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## How the Constitutional Court Secures the Future of Democracy in Indonesia: Case Study Regional Head Election Dispute Settlement

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**Abstract:** The Implementation of direct local elections was a correction of the local elections with a system of direct appointment by the central government in Jakarta during the era of the 32-years New Order government led by President Suharto. In the Suharto era, regional head candidates submitted without a vice head of the region and should be one name. Such conditions as described above was due to the undemocratic political system. Local elections immediately after the Suharto government is part of the development of a democratic political system. Democratic political participation will bear a truly participatory political system and political stability. However, it is undeniable that the electoral system sometimes was colored with money politics, non-neutrality of election organizers and local officials and all forms of intimidation against other participants. In the past, the Constitutional Court has several times to disqualify the winner of the election for fraudulent practices systematic, structured and massive and ordered a re-election without the participation of the participants who cheat. That is the Constitutional Court's role in fostering democracy in the region.

**Keywords:** Elections, Election of Head of Regional Government, Democratization, Sovereignty of the People, the National Election Commission and the Constitutional Court

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### INTRODUCTION

Peaceful transition of leadership through an election that is honest, fair and accountable is an important feature of a modern democratic state, because real people's political participation in determining the course of government is a fundamental right of citizens as guaranteed in the constitution usual in every country that claims to be a democratic state. A.V. Dicey argued that the political participation of citizens as guaranteed in the Constitution have signaled a country has had civilization. The change of government both at national level and in local government through a general election provides assurance that the process of transition the leadership baton departure will take place on a regular basis and provide opportunities for individual citizens to choose their leaders in future the appropriate line of political choices, because elections periodic to channel their political aspirations of citizens is one of the cornerstones in any democratic system. Since the era of Guided Democracy under President Sukarno until the era of the New Order regime under Soeharto Indonesia does not recognize the aspirations of the democratic-constitutional government as stipulated in the 1945 Constitution. Of course, it is very different from the conditions of the reform era, it can be seen that the changes in the substance of the constitution are up to The law has a vital role in creating democracy and economic efficiency in a country in an effort to realize social welfare, and the government has a role in maintaining and creating rules of security so that the implementation of economic development will not sacrifice the rights and interests of the weak.

The implementation of the direct elections of the regional head and deputy head of the region is an important signal that the development of democracy in Indonesia has been implemented for a decade after the end of the Suharto Government. During Suharto's administration, or popularly known as the New Order, despite official nomination by local parliament, indeed the governor and the regent and the mayor was factually picked up by Suharto. And nowadays the direct election of regional head of government across the country can be said as the antithesis to the political practices of the appointment of head of the region directly by the Suharto's rezim without regard to the political aspirations of the region as the truth. Suharto should be given the final say on the proposed single candidate of governor, for example, after receiving the proposed name of the candidate for governor of the Provincial People's Representative Council. There is no rejection of the dictator's decision against the background of the army generals. Nor is there a legal dispute over the appointment of the governor of the Suharto choice. Even if the existing political differences on the process of nominating candidates to the governor of the central government in Jakarta, the history recorded only a supplementary submission of candidates for governor of the Regional Representatives Council as it was in the process of selecting candidates for governor of Riau Province in the 1980s. In the Suharto, despite a recommendation for the appointment of candidates submitted by the Regional Representatives Council, which is a mere formality, the direct

appointment of regional heads by the central government was a reflection of the centralized power of the central government.

Based on Article 18 of the 1945 Constitution, the administrative territorial of Indonesia is divided into the 33 provincial governments, and the provincial government is then divided into about 400 of the regencies and the city. The regency government is likely a rural-based town. The city is a more modern-and-industrial based town. And both the regencies and the city government then divided into districts, and the district is divided into tens of villages. This is because as we know Indonesian is a country with rich varieties of cultures, with diverse social order, and has a process that is based on the value of local wisdom without involving the legal process in an approach that is based on the principles of decency and a fairness in the mechanism agreed upon jointly.

