laws 2008 No.12 reviewed from the system of direct democracy, including its mechanism issue after the enactment of Laws 2004 No.32 junto Laws 28 No.12. This research used two kinds of approaches. First, Juridical normative approach which was emphasized on philosophy approach. In order to complete the research material, it used the material of primary law, secondary law and tertiary material. The existent law material was analyzed qualitatively. Conclusion has been reached from this research, the system of district head's impeachment in the era of direct democracy must be redesigned because it is contrary with the concept of the district autonomy and it is also contrary with the principles of regulation establishment. Moreover, it must be redesigned in order to avoid the domination of centralization system which is contrary with decentralization system, it also must be done to avoid decentralization values in unitary context. In other words, the district head's impeachment in Indonesia negates the aspect of direct democracy as the corridor of people' thought.

Index Terms— District head's impeachment, direct election, district government.

I. INTRODUCTION

District head's impeachment is an actual law issue in Indonesia. Moreover, it has progressed fast since the case of AcengFikri, the Governor of Garut. Otherwise, the issue of district head's impeachment issue in this nation is not really attentive for the researchers, especially researcher concentrated in political field and constitutional field. This situation can be explained by some reasons. First, the references of this field are

limited. Next, the term of impeachment is only popular in the context surround the issue of *President's impeachment*. Even though, the issue of district head's impeachment often becomes the issue of local politics and regionalism law, which emerged the multi-understanding on the concept of impeachment regulated in local government laws. The point of this research does not analyze those issues, this research is more focused on critical analysis of the clumsiness on district head's impeachment mechanism which is regulated on Laws 2004 No.32 (revised becomes Laws No.12)on District Government, especially Article 30 and Article 31.

On both articles, the system of district head's impeachment (governor) is enormously dominated by the president's authority, without participating the district institution (Regional Representative House). According to the researcher, the system very distorts the constitutional rights of people in the district level, this view emerges because basically the authority of district head's impeachment is not in the hand of president, but it is in the hand of local democracy. The president domination in impeachment process reminds that the design of impeachment system regulated in Local government Laws still has the characteristic of "executive heavy". Therefore, the researcher think this system against the democracy principles. Moreover, based on the idea of Mahfud MD, this issue becomes one of the weakness from many lacks in constitution formulation or Constitution of Republic Indonesia 1945. He said: "The Constitutional of Republic Indonesia 1945 substantially still contains many lacks, those lacks can be seen from the big authority of executive. Executive does not use the appropriate principles of *checks and balances*. Thus, the Constitutional of Republic Indonesia 1945 is usually known as *executive heavy*. Automatically this situation is an advantageous for everyone who holds the president position".

Authority domination of President in impeachment system of district head in Article 30 and Article 31 Laws 2004 No.32 which has been revised into Laws 2008 No.12 has distorted the system of local autonomy. This condition is regarded as lack because this situation does not give any space for The Regional House Representative. Although The function of Regional Representative House is as the local parliament institution which functions as control to the head of the district. Moreover this situation does not give any opportunity to the Regional Representative House to involve in the system. This condition prevents the Regional Representative House in conducting its function. In Conclusion, the regulation system of governor's impeachment still centralized because the authority is only held by president and it is not given to the district institution. District Government cannot involve in this impeachment system.

Based on explanation above, there are law issues that emerge in this research. Those are: (1) Doesn't the governor's impeachment which is regulated on Laws 2004 No.32 that has been revised into Laws 2008 No.12 contradict with the principle of direct democracy? (2) What is the mechanism of the governor's impeachment? Besides, this research has some aims. Firstly, it was conducted to analyze the suitability between the mechanism of governor's impeachment which is regulated on Laws 2004 No.32 that is revised on Laws 2008 No.12 and the system of direct democracy. Secondly, it was conducted to analyze the mechanism of governor's impeachment based on Laws 2004 No.32 *junto* Laws 2008 No.12.

II. RESEARCH METHOD

A research is a way to answer a problem as a law issue which needs solving and decryption. In this research, the researcher used the normative judicial approach emphasizing on the approach of philosophy aspect by analyzing the substance and the essence, the aim, the principles and the basics of governor's impeachment concept implementation in direct democracy era. This method will be able to analyze the form of the scientific characteristic of the concept on direct democracy system. Especially, in the system of the governor election. Thus, this philosophy approach was used to get deep understanding of the ideal governor's impeachment system in the era of direct democracy. Moreover, to complete the research the researcher also used the primary law materials, secondary law materials and tertiary law materials *Firstly*, the primary materials consist of (1) Constitutional of Republic Indonesia 1945 that has been amended; (2) Laws 2004 No.32 that has been revised into Laws 2008 No.12 on Local Government; (3) Regulation that is related with the research object. Secondly, the collected secondary material was gathered from the library research, conducted by exploring, collecting, analyzing and studying the books, literature, documents, regulations and all kinds of articles related to this research. Thirdly, tertiary law materials. Those materials were collected by using dictionary, encyclopedia which explains the understanding of primary law materials and secondary law materials.¹

The analysis method that was used to identify the law norms is the normative analysis. This normative analysis

¹Soerjono Soekantodan Sri Pamuji, *Penelitian Hukum Normatif*, Raja Grafindo, Jakarta, 1995, hlm.29

explained the principle contained on the regulations, it also valued the synchronization between the vertical and the horizontal, compared one period to other periods, and also discussed its history developing. Those laws materials were analyzed in order to know the essence of governor's impeachment system in the direct democracy era.

