

Implication of the Vote-Difference Threshold in Settlement of Disputes on Results of Election of Regional Heads on Legal Protection Principle

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ABSTRACT

Legal protection is an effort to protect, safeguard and fortify the rights of citizens to avoid being violated or harmed, the effort of legal protection is built based on human rights and repressive protection. The realization of legal protection is the availability of judicial chambers for the justice seekers to obtain justice through the judiciary. However, the access to justice through the judicial process did not materialize in the settlement of disputes over the results of the Regional Head Election (PHPKADA). It is due to the application of the threshold of vote difference in the law of dispute settlement result of regional head election to be able to apply to Constitutional Court (MK) so that many candidate pair of election candidates who cannot apply although their rights violated or harmed. Based on this issue, a research problem appears on why the threshold of vote difference is a requirement to file a dispute over the results and what the implications are for the principle of legal protection. The formulation of this problem will be thorough with the juridical-normative research method by using content analysis and prescriptive analysis. The results showed that the application of the threshold of the difference in vote to file a case to the Constitutional Court is an attempt to minimize the number of cases filed, and must be prosecuted by the Court at the same time. The limitation of the number of cases through the threshold of the vote difference has caused the number of candidates for regional heads who cannot apply to the Constitutional Court when they feel that their rights have been violated or become victims of other pairs' fraud. This is certainly not in line with the principle of legal protection in which each right of candidate pairs should be protected and given the opportunity to obtain justice through the judiciary. Substantially, an alternative judicial process should be established for the candidates of regional heads who do not meet the threshold of the vote.

Key Terms: Threshold of vote difference, legal protection, rights of candidates for regional head.

A. Introduction

The regime of local elections in the electoral system in Indonesia is rather in a dilemma. Specifically, it is whether the election of regional heads is included in the regime of general election or regional government. This position is very important because it will have direct implications for the institutions that will organize and the institutions that will adjudicate the dispute over regional head elections. On the one hand, the election of regional heads is the same as the general election that includes the election of members of House of Representative, high council and the Provincial Council & Municipal Council and the President and the Vice President.¹ This view is based on the fact that the elections and local elections have the same character and form so that they cannot be distinguished. This view is valid since the General Election of Regional Head Election is effective for the first time until 2013. In 2013, the Constitutional Court Decree Number 97 / PUU-XI / 2013 is wrong which means that the election of regional head is not regime from general election but is included in local government regime. As a result of this Constitutional Court's decree, it has implications for election commission and election judges. Election justice institutions should not be the same as election courts. Therefore, the judiciary is an institution that can only adjudicate cases that become its competence, such as the Constitutional Court only authorized to adjudicate disputes over election results so that the Constitutional Court may not hear elections that are not included in the election section.

However, the Constitutional Court's authority to adjudicate the disputes over the results of regional head elections is still enforced until the establishment of a special judicial body that will be established no later than after the Simultaneous Regional Elections. The disputes over the results of the regional head election (PHPKADA) itself is a dispute between the candidate pairs with the Regional General Elections Commission (KPUD) regarding the determination of the election result.² As a result, it can be acknowledged the *subjectum*

¹ Pasal 22E UUD NRI Tahun 1945

² Pasal 157 Undang-Undang Republik Indonesia Nomor 10 Tahun 2016 tentang Perubahan Kedua Atas Undang-

letis and *objectum letis* from PHPKADA. *Subjectum letis* or the parties in the election of regional heads divided into three, they are:

1. The petitioner, the petitioner in the election of the regional head shall be the candidate pair of the regional head. That is, candidate pair of Governor and vice Governor, Pair candidate Regent and vice Regent and candidate of Mayor and vice Mayor.¹
2. The respondent, respondent in case of dispute over election result of regional head is the organizer of election.²
3. The Related Parties, the parties concerned in cases of election disputes are candidates for the election of regional heads who obtain the most votes and have a direct interest in what the petitioner petitioned for.³

