

Restorative Justice Approach in the Settlement of Ballot Manipulation Crime In Indonesian Legislative Election

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Abstract

Indonesia as a democratic constitutional state (*demokratische rechtsstaat*) in running the state administration system has its own advantages, because in every policy decision refers to the aspirations of its society. Society as the main character in a democracy has an important role. The role of the society in democracy is the participation in politics. Society also has a strong role in the process of determining the executive and legislative branches both in central and local government through elections, in which the people directly involved and participate in determining the direction and policy of the state for the next five years. The comprehension of these terms implies that a general election is a representation of the people's sovereignty which must be implemented in a direct, public, free, confidential, honest, fair and integrated which is an absolute requirement for the democratic process in Indonesia. Violations in the elections is not categorized as administrative violation, but it has entered category of criminal election¹, this also includes the crime of ballot manipulation. Ballot manipulation is a fraud done to obtain the majority of votes by taking the acquisition number of others votes or the votes acquisition of political parties participating in the election by changing the official report of the vote acquisition recapitulation. The operating mode is started from voting and counting stages. Observing the settlement of election violations, especially the crime of ballot manipulation in legislative election shows that the process of the settlement (law enforcement) is complicated, because it involves several institutions, difficult evidence, limited time of the investigation, prosecution and examination in court. Based on complexities of the ballot manipulation settlement/law enforcement in the legislative election thus choosing the restorative justice election as an alternative to the settlement of the ballot manipulation crime in legislative election is appropriate, compared with settlement through the courts. Therefore, the settlement of crime in election especially about the ballot manipulation using restorative justice approach will lead to a better change namely: faster time of settling, cost efficient, faster administration and recapitulation process, then the victim can be satisfied because they will get the justice that they deserve

Keywords: Nation of Laws, Democracy, Election Violation, Restorative Justice

1. Introduction

The discussion of the need to establishing articles regarding ballot manipulation in laws number 8 year 2012 about election of House of Representatives, People's Representatives, and Regional House of Representatives member is based on the consideration that General Election is a procedure and conversion mechanism of people's vote into making someone become country administrative in legislative and executive in local and national level.

Thus, electoral system is needed to convert people's vote, because it will determine :a) The scope of vote being contested and the number of seats to be contested (magnitude of voting region); b) who will be the participant of election, who is the eligible candidate, and c) how to determine candidates for state officials (nomination pattern); d) what and who will be selected, and how the voters legally declare their choice (voting model); and how to distribute seats in each constituency to election participants and/or the procedure for determining the elected candidate (electoral formula)²

Therefore, the election is complex and involves many parts. Not only voters, election participants and or candidates, organizers and the election administration, election supervisors, central and local government, it also involves election observers both domestic and International, civil society organizations, law enforcement, partner of procurement and distribution of logistics, and mass media.

Complexity of the election administration and the high competition to win seats as much as possible

¹There are various types of electoral crime acts in legislative election namely : unsubmitted the result copy of votes counting, money politic, campaign prohibition by civil employee, humiliation and provocation during campaign, removing others right to vote, letter forgery, disturbing vote counting system, disturbing vote collection and counting process, disturbing campaign process, vote more than once, ballot manipulation, changes of total vote by committee error and eccentric.

² Ramlan Surbakti, Didik Supriyanto, Hasyim Asyari, menjaga Integritas Pemungutan dan Penghitungan Suara, Jakarta, Kemitraan Bagi Pembaharuan Tata Pemerintahan, 2011, hlm. 1

arouse the temptation to acquire it by doing the cheating ways, such as vote-buying, intimidation, coercion and ballot manipulation. It is highly possible to occur, because at this stage, the stake is very high. Not only about money, manpower and time, the election is also an ideological gamble, dignity and interests of supporters.

When such practices occur, then the legitimacy of the election administration process will be questioned and eventually the public perception toward the manipulation of vote counting result will make the public refuse the result of the elections.

Addressing the potential existence of fraud in the elections, especially at the stage of voting and counting, thus the legislative policy related to the elections then includes the law chapters for legislative candidates who seek to act in the form of vote-buying, intimidation, coercion and manipulation. The existence of criminal threat for such action is considered appropriate, because from honest, fair and democratic rise a good quality and integrated leader.

This generally motivates the importance of Law's Chapters which contained criminal act threat inside The Law of Republic of Indonesia Number 8 Year 2012 regarding General Election of the House of Representatives, People's Representatives, and Regional House of Representatives, then the existence of those chapters will be analysed in further academic conception.

Academic conception is meant to be a theoretical opinion related to the chapters regarding ballot manipulation crime, namely Chapter 287, 309 and 312 in The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives.

In chapter 287, 309 and 312 The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives about ballot manipulation, this law takes over The Law of Republic of Indonesia Number 10 Year 2008 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives. The changes occur on the qualification of the crime's type, Chapter 298, and Chapter 299 article (1), (2) The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives did not recognize the different types of criminal qualification.

The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representative, Chapter 287 is included into act of offence and Chapter 309 and 312 includes in act of crime.