III. RESEARCH RESULT AND DISCUSSION

3.1 The implementation of Direct Democracy in The Governor Election

History records the past experience. By the time of Governor Election became the authority of the controller, it had been proved that a governor is only another tool of the controller in the central state. Living years by having governor that only obeyed the political policy of the central government has destroyed the social dynamic of people in district area. The consciousness of individual rights that should be followed by the politic controllers, has slowly created people that do not believe in their own abilities and their faith. Living without creativity is a useless life. However, PILKADA has opened the way for people in participating freely. It gives enormous door for people in supporting governor who concerns to social interest and rejecting the governor who does not concern to social interest.

It means that theoretically the direct election has given some advantages. It closes the state and the society, turns back the state supremacy to be democracy, and gives politic learning to society. Moreover, the direct elections increases society dignity and society autonomy in the district psychologically. The direct election gives strong legitimacy to the governor and the vice governor in governing. The direct election also contributes the democracy development in the district level.²This decentralization has become the part of government work since the implementation of Constitutional of Republic Indonesia 1945, continuing to Constitution era of RIS, UUDS 1950 and Constitutional of Republic Indonesia 1945 which was confirmed by president Decree 5 July 1959. This history development has proved that The State of Indonesia holds *decentralization* ideal, although in its each period the intensity was different.³

In this research, the researcher are going to analyze and discuss some opinion of different philosophies of governor election using direct democracy. Those are the opinions: According to Amin Rais, direct democracy gives some advantages:⁴*firstly*, when the election is done directly, the chosen candidates get stable legitimacy. This opinion emerges because the situation implies that the candidates get authority, get the power delegation directly from people (bottom-up to governor, mayor or regent). This condition reflects the stability of a district government. The chosen will be stable decision

² Kamal Alamsyah, *Konflik Pilkada Cederai Nilai Demokrasi, Pikiran Rakyat*, Thursday, 08 September 2005

³Josep Riwu Kaho, *Prospek Otonomi Daerah di Negara Republik Indonesia, Identifikasi Beberapa Faktor yang Mempengaruhi Penyelenggaraannya*, Jakarta, PTR Raja Grafindo Persada, 2001, hlm. ix

⁴Joko Prihatmo, *Pemilihan Kepala Daerah Langsung Filosofis, Sistem dan Problem Penerapan di Indonesia*, Yogyakarta, Pustaka Pelajar, 2005, hlm. 6.

because they are elected directly by people. They will obtain enormous confidence in doing their duty in the future. They will not be doubt in doing the responsibility because they have got mandate from people directly in governing the district. The mandate is not from DPRD but from people itself. *Secondly*, if the governor and the regent are elected directly by people, they will have bigger responsibility to constituent that has voted them.

J. Prihatmoko in his book stated: "The idea or the concept of direct election of the head district emerged as the reaction of the violating that has been done in head district election by The Reginal Representative House for the last five years. The concern and disappointment of the head district election based on Laws 1999 No.22 and Government Regulation No. 151/2000 caused by two crucial issues. First issue, it is caused by *money politic* happened at that time and the interference of the politic committee in local and central stage".⁵

According to ArbiSanit that the revision of Laws 1999 No.22 which creates Laws 2004 No.32 related to the regulation of the district head directly, such as the president election. Thus, the chosen district head will represent the willing of people and the aspiration of people not as the choice of the council in which they are suspected to conduct money politic easily.⁶

Rudy Alfonso, by conducting the district election it means that we have created the politic instrument that supports politic decentralization and local democracy. Through the direct election of district head, the education of people politics can be applied in lowest stage and it is very effective.⁷

While from the point of view of Laode Ida From PSPK (she has conducted the direct election project in many areas, she stated that the direct election has decreased the opportunity of Council in misusing their authority. Before, the election of KDH is one of the politic opportunity in DPRD to struggle their politic delegation to be the district head. Although this opinion cannot be proved, but the view of people indicates that the direct election will take the opportunity of DPRD in conducting the money politic. This statement emerges interesting issue to be discussed further.⁸

⁵Ibid.Hlm6.

⁶ArbiSanit, "tentang Revisi UU Otda: Jangan Kembali ke Sentralisasi Kekuasaan" Sumber: <http://www.suarapembaruan.com/News/2004/08/26/index.html>, 26 Agustus 2004.

Rudy Alfonso, Mewujudkan Desentralisasi Politik, Makalah yang disampaikan dalam sambutan pada Seminar Nasional dengan tema "Pemilihan Kepala Daerah Kota/Kabupaten Sebagai Wujud Demokrasi Lokal" sebagai Key Notes, diselenggarakan oleh ADER KSI.

Dikutip dari Agung Djojosoekarto (ed), pemilihan langsung kepala daerah, Transformasi Menuju Demokrasi Lokal, diterbitkan oleh Asosiasi DPRD Kotaseluruh Indonesia bekerjasama dengan Konrad Adenauer-Stiftung, hlm. iv

⁸Agung Djojosoekarto (ed), "Pandangan Masyarakat tentang Pemilihan Kepala Daerah Secara Langsung", makalah yang hasil tulisan (Bab II). Dikutip dari Agung Djojosoekarto (ed), pemilihan langsung kepala daerah, Transformasi Menuju Demokrasi Lokal, diterbitkan oleh Asosiasi DPRD Kota Seluruh Indonesia bekerjasama dengan Konrad Adenauer-Stiftung, hlm.9-10.