While *Objectum letis* or object of the case relates to the authority of the court.⁴ The matters that are prosecuted or the object of dispute over the election result in the dispute over the result of the election of the regional head shall be the Determination of the Provincial KPUD or the Regency / Municipal KPUD concerning the determination of the election vote result affecting the election of the petitioner.⁵ The dispute over election results means a dispute that makes the vote as its object. Furthermore, vote procurement deemed to affect or harm the petitioner. The trait which may affect the result of vote procurement considered being detrimental to the petitioner or candidate pair of regional head are the violations that occurred in the administration of regional head election. To determine the qualification of violations that may affect the results of elections, it can be seen from the qualification of violations established by the Constitutional Court (MK). The Constitutional Court divided the violations into three types, they are as follows:

a. In-process violations that cannot be estimated or have no effect on the result of a vote. These types of violations are a violation that cannot be found, their relation to mass mobilization or other types of fraud and / or in terms of how influential the voter's choice is. Included in this unacknowledged offense is a simulation paper that uses emblem or symbols of certain candidate pairs, banner / billboard installations, props and others.

b. Violations in the election process that affect the results of election such as money politics, the involvement of officials or civil servants, alleged criminal election and so forth. Such violation may invalidate election results or election as long as it significantly affects the vote procurement and occurs in a structured, systematic, and massive manner whose measures have been established in Court decrees.⁶

In addition to the provisions on *objectum letis* and *subjectum letis*, the petition for dispute over the results of regional head election may be applied or submitted to the Constitutional Court if it meets the formal and material requirements in accordance with applicable law. The law of the settlement of PHPKADA is regulated in PMK No. 1 of 2016 concerning Guidelines for Proceedings of Disputes on Results of the Election of Regional Head. One of the formal requirements that must be fulfilled by the petitioner is the threshold of the vote difference between the candidate pairs of candidates who wish to apply with the candidate pair who get the most votes should not exceed 0.5-2%. If the threshold of the vote difference is not met then the petitioner will be declared to have no legal standing. In this case, the rights of the electoral candidate pair that is violated or harmed do not serve as the settlement parameter but the significance of the vote difference. This means that violations and frauds occurring in the Regional Head Election cannot be prosecuted if the difference in votes obtained by the candidates who receive the highest number of votes exceeds the threshold of vote difference even if the difference of the vote is obtained by fraud means.

Based on the background above, this research has two problems, which are,

1. Why is the vote threshold used as a formal requirement for filing election disputes?
2. What are the implications of applying the threshold of the vote to the principle of legal protection?

Undang Nomor 1 Tahun 2015 tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2014 tentang Pemilihan Gubernur, Bupati, dan Walikota Menjadi Undang-Undang (Lembaran Negara Republik Indonesia Nomor 5898).

¹ Pasal 3 ayat (1) Peraturan Mahkamah Konstitusi Nomor 1/2016 tentang Pedoman Beracara Dalam Perkara Perselisihan Hasil Pemilihan Gubernur, Bupati, dan Wali Kota.

² Ibid, Pasal 3 ayat (2)

³ Ibid, Pasal 3 ayat (3)

⁴ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi*, Jakarta: Sinar Grafika, 2011.171-178.

⁵ Pasal 4 PMK Peraturan Mahkamah Konstitusi Nomor 1/2016 tentang Pedoman Beracara Dalam Perkara Perselisihan Hasil Pemilihan Gubernur, Bupati, dan Wali Kota.

⁶ M. Mahrus Ali, dkk, *Tafsir Konstitusional Pelanggaran Pemilukada Yang Bersifat Sistematis, Terstruktur Dan Masif*, (Jurnal Konstitusi, Volume 9, Nomor 1 Maret 2012), hlm. 224

B. Methodology

The type of this research is normative legal research (doctrinal research) that is based on conflict of norm problems with statute approach, conceptual approach, historical approach, and case approach. Legal materials in this study consist of primary legal materials, secondary legal materials and tertiary legal materials. Primary legal material consists of laws and regulations sorted under the hierarchy of laws and regulations prevailing in Indonesia as stipulated in Article 7 paragraph (1) of Law Number 12 Year 2011 on the Establishment of Legislation. Secondary Legal Material consist of treatises of laws, academic texts, minutes of proceedings in the Constitutional Court, textbooks, papers, articles, and journals. While tertiary legal materials include legal materials that provide guidance or explanation of primary and secondary legal materials. Such as both print and electronic dictionary. Sources of legal materials in this study were obtained through library / reference searches and legal documents supported and supplemented by in-depth interview materials on the figures / experts and with constitutional justices.