Observing the occurrence of changes and the existence of ballot manipulation crime chapters in The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representative, theoretically can be analysed into three aspects, which are the philosophical aspect, sociological aspect, and juridical aspect.

1.1. Philosophical Aspect

Talking about compliance and improvement of laws basically is a political policy of a country or it can be law policy that formed by House of Representative and President. As for its purpose is to establish the rules which are suitable with the condition and situation in a certain time, and to determine the chosen rules which can be used to express the society's needs and to achieve the desired purpose.

This also occurs in The Law of Republic of Indonesia Number 8 Year 2012 Regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives in which it has provided several chapters and the punishment. The use of criminal law and its punishment have already been a tendency inside the use of legislation policy product that criminal law is mostly used to scare or secure many crimes which emerge in all field. This phenomenon gives an impression that it would be imperfect if a product of law does come with its crime provision (sanctions).

The problem emerged is about the philosophical base of the applied crime punishment in some laws. It later encourages the analysis from criminal philosophy field.

Basically, the philosophical definition of "criminal philosophy" in this case is described as one which has a dimension and orientation to part of "crime", and begin in "*criminal sanctions*" which is the prime guarantor also acts as the prime threatener or also become best tools or means against crime. Those philosophical view in theory is related to criminal enforceability and based on "criminal sanction" which have been affected by retributivism or theory of proportionality.

1.2. Sociological Aspect

Sociological aspect basically is a study which analyse the impact of the law when it applied in society, then social phenomenon can emerge and developed in society. The visible social phenomenon is occurrence where an

¹ *ibid*, hlm. 3

individual or a social group dealing with laws.

Law as a part of social regulation, especially as social control institution, will be always dynamics and having process in reacting to cultural changes that happen in society. This happen because laws cannot be separated from social and political life.

Political life can be explained as activity or groups in society that sought to gain power, retain powers, using a power, how to limit their use, and so on. This is where law take part in limiting power or sovereignty

As related with the definition previously, where the process of legislative general elections implementation is related with the aims of power (achieving, defending, using and how to impede the use of power), it potentially causes fraud by the contestant of legislative general elections. This indicates the emerging of society behaviour that tends to do everything to achieve the goal even if it violates the law.

Therefore, laws regarding with election attach criminal laws with consequence of violation of rule will be sanctioned by criminal laws.

As it starts from such reality, thus the existence of criminal sanctions in legislative election law is considered as the facility of prime guarantor and prime threatener also as the best tool or facility to face crime, aimed to held the general elections with the best result.

In theory, existence of criminal sanction in legislative laws based on two aim of criminalization, that are preventive which is to prevent the most nefarious act and deterrence which is to use suppress loss or cost as small as possible.

Furthermore, it means that the existence of criminal sanctions in legislation is needed to anticipate ballot manipulation crime in general elections that happens periodically.

So, the existence of criminal sanction in legislative laws examined from sociological aspect can be regard as a tool to change or instructions coherent with country politics of development that require fulfillment of society can be held coherent with value, principle and norms that valid. Then process of election can be done with good expectation from society and hopefully can be useful in Indonesian political construction.

1.3. Juridical Aspect

Juridical aspect examines the aspect of law that becomes the principle of some norms formulation in laws regarding the necessity of including the use of criminal sanctions.

The inclusion of ballot manipulation criminal sanctions in The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives cannot be separated from *penal policy* or criminal law politic, in the sense of a decision which outlines the most effective and efficient way to achieve the goals set collectively.

Criminal policy as formulated by Marc Ancel¹ is "*the rational organization of the control of crime by society*"² while G. Peter Hoefnagels states that "*Criminal Policy is the rational organization of the social reactions to crime*"³.

As an effort to combat the crime, the criminal policy can be described in various forms, namely: **First**, the use of repressive penal; **Second**, in the form of efforts, using non penal facility. **Third**, utilizes the efforts to form the society about crime and dissemination through the mass media law widely. (This can be included into non penal efforts).⁴

Thus, in addition to the criminal policy that can be done through the repressive criminal justice system (penal approach), it can also be done by using non penal facility through various prevention efforts without applying the criminal justice system (prevention without punishment).

2. Research Method

This study uses normative research, namely the research that is done by examining the literature sources or secondary data,⁵ including the written rules or other law sources related with ballot manipulation crime in legislative elections. This research especially concerns about the chapters inside The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives, namely: Chapter 287, 309 and 312 which are connected with the changes occur in the official report of vote counting result certification data (ballot manipulation).

The method used in this study is juridical analytical departed from other legislation, as well as

¹ Sudarto, *Hukum dan Hukum Pidana*, Bandung, Alumni, 1981, halaman 38.

² Lihat Muladi, *Kapita Selektta Sistem Peradilan Pidana*, Semarang, Undip, 1995, halaman. 7.

³ ibid

⁴ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Citra Aditya Bakti, Bandung, 1996, pg. 48.