### **The Election Commission**

The existence of the general elections and the national election commission is stipulated in Article 22-E of the 1945 Constitution. Election Commission as the national elections was set up in Government of President B.J. Habibie, the third Indonesian President. The election commission was set up in line with the spirit of political reform after the fall of the Suharto regime to bring the elections fair, just, and is directly under an independent Election Commission. Members of the Election Commission members stay in the office for a period of five years of work since his inauguration.

Direct elections of the head local government is organized by the Election Commission at every level both at the provincial and regencies/city. In addition to the General Election Commission as the organizer of the election, there is also a supervisory agency called the election or the Election Supervisory Body, which is in the national with central office in Jakarta as well as the Provincial Election Supervisory Board and tiered down that the Supervisory Committee of the Regency/City to the District Supervisory Committee. Besides the Election Commission served as organizing and coordinating activities elections, there is the Election Supervisory Board has the authority to oversee the implementation of the election both towards potential partner candidates for regional head and deputy regional head and neutrality of members of the Election Commission. General Elections Supervisory Board can make recommendations and bring the electoral violations that are criminal to the police and the nature of ethical violations to the Honor Council Election.

### **Election of Head of Local Government**

Direct election of the regional heads is one of the essential instruments of political reform post Suharto's era. People at the local level actually requires the implementation of a real democracy and can experience firsthand. Management of regional autonomy demands conditions for a democratic process. The democratic process is a guarantee that people can arrange their own affairs and interests of the community at its own initiative based on the aspirations of the people. In the context of the consolidation and strengthening of democracy, direct election immediately became pillars that strengthen democracy building nationwide. The implementation of direct election showed an increase in democracy for the people as individuals and groups involved in the birthing process of government or state officials.

Indonesia has implemented the general elections of regional heads directly since the enactment of Law No. 32 of 2004 on Regional Government. In the enactment of Law No. 22 of 1999, the pair of regional head and deputy head at the provincial, district and municipal elected through elections at the Regional Representative Council at the provincial level, regency and cities. The direct election would open up space for a wider participation of society in the democratic process to determine the political leadership at the local level. The current election system also opens opportunities for people to actualize their political rights. Direct election also trigger aspirational leadership figure, a competent, legitimate, and dedicated.

Since the enactment of Law No. 32 Year 2004 on Regional Government, heads of local elected directly by the people through Election of Regional Head and Deputy Regional Head. Regional head elections for the first time held in June 2005.

## **II. The Constitutional Court of Indonesia**

It is unavoidable discussing the Constitutional Court of Indonesia as part of this paper. The establishment of the Constitutional Court is the fruit of political reforms after the fall of the dictator Suharto into power as the second President of the Republic of Indonesia ruling the country since 1966. The 1945 constitution amendment was carried out aiming to develop a democratic government with an equal checks and balances between the executive branch with the judicial power and legislative power, realizing the supremacy of law and justice, and to guarantee and protect human rights. The establishment of the Constitutional Court is one of the results of the amendment of 1945 Constitution.

The establishment of the Constitutional Court was mandated by the Amended 1945 Constitution. The existence of the Constitutional Court was ruled under Article 24C of the 1945 amendments, which was promulgated on 9 November 9 2001. The original idea behind the establishment of the Constitutional Court that there was a necessity to have a state organ reviewing the constitutionality of the laws. Such organ of state will be given

power to examine if any laws against the constitution as the supreme law of the land, or popularly known as judicial review. Indeed, such idea appeared during the discussion of preparation for the country's independence in 1945. The country's founding fathers considered the necessary to include power examine laws preventing the laws contrary against the constitution within the Supreme Court. The power given to the Constitutional Court then was to also include the dissolution of political parties, the examination authority dispute between state institutions, the examination results of the election dispute, and the dismissal of the president or vice president. The establishment of the Constitutional Court finally reached a stage that is operational on July 31, 2003 after the Parliament and the Government collectively approved Law No. 24 Year 2003 concerning the Constitutional Court. On August 13, 2003, President Megawati Sukarnoputri ratified the Constitutional Court Law. Two days later, on August 15, 2003, the President through Presidential Decree No. 147 /M Year 2003 endorsed the nine judges of the constitution for the first time, followed by the oath-taking of the constitutional judges at the State Palace on August 16, 2003. On October 15, 2003, the Supreme Court submitted all constitutional cases to the Constitutional Court, on October 15, 2003 which marks the operation activities of the Court as one of the branches of the judicial authorities.