The analytical technique of this research is Prescriptive analysis that is by examining whether the implementation of the threshold of vote difference has been in accordance with the legal principles in the settlement of dispute cases of the results of simultaneous regional head elections. Using this analysis, it is concluded that the implication of vote difference threshold as a formal requirement to file a dispute over regional head elections is also used as an analytical material to the alternative legal construction of the threshold of vote difference offered in this study.

C. Results and Discussion

1. Setting the Vote Limit Threshold

The quality of local elections is influenced by two things which are electoral process and electoral laws. Electoral Process deals with the mechanisms implemented in the implementation of local elections such as nominations, registration, campaigns, calculation methods, determination of results, and so forth.

While electoral laws relate to electoral systems and regulatory tools that organize how elections are run and how the distribution of election results is. Douglas Rae describes electoral laws as *"Those which govern the process by which electoral preferences are articulated as votes are translated into distribution of governmental authority (typically parliamentary seats) among competing political parties."*¹

When an error occurs in the electoral laws, such regulation shall be corrected through amendment of laws and regulations or through judicial review. However, if there is a violation in the level of electoral process then it must be resolved through the applicable legal mechanism. In the *ius contitutum* on the election of regional heads, violations in the electoral process are divided into types of administrative violations, violations of criminal administration, election state administration disputes, general criminal offenses, ethical offenses and election disputes cases.

Electoral administration violation is a violation that occurs in a structured, systematic, and massive means. This structured, systematic, and massive violation is a violation of the provisions of Article 73 paragraph (2) of Law 10/2016 about Pilkada. It explains about candidate pairs and / or campaign teams that commit violations in the form of promising and / or giving money or other materials to influence the election organizer and / or voter may be subject to administrative sanction of cancellation as a candidate pair by Provincial KPU or Regency / Municipal KPU based on decree of Provincial Election Supervisory Agency (Bawaslu).

Administrative violation is a violation consisting of procedures, procedures, and mechanisms relating to the administration of elections which at each stage of the operation outside of election crimes and violations of the code of conduct of electoral administrators.²

Topo Santoso viewed that the violation of electoral administration is a violation of the provisions of the rule of law (provisions of statutory regulations) that are not threatened with criminal sanctions, in particular violations of the terms, conditions, obligations, orders and restrictions. Furthermore, Topo Santoso classified the administrative violations of the General Elections in two groups: minor administrative violations and major administrative violations.³

Dispute of State Administration of Elections is a dispute between candidate pair of regional head /

¹ Douglas Rae, *The Political Consequences Of Electoral Laws*, (New Haven Connecticut: Yale University Press, 1971), hlm, 14 dalam Mahfudz . MD. *Politik Hukum, Di Indonesia*, (Jakarta: PT. RajaGrafindo, 2011), hlm. 74.

² Pasal 138 UU RI 8/2015 tentang Pemilihan Kepala Daerah.

³ Topo Santoso, dkk, *Penegakan Hukum Pemilu, Praktik Pemilu 2014, Kajian Pemilu 2009-2014*, (Jakarta: Badan Pelaksana Perludem, 2007), hlm. 95

candidate for deputy head of region with KPUD Provinsi / Kabupaten or Kota which caused by KPUD decree.¹ The criminal act of election constitutes a violation or a crime against the provisions as regulated in the regional head election law.²

Disputes over election results are a dispute between the Provincial and Municipal Election Commission with election candidate pairs either Governor / Vice Governor, Regent / Vice Regent and Mayor / Vice Mayor regarding the determination of voting result of election result.³

The petition for a dispute over the result of the election shall be submitted to the Constitutional Court. However, not all cases of dispute over election results can be submitted to the Constitutional Court considering that one of the conditions to file a dispute over proceeds to the Constitutional Court must meet the threshold of difference of vote as regulated in article 158 of Law 10 year 2016 about regional elections (Pilkada).

