

Legal Pollution of Dispute Settlement Results of Regional Head Selection Realizing the Election Justice



Gita Santika Ramadhani¹, Suteki²

^{1,2}Faculty of Law, Universitas Diponegoro

ABSTRACT: The implementation of direct regional head elections in the regions often raises disputes regarding the determination of the results of the vote. Efforts made by candidates who are dissatisfied with this determination are to submit a cancellation to the judicial institution. The update on the system for resolving the election results was carried out by the government to overcome this problem, namely the Government Regulation in Lieu of Law No. 1 of 2014. Problems discussed in this study include: how the dispute resolution mechanism was issued before the regulation, what updates are contained in the regulation how to achieve effective and fair election outcome dispute resolution. This study is a normative legal research that is descriptive in nature using a legal and analytical approach. Based on the results of the study, it can be concluded that the fundamental renewal lies with the institution authorized to handle, namely from the Constitutional Court to the High Court appointed by the Supreme Court. The author recommends that the renewal must be supported by technical regulations to ensure effectiveness and fulfill a sense of justice. Based on this research, the results show that the dynamics of the shifting of dispute resolution authority over the election results are influenced by the decision of the MK opened legally policy and the background of certain events. Namely: the problem of bribery that ensnares the judge, decisions that are considered controversial, case accumulation, and unpreparedness of institutional structure and infrastructure. Regarding the threshold requirements as a condition for receiving a dispute over a dispute over the results of a regional election, it has not yet supported the fulfillment of electoral / election justice. Because it has the potential to ignore aspects of substantive justice, mainly because it does not make the facts of the violations structured, systematic and massive (TSM) as a variable in examining cases. This neglect is not in line with one of the universally adopted principles of law and justice, which states that no one can benefit from irregularities and violations committed by himself and no one may be harmed by irregularities and violations committed by others (*nullus / nemo commodum capere potes de injuria sua propria*).

KEYWORDS: Dispute Resolution; Election of Regional Heads; Election Justice

A. INTRODUCTION

The 1998 reformation, which was accompanied by changes to the 1945 Constitution of the Republic of Indonesia in 1999-2002, was implicated by the existence of significant changes in the social, political and legal domains in Indonesia. The change is indeed a necessity, because as we understand that the existence of the Constitution or constitution is a document that reflects the condition of society at a certain time, so that changes in the condition of society will have a very large influence on the formation of the constitution. (K.C. Wheare, *Modern Constitutions*). The connection of the constitution and society is as also said by James Bryce who defines the constitution as a framework of political society (state) that is organized with and through law. (James Bryce in C.F. Strong, *Modern Politics of the Constitution*). The existence of such a constitution is what brings a major influence on social, political and legal conditions when changes are made to it. As a form of the highest social agreement, the constitution of the Indonesian nation is a legal document and political document that contains the ideals, foundations, and principles of the implementation of national life.

Elections are a tangible manifestation of procedural democracy, although democracy is not the same as elections, but elections are one of the most important aspects of democracy. Therefore, it is common in countries that call themselves a democratic country to tradition elections is to elect public officials in the legislative and executive fields both at the central and regional levels. Democratic democracy and elections are "qonditio sine qua non", one can not exist without the others. (A. Mukhtie Fajar, *Democratic Elections, Constitutional Journal*).

The implementation of regional head elections at both the provincial and district / city levels often occurs in disputes between the parties. The handling of disputes over the results of the elections was initially the authority of the Supreme Court on the basis of the rules of Law No. 32 of 2004 concerning Regional Government Article 106. Then a new law came out namely Law No.12 of 2008 concerning Amendment to Law Number 32 of 2004 concerning Regional Government. It is clearly affirmed in article 236 letter C which reads: "Handling disputes over the results of the vote count of regional heads and deputy regional heads by the

Legal Pollution of Dispute Settlement Results of Regional Head Selection Realizing the Election Justice

Supreme Court is transferred to the Constitutional Court no later than 18 (eighteen) months from the promulgation of this Law. (Law No.12 of 2008 concerning Amendments to Law Number 32 Year 2004 concerning Regional Government).

