

Quo Vadis General Election Dispute Handling: Between the Constitutional Court, Supreme Court or Election Court

La Ode Bariun

Faculty of Law, Khairun University, Gambesi, Ternate, North Maluku-Indonesia

Abstract

The existence of the Constitutional Court in a country beside the guardian of the constitution, it also serves to ensure the fulfillment of the constitutional rights of citizens. As one of state institution of reformation product, Indonesia's Constitutional Court also given the authority to decide disputed elections, both the election at the national and local level. This type of research is *socio-legal* research. Data analysis used descriptive-qualitative analysis with *content analysis* method. The results indicate that the nature of the Constitutional Courts' authority to rule on the dispute of Regional Head General Election is based on the constitutional mandate and also regulated in the Acts on General Election so that that authority is an attribution. The ideal concept in the handling of general election disputes locally can be found by considering the historical aspects of the handling of Regional Head General Election dispute, either still under the authority of the Supreme Court or when it has been transferred to the Constitutional Courts' authority. This phenomenon shows that the handling of Regional Head General Election disputes often ended in controversial decisions. Therefore, we need a concept of handling carried out by the independent institute and completely exclusively handle disputes of Regional Head General Election.

Keywords: Constitutional Court, Democracy, Election Court, Election System, General Election, Supreme Court

1. Introduction

Pancasila as national identity (*filosofische grondslag*) that is mentioned in the Preamble of the Constitution of the Republic of Indonesia 1945 as a *modus vivendi* (*noble agreement*) of Indonesia. The concept of Pancasila is fits perfectly with the reality of a pluralistic Indonesian nation and become a "space" for the convergence compromises the interests previously conflicting.¹ The embodiment of the noble values of Pancasila among others by establishing a constitution which is the binding basic law with be based on the supreme power or sovereignty principles adopted in the country and in the environment of democracies countries, people is a sovereignty holder that determine the enactment of a constitution.²

Indonesia is a country built by upholding the rule of law and democracy.³ On that basis, people are required to participate in governance, one of which is in the form of political participation. Efforts to achieve democracy in Indonesia, among others by giving authority to local governments to regulate the interests of their respective areas through the concept of regional autonomy as set forth in Article 18 of the Constitution of the Republic of Indonesia 1945. One implication of this is to give the right of the people to choose their leaders; in this case the Regional Head through the direct election or *direct democracy*.

In general, *Election Court* and *Election Judge* resolve the election petition. The basis to claim can be broadly, either in relation to a miscalculation or election offenses or even regarding the organizers. In some countries, the election petition can also resolve by general courts (not *election court*). *Election Court* and *Election Judge* are not generally being authorized to resolve election offence.

Regional Head General Election brings new hope to attain justice but the presence of the Constitutional Court in a dispute resolution of Regional Head general election was still cause *pros* and *cons*. Election case has become part of the authority of the Constitutional Court that be effective since November 2008. The implementation of this authority is often implemented by generating an "*unusual*" decision. The process of "*unusual*" is meant here is the verdict of the Constitutional Court considered often not in line with the provisions of the legislation include not only decide on the calculation of vote correctly but also decide on the implementation of the General

¹ Moh. Mahfud MD. 2007. *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi*. Pustaka LP3ES Indonesia : Jakarta. page. 3-5

² Brian Thompson as cited ini Jimly Asshiddiqie. 2006. *Ideologi Pancasila dan Konstitusi*. Konstitusi Press: Jakarta. page. 2

³ Suroso. 2009. *Peraturan Daerah Syariah dalam Dinamika Bangsa Indonesia*, available online at: <http://www.hukumonline.com>

Election¹ to lead to the implementation of the Re-election as well as the disqualification of election candidates.²

Along the way the authority of the Constitutional Court in resolving election disputes is statistically, the high percentage of disputes submitted to the Constitutional Court has contradictions with the final result in the Court Constitution. It is characterized by low verdict of the Constitutional Court granted the request of the applicant, among others, it can be seen in 2008 of 18 (eighteen) total verdict, only 3 (three) granted, in 2009, 12 (twelve) verdict, in 2010 of 224 (two hundred and twenty-four) verdict and only 26 (twenty-six) granted, in 2011 of 77 (seventy-seven) verdict, only 6 (six) granted and in 2012 of 1 (one) verdict, no granted.³

The existence of the Constitutional Court as an institution that has authority to resolve General Election dispute still has the complexity of the legal issues that tend to be not able to bring about justice, fairness both procedural and substantive justice. Thus, further studies are necessary for the implementation of the Constitutional Courts' authority to resolve General Election dispute. In addition, this paper aims to examine the legal concept of ideal General Election Dispute Handling to be applied in the future (*ius constituendum*).