According to Bambang Widjoyanto, there are three important things that become the principles and reasons of people in giving response to the direct election of district head, those are:⁹ 1. People wants the district head to represent them, not as the fraction of the politic party that choose them or the government official who takes part in deciding the election result; 2. People wants the district head to conduct the public policy that prioritize the need of people who choose them. Thus, people will decide by themselves whether the certain district head can be re-chosen for their second period; 3. Direct election will lead the responsibility of district head to people who choose him, not only merely lead to the politic interest of the politic party.

Direct election is the main purpose of the people's willing, it is part of democracy, it is the form of rejection of the oligarchic authority. The oligarchic government performance has the same context with elitist. This condition merely creates sustainable instability, moreover in the middle of situation where the politic awareness of society is decreasing, the uncertainty law and economic degradation happen. People have their dream, dream of having democratic government where the direct election of the district head held. That is their dream because democracy is directly related with the nature of human existence.¹⁰

Opinion above becomes strong reason why direct election has to be held in the district. It is very important to choose the district head through direct election. However, if we look the situation clearly and honestly, the system of direct election in the district substantially violates the values of democracy principles. Why? It is because there three requirements that have to be fulfilled in democracy in order to establish the head election. *Firstly*, each individual in society (an adult who is in the age of vote) has the equal right to choose the leader. This idea is based on the principles of equal voting right in democracy especially the principles of independent and autonomy individual. If an individual cannot choose their leader as their willing, it against democracy principle itself. There is no one that can represent voting right of the leader election. *Secondly*, the second leader has emerged from public desire. This is the condition that a leader has to be from the collective decision based on equal individual right, thus it has strong social legitimacy. Strong legitimacy is able to emerge if a leader, and the other public policy that is going to be conducted based on society majority. It is absolutely that the decision of majority is dynamic, because the decision of society can be changed every time, as the consequence of public judgment of the chosen leader. *Thirdly*, the guarantee of voter privacy. This condition emerges from moral independency from each individual in society to choose their

⁹Bambang Widjoyanto, dikutip dari Agung Djojosoekarto (ed), *Pemilihan Langsung Kepala Daerah, Transformasi Menuju Demokrasi Lokal*, diterbitkan oleh Asosiasi DPRD Kotaseluruh Indonesia bekerjasama dengan Konrad Adenauer-Stiftung, hlm. 19.

¹⁰Laode Ida, "Pemilihan Langsung Kepala", dikutip dari Agung Djojosoekarto (ed), makalah yang disampaikan dalam pada Seminar Nasional dengan tema "Pemilihan Kepala Daerah Kota/Kabupaten Sebagai Wujud Demokrasi Lokal" sebagai Key Notes, diselenggarakan oleh ADER KSI. Dikutip dari Agung Djojosoekarto (ed), pemilihan langsung kepala daerah, transformasi menuju demokrasi Lokal, diterbitkan oleh Asosiasi DPRD Kotaseluruh Indonesia bekerjasama dengan Konrad Adenauer-Stiftung, hlm. 24.

own opinion without the influence from other sides. In the context of pluralist Indonesia when an individual is led by elite group in certain community, it can be said that this condition violates the politic right of citizens and it becomes important issue.¹¹

The meaning of direct election is an effective answer for some issues of indirect democracy. To decrease the culture of free trade, to decrease money politic, to change the orientation of elitist to populist and to enrich the basic of leader recruitment. The main aim is also to elect the governor and regent directly. When this condition has been reached so the sovereignty is not just symbolic anymore. In the previous period, the district head election was controlled by DPRD that use the name of people, the holder of sovereignty in their district. However that is merely symbolic. In fact, there is not any relationship between The Regional Representative House and representative people. This condition was progressing in the era of representative system. Whereas, in this era the elite party was demanded to be as close as possible with society. It was hoped that they could represent the idea and the willing of society.¹² In this context, the rights of local constitutional has to be understood, it has important role in regulating the decentralization system, especially the issue of governor impeachment, if it is related with the implementation of direct election system (direct democracy). The direct election of the district head reflects that people who actually have right in choosing their leader and also discharging the leader.

3.2 The Impeachment of District Head as the Law Issue

The alteration of people sovereignty principle based on Constitutional, which is logic consequence of the amendment Constitutional of Republic Indonesia 1945, it absolutely influences on principles of direct election system, especially the president election and the vice president election and the district head election and vice of district head election using the direct election system.

The principle of direct election is the implementation of direct democracy theory (the classical principle in democracy theory, adopted by Constitutional of Republic Indonesia 1945 after the amendment. By adopting that system, it affects indirectly the change of the concept or the law system of constitution in this state, after the amendment. For instance, it was explained above that is the implementation of system and mechanism of president and vice president election (Pilpres).¹³

That system is also applied in the election of district head (Governor, regent and mayor),¹⁴ using the system of direct election or using the mechanism of democracy system, as applied in the era of Ancient Greece.