⁵ Soerjono Soekanto, dan Sri Mamudji, *Penelitian Hukum Normatif : Suatu Tinjauan Singkat*, Jakarta, Raja Grafindo Persada, 2003, hlm.13

documents, scientific papers related to the establishment of the electoral law as the primary source of research.¹

The study used a qualitative approach, in which the ballot manipulation crime included in Chapter 287, 309 and 312 The Law of Republic of Indonesia Number 8 Year 2012 regarding the general elections of The House of Representatives, People's Representatives, and Regional House of Representatives becomes the reference in the application, and then offers a restorative justice approach as the effective and efficient settlement patterns.

By using the *restorative justice* approach, it is expected that it can fulfil the sense of justice and become efficient in improving the official report of vote counting result recapitulation, thus the improvement can be done in every level of recapitulation of vote counting result.

3. Result and Discussion

The settlement of ballot manipulation crime in legislative election through restorative justice approach:

3.1 Factual condition of the settlement of ballot manipulation crime in legislative election 2014

Although it is deemed as well organized, the implementation of legislative elections in 2014 still leaves a disappointment because of the high level of ballot manipulation conducted by the organizers of the election or by the candidates.

In Medan², the High Court of Medan sentenced Dedi Syahputra, the Chairman of KPPS Pearl Village, District East Range, Asahan, with imprisonment for 2 (two) months and Rp. 1,000,000.00 fine (one million rupiah) provided. If the fine is not paid, then it is replaced with imprisonment for 1 (one) month. Due to his negligence as a member of PPS, it results in changes in the certificate of recapitulation of votes on behalf of legislative candidates Helmiati from the Golkar Party.

From the result of the study there are cases where these laws are applied and not applied. These happen where in case where according to handling procedure from the existed criminal offense rule, where the case has to be first handled to the supervisor committee then it will be handled by "*Gakumdu*" process whether this violation can be reported to police investigator or it is not fulfilling elements of election crime. These crimes can be including: lack of evidence, no one wants to be eye witnesses, or the reports is categorized as expired according to the supervisor.

As in Bekasi case³, Integrated Law Enforcement Centre (Sentra Gakumdu), aborts the report that suspected the legislative election ballot manipulation that took place in two (2) districts : Sukatani and Sukakarya district that are filed by PPP (Partai Persatuan Pembangunan) who suspect manipulation in margin of 58 votes. This case is cancelled because the report does not meet the requirements as included in the discussion in Sentra Gakumdu. Moreover, the process of the recapitulation in two locations had been implemented in accordance with the legislation in force.

In addition, law enforcement sometimes is implemented not only through the criminal justice system, but also from the Election Supervisory Committee that resolves ballot manipulation crime in their own way or finish the case out of the court.

Just like the ballot manipulation⁴ happened in 6 polling booth in Kualu Village, Sub district Tambang, District Kampar Riau, where the number of votes noted on C1 witness report and PPL is different with the C1 report belongs to PPS. The number of votes manipulated is about 541 votes belonged to a candidate named Muktar from Nasdem Party. The votes were spread: 41 votes in TPS (election booth) 02, 100 votes in TPS 03, 100 votes in TPS 04, 100 votes in TPS 09, 100 votes in TPS 10 and 100 votes in TPS 13. Also, there was a vote reduction in TPS 03 as much as 25 votes in name of Bustami from PKS party⁵

Member of Riau electoral supervisor, Rusidi Rusdan with member of Kampar electoral supervisor, Edwar and Syawir Abdullah and district supervisor has ordered to do recount of votes from C1 Plano not from C1 of each that belonged from head of KPPS. This recount process is directly supervised by regional supervisor from Riau and Kampar district supervisor and attended by witness from political party, PPL officer, PPK Tambang Districts, and also guarded by policemen from Tambang Police, and Kampar Riau.⁶

Given these events, as the recount was held and there was a prove of ballot manipulation, thus the Electoral Supervisory declared that there are 3 violations at once, namely the criminal offense, administration and the code of ethics. However, due to the ballot manipulation that had been settled through discussion with recount, then the ballot manipulation can be thwarted. In the end, all electoral parts participated feel that the

¹ Sunaryati Hartono, Penelitian Hukum di Indonesia Pada Abad Akhir ke20, Alumni Bandung, 2009, pg.22

² Putusan No. 331/PID 2014/PT MDN

³ <http://bogor.antaranews.com/berita/7954/gakkumdu-gugurkan-dugaan-penggelembungan-suara-dua-kecamatan>, 29 April 2016

⁴ http://www.Metroterkini.com/berita_-5863_-panwaslu_-diminta_-proses_-penggelembungan_-suara_-caleg_-nasdem.html, 29 April 2016.

⁵ Ibid

⁶ Ibid

settlement from Election Supervisory Agency is precise, that they have corrected the wrong vote result and no one feels aggrieved.

Other interesting result from the research of the discontinuance electoral law enforcement process, especially the crime of ballot manipulation in the reality of practice is constrained by the time limits stipulated in the electoral law as described below.