A vote difference threshold is a minimum that must be met in order to gain something or get a chance. The term threshold is used in the General Election as a term to express restrictions for political parties to participate in elections, send their representatives as members of parliament and propose candidates for president and vice president. The threshold applies in the general election and regional head elections in Indonesia. In the general election, the threshold is enacted in an election which includes the election of members of the House and the election of President / Vice President. The threshold in the election of members of parliament is called the term parliamentary threshold. According to Kacung Marijan, the term parliamentary threshold in Indonesia is the minimum limit of a party or people to obtain seats (representatives) in parliament. By means, the person or the party is able to perform its function as a representative because it gets an adequate strength in the representative institution.⁴ With the enactment of the threshold, the number of parties eligible to have seats in the National Council will be limited. Only Political Parties reach the parliamentary threshold that can send their envoys in parliament. By limiting the party sitting in parliament, the simplification of political parties will be realized.⁵

The parliamentary threshold was first enacted in Indonesia in the 2009 legislative elections with 2.5 percent.⁶ The enactment of parliamentary threshold through Act 8 of 2008 can achieve the goal to minimize the number of Political Parties having seats in parliament. Of the 38 political parties participating in the 2009 elections, only 9 political parties can send representatives to be able to sit in parliament.⁷ Parliamentary threshold was raised to 3.5% in 2014 elections through Constitution of Law No. 8 of 2012. Of the 12 political parties participating in the election are only ten political parties that can have seats in the House of Representatives.

The threshold based on vote procurement not only applies in legislative elections but also applies in presidential election so often known as presidential threshold term. The purpose of the Presidential threshold is almost similar to the parliamentary threshold. The difference, Presidential threshold in order to minimize the number of candidates for the election of President / vice president. That is, the threshold of vote procurement in the election of the Parliament is a requirement of vote for a political party to be able to send its cadres as members of the House while in the Presidential Election as a condition to become election participants. The presidential threshold is determined after the vote count of the legislative election results while the parliamentary threshold is applied before the presidential election is held. And since 2019, the imposed presidential threshold refers to the vote procurement of the previous elections, considering that in 2019, legislative and presidential elections are held simultaneously.

The presidential threshold number in the 2009 Presidential Election is 20% seats in the House of Representatives and / or 25% of the national legitimate votes,⁸ so that in the Presidential Election 2009 only three candidates participated in the Presidential / Vice Presidential Election. Presidential threshold number in the 2014 Presidential Election did not change the percentage of permanent 20% seats of the House and/or 25% of the national legitimate votes and the number of candidate pairs of President / Vice President were only two candidate pairs. Likewise, in the 2019 presidential election presidential threshold equal to 2009 and 2014.

The success of the parliamentary threshold and the Presidential threshold in an effort to minimize the number of political parties and candidates for the election of President and vice president also adopted in the process of dispute settlement result of regional head election. The threshold in the settlement of disputes on the result of the regional head election (PHPKada) is the enforcement of the difference between the candidate pairs who wish to propose PHPKada with the candidate pairs that get the most votes. In this case, the threshold is

¹ Pasal 153 UU 10 Tahun 2016 tentang Pilkada.

² Ibid, Pasal 145

³ Pasal 156 ayat (1) dan (2) UU 10 Tahun 2016 tentang Pilkada.

⁴ https://id.wikipedia.org/wiki/Ambang_batas_parlemen).

⁵ Lukman Edy, *Konsolidasi Demokrasi Indonesia: Original Intent Undang-Undang Pemilu*, (Jakarta: Rmbooks, 2017). hlm, 150.

⁶ Pasal 202 UU 10 tahun 2008 tentang Pemilihan Umum.

⁷ Ahmad Siboy. *Membongkar Politisasi Fungsi DPR*, (Malang: Intimedia, 2013), hlm. 95

⁸ Pasal 9 UU 42 Tahun 2008 tentang Pilpres.

determined not by the minimum threshold of vote procurement of candidate pairs wishing to propose PHP but by the maximum number of votes with the candidate pairs that get the most votes.

The enforcement of threshold in PHP is first set by Government Regulation in Lieu of Law (Perpu) Number 1 year 2014 up to Law 10 year 2016 about Pilkada and PMK Number 1 year 2016. With the enforcement of the threshold of this vote, who wish to submit to PHP must meet the maximum threshold of vote difference. Namely, 0.5% -2% depending on the number of residents in the regions that hold elections. Pair of candidates who do not meet the provisions of article 158 then cannot submit PHPKada.