The regulation of the system on direct election of district head, which at first it was in the condition of unclear constitution. It did explain clearly weather it was "direct

election",¹⁵ or indirect election. The regulation was ambiguous (multi understanding-constitutional), as the basic base in the system regulation of constitutional in this state. However, as explained on previous chapter, the understanding of democracy becomes clear when the Laws 2004 No.32 revised into Laws 2008 No.12 on District government. On this laws, it clearly explains that the principle is direct democracy, it is not indirect democracy. The regulation of direct democracy principle, in the process of district head election, arranged on Article 24 Clause (5) stated that: "The district head and the district vice election is done in a pair done directly by people in the concerned area".

The judicial basic on Article 24 Clause 5 Laws 2004 No.32 revised into Laws 2008 No.12, clarifying clearly that the position of district head after the constitutional amendment is more powerful than before, as the system applied on: "election system of Nederlands-Indiëperiod, election system of Japanese colonization, election system of proclamation period (Laws 1945 No.1 on Committee of District National, Laws 1948 on Principle of Local Government). In the period of the Republic of Indonesia (RIS) and UUDS. In the period of Guided Democracy (Prsident Decree 5 July Year 1959-11 March 1966) with Government Regulation 1959 No. Laws 1965 No. 18 on Principle of Local Government. The election system in the period of New Order Government using Laws 1974 No.5 on Principle of Local Government, moreover on Laws 1999 No.22, those still use the election system based on "theory of democracy procedural or representative democracy (indirect democracy). It means that the authority is still in the hand of Representative Council. Some those election systems or the discharge system is legally done by government institution, by both central executive and central legislative, because it is still suitable with the principles of representative democracy. However, if this is applied in the direct election system based on Laws 2004 No.32, thus this system will emerge fundamental issue. It happens because the election system contained on laws 2004 No.32 is a system based on "theory of direct democracy", it is not indirect democracy anymore as previous systems. This is an uncommon things for the researcher in analyzing "the discharge system" even the president and district head in this era, because it is still using the procedural democracy system (indirect democracy) or democracy system before the arrangement of Laws 2004 No.32 revised into Las 2008 No.12. Thus, an issue emerges, has the system in this time totally changed, as mandated in the democracy system which has been determined on Constitutional of Republic Indonesia 1945 as amendment result or other organic laws.

Then, there is other crucial and fundamental issue that has to be faced impeachment system of district head in the era of direct election, especially which is regulated on Laws 2004 No.32 revised into Laws 2008 No.12, this issue emerges because the impeachment system or the impeachment mechanism still uses the old paradigm or the previous pattern, as previous regulation. For instance, on the election sytem in proclamation era (Laws 1945 No.1 Regional National Committee, Laws 1948 No. 22 The principles of Local Government). The period of the Republic of Indonesia (RIS)

¹⁵ On UUD 1945 this result of amendment is not explained clearly weather it is direct democracy or indorect democracy. It is only said "democracy".

¹¹ *Ibid.*, hlm.25-26.

¹² Saur Hutabarat, *Mencari Pimpinan Masa Depan*, taken from Agung Djojosekarto (ed), *Op.Cit.*, page.33.

¹³ See Article 6 AUUD 1945 the result of Third Amendment legalized on November 10, 2001.

¹⁴ See article 18 Clause (5) UUD 1945 result of second amendment legalized on 18 August 2000.

and UUDS. Masa Demokrasi Terpimpin (President Decree 5 July Year 1959-11 March 1966) with the President Ordinance No. 6 Year 1959. Laws No. 18 year 1965 The principles of Local Government. The system on New Order Government using Laws 1974 UU No. 5 on The principles of Local Government, moreover on Laws 1999 No. 22 ". In this system, the central authority in the direct election process and also impeachment process were very dominated by the central authority.

The impeachment process that was done based on the previous regulation (before Laws 2004 No.32 and Government Regulation 2005 No.6) that was through the procedural institution in this case (President, DPRD, MA, Menteri Dalam Negeri, Governor or Justice Institution), was actually legal, because the democracy system or the sovereignty theory applied on the system of Constitutional of Republic Indonesia 1945 pre amendment is still based on the representative democracy system (*indirect democracy*), it does not use the direct democracy system. An issue emerges from this condition, when the impeachment theory is applied on Laws 2004 No.32 that has been revised on Laws 2008 No.12 on District Government that is still based on procedural system (parliamentary paradigm), whereas the election system on Amendment Constitution of Republic Indonesia 1945, or on Laws 2004 No.32 revised on Laws 2008 No.12 on District Government already have been changed fundamentally. Moreover, the impeachment mechanism is very dominated by the central authority. It also can be seen from the goal in changing democracy system to direct democracy system in Reformation era was not pretty serious, because the democracy values in election in direct democracy period is not perfect enough normatively and empirically. According to Affan Gaffar, the democracy practice in Indonesia is "*uncommon democracy*", especially if it is connected to impeachment system directly in the period of direct democracy.¹⁶

The question is, based on constitutional is it ideal that the applied impeachment regulation system of the district head dominated by centralism system on regulation that design a district government management?