Each electoral violation that occur must be reported to election supervisors within 7 days from the occurrence of the violation. Electoral supervisors are given 3 days to verify the report, but if within 3 days the electoral supervisors still need more review or investigation, then the electoral supervisors are given 2 days' additional time to decide the case in election. That means, it need 5 days for the electoral supervisors to decide a report of violation or other findings, that it truly violates the law. Likewise, the next process either at the police station or in court, they all have the time limitation.

The expired case existences make the electoral candidates feel aggrieved and wish to obtain justice, thus they using MK (Mahkamah Konstitusi) rule number 3 year 2014 regarding changes about rule of MK number 1 year 2014, regarding the allowance of individual or legislative individual candidates to submit accusation of elections result disagreement to the Constitutional Court.

Although the party candidates can submit the accusation of elections result disagreement, they should obtain the approval from the chairman and the secretary general of the party concerned. Besides the dispute is not submitted by the individual candidates, but it must be filed by the parties concerned. This is the ironic condition that occurs in the process of electoral law enforcement related to ballot manipulation.

3.2. *The settlement of ballot manipulation crime in legislative election through restorative justice approach.*

Observing the settlement of the ballot manipulation crime in legislative elections shows that the settlement process (of law enforcement) is complex, because it involves several institutions, the difficulty of the evidence, the limited time of the investigation, prosecution and examination in court.

Based on the complexities of the settlement/law enforcement of the ballot manipulation on legislative election, thus choosing restorative justice as the alternative legislative ballot manipulation settlement is considered appropriate, compared with the settlement through the courts.

It is parallel with the opinion from Satjipto Raharjo¹, that settling a case through justice system led to the court verdict, is putting the law enforcement into a slower way. It is because that the law enforcement itself must be processed in such a long procedure, through various levels from the police, prosecution, courts, the high courts and even to the Supreme Court. This will lead to excessive case hoarding in the courts.

Therefore, election crime settlement especially the one about ballot manipulation using *restorative justice* approach will take to a better change such as faster settlement time, cost efficient, process of administration recapitulation can be fixed quickly and the satisfaction of the victim as the justice can be achieved.

However, the settlement pattern using *restorative justice* approach that has not been done fully in practical. Thus, the ideal ballot manipulation crime settlement pattern should be found and defined to be the guidance related with the implementation of a better general election in the future.

Seeking for the standard pattern in electoral crime settlement (ballot manipulation) to prevent the crime verdict enactment in court, through *restorative justice* approach which is the form of settlement outside the court, theoretically can be explored either in custom law, doctrine, or inside The Law of Criminal Procedure, both local and foreign.

The law settlement outside formal justice process, in Indonesian history, is not a current issue. The paradigm of *restorative justice* has been practised in community in Indonesia.

In Lamaholot society, Nusa Tenggara Timur 2, the criminal cases settlement believed by Lamaholot society tries to build a harmony in wide a context: harmony between the conflicted parts, harmony with the social environment, and the harmony with the God. *Mela sare* as their traditional institutions that carries their custom becomes the connector between the world fulfilled with conflict and the world that is safe and beatifical. Then the reconciliation process of Lamaholot society involves *Dewa Rerawulan Tanaekan* and ancestors *Ama Opo Koda Kewokot* which are strongly bounded between the conflicted people.

Even after the reformation era in Indonesia, the traditional settlements are still enacted such as in Aceh. In this case, the law enforcement by Acehnese society after conflict and tsunami. According to Priyadi Permana,³ The police in Nanggroe Aceh Darussalam are committed to law enforcement that based on justice. With such

¹Satjipto Rahardjo, *Sisi Sisi Lain dari Hukum di Indonesia*, Jakarta : Kompas, 2003, pg. 170

²Karolus Kopong Medan, *Peradilan Berbasis Harmoni: Wawasan Baru dalam Penyelesaian Kasus Kriminal*, dalam MMH, Jilid 41 No 1 Januari 2012, dalam Yoachim Agus Tridiatmo, *Keadilan Restoratif*, Yogyakarta, Cahaya Atma Pustaka, 2015, pg. 64-65

³An interview with Commissioner Priyadi, Chief of Resort Bireun Police Investigation Unit, in³ I Made Widnyana, *Bunga Rampai Perkembangan Hukum Indonesia*, Bandung, Eresco, page. 270. Natangsa Surbakti, in his book *Peradilan Restoratif dalam bingkai Empiri, Teori dan Kebijakan*, Yogyakarta, Genta Publishing, 2014, page. 143

consideration, whenever a person has received the justice in a well case settlement through a deliberation in his neighbourhood in which facilitated by *Tuba Peut*¹, then the police will not try to prevent the traditional settlement itself. Therefore, the suspect of crime that has been arrested by the police can be released after the deliberation between the related family. The police allows this kind of settlement.²

Likewise, if considered in doctrine, as stated by the criminal law expert, that the settlement of criminal case can be done outside the formal justice system (*Out of Court System*), and it is a corrective action toward the negative effect of criminal punishment, especially in short time punishment, which is considered less helpful to reduce the high crime level, that even it can cause new problem: the arrested people can learn inside the jail on how to do more serious crime.