The attempts made to limit the number of PHPKada through the enforcement of the threshold of the vote difference are certainly not excessive. Therefore, the limitation is necessary to create the effectiveness and efficiency of completion PHPKada. The number of PHPKada relatively many at the same time will certainly make the case load prosecuted by the Constitutional Court is also quite a lot when the number of constitutional justices are only nine people and the Constitutional Court decree related to PHP maximum 45 days. If it is not limited through the threshold of the vote, it will certainly make the process of justice PHPKada cannot run effectively and efficiently. Given the number of regions that held PHPKada reached 541 regions.

The limitation of the number of PHP through the vote difference threshold is also to ensure that PHP is submitted by candidate pairs who actually feel disadvantaged. It is often because of the case of PHPKada submitted to the Constitutional Court is only limited acts committed by parties who are not ready to accept defeat, therefore using various ways to delaying and even trying to deceit through the judicial process in the Court. With the limitation of PHPKada through the threshold of vote difference is also expected to create cultural attitudes accept defeat for all candidate pairs. The culture of losing in elections competition has not in Indonesia. Candidate pairs who lose the elections cannot be overwhelmed by their defeat and are always looking for various loopholes to cancel voting results.

2. Implications of Variance Limit Threshold Enhancement

The expectation of the enactment of the threshold of the vote difference in an attempt to minimize or limit the number of PHPKada to be prosecuted by the Constitutional Court will be materialized when the threshold of the ballot is first applied in the elections in 2015. There were 147 cases of proposed dispute and that can be continued until the examination of the principal case only 5 cases while the rest do not meet the requirements and of the 139 otherwise unacceptable, 97 of them for not meeting the threshold of vote difference. In the second period of elections, 55 cases filed 43 were declared not to meet the threshold of vote difference as regulated in Article 158 of Law 10 year 2016 about Pilkada.¹

The above facts have directly distinguished the candidate pairs of candidates into two categories. First, candidate pairs meeting the threshold of the vote and the case can be prosecuted in the Constitutional Court. Second, candidate pairs that do not meet the threshold of the vote so that the case cannot be prosecuted in the Constitutional Court.

For the election candidate pairs who do not meet the threshold of the vote and cannot be judged by the Constitutional Court surely has no room or opportunity to gain access to justice through the judicial institution for the rights of the disadvantaged or as victims of fraud candidate pairs who get the most votes.

The above conditions are absolute contrary to the principle of legal protection, that should be the basis in the principle of settlement of election disputes. Since the principle of dispute settlement of the election result is a form of legal protection for election participants who feel their rights are violated to obtain justice and legal certainty through the judicial process as guaranteed by constitution.² According to Satjito Raharjo, legal protection is how to allocate power for a person to act based on human rights as an effort to protect his interests.³ Philipus M. Hadjon, qualified the protection of the law into the form of preventive and repressive legal protection. Preventative legal protection is a form of legal protection in which the public is given the opportunity to file an objection to the rule of law to be applied. While repressive law protection is an attempt to resolve the dispute.⁴

As a matter of fact, the principle contained in the protection of the law is the effort to protect human rights and provide repressive legal protection space. However, this principle is ignored when the enactment of the threshold of vote difference as a formal requirement to submit PHPKada to the Constitutional Court. In the

¹ Putusan MK Nomor 1/PHP.BUP-XIV/2016-147/PHP.BUP-XIV/2016 dan Putusan MK Nomor 1/PHP.BUP-XV/2017-55/PHP.BUP-XV/2017.

² Pasal 24 dan 28D UUD NRI Tahun 1945.

³ Satjito Raharjo, *Sisi Lain Dari Hukum Di Indonesia*, (Jakarta: Kompas), hlm, 121

⁴ Philipus M. Hadjon, *Perlindungan hukum bagi rakyat di Indonesia: sebuah studi tentang prinsip-prinsipnya, penanganannya oleh pengadilan dalam lingkungan pengadilan umum dan pembentukan peradilan administrasi*. (Surabaya: PT Bina Ilmu, 1987), hlm. 2

first principle related to human rights. Human rights defined as a set of rights inherent in nature and on the existence of human beings as creatures of God Almighty and is a gift that must be respected, upheld and protected by the state, law, government and every person for the honor and protection the hereafter and the dignity of man.¹ From this understanding, it can be translated that human rights are essentially inherent and a gift of the most omnipotent God so it should not be reduced or non-dirigible rights. Due to this reason, the state has an obligation to be responsible for the protection of human rights. The obligation of the state is the obligatory state to respect, to protect and to fulfill, following the understanding of each concept of the state's obligations:

The obligation to respect requires the state to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the materiil resources available to that individual in the way she or he finds best to satisfy basic needs.