The clumsiness of that concept becomes the main issue that should be discussed further, based on Affan Gaffar, it has to be observed normatively and empirically. Moreover, Affan Gaffar explains that the normative dimension teaches us the things that has to be equal on democracy system. For instance, "Sovereignty is on the hand of People, and conducted by People's representative Council (before amendment). Or "Sovereignty is on the hand of people and conducted based on Constitutional of Republic Indonesia 1945 (after amendment). However, has it been done as the way? Besides, Based on Affan Gaffar, the fact was 32 years under the Orde Baru Period,

¹⁶The uncommon democracy idea comes from pessimistic language Affan Gaffar, saw the democracy phenomenon in Indonesia. he thinks that the uncommon democracy is still a form of democracy. However, this democracy is not perfect yet because the economic social condition has not support it. The uncommon thing from this democracy is related to the possibilities of the authority change which is very limited. See Affan Gaffar, *Politik Indonesia, Transisi Menuju Demokrasi*, ctk. Kedua, Pustaka Pelajar, Yogyakarta. page. Xii.

it was very different. People is only decoration and accessories for the politic life.¹⁷

While the democracy empirical dimension showed us what really happened in politic life in a state, how the normative principle could be realized in daily politic life. People sovereignty gives enormous opportunity for people to speak, to give their judgment on what has been done and on what will be done by the powerful side or the government. People sovereignty is also created in the life where people can enjoy their basic rights as human, they can speak everything that they think, they don't have to be quiet and keep their thought. Finally, people sovereignty can be realized in life where people have their rights and they are free from fear.¹⁸

From explanation above, the main circumstance in the system of district head impeachment in direct election era is still based on the principle of indirect election. The principle is still similar with principle from previous laws. That the impeachment authority is in the hand of president.¹⁹

The election system value of district head election that is explained on Laws 2004 No.32 revised into Laws 2008 No.12 based on the value of direct democracy. Those Laws emphasize the value of direct democracy in conducting the leader election. Those Laws are different with the previous District Government Laws. The previous Laws were based on the system of indirect democracy. While the latest Laws are based on the system of direct democracy.

The phenomenon on district head's impeachment system that still uses centralistic system absolutely against the system of direct democracy. Moreover, it against the principles of local democracy, without ignoring the unitary system. Besides, Mahfud MD explains:

"The implementation system in deciding the existence of district head election which is still controlled by the central government is able to initiate the central government takes a decision which against the willing of people. Thus, this condition against democratic principle. If the lowest system works based on democratic system while the higher system still does not apply this system, it will create some issues such as Kalteng and Deliserdang issues which were the result of logical consequence".²⁰

On 1956, Mohammad Hatta was successful to achieve the title of *doctor honoris causa* from University of GadjahMada, this creates a concept which is called as *Hatta Conception*. This concept put the district autonomy in State II (district and municipality). However, in its implementation the principle was not fully used. There was still some implementation which against democracy principle. This opinion emerges because in fact the centralization principle is more controlling rather than the decentralization principle. Moreover on 1974, it was established Laws 1974 No.5. This laws adapted other Hatta Concept.²¹

¹⁷*Ibid.*, page.xiii.

¹⁸*Ibid.*, hlm.viii-ix.

¹⁹See Article 30 and 31 Laws 2004 No.32 revised into Laws 2008 No.12 on local government

²⁰Mahfud MD, *Hukum dan Pilar-pilar Demokrasi*, Gama Media cooperate with dYayasan Adikarya IKAPI and The Ford Foundation, Yogyakarta, 1999

²¹N. Sonthanie, *Otonomi Daerah dari Masa ke Masa*, Koran Pikiran Rakyat, 25 Oktober 2004.

Although, we know that the Laws were pretty effective, efficient and it created stability during the implementation process of district government, this condition was in accordance with the stability of constitutional. At that period the action of government ran smoothly enough and people also could get the advantages. Except, some politic parties that said and felt their politics life were controlled. When democracy does not run smoothly, authority ideal will emerge. Then, the perception that government focus was on central government.²²

The implementation of impeachment system of district head explained on Laws 2004 No.32 revised into Laws 2008 No.12 still emerges issues and distortion system. This condition happened because the impeachment system is still dominated by the authority of central government, it means the authority is in the hand of President, especially the mechanism explained in Article 30 and Article 31.

3.3 Local Aspiration in The System of District Head's Impeachment

In general, the implementation of direct election for district head is pretty satisfying and nice. Then, paradigm question emerges. What is the new paradigm of Laws 2004 No.32 that has been revised into Laws 2008 No.12? Article 30 Clause (1) explains that : The district head/ the vice district head is discharged by the President without the agreement of DPRD if they are proved conducting criminal action that is punished by imprisonment at least five years or more based on the court decision; Moreover, article 31 clause (1) explains: the district head/the vice district head is discharged by the president without the agreement of DPRD if it is proved conducting corruption, terrorism action, sedition action, and/or any kinds of criminal action of threatening the nation security.