Related with the ballot manipulation settlement which is settled using *restorative justice* that has been done, namely: the ballot manipulation³ happened in 6 polling booth in Kualu Village, Sub district Tambang, District Kampar Riau, where the number of votes noted on C1 witness report and PPL is different with the C1 report belongs to PPS. The number of votes manipulated reached about 541 votes belonged to a candidate named Muktar from Nasdem Party. The votes were spread: 41 votes in TPS 02, 100 votes in TPS 03, 100 votes in TPS 04, 100 votes in TPS 09, 100 votes in TPS 10 and 100 votes in TPS 13. Also, there was a 25 votes reduction TPS 03 from PKS party in the name of Bustami.⁴

Member of Riau electoral supervisor, Rusidi Rusdan with member of Kampar electoral supervisor, Edwar and Syawir Abdullah and district supervisor has ordered to do recount of votes from C1 Plano not from C1 of each that belonged from head of KPPS. This recount process is directly supervised by regional supervisor from Riau and Kampar district supervisor and attended by witness from political party, PPL officer, PPK Tambang Districts, and also guarded by policemen from Tambang Police, and Kampar Riau.⁵

As the recount was held and there was a prove of ballot manipulation thus the Electoral Supervisory declared that there are 3 violations at once, namely the criminal offense, administration and the code of ethics. However, due to the ballot manipulation that had been settled through discussion with recount, then the ballot manipulation can be thwarted. In the end, all electoral parts participated feel that the settlement from Election Supervisory Agency is precise, that they have corrected the wrong vote result and no one feels aggrieved.

The pattern of ballot manipulation settlement using *restorative justice* approach can also be done without the recount verification but only by juxtaposing the certificate of vote counting result which is spread to each witness, or general election supervisor, or from the archive give to General Election Commission.

Commenting on the ballot manipulation settlement pattern as defined previously, thus the ideal pattern of the ballot manipulation settlement through *restorative justice approach* can be done using the patterns as follow:

- 1) Handling pattern is institutional and permanent, and it is aimed especially to handle ballot manipulation case, through *Out of Court System*;
- 2) Therefore, it is necessary to create a mechanism in form of formal rules which manage the procedures of the settlement process of ballot manipulation, through *Out of Court System*;
- 3) Not only in the stage of Voting Committee Group (KPPS), but also can be applied on every legislative election, in recapitulation and counting stage. This is reliable if provided with a recommendation from Election Supervisory Committee to held the recount.
- 4) Before the settlement of ballot manipulation is held, it supposed to have the report from the victim, and the willing of all parts to settle outside the court.
- 5) If the Election Supervisor Committee states that even though the ballot manipulation case has fulfilled the criminal elements (proved as a crime), to later followed up, is it still necessary to enforce the law, which law should be enforced, to whom it should be enforced, and in what condition that the case can happen.
- 6) After observing and considering standard / pattern of settlement measurements in ballot manipulation in legislation verdict with using restorative justice approach, then with its own initiative conclude that there is no need for the case to next level of verdict process in court. These decisions then made into a reports and must be agreed by every side.
- 7) After the settlement have completed by previous decisions, that is to held recount. Legislative supervisor then coordinating with committee (KPU or in every of its level), the doer and the aggrieved victim, witnesses and police; will agree that the result of the recount or proving by comparing the certificate will be a valid source of the vote result.

¹*Tuba Peut* is a coordinated society organization which consists of local society figures as it is functioned to discuss, negotiate, and reconcile the parts in conflict.

²Ibid

³http://www.Metroterkini.com/berita_-5863_-panwaslu_-diminta_-proses_-penggelembungan_-suara_-caleg_-nasdem.html, 29 April 2016.

⁴ Ibid

⁵ Ibid

- 8) Then with agreement and suggestion from legislative supervisor, then recount will be held again if there are errors in the process of counting (ballot manipulation crime). Supervisor according to their duty and authority formulated requirement that need to be done by the committee, for example an agreement must exist within every sides, from the doer and the victim to solve the problem in peaceful ways, with colloquy system, agreement and with police as the mediator;
- 9) These requirements can be in form of severe warning to the doer, The doer need to rectify the harm of the victim. the doer then states an apology to victim: the doer then recommended to the KPU to not be able to participate anymore in legislation.
- 10) Construction process of the legislation verdict in ballot manipulation made into a brief verbal process;
Presumably, if these patterns of verdict solving using restorative justice approach can be used to nurture justice for all legislative candidates. Then, in order for public and private interest can be in harmony, there is need to anticipate every changes and development of law value that exist in society. For that, embodiment of restorative justice approach is not contradicting with the value even it can be source of law renewal.

3.3 The Reason Why Restorative Justice Approach is Used as an Alternative To Settle Ballot Manipulation

Restorative justice approach has become a trend in many criminal act settlement of so many parts in the world and also in Indonesia. It is interesting that the restorative justice approach is also used as a settlement in the election law.