On December 9, 2015 for the first time the election of regional heads and deputy regional heads (pilkada) which included governors and deputy governors, regents and deputy regents, and mayors and deputy mayors was carried out simultaneously. The implementation of this simultaneous local election is mandated by Article 5 of the Government Regulation in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayors which have been stipulated as Law Number 1 Year 2015 as amended by Law Number 8 2015. (Republic of Indonesia State Gazette 2015).

Based on the background of the problems mentioned above, the authors are interested in formulating 2 (two) formulations of the problem as follows:

What is the dynamics of shifting the authority of dispute resolution on the results of regional head elections (from the Supreme Court delegated to the Constitutional Court to the Special Judiciary), and How the legal politics of dispute resolution results of Regional Head Elections relate to restrictions on submission of disputes based on the percentage difference in votes according to Law Number 1 of 2015 as last amended by Law Number 10 of 2016 in the election justice perspective?

B. DISCUSSION

Legal research is a scientific activity based on methods, systematics, and certain thoughts, which aims to study one or several symptoms of a particular law by analyzing it unless it is also carried out in-depth implementation of the legal facts then try a solution to the problems arises in the symptoms concerned (Soerjono Soekanto, Introduction to Legal Research).

The approach method that will be used by the author is the Socio-Legal Research approach, which is an alternative approach that tests doctrinal studies of law. The word "Socio" in Socio-Legal Studies reflects the interrelationships between the contexts in which law exists (An Interface With A Context Within Which Law Exists). That is why when a writer Socio-Legal uses social theory for the purpose of analysis to analyze problems that occur in society.

B.1. State of Democratic Law

The rule of law places law as the basic foundation in the life of the state, so that in fact the law is the highest authority in the administration of the state, or known by the principle that the rule in the state is law, not man (the rule of law, and not man). In principle, through law directed to realize order by having several objectives which according to modern theory is to achieve justice, benefit and legal certainty. (Muhammad Tahir Azhary, 2007).

This discourse about the rule of law began to develop when he introduced ideas about the theory of natural law which grew in Europe in the 17th century until the 18th century. The idea of a rule of law as a continuation of the idea of limiting power as one of the principles of democratic constitutionalism. The essence of thinking about the rule of law is the limitation of power through a juridical rule. (Ridwan HR, 2006).

B.2. Constitutional Court

A new institution which is the delivery of the mandate of the Constitution is the birth of the Constitutional Court (hereinafter referred to as the Constitutional Court). The first historical sheet of one of the branches of judicial power was opened with the approval of the establishment of the Constitutional Court in the third amendment to the 1945 Constitution by the People's Consultative Assembly (MPR) in 2001 as formulated in the provisions of Article 24 paragraph (2) and Article 24 C of the 1945 Constitution. November 9, 2001.

As a state high institution which has an equal position with other state high institutions, the existence of the Constitutional Court increasingly emphasizes that the Indonesian constitutional system has adopted the principle of separation of power and checks and balances in lieu of the previous parliamentary supermatation system. The presence of the Mahkamah Konstitusi and all its authority and obligations is considered to have changed the doctrine of the supremacy of the parliament (parliamentary supremacy) and replaced it with the teachings of constitutional supremacy. (Mariyadi Faqih, 2010)

B.3. Post-Reform Election

Election as a democratic instrument in determining the growth and development of democracy carried out directly, publicly, freely, secretly, honestly and fairly every five years to elect members of the People's Representative Council (DPR), Regional Representative Council (DPD), President and Vice President and Regional People's Representative Council (DPRD). (Widodo Ekatahjana) In its development, the scope of the election is increasingly widespread which places the election as part of the election which is then called regional head elections (pemilukada). (Article 22E of the 1945 Constitution)

The fact is that the elaboration and purpose of "democratically elected" in Article 18 paragraph (4) of the 1945 Constitution is determined by the legislators as Law Number 32 Year 2004 is through direct regional elections. The logical consequence is that the principles of organizing general elections must be reflected in the administration of elections and organized by independent institutions. (Kacung Marijan, 2010).

Legal Pollution of Dispute Settlement Results of Regional Head Selection Realizing the Election Justice

Therefore, it can be concluded that elections are a concrete manifestation of procedural democracy, although the conception of democracy is not the same as elections. But its existence is one of the most important aspects of democracy which must also be held democratically.