2. The Concept of General Election Dispute Resolution in Several Countries

Admittedly, law enforcement practices on general election disputes handling through the courts either by the Supreme Court and the Constitutional Court has not run optimally. In some cases, the Constitutional Courts' decision related to the General Election dispute often cannot be applied, or even verdicts are not followed up by the election organizers. This phenomenon becomes biased experience and a bad precedent for a country like Indonesia, specifying the rule of law as the supremacy of law.

In essence, one embodiment of the instruments of democracy is through the Regional Head General Election. The instrumentation of democracy in the form of Regional Head General Election cannot be separated from the concept of *decentralization*, but also political decentralization.⁴ This election is a momentum for local people to distribute its autonomy in determining who will lead the development in the region, so that with the development of the region welfare would be based on the interests of the people.

During this, in Indonesia, the arrangement of the Regional Head General Election has been entered as the substance of the Local Government Act, ranging from Act No. 22 of 1999 on Regional Government, which subsequently repealed by Act No. 32 of 2004 and its amendments, namely Act No. 12 of 2008. Nevertheless, the House of Representatives and the Government made an agreement to no longer enter the Regional Head General Election as a substance of Local Government Act. The implementation of the agreement, emerge Act No. 1 of 2015 on Stipulation of Government Regulation in Lieu of Law (Government Regulation) No. 1 of 2014 on the Election of Governors, Regents and Mayors being Act (Regional Head Election Act).

Hopefully, through breaking the Act on Local Government and the General Elections, will gives a place to arrange more detailed and comprehensive of each of these issues so as to contribute to the smooth running of the wheels of local government along with the flow of the democratization of the election to the region effectively.

In the context of the resolution of electoral disputes, Regional Head Election Act provides clarity about the resolution of election dispute in the Supreme Court;⁵ however, one point that was legalized in the revision of the Regional Head Election Act is to restore the election dispute to the Constitutional Court in a transition period until the establishment of a special judicial institution. This shows that there is legal importance to establish a special court to specifically deal with election disputes. Moreover, the Supreme Court declared to reject the resolution of election disputes.

Based on the dynamics of the present legislation and the design concept of the elections in Indonesia, then one of the main instruments are the existence of the adjudications agency needed to and capable of resolving disputed elections. For that, they must consider an institution that is able to resolve the dispute adjudication and elections dispute with a more efficient, effective, and equitable. It is important to make the elections as a democratic party in a region that has not lost its meaning and democratic principles.

¹ As jurisprudence in a case No. 41/PHPD-VI/2008 which in the verdict, the judge argues that transfer of dispute resolution the Regional Head General Election from the Supreme Court (MA) to the Constitutional Court (MK) is not only the transfer of authority institutionally but also give implication on MK's function and duties as the constitution court.

² Gamawan Fauzi et al. 2012. *Demokrasi Lokal Evaluasi Pemilukada di Indonesia*. Konstitusi Press : Jakarta. page. 70

³ *Ibid*.

⁴ William Tordoff, "Decentralisation: Comparative Experience in Commonwealth Africa", *The Journal of Modern African Studies* 32:4: 573

⁵ Dian Agung Wicaksono and Ola Anisa Ayutama. (2015). "Inisiasi Pengadilan Khusus Pemilihan Kepala Daerah Dalam Menghadapi Kesenjangan Pemilihan Gubernur, Bupati, Dan Walikota Di Indonesia", *Jurnal Rechtsvinding*, 4(1): 157-179

If look back on the international standards of democratic elections, and also pay attention to the law enforcement practice of elections in some states, the issues of election law is divided into 2 (two) groups, namely *election offenses* or *corrupt practices*, which can be translated with election offense; and *election contest* (dispute of election results) submitted through *election petition*. In addition, there is also the matter of complaint against the decision of the election organizers in the stages of the election (for example, registration or establishment candidates). It is also known as pre- and post-announcement of election result.