Such settlement pattern was adopted by Act No. 8 of 2012 concerning the election of Members of DPR, DPD and DPRD which provides a space to settle electoral fraud through restorative justice approach. Article 258 Paragraph 4 states that:

"The regulatory body elections to settle electoral fraud through the following phases:

- a. Receiving and reviewing reports or findings, and*
- b. Reconciling the parties to reach agreements through consultation and consensus."*

However, in Act No. 8 of 2012 concerning the election of Members of DPR, DPD and DPRD, there is no explicit regulation of how to settle the electoral fraud needs to be done. By considering the fact mentioned before, restorative justice approach could be an alternative with the following considerations:

3.3.1 The Crime of the election is a Criminal Justice Administration.

The holding of elections is the domain of constitutional law and administrative law, but the mechanism and its implementation involve criminal law, including criminal sanctions as a reinforcement of the administrative norms. From the perspective of criminal law, there are three basic important problems, which are: (a) there are matters which are prohibited by criminal law or law enforcement; (b) there are people who commit criminal acts or criminal liability; and (c) there are criminal penalties for people convicted of committing a crime¹.

Based on the perspective of criminal law policy, protection against various legal rules of an administrative nature is reasonable. A variety of behavior is prohibited by the provisions of the legislation new administrative qualifies as a criminal offense if such actions meet the elements being basic prohibition of such administrative rules, while the use of criminal sanctions is more bracing mere administrative norms².

Presidential election is administrative law and require reinforcement to the norm also contains criminal provisions. Criminal provisions in the Act No. 8 of 2012 on General Election of DPR, DPD and DPR, consists of 49 articles, 19 chapters included in the offense, and 30 articles included in the qualification of the crime.

Judging from the scope of criminal law policy formulation based on the criminal provisions of Law No. 8 of 2012 on General Election of DPR, DPD and DPR, it can be concluded that the formulation tends to be over-criminalization. Which means there are formulas that unnecessarily threatened with criminal sanctions, for the qualification of the action is defined as technical. Therefore it is more appropriate to use administrative sanctions, such as Section 287.309 and 312 of Law No. 8 of 2012 on General Election of DPR, DPD and DPR.

Technical administrative errors can be corrected through administrative technical anyway without the need through the criminal law or criminal sanctions.

In the use of administrative law, the formulation of the act relating to the conduct of the election are hung on the principles and norms in the administrative law itself. That's why "the core formulation behavior and/or actions" adopted in the law the election in the electoral process must be rather technical and administrative, as it is mentioned in several categories such as: the participants, implementers, providers, government agencies and the judiciary, and society. If there is a violation from any of the perpetrators, executors, organizers, government agencies and the public in general, then we can use administrative sanctions. If such sanctions is not supported, then it's allowed to use criminal law sanctions (the appeals of principle of ultimum

¹ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Bandung, Citra Aditya, 1996, hlm.

² Muladi, *Proyeksi Hukum Pidana Materiil Indonesia di Masa Datang*, Pidato Pengukuhan Guru Besar Dalam Mata Pelajaran Ilmu Hukum Pidana pada Fakultas Hukum Universitas Diponegoro, Semarang, 24 Pebruari 1990

remedium or subsidiary)¹.

This is where the role of restorative justice approach is able to settle the ballot manipulation where it can bring the interested parties, the perpetrator, the victim, election monitors, police and relevant stakeholder in order to restore the data recapitulation of the vote. In the other words, the settlement of restorative justice emphasizes administrative techniques and administrative sanctions of the criminal sanctions and fines that ended with criminal sanctions.

3.3.2 *The Problems Appeared Under Settlement Based on Law No. 8 Year 2012 on General Election of DPR, DPD and DPRD*

Criminal justice system of elections (including the crime of ballot manipulation) refers to the Criminal Procedure Code. The settlement of electoral fraud is faster because it's limited by the time.

The grace period on handling electoral fraud under Act No. 8 of 2012, which is handling in the Election Supervisory is not later than five (5) days after getting the report, by the Police Investigator is not later than 14 (fourteen) days after getting a report from the Election Supervisory, in the Attorney General Prosecutor maximum of five (5) days after getting the results of the investigation of the police file, and in the District Court is not later than seven (7) days after having the file transfer of prosecution of the Public Prosecutor. This is different from the time limit when handling general crime stipulated in the Criminal Procedure Code which takes a maximum of 200 days, from the inspection process at the level of investigation until the decision of the District Court.

However, this rapid process of the settlement of electoral fraud still contains few problems: first, a provision that restricts reporting the ballot manipulation is not later than 3 days after the case can cause problems, especially for the criminal cases which are only discovered only after three days past the deadline. So if the ballot manipulation is reported past the expiration date, the only way left is to apply Dispute Election Results (PHPU) to the Constitutional Court, which can cost more. In addition, the submission must be approved by the political party leaders in its region, because the proposal must be signed by the chairman and secretary. Otherwise it cannot apply PHPU.