B.4. Election Dispute

Disputes occur because of a conflict of interest. Disputes can be defined as statements of conflicting claims or rights between the parties involved in a legal process. Election disputes are complaints (statements of objection), protests, conflicting statements, cancellations, and contestations related to the electoral process. (Bambang Eka Cahya Widodo, 2016) In the electoral justice system, effective handling of disputes is an important part of maintaining public confidence in the election process and its results. Therefore, public trust will legitimize the election winners to govern. Trust in the absolute electoral process to build, maintain and restore democracy.

Election disputes in the period 2005 to 2008, normatively regulated in Article 106 paragraph (2) of Law No. 32 of 2004 relates to objections to the determination of the results of regional head elections and deputy regional heads which only agree with the results of vote counting that influence the election of candidate pairs. Objections to the determination of the results of the election of the head of the blood and deputy head of the region can only be submitted by the candidate pair to the Supreme Court within no later than 3 (three) days after the determination of the results of the election of regional heads and deputy regional heads. objection only to the results of the vote calculation that influence the election of the candidate pair. (Ni'Matul Huda, 2011).

Furthermore, in the era of 2008, after the transfer of authority for the resolution of election disputes from the Supreme Court to the Constitutional Court, the provisions of Article 106 paragraph (2) of Law No. 32 of 2004 was revised through Law No. 12 of 2008, which confirms that objections to the determination of the results of regional head and deputy regional head elections can only be submitted by the candidate pair to the constitutional court within a maximum of 3 (three) days after the determination of the results of regional head and deputy regional head elections.

B.5. Urgency of the Democratic Perspective

Seeing the reality in the implementation of democracy in Indonesia, it can be said that in developing a democratic legal state not only is there a need for regulation in the democratic mechanism, but also a legal channel in the enforcement and resolution of democratic issues. This is intended so that democracy is able to converge with the principle of the rule of law which has an element regarding the protection of human rights. Therefore, understanding democracy is not only interpreted as a rule norm and a legal decision carried out through elections as a form of freedom, but more importantly is its conformity with the will and sense of justice of many people.

Democracy cannot abandon the fulfillment of individual rights, let alone violate the constitutional rights of citizens, both civil rights, economic, social and cultural politics. Because democracy actually stands on the principle of recognizing citizenship with all its rights as citizens. By itself, democracy is not a name if in its implementation there is a violation of the constitutional rights of citizens. (Kacung Marijan, 2010).

Public space is a manifestation of community participation to be directly involved in overseeing the implementation of post-conflict local elections and the administration of government to improve aspects of absorption of people's participation and interests so that they can sustain the sustainability of democracy at the local level. (Hellmut Wollman, 2008). Through this public space as well as the development of cultural democracy, so that the development of democracy includes the improvement of the system, namely structure, substance and legal culture. This is in line with Jimly Asshiddiqie's thought that as a manifestation of the idea of popular sovereignty as outlined in the constitution, democracy must be interpreted to guarantee the people to be fully involved in planning, regulating, implementing and conducting supervision and evaluating the implementation of the functions of power. (Afan Gaffar, 2006).

In connecting to the commitment of a democratic law state, the administration of the elections is an instrument that is in line with the conception of constitutional democracy. Strengthening democracy needs to be done as well as through efforts to obey the constitution as the implications of the principle of sovereignty in the hands of the people and carried out according to the Constitution. The existence of the 1945 Constitution of the Republic of Indonesia was to limit the power of government for the protection of human rights for the realization of social welfare. The constitutional democratic framework will be stronger when the election agenda is understood as a cycle towards the consolidation of democracy which leads to the welfare state. Elections are not merely rituals but a continuous process.

Referring to this, the indicator of fair or not elections according to the standards formulated by IDEA depends on whether or not the availability of electoral legal instruments along with the mechanism for resolving election legal problems that occur. Of course, the notion of electoral justice formulated by IDEA stems from the paradigm of guaranteeing recognition of citizens' suffrage, (Veri Junaidi et al., 2014) but the boundaries formulated are clearly very procedural-formalistic. Such election justice only becomes another meaning of the "truth" of the election. The meaning is that the implementation of the election has been carried out correctly as long as it is carried out in accordance with the provisions of legislation governing it or procedural truth.