The obligation to protect requires the state the measures necessary to prevent other individuals or groups from violating the integrity freedom of action, or other human rights of the individuals- including the prevention of infringements of his or her material resources.

The obligation to fulfil requires the state to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.²

The three obligations of the state to human rights are ignored when the validity of threshold in the difference of the vote. First, it is from aspect to respect. A country that has an obligation to recognize the human rights of its citizens means that the State shall respect and end all citizens' rights including the right of each candidate pair to file a dispute over the results of the regional head election. The recognition of this country is how the state treats equal or equal rights to be earned by every candidate pair who feels their rights are harmed. It also means that any candidate pairs should not get different or discriminatory treatment from the state. However, with the validity of the threshold conditions applied, the treatment of the right of each candidate pair is different. For the candidate pair who fulfills the threshold of the vote difference is recognized the right to propose to the Constitutional Court while for those who do not meet the threshold of the vote, the rights are not recognized or the right to submit PHPKada not provided by the state. In fact, between candidate pairs who meet the threshold of vote difference and who do not meet the threshold of the difference in the vote experience the same condition that is equally judged that their rights violated. Therefore, candidate pairs who meet the threshold of the vote with not meeting the vote difference threshold should get the same treatment not treated differently. Different treatment is contrary to the principle of prohibition of international human rights discrimination. In which in realizing an equivalence requires equal treatment, in the same situation should be treated equally, and in different situations are treated differently.³

On the other hand, differential treatment for election participants based on vote difference is considered as a legal option that does not contain discrimination. This argument is built on the argument that the enactment of Article 158 of Law 10/2016 on Pilkada applies to all electoral participants simultaneously without making exceptions and privileges to certain candidates of regional heads. For election participants who wish to apply the request for cancellation of proceedings of disputes to the Constitutional Court, may directly submit the application. As long as the petitioner meets the maximum limit of voting with the voting contestant who has the most votes and who can determine the election participants can or cannot apply for the cancellation of the vote to the Constitutional Court not from other parties, but from internal electoral participants in obtaining votes. If the election participants have a significant vote and the difference with the voting participants who get the most votes is not so great or does not exceed 0.5% -2% then the election participants can apply for cancellation of vote procurement to the Constitutional Court. It can be inferred that it is clear, the difference in votes between the participants who want the cancellation of the vote procurement in a Pilkada is determined by the procurement or achievement of the election participants themselves. This means that election participants cannot apply for the cancellation of the vote to BPK / CC is not solely due to restrictions but because of the inability of election participants (who want to propose PHPKADA) in trimming the gap with voters who get the most votes.

The above logic is certainly acceptable. The reasons are firstly, the distance between the candidate's votes with the relevant parties is determined by the respective vote procurement not the organizer of Pilkada. For example, pair A earns 40% votes and pair B gets 30% so pair B cannot apply to BPK/MK. The procurement of 40% by candidate pair A and 30% for candidate B is purely from the hard work of each pair of candidates, during the process of holding the regional head election. Thus, if the pair B cannot apply to the Constitutional Court then it is purely because the candidate pair B is not able to cut the difference with the candidate A's vote so

¹ Pasal 1 angka 1 UU Nomor 39 Tahun 1999 tentang Hak Asasi Manusia

² Asbjorn Eide, *Economic an Sosial Right*, dalam Titon Slamet Kurnia, *Interpretasi Hak-hak Asasi Manusia Oleh Mahkamah Konstitusi Republik Indonesia*, (Bandung: CV. Maju Mundur, 2015) , hlm. 130-131.

³ Rhona K.M. Smith dkk, *Hukum Hak Asasi Manusia*, (Yogyakarta: Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia, 2008), hlm. 39.

that the distance of the difference in vote significant.