Second, the process of handling ballot manipulation is need to be done faster because of its recapitulation stage and the counting of votes and can disrupt the recapitulation. So in order to change the data when the time arrives recapitulation national level, hearing ballot manipulation a criminal offense must be done before the count recapitulation 5 days nationwide. Third, in terms of law enforcement against ballot manipulation based on the data of the Constitutional Court, many electoral organizers who have been subject to criminal sanctions and fines. Both decided in the District Court and the appeal to the High Court.

The reality is contrasted to the intellectual authors of ballot manipulation actors (candidates) whom told to do the ballot manipulation. Most of them are friends in one political party. This might defame the party and, the victims can come back and be a member of the legislature.

3.3.3. *Internal Party Conflicts*

The open proportional system gives a chance for the internal party conflict. This is evidenced by the rampant cases of vote-buying which generally occurs between candidates in a political party. Internal disputes of political parties is also evident from an analysis of the petition filed by the political parties, both national and local².

Some data indicate the occurrence of internal disputes in the party. On request Dispute, The Party of Service Society (Indonesia: Partai Golkar) has the biggest internal dispute in election results in the Constitutional Court with 48 cases, PPP 26 cases, Democrats 17 cases, PKB 12 cases, PAN 8 cases, Gerindra 4 cases, PKPI 2 cases and Nasdem 1 case. Even when some political parties do not dispute an internal party (Hanura, UN, PDA PDIP, PKS and PNA), they have internal mechanism so they do not need to go in court³.

The data above is the party that is applying Dispute, but it could still be a lot of internal political conflict occurred yet settled in the area. Based on this, the internal party conflict would be easier if the ballot manipulation case resolved through a restorative justice approach because it's involved co-member in one part. If the said-so case comes to the surface, it might defame the party's name.

Besides, the settlement through a restorative justice approach might involve the leaders of political parties to become a mediator in the settlement process, making it easier to achieve an agreement and everyone is able to accept the outcome.

3.3.4. *Attain justice*

Restorative justice approaches can provide justice directly to victims who are disadvantaged. By bringing victims, offenders, Supervisory Committee and relevant stakeholder together, then the refinement process of the data of the vote count results can be done at once, after a recommendation from the Supervisory Committee to

¹ John Dirk Pasalbessy, <http://fhukum.unpatti.ac.id/hkm-pidana/350-aspek-hukum-pidana-dalam-pelanggaran-pemilihan-umum-kajian-dari-perspektif-kebijakan-hukum-pidana>, diunduh

² Junaidi Veri, *Potret Pemilu Dalam Sengketa*, Jakarta, Perludem Journal #7 Januari 2015, page 13-14

³ *ibid*

amend the actual data. The victims just want to their vote back which has been taken, the certificate data recapitulation is also changed so that their votes becomes the most and become legislators without prosecute those who took their votes.

In addition, based on the considerations above, the model outside the criminal justice (Out of Court System) is used for the settlement with the following considerations:

- 1) The process of settlement out of court proceedings (Out of Court System) aims not only strive to bring about justice and truth, but also the birth of harmony and balance in society;
- 2) The process of settlement out of court proceedings (Out of Court System), is limited to those cases that are still qualified light;
- 3) The process of settlement out of court proceedings (Out of Court System) is an institution, which existence is intentionally built and supplied as a forum to resolve the dispute to the parties
- 4) The process of settlement out of court proceedings (Out of Court System) through restorative justice approaches serves as "extra-judicial" side by side as the judiciary or as "Ordinary Court."

There are some differences between the settlement out of court proceedings (Out of Court System) with the settlement in the court proceedings (In of Court System) which has been applied in Indonesia. The differences are as follows:

- 1) The completion of the judicial or normative settlement, starting with the indication of the occurrence of an offense, which is known, both by law enforcement officials themselves and the results of a report or complaint public. While the settlement out of court is started with their availability and willingness of peace and negotiate the interested parties, most of the injured party;
- 2) Settlement of the litigation or the settlement of a normative, cling to the procedural law based on Western law (HIR/Criminal Code), whereas customary justice outside the courts or state courts (Out of Court System) is not adhering to the rules of the law of the event, but under customary law or local customs that are simple.
- 3) Completion of the judiciary is highly dependent on the decisions of the judges (District Court, High Court, Supreme Court), who wins and loses, to take a long time and high cost. In addition, although a definite decision has legal force (in kracht van gewijsde), it does not guarantee the disputing parties will reconcile. This differs from the settlement outside the judicial system of peaceful resolution through customary law, that is not intended solely to get the law by justice, but also provides a wise solution. So the possibility of disruption of the balance in a society can be minimized and the parties reconciled.
- 4) Completion of trials is oriented to meet and/or to recover individual rights as guaranteed by the legislation in force. While the settlement outside of court emphasizes more on the parties' agreement or mutual price-respect and sympathy, taking into account mutual interests, and/or public interest that lived together, were resolved by discussion and consensus, in accordance with the values of the fit and proper embraced by the community concerned.