Legal Pollution of Dispute Settlement Results of Regional Head Selection Realizing the Election Justice

Such understanding is only limited to "justice" in the legal sense as stated by Hans Kelsen. Justice is judged from the aspect of suitability of actions with positive law, especially in accordance with the law. Elections are considered fair if the implementation is in accordance with existing rules. In that context, just meaning is just another word from "right". Because, the application of the law will be said to be "unfair" if a common norm is applied in one case but is not applied to other similar cases that arise. (Hans Kelsen, 1992)

Departing from the criticism of the narrow meaning of electoral justice formulated by IDEA, even though Ramlan Surbakti did not provide a clear definition of electoral justice, however, he put forward seven criteria that must be met in order to achieve a fair election with integrity. The seven criteria are: 1). equality between citizens, both in voting and counting votes as well as in the allocation of seats for DPR and DPRD and in the formation of electoral districts; 2). legal certainty formulated based on the principles of democratic elections; 3). free and fair competition between election contestants; 4). participation of all stakeholders in the entire series of holding the election stage; 5). a professional, independent and impartial election management body; 6). integrity of voting, counting, tabulation and reporting of election votes; 7). fair and timely resolution of electoral disputes. (Ramlan Surbakti, 2014)

The progressive legal framework emphasizes that the pilkada as a vehicle for people's sovereignty must remain on the path of substantive justice. Namely the notion of justice as stated in the Black's law Dictionary 7th Edition, that justice provided is in accordance with substantive legal rules, regardless of procedural errors that have no effect on substantive rights.. (Bryan A. Garner, 1999) Reinforced by using progressive law optics, which is out of the box. The concrete implementation is to "get out" from the provisions of the branch boundaries for submitting requests for disputes over the results of the elections. This is based on the occurrence of structured, systemic, and massive violations as described earlier. Therefore, one of the principles of law and justice that is held universally states that no one should benefit from irregularities and violations that have been committed by themselves and that no one should be harmed by irregularities and violations committed by others. (*nullus/nemo commodum capere potes de injuria sua propria*). (Hamdan Zoelfa, 2013)

The task of the Constitutional Court does not only stop at the text (original interpretation of intent), but goes further than that, namely being able to revive the constitution in the midst of changing times and the problems of the nation and state, so that the breath of the nation and state does not stop, then the meaning of the text is not enough, it requires meaning. which is actually "the meaning of law that lives in society (the living constitutions)". (Tanto Lailam, 2015) In this case is the meaning of substantive justice, which goes beyond procedural justice. Its implementation in the implementation or procedural law for dispute resolution on the results of the elections is that in the preliminary examination stage which culminates in a decision whether the application is accepted or cannot be accepted (dismissal), it is really focused on checking whether there are elements that meet the structured category of violations, systemic, and massive (TSM). If it is proven, in order to avoid interpretations of protracted electoral process violations without legal certainty, the examination at this stage can be carried out by tracing the track records of documents and records of reports and findings of violations from Bawaslu according to their level. This method is at the same time to strengthen the importance of monitoring, reporting, and findings of election violations. Departing from this understanding that places election supervision as a "basic need" (basic an objective needs) of every election that is held, both nationally and locally in each region. in the pilkada is important. (Refly Harun) Apart from that, the petitioner was also not automatically able to argue that there was a TSM violation without the historical basis and concrete data of the violation record.