There are at least 5 (five) law enforcement model to resolve the election dispute. *First*, an investigation by the election organizer with the possibility of appeal to the higher institution. *Second*, the courts or special judges of election to handle election complaint. *Third*, the public courts that deal with the complaint with the possibility of appeal to the higher institutions. *Fourth*, the resolution of the election problem submitted to the Constitutional Court. *Fifth*, the resolution of the election problem by the high court. Table 1 shows some countries are using these models.

Table 1. The model of election dispute resolution in several countries

No.	Dispute Resolution System	Countries
1	Examination by the election organizer with the possibility to appeal to the higher institution	Philippines (the elected candidates submit appeal to the high court)
2	Courts or special judges to handle election complaint	Malaysia, Singapore, Philippines (the election of members of the House and Senate) submit appeal to the High Court.
3	Public court proceedings against the election complaint, may submit to the higher institutions	-
4	The resolution of election dispute submitted to the Constitutional Court	Indonesia (elections for DPR/DPRD, DPD, President)
5	The resolution of election dispute by the High Court	Philippines (Presidential election)

Source: Primary data, 2015.

The lesson to be drawn is that the mechanism for submit a complaint may be submitted by political parties or candidates who feel aggrieved by the decision of the election organizers. However, when the decision was made by the Supreme Court (MA) or the Constitutional Court (MK), shall be final. This would not be a big problem if the case should be resolved by MA or MK is not too much, as occurred in the Philippines. In court cases in the Philippines, MA acting as first and last courts with the first and last decision over the issue of presidential elections.

Based on the international standards of democratic elections, pay attention to the practice of electoral law enforcement in some countries, and combine it with the experience of the elections in Indonesia, then the problem of electoral law can be divided into 2 (two) major groups, namely *violations* and *disputes*. Violation meant is a violation of the obligations or prohibitions stipulated in the electoral law. Violations of the obligation or prohibition was threatened with criminal sanctions in the election law is referred to as criminal election. While a violation of the terms, obligations, orders and prohibitions are not threatened with criminal sanctions referred to as an administrative violation.

3. General Election Dispute: Between the Constitutional Court, Supreme Court or Election Court

The authority of the Constitutional Court to rule on the dispute of election result in the Regional Head General Election in terms of democracy and people's sovereignty have a very close correlation. Democracy is uniformity between the will and the sense of justice for the people. It is part of people's rights that cannot be ruled out for any reason. Democracy cannot be leave or violate the constitutional rights of the people for democracy stood on the principle of recognition of citizenship.

People sovereignty is a fundamental principle and seen as a constitution morality that provides color and the overall nature of legislation in the area of politics. This can be seen in the verdict of Constitutional Court No. 22-24/PUU-VI/ 2008. The implementation of General Elections for governors, regents and mayors directly a manifestation of sovereignty and confirmation that the owners are the people in the region so that any attempt to resolve the dispute in the Regional Head General Election as an integral part of democracy and people's sovereignty. Rights relating to democracy and the people's sovereignty is a constitutional right of citizens to be

protected and it is the responsibility of the Constitutional Court, which plays a role ensuring that the constitutional rules in the implementation of democracy is still running as it has been mandated in the Constitution as the basic norm.¹

The Constitutional Court in terms of the dispute handling of the Regional Head General Election according to author as the guardian of democracy to make decisions which should ensure the implementation of local democracy in accordance with the constitution corridor. This view of democracy at the local level suggested by Jenendry M. Gaffar,² by stating that democracy is a fundamental principle of the constitution and not only at the central government level but at the local governments and even the existence of local government as an autonomous regional government administration in essence is one form and the consequences of democracy.

Democracy at the local level is an integral part of democracy followed by the constitution so that the implementation of regional head general elections as an embodiment of democracy is an integral part of the constitution. The presence of electorate is not a trivial matter. Its presence is guaranteed in the constitution, that every citizen has equal rights in government. The right to vote even in the context of internationally recognized as civil and political rights of citizens. Setting the international community recognizes it, and even the arrangement was ratified in the legislation in Indonesia. Based on this, then the next discussion leads to electoral justice and the principles of electoral disputes resolution. Elections here in view as one of the instruments in upholding the public's vote right to realize the fairness of electoral.