Having regard to the foregoing, it can be seen that the out of court system settlement has advantages over the in of court system settlement, where the system is applicable outside the court emphasizes the settlement peacefully on the basis of consensus implemented wisely, without pressure and coercion, but is oriented to the fulfillment of a sense of justice and truth and led to the creation of peace in society. By taking it into account of the complexity of handling the problem, the crime of ballot manipulation settlement through restorative justice approaches is considered appropriate because the penal provisions is under administrative law. It is intended to satisfy the sense of justice, and to create an honest democracy, fairness, and integrity.

4. Conclusions and Recommendations

4.1. Conclusion

Based on the description and analysis of the foregoing discussion, it can be concluded some of the following:

- 1) The need for the establishment of the Article 287, 309 and 312 regarding changes to the minutes of recapitulation of votes, are generally based on the consideration that the elections are the procedures and mechanisms for converting the popular vote into seats organizer of the state legislature and the executive, both at national and local level. The conditions of high level of competition is to win a seat as much as it is possible to acquire it by doing the electoral fraud, such as buying and selling votes, intimidation and coercion and manipulation of ballot. There are three aspects that relate specifically to the establishment of provisions, if examined from an academic concept, namely: the philosophical aspect, sociological aspect and the juridical aspect. Judging from the philosophical aspects, in addition to be useful in protecting the constitutional rights of citizens/human rights and protect the participants of the election (candidates), election organizers and voters, criminal sanctions must satisfy the justice and legal certainty. Judging from the sociological aspect, the crime of manipulation done in previous elections, to the detriment of candidates and citizens who have chosen, as well as the legitimacy of the candidate in question. Judging from the judicial aspect, the lack of distinction, it will be easier to catch

- the perpetrators. Aggravated by the sanctions and the absence of minimum criminal, people have become wary and unwilling to do anything ballot manipulation.
- 2) The reality of the completion of the crime of ballot manipulation in the 2014 legislative elections, showing the following matters:
 - a. Not all ballot manipulation offenses are settled through the criminal justice system. There were conducted law enforcement and have obtained a court decision, some do not do law enforcement. But also resolved through a restorative justice approach.
 - b. Completion of the crime of ballot manipulation legislative elections could be resolved through the approach of restorative justice with the following pattern: The presence of the findings or report criminal election submitted to election supervisors, followed up with a clarification and their evidence, then the parties is met face to face, both the victim and the perpetrator, Supervisory Committee and relevant stakeholder, also by the recognition actors and based on the evidence of the vote count result certificate. If there is a need to be proved by a recount, Supervisory Committee will recommend to do a recount. But if it's already enough to pair with news events in the ballot box at the top level recapitulation, there is no need to be done. When the error is discovered, the Supervisory Committee will recommend to hold a repairing data of the vote count result certificate and reported the event.
 - c. Settlement through restorative justice as an alternative approach to the completion of the crime of ballot manipulation based on the following considerations:
 - Crime of the Criminal Law Administrative elections.
 - Resolution pursuant to Law No. 8 Year 2012 on General Election of DPR, DPD and DPRD still cause problems.
 - Internal Conflict Parties.
 - Achieving a sense of justice.

4.2. Recommendation

For the creation of an honest election administration process is fair and democratic and at the same time be able to realize the quality leader and integrity consistent with the goals held legislative elections itself, it is recommended that the following matters:

- 1) The application of clauses related to the crime of ballot manipulation is done selectively and not over-criminalization, considering the existence of criminal sanctions in administrative law as ultimum remedium and not preimum remedium. This is based on consideration of the complexity of the criminal enforcement of elections;
- 2) Required pattern of administrative policy and supervision patterns are applied to organizing legislative elections. Supervision here is intended as a planned process and are invited, educate, promote and institutionalize the values underlying the rule of law legislative election to election organizers and residents to abide by the system rules and values that apply, for the implementation of legislative elections which has been coveted by every component of the nation;
- 3) There needs to be an open proportional electoral system reform, which is still not running as expected, because it is vulnerable and prone to manipulation of ballot impact on competition or the internal party conflict. In addition, the open proportional electoral system makes a political party loses its best candidates. That's why the Indonesian electoral system should be returned to the impersonal electoral system by choosing the icon, by choosing the emblem, and by choosing the symbol of the party. This is because the closed proportional system's goal is to minimize the practice of money politics, include vote-buying;
- 4) There needs to be awareness of the common perception of the whole electoral law enforcement officers to support the realization of the integration system. It is therefore necessary steps to make the electoral criminal justice system can work as a system to embed: (1) awareness of the system, (2) the behavior of the system, and (3) culture system. It should be noted and emphasized because in the end the system and its elements can only operate through human action. Their behavior (elements of the system) that support these efforts must be made to depart from the values and the same perception of the purpose and operation of the system;
- 5) Required to an increase in human resources (election organizers) qualified through electoral education. Also regarding the recruitment of election organizers should be done selectively, in order to obtain the election management quality and integrity. Likewise related to election monitoring involving witnesses from political parties and public participation needs to be optimized.
- 6) Necessary monitoring integrated by stakeholders, both vertically and horizontally, either by participating in the election as well as by related institutions with the public, so that the organization of legislative elections in line with the goals and expectations of the elections held to obtain a quality leader and

integrity.

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