Second, the enforcement of the vote balance threshold has been established prior to voting and determination of the vote. Furthermore, it is unknown which election participants get the most votes and how much difference so that when article 158 of Law 10/2016 about Pilkada is applied then all participants already know the threshold to be able to apply for cancellation of vote procurement. At this stage it is also argued that when the candidate pair who volunteers for the election is concerned (the candidate pair) is aware and ready to accept all the consequences that have been determined by the provisions of the law including the provision on limiting the difference of votes to file the case of disputes to the results MK. It is unreasonable to be unable to apply for the cancellation of disputes to the Constitutional Court because the vote exceeds the maximum limit of article 158 and then disputes the provisions of article 158. In addition, all participants should not have to submit an application to the Constitutional Court if the difference of the vote has exceeded the maximum limit because the restriction has been determined before the law so that if it cannot accept the provisions of Article 158 of Law 10/2016 about Pilkada then in fact election participants do not need to register themselves as election participants.

However, the rationale above is not appropriate to serve as an excuse that the enactment of Article 158 of Law 10/2016 on Pilkada does not contain elements of discrimination or is a unilateral action of the legislator. The provisions of article 158 in essence still contain different treatment for election participants. The differentiation of such treatment is not giving the same space for the election participants to file an application for cancellation of the result of the election vote to the Constitutional Court. The election participants in the case of election disputes are divided into two groups. One group is the election participant who can propose PHPKada if the difference of vote according to the provisions of Article 158 and the second group is the candidate pair who has no right to propose PHPKada because of the difference of vote earned over 0.5-2%. Thus, the second group is a group or pair of candidates who get discriminatory treatment.

The above discriminatory treatment is also not based on deep thinking. Therefore, from the enactment of the allowable candidate pairs whose difference between the vote and the petitioner is not more than 2% -0.5% for submitting PHPKada, and not allowing the candidate pair whose vote difference with related parties exceeds the provision of article 158. Exactly as stating that in Pilkada the difference the procurement of votes between pairs of candidates insignificant, then automatically potentially, a violation should be prosecuted while in the elections that the difference between the votes between candidate pairs is very large. Thus, certainly there is no violation need to be given room to be prosecuted in BPK / MK.

Meanwhile, the argument used to validate the application of discriminative because it has been arranged before the implementation of Pilkada simultaneously, so that it can be said has been known by every candidate pair who will become participants of Pilkada, is also a very unfeasible reason to be presented. Although candidate pairs have already known the rules but the election participants cannot know exactly what matters affect the election result. For example, the candidate pairs initially thought that the election would be democratic, thus the possibility of fraud did not happen and the vote between candidate pairs is not significant. Accordingly, if a propose need to be done to the Constitutional Court (MK) difference between candidate pairs still meet the provisions of the limitation of vote difference determined Article 158 UU 10/2016 about Pilkada. However, in the fact of administration, the predictions of election participants may be inversely proportional. In the implementation of Pilkada there can be a very severe violation and cause the vote difference between election participants far enough between the related parties or election participants with the highest vote with the petitioner. Hence of this kind of operation, it is clear that there are allegations of serious violations to be prosecuted by the Constitutional Court. The process of the Constitutional Court in such case is obliged to solve the problem of potential conflict, considering the nature of the settlement of PHP in the Constitutional Court is in order to end the conflict between election participants. Thus, the limitation of vote difference through provisions in Law 10/2016 on Pilkada is clearly only based on the normal condition of the implementation of Regional Head Election, without considering matters affecting the height of the difference in the procurement of votes between candidate pairs. The enactment of these provisions is only based on the real figures set by the KPUD.

The second state's obligation to human rights is to protect which means that it has an obligation to protect every citizen's human rights. The form can be how the state provides protection that the human rights of its citizens are not deprived or harmed by anyone. The form of protection from this country can be repressive protection through the provisions of the rule of law applicable in a country. The existence of the provisions of the threshold of the vote difference is certainly not an arrangement built on the spirit of protecting the rights of election candidates but rather the setting that deprives the election participants the right to propose PHPKada to the Constitutional Court.

The principle of further legal protection is repressive legal protection. Repressive law protection is a legal protection that seeks to make room for justice seekers to obtain justice through the judicial process. In this case, the state must guarantee every citizen to have access to justice by providing a courtroom for the justice seekers to fight for their rights that are harmed. In case of dispute over election result of regional head, repressive

legal protection has been fulfilled by the government by establishing a special judicial body to adjudicate cases of dispute over election result of regional head and before the establishment of BPK, the authority is run by the Court for a while. The spirit that is built is certainly very appropriate because the existence of the judiciary can be an institution that can end the dispute among candidates election candidates who are in litigation.