Fairness in an election meant is derived from the term "*electoral justice*" which was popularized by *the International Institute for Democracy and Electoral Assistance* (International IDEA). The term appeared in a book published by International IDEA. The "*Electoral Justice*" is not just a concept, but it serves as a paradigm for fairness in elections, which for the purpose of enforcing justice every citizen to vote. Fairness or justice in elections would be realized if the mechanism of elections is able to ensure "purity" citizen's vote right. A vote in election facilitated well by the organizers. So, election candidate should respect the freedom of citizen to choose their representatives in government.

It is important from the paradigm of electoral justice is a guarantee of the right to vote. If the right to choose of citizen is manipulated by participants or candidate of the election, the electoral justice system should be able to return it even if the election management was negligent accommodate the right to vote, and then there is no reason to restore the right to vote itself. So, the right to vote of citizens must be guaranteed and maintained "purity".

Talking about *electoral justice*, it will be linked to justice in general. In constructing his theory of justice, Rawls departs from a hypothetical position where every individual enters a social contract that has liberty or freedom.³ Hypothetical position is called the *original position*. The original position is an initial status quo which confirms that the fundamental agreements reached in the social contract is fair. Based on the fact, then the original position emerges the term "justice as *fairness*". It is confirmed by Rawls that even in this theory uses the term *fairness* but does not mean that the concept of justice and *fairness* are the same. One form of justice as *fairness* is seeing that the position of each person in the initial situation when entering an agreement in the social contract that is rational and equally neutral. Thus, justice as *fairness* is also called the contract theory.⁴

The concept of election justice itself is not limited to the enforcement of the legal framework, one of the factors to consider in designing and implement all stages of the election. Therefore, the scope of electoral justice system more broadly related to the various mechanisms to ensure the resolution of election dispute that is credible. The system includes precautions and electoral dispute resolution methods that are formal (*institutional*) and informal (*alternate*). Some election dispute handling provided divided into 2 (two); *corrective* and *punitive* mechanism.

To design and implement the electoral justice system that is comprehensive and effective, must to consider the three of stage in the election cycle, namely: pre-election, election and post-election. This should be done considering almost all activities within the electoral have potential to dispute. If the electoral justice system was not authorized, sufficient resource and tools to handle disputes efficiently and effectively throughout the election cycle, then the election process may be disrupted. Thus, the electoral justice system to ensure that all actions and decisions taken must be in accordance with the mandate of the legislation.

Electoral dispute resolution systems need to adopt the principle that the election lawsuit must be submitted at the

¹ Mochtar, Z. (2015). "Antinomi dalam Peraturan Perundang-undangan di Indonesia". *Hasanuddin Law Review*, 1(3), 316-336. doi: <http://dx.doi.org/10.20956/halrev.v1n3.112>

² Jenendry M. Gaffar. 2012. *Politik Hukum Pemilihan Umum*. Kompas : Jakarta. page. 98

³ Charles Himawan, 2003, *Hukum sebagai Panglima*, Penerbit Buku Kompas, Jakarta, page.43

⁴ *Ibid*

election period when the contested acts occurred, because the actions or decisions that would not be sued for a certain period shall be final and binding. It aims to ensure that each stage of the election can proceed without obstruction so that the electoral process can run smoothly.

The electoral process already underway should not be discontinued, because every stage itself has significance in the process of government formation. The action taken cannot be deferred even though there is submit a lawsuit. Decisions that have been taken will continue to run as long as no resolution on the lawsuit. Therefore, any lawsuit must be completed as soon as possible following the election stages.

In carrying out its mission, the Constitutional Court as the guardian of the constitution and justice providers cannot play its role in realizing the ideals and objectives of the state in providing justice and welfare for the citizens when resolve the election dispute only calculate votes mathematically. Because if so, the Constitutional Court cannot be or are banned from entering the judicial process to decide on the legal facts clearly proven to damage the rights of human rights, notably political rights.

The view above shows that if the Constitutional Court is positioned just to handle the dispute results in the calculation of Regional Head General Election, then it is similar to letting the electoral process or the General Election took place without the rule of law. If so, then the Constitutional Court as a state institution and judicial holders to be positioned as a “*stamper*” in assessing the performance of the National Election Commission as election organizers. If so, means it will far from the philosophy and purpose of election disputes handling.

In various the Constitutional Courts’ decision in dealing with election disputes, have made a clear legal meaning and decision breakthrough (see the verdict of the Constitutional Court No. 41/PHPU.D-VI/2008 dated 2 December 2008). The Constitutional Courts’ judges have the prerogative right to discover the law or breakthrough to obtain substantive justice. This can be seen in the decision of the Constitutional Court regarding the Regional Head General Election in the district of Waringin Barat, its candidates only two, the winner proved to have violated a structured, systemic and massive, will not probably do the re-election for one couple candidates and it disqualified.