All those impeachment systems which are implemented on those Laws actually does not appreciate the principles of politic decentralization. It is caused by the domination of centralization authority. What is the function of those laws (Laws 2004 No.32 revised into Laws 2008 No.12) declared as the regulation in controlling the focus of politic administration into local interest, in fact those laws harm the right of local politics. If this condition happens so it means that the central government does not really apply the system of district autonomy. Central Government still applies the democratic system reluctantly. The researcher is one of side that against this system condition, the researcher has strong reason to against this condition. It is because this condition is still same as the characteristic in New Order Government.²³

History has showed and proved that the New Order Government begins to reach its glory, centralization becomes the main strategy that regulates the district government. Laws 1974 No. 5 created by Soeharto regime is very centralization,

²²BagirManan, *MenyongsongFajarOtonomiDaerah*, CetakanPertama, PSHFakultasHukumUII, Yogyakarta, 2001, hl m.40.

²³Based on MuhtarMas'oe'd, in the new order government the President had created his own government that could be controlled by himself and it also could create his own source. The, this developed into "power-house" this opportunity that give chance to President in building his *patronize system* which strengtened his position *vis-à-vis*, his own birocracy or the opponent from aouside of this birocracy. MuhtarMas'oe'd, *Presidency InstitutionThe recipe of Politics ControlinIndonesia*, seeRizaNoerArfani, *DemokrasiIndonesia Kontemporer*, first publishing, take fromSeminarAhliPPSKBekerjasamadenganPenerbitRajawaliPress, Yogyakartaarta, 1996, hlm.108-109.

this centralization system very controlled the authority of district government. This condition was much related with the politic condition in that period in which led to the *otoriterian* controlled by Soeharto Regime.²⁴

According to opinion of MahfudMD that the configuration of Politic of Law which is not autonomous still led to centralistic concept. Then, this Politic of Law which is used in the system of district head's impeachment (explained on Laws 2004 No.32 revised into Laws 2008 No.12), thus it means that this impeachment system still leads to centralistic even to *otoriterian* values as the system in New Order Government the impeachment authority is still dominated by the executive power in this explanation is the president.

Besides, analyzed based on the perspective of politic system configuration, the mechanism of the impeachment is not consistent with democracy principles. It is a blemish system, unbalanced system. This system is dominated by executive institution (domination of central executive). Other parliament does not have strong authority as Executive parliament. Other parliament cannot *check andbalance* the situation effectively.²⁵

While the concept of democracy actually supports the local authority (*local democracy*). For instance, the importance of autonomy in strengthening democracy values, which was supported by Muhammad Yamin and Moh. Hatta.²⁶

"Democracy in the local state and community is often ignored on democracy discussion and the democracy of politic life. In fact, the local democracy is the beginning way to develop the politic democracy. If the value of politic democracy is self-democracy, human developing in the countryside, protection of living environment, then the most important control is the area around the citizen that is the location of their living environment. Village, district and City should be more important than the larger units such as province and state. The authority of local politic should become the standard of politic democracy. It has to be an important value in deciding the standard of politic democracy. The bigger the authority of local government, it means the bigger of democracy value of a politic system. In the other hand, when the authority of the central government is larger so the value of democracy system is smaller."²⁷

Opinion above substantially criticizes the awkwardness of implantationcentralizationsystem that distorts the democracy principles in the local state. This phenomenon in the world of academic is called as the system of "*executive heavy*", the executive parliament takes over the authority and interferes all other institutions, both the formal state institution and society institution. In this case, the law product is still included into elite character. The reason is the authority always comes from the central authority and it does not involve also accept the society aspiration. Our laws that regulate the democracy basic give an opportunity to the central government (executive parliament) to interfere matters which is able to destroy the democracy principles. The president has prerogative rights, the rights to establish policy, the rights to choose the government

²⁴SeeHarianJawaPost, on19September2005.

²⁵MahfudMD, op.cit, page.395-396.

²⁶LihatMahfudMD, *PolitikHukumdiIndonesia*, second publishing, LP3ES, Jakarta, 2001, page.90.

²⁷MuhadiS., *Struktur dan Pelembagaan Demokrasi, Op. Cit.*, page.84-85.

official which is practically used to get some rewards.²⁸ This is clear that the impeachment of district head is dominated by president authority. It is a weakness of the constitution system in this republic in reformation Period.

According to MuhtarMas' oed, one of the result of New Order Government is the axiom that relates the presidential parliament strongly, by the effectiveness of the development establishment. There are many proof that show the condition where most elite politics in Indonesia, especially that involved in the implementation of main establishment believed that without the *central* authority, it would be difficult to reach the success of president authority at that period, especially with the existence of economic issues. Believed on this *dictum* has pushed the theorists and ideologist in New Order Government to redesign and understand the rules that can give formal legal support for the proposition of that axiomatic. The Constitutional of Republic Indonesia 1945 and the kinship conception. For instance, the two suitable principles for this need.²⁹

Based on this phenomenon, it indicates that one of the petition of the Constitutional/Constitutional of Republic Indonesia 1945 amendment is how to re control the ideal presidential authority, in which in the New Order Government, the authority of president is very huge and the government is centralistic. In the Constitutional of Republic Indonesia 1945 as amendment result, it still gives opportunity to regulate further (attribution) the bigger authority to president in almost all important matters. In this case, President used the politic authority to establish regulation that gives bigger opportunity of centralization authority.³⁰ If this condition happens, it means that the presidential system in this state does not apply the substance of constitutional presidential system, but it still applies the system of repressive presidential and authoritarianism.

Thus, this issue shows that the design of the system is still similar with the previous system in New Order Government. There is not any alteration in the new impeachment system. The applied system in this new period (direct election) is not based on the area of theoretic substance. It still shows the same pattern of centralization domination.