Based on the article 24 of the amended 1945 Constitution, the judicial power is carried out by the Supreme Court and its lower tribunal bodies together with the Constitutional Court.

The authority of Constitutional Court is Described more detail by Article 24C of the part (2) of the 1945 Constitution that: "The judicial power shall be implemented by Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military Tribunals, and state administrative courts, and by a Constitutional Courts."

The establishment of the Constitutional Court can be seen as efforts to protect the constitution and the rights of citizens. The existence of the Constitutional Court in the constitutional context of Indonesia is considered as the "guardian of the constitution ..... functioning of constitutional justice in public life. The Constitutional Court's duty to encourage and ensure that the constitution is respected and implemented by state officials and the public. The Constitutional Court acts as the sole interpreter of the constitution to the spirit of the constitution is always alive and coloring sustainability of the state and society. "

Judge of the Constitutional Court consists of nine judges, who three judges come from the Government, three judges of the Supreme Court and three men came from the selection in the Parliament.

Article 24C paragraph (1) and (2) of the 1945 Constitution set up the authority of the Constitutional Court are as follows:

- 1) Review the law against the 1945 Constitution;
- 2) Terminate dispute the authority of state institutions whose authorities are granted by the 1945 Constitution;
- 3) Terminate the dissolution of political parties; and
- 4) Resolving disputes over the results of general elections;
- 5) The Constitutional Court shall give a decision on the opinion of the House of Representatives that the President and/or Vice President is alleged to have violated the law in the form of treason, corruption, bribery, other felonies , or misconduct , and /or Vice President as stipulated in the 1945 Constitution.

Changing the constitution gave the authority to judiciary institution to resolve disputes on election result both legislative and executive elections. The authority of the completion of the results of elections member of the House of Representatives, the Regional Representative Council, Regional Representatives Council, as well as the president and vice president be given to the Constitutional Court. While the election of regional heads, which was originally based on the Act 32 of 2004 is the authority of the Supreme Court to dispute the election of Governor and deputy governor and the authority of the High Court for the election of the Regent/Mayor transferred to the authority of the Constitutional Court since 1 November 2008. In the Act No. 12 of 2008 changes to the Law No. 32 of 2008 on Regional Government at 236C article said that "the disputed vote counts handling the head regional election by the Constitutional Court not later than 18 months since the Act was enacted".

In the process, the authority of the Constitutional Court in a dispute over the election is not only meant textually that is simply just decide disputes counting the election results, but also consider violations that occurred during the elections. We can see the decision of the Constitutional Court case No. 41 / Dispute - VI / 2008 which embodies the Constitution of the Article 18 of the Act of 1945 which is democratically. This is the one that the Constitutional Court is basically intended that the election be fair and equitable. Step Constitutional Court actually a necessity and increasingly show judicial character to uphold the Constitution of the law and justice as mandated by the 1945 Constitution.

### **III. Simultanous Elections of Head of Regional Government in 2015**

The General Election Commission (KPU) organized the implementation of the Regional Head Election simultaneously in the first wave on December 9, 2015, for the regional head and regional deputy head towards the end of the term of service in 2015 and the first half of 2016. The KPU managed tens of thousands of polling stations and oversaw the tabulation of votes between December 9 and December 18. If necessary, an electoral

dispute resolution process overseen by the nation's Constitutional Court will resolve electoral disputes between December 18 and March 13, 2016.

Registration of candidates for regional head election in the first wave simultaneously had started on July 26-28, 2015, provided that the candidate promoted by political parties with seat acquisition of 20 percent or 25 percent of valid votes, got a decree from the central leadership of the party, got the management Decree of political parties in Regency, City and the Provincial Level.

On December 9, tens of millions of Indonesian citizens went to the polls to elect the heads of government of 264 regional jurisdictions across the country including eight Governors, 35 Mayors and 221 Regents. This simultaneous election models the first time in Indonesia, even in the world. Indonesia should be recorded in the history of world democracy because there will be 269 regions consisting of 9 provinces, 36 cities and 224 regencies simultaneously elect regional heads. That is, about 53 percent of the total 537 number of provinces and regencies/cities in Indonesia that will carry out elections simultaneously at the end of the first wave of 2015 local election into the ideal design, which is the simultaneous nationwide to choose the House of Representatives, Regional Representatives, the President and Vice President, as well as simultaneously to choose the regional heads and the DPRD at the provincial, regency and city level.