Long debate over the limitation of the Constitutional Courts’ authority with regard to dispute the calculation results or included other things that affect the calculation results of the regional heads election is still occur today. Some believe that the Constitutional Court is enough to handle the calculation result of elections alone. On the other hand, assume that should the Constitutional Court as the guardian of democracy can give decisions more progressive and substantive and not just a “Calculator Court” which restricted on the dispute over the calculation of election.

In fact, the existing reality in the regulation regarding the authority of the Constitutional Court is currently limited to the authority of calculation result the Regional Head General Election so that it takes arrangement comprehensively and more affirm the authority of the Constitutional Court as the guardian of democracy and people sovereignty. The author in this case agree with this view that basically the Constitutional Court is the guardian of constitution, democracy and the people sovereignty, so it should have been within its competence to handle disputes the Regional Head General Election, the Constitutional Court should not only deal with the results of the vote count but can handle other violations that affect these results. But this requires a legal basis explicitly in exercising its authority, the Constitutional Court has the certainty and confidence with handling being implemented and does not give rise to a long debate.

In terms of arrangement, the scope of the Constitutional Courts’ authority can be seen from the beginning before the transition of the Supreme Court. The scope of authority can be seen from the competencies of the Supreme Court in resolving election results, given the Constitutional Court takes its authority as the transfer of the competencies of the Supreme Court.

An analysis of the Constitutional Courts’ authority that break in the rules of procedural law to close the empty space the election law enforcement as a dilemma decision. The Constitutional Court was faced with 2 (two) levels legal rule, the laws and the constitution. The choice of the respective rules will lead to different legal consequences. If continue to rely on the law, the Constitutional Court cannot be included in assessing and considering both administrative and criminal violations. In other words, the Constitutional Court had to close their eyes and ignore the injustice and the whole offense that cannot be corrected by the law enforcement system of elections.

In addition, the strengthening of the Constitutional Courts’ authority, the idea of a special court for election becomes relevant for consideration at this time. Because it must be admitted, remedies in the electoral process that has occurred during this time often cannot meet the demands for social justice, for example, a new court

ruling that terminated the post-election phase has been completed and multi-layered of elections rule so counterproductive.

By stage of elections are limited by time period. Moreover, a separate remedy in some jurisdictions. Under these conditions, the legal remedies against the stages of elections faced a further challenge to the implementation of elections simultaneously for selection process stage and legal efforts on every stage will be held simultaneously, so that when using the judicial mechanisms as positive law, certainly realize the elections were fair will difficult to achieve.

In the context of the election rules today, the Constitutional Court is an institution that is highly expected to be able to provide justice to the people so that the decisions are given by the Constitutional Court is expected to fulfill a sense of justice for those seeking justice. However, in a dispute resolution, it will not be possible for the Constitutional Court to achieve equal justice for both sides, but the Constitutional Court can make a fair procedure so that in every decision. This can be realized if in providing an assessment of a dispute, the Constitutional Court remained true to the mandate of the constitution as well as the procedures that have been set in the legislation as an effort to procedural fairness by not rule out efforts to achieve substantial justice. Effort to achieve substantial justice which is ideal according to the researchers is to pour the value of substantial justice to be achieved through legal norms which provide legal certainty for all parties.

4. Conclusion

The capacity of the Constitutional Court as the guardian of local democracy for the implementation of general election as in the corridors of the constitution. The justice system of elections which serves to prevent irregularities that can cause dispute and ensure the elections carried out democratically. Efforts should be made to realize justice in the resolution of disputes in the Regional Head General Election by the Constitutional Court is harmonizing between the attainments of procedural with substantive justices. Structured, systematic and massive violation remains a reference in dispute resolution but limited on things that are directly related to the calculation results of the Regional Head General Election which is related to the final voters list.

Some things that recommended is the Constitutional Courts' authority in the dispute resolution of the Regional Head General Election still need a more comprehensive arrangement to prevent multiple interpretations in the handling of the dispute. The authority of dispute resolution of the Regional Head General Election should still be implemented by the Constitutional Court as the Regional Head Election is closely related to the attainment of democratic public life and as a mandate of the constitution.

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