3.4 The Perspective of Legislation Regulation in the Impeachment System of District Head

As stated in The Constitutional Republic Indonesia 1945 that Indonesia is a legal state,³¹ Indonesia is not an authority state (*machstaat*). It becomes basic of the government performing in the area of executive, legislative and judicial. In the case of legislation regulation establishment, it cannot be done by merely the interest of individual or party. Legislation regulation has to be established based on the principle Legal norms that have been demanded by formal legal. Thus, the establishment of legislation regulation has to

²⁸ Mahfud MD, *Op. Cit.*, page.396-397.

²⁹ MuhtarMas' oed, *Lembaga Kepresidenan, Ekonomidan Struktur Politik Orde Baru 1966-1971*, LP3ES, 1989, Jakarta, page. 95

³⁰ Mahfud MD, "Kontrollah Kekuasaan Presiden Sejak Sekarang", hasil wawancara dengan *Kompas*, published on 13 Mei 1999.

³¹ One of the our government form based on Law, see Constitutional of Indonesia 1945 Article 1

be based on the ideal basic of legislation regulation establishment, especially Laws 2004 No.10 (revised into Laws 2011 No.12) on legislation Regulation.

The ideal principles of legislation regulation establishment are explained clearly on Laws. It contains the ideal principle in establishing the ideal legislation regulation. It explains that the main basic of legislation regulation establishment is the Law Principle. According to SatjiptoRaharjo, that the Law Principle is a principle appreciated by law society related to the *basic truth* or the human truth. Through that law principle, the ethos and social consideration can be involved in Law. Therefore, this law principle becomes the main source to support the law rule with ethos value, morality value and social value.³²

Law principle is very important in establishing the legislation regulation, based on SatjiptoRaharjo, the law principle is like the heart in human body that spreads the blood into the whole body. This law principle that can develop the quality of the law rule as regulation that arranged logically and rationally, it becomes a law construction that contains the ethos, morality and social values.³³

Besides, JH.Niwenhuis also stated the importance of law principle act. He stated that law principles create the system of *check and balance* each other. The law principles often lead to the contrary purpose, but in the case law regulation it is a form of prohibition, it is precisely a lesson for law principles (move in the contrary direction), thus they can control each other and as the result, balanced will be established. There are few things of law principles that have to be noticed. The law principles that establish Laws does not only influence the system of positive law in Indonesia, those law principles even create a system in the national law. In conclusion, it can be said that without the law principles, the law system will not be created.³⁴

In this discussion, the weakness of establishing and formulating the district head's impeachment contained on Law 2004 No.32 (revised into Laws 2008 No.12). Legislation regulation has to contain the interest of society, or in other words the legislation regulation is the made to fulfill the society need. The legislation regulation should not be established based on the interest of the leader's compulsion.³⁵ Thus, sociological principle is the main basic in establishing the legislative regulation. That is the main principle of the ideal legislation regulation establishment.

Moreover, there are also the philosophy ideals, those are opinions or the ideas that becomes basic ideal in the process of policy establishing (government) into state regulation draft.³⁶

³² Rony Sautama Hotma Bako, *Kewenangan Mahkamah Konstitusi Atas Hak Menguji Undang-Undang Terhadap UUD, Suatu Perbandingan Terhadap Konsep RUU Tentang Mahkamah Konstitusi*, dikutip dalam Didit Hariadi Estikodan Suhartono (ed), *Mahkamah Konstitusi: Lembaga Negara Baru Pengawal Konstitusi*, Sekretariat Jenderal DPR-RIPusat Pengkajiandan Pelayanan Informasi (P31), Jakarta, 2003, page.89.

³³ *Ibid.*, page.89.

³⁴ *Ibid.*, page.90.

³⁵ Zairin AM, *Theory Lecture Papers Legislation*, Master Degree Program (S-2) Law Faculty in Islamic University of Indonesia. Yogyakarta, 2005, page 2.

³⁶ M.Solly Lubis, *Landasandan Teknik Perundang-undangan*, ctk. Ketiga, CV. Mandar Maju, Bandung, 1989, page.7.

Besides, in every establishment of regulation people always have *rechtsidee*, it mean that people have their interest in the establishment of each regulation such as regulation that will guarantee justice, regularity, prosperity, security, etc.³⁷

If it is analyzed philosophically using the approach of *epistemological* paradigm (idealization of direct democracy) and physiological (value and the advantage of direct democracy), otologist (the essence of direct democracy), therefore the unclearness that faced by Laws 2004 No.32 (revised into Laws 2008 No.12) is *distorted* and *paradox* of those philosophy values, as the main basic of legislation regulation establishment.

Hamid S. Attamimi in the speech “PurnaBakti Guru BesarTetap”, established on Monday, 20 September 1993 at 10.00 A.M at Auditorium of Djokostono Law Faculty University of Indonesia, New Campus UI. Depok, stated:³⁸

“That it can be imagined how many legislation regulation and the policy regulation that will emerge during this moment, which all those regulations are not guaranteed fulfill the good and suitable requirements of constitutional principles (wetgevingsprincipes) and the policy principles (beleidsprinsipes). However, the increasing of those regulation cannot be prevented or decreased by regulation started for a long time ago, thus effort that can be done is to support those regulations to fulfill the suitable principle of its establishment”.