C. CONCLUSION

The dynamics of shifting authority to resolve disputes over regional head elections are closely related to the norms regarding regional head elections in Article 18 paragraph (4) of the 1945 Constitution, namely, "Governors, Regents and Mayors as Heads of Provincial, Regency and City Government are elected democratically respectively. " In the constitutional review process of Law Number 32 of 2004, through Decision 72-73 / PUU-II / 2004, the Constitutional Court (MK) has determined that direct elections are elections materially. Based on this decision, the Constitutional Court has actually included the pilkada in the general election regime. On the other hand, the Constitutional Court Decision Number 72-73 / PUU-II / 2004 also gave birth to norms that are open legally policy, that lawmakers can also determine direct elections instead of elections in the formal sense referred to in Article 22E of the 1945 Constitution, resulting in disputes. the result is determined as an additional authority of the Supreme Court. In subsequent developments, through Decision Number 97 / PUU-XI / 2013 concerning Regional Government and Judicial Power, the Constitutional Court stated that the pilkada was not a general election regime. This is one of the root causes of the dynamics of shifting authority to resolve disputes over the results of the elections. Initially the authority was in the Supreme Court, shifted to the Constitutional Court, wanted to be returned to the Supreme Court, but there was a refusal, it was returned to the Constitutional Court until the formation of a special regional election judiciary body as regulated in Article 157 of Law Number 1 of 2015. These dynamics caused problems with legal certainty of settlement. dispute over the election results. This shift in authority was also motivated by certain events. Namely: the problem of bribery that ensnared judges, decisions that were considered controversial, the accumulation of cases, and the unpreparedness of institutional structures and infrastructure. This uncertainty problem must be

Legal Pollution of Dispute Settlement Results of Regional Head Selection Realizing the Election Justice

immediately followed up by forming a special judicial body to handle dispute resolution over the election results. One of the institutions that allows prospects to handle election dispute resolution that is capable of upholding electoral justice, both in the electoral process and in the results, is the Election Supervisory Body (Bawaslu).

The new norms regarding the maximum threshold / difference in votes as a condition for the acceptance of requests for dispute over election results disputes in Law 1/2015 on Pilkada and its amendments, have not actually supported the fulfillment of electoral justice. Therefore, these norms have the potential to ignore aspects of substantive justice, including by not making structured, systematic and massive violation facts (TSM) a variable in examining cases. This is in accordance with one of the principles of law and justice that is universally embraced, which states that no one should benefit from irregularities and violations that he has committed himself and that no one should be harmed by irregularities and violations committed by others (*nullus / nemo commodum capere potes de injuria sua propria*).

D. SUGGESTIONS

Suggestions and efforts that can be made in relation to the dynamics of shifting authority to resolve disputes over regional head elections, are: The legislators (DPR and Government) can reconstruct the articles which the Constitutional Court declared as an open legal policy in order to create legal certainty and strengthen the direct election system with integrity and quality. The DPR and the Government must immediately realize the formation of a special court that handles all pilkada cases in an integrated manner, without having to wait for 2027. The establishment of an integrated special election court must be made under one roof, with the authority to adjudicate election crimes, administrative disputes, and outcome disputes on a cycle. which are linear and influence each other.

In order not to cause new problems with the addition of one more institution in solving election legal problems, it is best if Bawaslu is currently transformed into an institution that will carry out the judicial functions in question, Bawaslu can be an alternative institution designed and reconstructed in such a way as the embryo of a special election judiciary body.

Suggestions and efforts that can be made in relation to the legal politics of dispute resolution on the results of the Regional Head Election in relation to restrictions on submitting dispute requests based on the percentage of difference in vote acquisition, are:

a. The government and the DPR must change the provisions on the threshold requirements for submitting requests for disputes over the results of the elections, because this is the cause of not fulfilling electoral justice. Lawmakers can expand the maximum difference / testing threshold requirement and adopt the TSM variable as a substantive determinant of whether or not the dispute over the results of the regional elections can be examined.

b. Simultaneously with the application of Article 158 by the Constitutional Court, this must be accompanied by optimizing the settlement of disputes and disputes in the Pilkada outside of the dispute over the results of vote acquisition problems at each stage of the election, such as verification of prospective pairs of candidates, determination of candidate pairs, campaign violations, voting violations and fraud. Thus, these cases must be completely clear cut, before or outside the dispute resolution process of the election results. can still be sued at the final stage in a case that should only settle disputes over the vote count results.

c. Direct election disputes must be resolved in accordance with the law (due process of law), so as not to reduce the legitimacy of the direct election, by prioritizing substantive justice.

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Legal Pollution of Dispute Settlement Results of Regional Head Selection Realizing the Election Justice

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Legal Pollution of Dispute Settlement Results of Regional Head Selection Realizing the Election Justice

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