The functions of the judiciary in PHPKada are firstly ending the problems among the disputing parties such as the election candidates who feel that their rights have been impaired with the requested and related parties. Secondly, to muffle emotions. The settlement of disputes over the results of regional head elections through the judiciary also serves to dampen people's emotions in the very harsh election of political election. In smoldering and violent politicized conditions and situations, the judicial process becomes a dampening way so that people's emotions are not polarized and cause social divisions and conflicts. Therefore, with a court ruling over PHP, it will make all parties in the Regional Head Election have to respect the court's decree as a form of law-abiding behavior in the legal state of Indonesia. Thirdly, to prevent people to judge themselves. The process of resolving PHPKada is in order to prevent the people from doing their own justice on PHPKada, where the people can just conduct the judicial process outside the legal justice process and can take the form of a process full of anarchism.

The provisions of article 158, making the Constitutional Court unable to perform judicial functions to resolve cases of election disputes so that the decree of the Election Commission on the determination of the election results of regional head election cannot be corrected or canceled although in the determination there are participants who feel harmed. When the Constitutional Court cannot perform the judicial function, the dispute over the election result cannot be terminated when the dispute over the election result cannot be terminated, the potential problems caused by the absence of judicial process over PHP will arise.

Disputes over election results that cannot be brought to the Constitutional Court will surely become PHPKada that will be potentially resolved through ways beyond the applicable legal provisions. The judiciary that should be able to reduce the emotions of those who feel disadvantaged by the KPUD's decree on the election result has been handed off while at the same time the emotions of those who feel aggrieved are still high resulting in efforts to make their own settlement through the process of street courts. The street justice in the case of PHPKada is the settlement of disputes cases through street ways such as vigilante and so on. The potential of vigilante in the settlement of disputes over election results of regional heads is a concern that is not excessive. In the political escalation of Pilkada which drains the emotion and then the hand-off court to muffle the emotion. Then vigilante as a form of rejection of KPUD decree about determination of election result vote is inevitable. Practices of the judges to refuse the election results will certainly be realized in various forms such as the destruction, arson, looting and so forth so that makes a big conflict in a region.

The release of the judiciary to adjudicate cases of election, disputes under the pretext of not meeting the provisions of Article 158 of Law 10/2016 on Pilkada, is exactly the same as allowing the community to self-assess or adjudicate cases of election disputes whereas the existence of the judiciary in cases of dispute over election results is to terminate conflict, dampen the emotions of the people through the judges rulings. The judges' judgment will dampen social conflict due to the elections because the judges' judicial decrees have been recognized and will be obeyed as the fairest judgments. The parties, especially the petitioner, will be much more calm or able to accept their defeat if they have gained room to file their losses in court. In this context, the function of the judiciary is urgently needed, especially by the petitioner, as a space to conduct an objective assessment of the conduct of regional head elections affecting the outcome. That is, the judicial process is the main thing needed while the outcome of the judicial process becomes the sequence of umpteenth. Is not the *posita / petitum* of the petitioner often accompanied by the sentence *a qua et bono* (panel of judges when having another important rationale or fair justice and decree).

D. Conclusion

The threshold of vote difference is the maximum limit of vote difference between candidate pairs wishing to file an election disputes case with the candidate pairs that get the most votes (the winner). If the candidate pairs of candidates have a vote difference exceeding the 0.5-2% vote margin as stipulated in Article 158 of the Pilkada Law, the candidate pair cannot file a PHPKada.

A vote-difference threshold is applied as a formal requirement to propose PHP in order to minimize the number of PHPs and create a culture ready to receive any defeat for the candidate pair election.

The enactment of the vote-difference threshold in PHP law proves that it is not based on the principle of legal protection that includes the protection of human rights for all election participants and repressive law protection. The law of such a clear event has ignored the material truth when material truth is oriented towards justice. In the future, the threshold of vote difference as a requirement to propose PHPKADA as regulated in Article 158 of Law 10/2016 about Pilkada should be reconsidered whether it should be removed or remain in effect. However, if applicable then alternatives should be suggested for candidate pairs who do not meet the threshold of the vote to get repressive legal protection in the form of access space for justice through the

judiciary.

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