The statement of A. Hamid Attamimi above has inspired the researcher to analyze the issue. The researcher is motivated to criticize the phenomenon that happened in the establishment process of legislation at this moment. The researcher thinks that this is a crucial issue. The discussion of the unclear formulation of democracy principle in the theory implementation of legislation regulation has to be conducted intensively and concentrate based on the applicable regulation. Therefore, the issue will not emerge in the future. There will not be the unclear theory or principles, especially in regulation that has been legalized. For instance, the issue of Laws 2004 No.10 (revised into Laws 2011 No.12) which is the juridical basic in the establishment of legislation regulation.

If it is analyzed further, the applied system on Laws 2004 No.32 (revised into Laws 2008 No.12) actually against the regulation of legislation establishment has been arranged on Laws 2004 No.10 (revised into Laws 2011 No.12), because it is not consistent with the principles of legislation regulation establishment even it against the principles of legislation regulation establishment. It is not consistent with the principle of aim clearness, the clearness of formulation and balanced, the clearness of harmony and suitability, especially the principle or the theory of direct *democracy*.³⁹

³⁷ZairinAM.,Makalah...,*Op.Cit.*,page.2.

38 A. Hamid S., Attamimi,

“HukumTentangPeraturanPerundang-undangandanPeraturanKebijakan (Hukum Tata Pengaturan)”, PidatoPurnaBakti Guru BesarTetap, yang diselenggarakanpadahariSenintanggal 20 September 1993, Law faculty in University of Indonesia, Jakarta, 1993, page 5

³⁹ Those principles are contained on Laws2004 No. 10. Expained on Article 5 and Article 6: “ On the establishment of legislation regulation has to be based on the principles of good and suitable legislation regulation establishment, those are: (1) the clear aim; (2) clear institution ; (3) suitability between kind and contained material; (4) it can be conducted; (5) utility and result; (6) clear formulation; and (7) the honesty of Article 6 in which explains the material of legislation regulation containing of the principles: (1) aegis; (2) Humanitarian; (3) nationality; (4) family; (5) archipelego; (6) Unity in Diversity; (7) justice; (8) equality before the law and government; (9) order and legal certainty; and / or. (10) the balance, harmony, and harmony.SeelawsNo.10/2004.

In this research, the researcher has found some principles that are not consistent with the establishment of Laws 2004 No.32 revised into Laws 2008 No.12. The principles are the balanced principle, the harmony principle and the suitable principle. According to laws 2004 No.10 revised into Laws 2011 No.12 states that in establishing legislation regulation, it has to be based on the principles of good legislation regulation establishment. One of them is containing of material that based on balanced principle, the harmony principle and suitable principle.⁴⁰ In the explanation of Laws 2004 No10 (revised into Laws 2011 No.12) said that the meaning of balanced principle, harmony principle and suitable principle are:⁴¹ “That the containing material of legislation regulation has to reflect balanced, harmony and suitable between individual interest and society interest with the nation and state interest”.

If it is analyzed further, the impeachment system of district head regulated on Laws 2004 No.32 (revised into Laws 2008 No12) is not consistent with the principle of legislation regulation which has been mandated on Laws 2004 No. 10(revised into Laws 2011 No.12). The reason is the system is not containing the balanced principle, harmony principle and suitable principle. The impeachment system regulated on Laws 2004 No.32 (revised into Laws 2008 No.12 on local Government, especially Article 30 and Article 31) does not give opportunity to local society to impeach the district head. However, the president authority is very dominated in this system. In other words, the system is *distortive* because it against the principles of legislation regulation. itagainst principle of direct democracy and principle of *decentralization*. *It seems that the existence of direct democracy is similar with its inexistence in impeachment system of district head.*

IV. CONCLUSION

According explanation above, it shows that impeachment system applied in those articles does not respect the principles of politic decentralization. It is enormously dominated by centralization concept. In other words, the president authority that represents the nation through the government system in conducting impeachment against the principle of direct democracy. The voice of people in deciding the district head which is negated in the form of the president authority.

V. RECOMMENDATION

Based on explanation above, the researcher suggests some problem solving related to the weakness of impeachment system of district head in the direct election period under the president authority. *Firstly*, the impeachment system of district head in direct democracy period, especially arranged on Article 30 and Article 31 Laws 2004 No.32 which was revised into Laws 2008 No.12 has to be redesigned in the form of revision because the concept is not consistent with local autonomy. The design of the impeachment system suggested on Article 30 and Article 31 is that the authority of district head’s impeachment has to be given to the local institution before decided by central government, in this context is the president. The aim of this concept is to prevent the domination of central government in impeachment system of district head in which not consistent

⁴⁰LihatPasal6padabagian(j)UU.No.10/2004.

⁴¹LihatpenjelasanUU.No.32Tahun2004.

with the decentralization principle. *Secondly*, the impeachment system of district head has to redesign because it is not consistent with the principle of legislation establishment. In this context, the system designed of Article 30 and Article 31 is not consistent because it against the value of decentralization in the unitary context. The presidential system in impeachment concept does not only against decentralization system but also the principles of legislation establishment. It does not reflect the balanced, the harmony and the suitability of state and nation.

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