After the simultaneous elections in 2015 in the 269 regions, which will be followed by other simultaneous elections in February 2017 in the 99 regions, and the third election in June 2018 in the 171 regions. Then simultaneous election again will be organized nation wide in 2027.

The elections are the first of three rounds to elect local heads of government in the country's 34 provinces and 514 regencies/municipalities. The second round of elections is scheduled for February 2017 and the third round is scheduled for June 2018. This year, the number of women candidates standing for local head of government offices reached an all-time high of seven percent. Similarly, the number of independent candidates reached a new high of 16 percent.

Some crucial problems appeared in the first simultaneous elections:

#### 1. **High Intensity of Conflicts**

The elections simultaneously are heavier than the legislative and presidential elections. Competition of elections at lower levels is prone to security problems. The political dynamics in these areas are more difficult to predict. Because the strength of the local politicians have started immeasurable, both in terms of number of supporters, the distribution of influence, as well as the patronage of the party elite in central power. Approximately 827 pairs of regional leader's candidates will compete in the first wave of simultaneous elections.

The main challenge for the holding of simultaneous elections later is to minimize conflicts in its implementation. Conflict pattern occurs mostly among election participants and supporters accompanied by anarchy and destruction of public facilities. Source of conflict is generally from unelected elite or who can not accept the victory of another candidates. Potential conflicts in 2015 elections is very high because it is done in areas involving various parties and only lasted one lap. No elections are devoid of conflict. Unneutrality of the electoral administration in the area is also a source of conflict. This is because the law does not give the judge a certain measure to define to what extent an individual should give authentication concerning the public's general knowledge.

#### 2. **Neutrality of Regional Election Organizers**

The regional head office in autonomy era is so attractive in the eyes of search powers for extraordinary authority to manage the full regional head of each region. That position could make a regional head like a little king with great power. Organizing simultaneous elections is the biggest celebration in the reign of President Jokowi, which can create an aura of competition and passion of the candidates to contest.

Election organizers simultaneously in the regions later should be neutral in carrying out each stage of the election, instead of 'collusion' with the local bureaucracy or into a successful team of competing candidates of regional heads. Neutrality of the election organizers will make the simultaneous elections be qualified, credible, and to avoid conflict. The responsibility of organizing regional elections should be able to increase voter participation and minimize potential fraud that might occur, such as inflation and the reduction of noise, phantom voters, multiple voting, or voters who eliminated their right to vote.

#### 3. **List of Permanent Voters**

List of Permanent Voters (DPT) will remain a crucial issue and the object of the dispute. Moreover, polling stations (TPS) are very vulnerable in the intervention, especially in remote areas. The most crucial is the population data that until now have not been able to cover the entire population, especially those living outside the area. Ministry of Internal Affairs has submitted a list of Potential Voters in Elections (DP4) to the Commission which are used as data in arranging voter registration of simultaneous election. The number of voters have been recorded in the Ministry of Internal Affairs until now has reached 102 068 million people. The amount represents the total number of potential voters in the list that will follow the election of 269 Regional Head and Deputy Regional Head on December 9, 2015. Total registered voters exceeded 50 percent of the voters that gives right to vote on the 2014 Presidential Election. Total 269 regions that hold elections have exceeded 50 percent of the total of 514 regions in Indonesia.

Unfortunately, the election system in Indonesia do not consider the mobility of the population that is already very high. Residences are still statically defined. In fact, many people are outside the official address, including overseas, because of jobs and education. Another problem is that not all people have e-ID Card because it is outside the eligible categories such as bums, beggars, migrant workers, domestic workers, and the like. They do not have an e-ID card so they can not involve in the election. It means, not all people have the right to vote because of their poverty. Not to mention also a matter of voters who have died but are still registered as voters, or voters who are registered at two different locations.

#### **4. Money Politics**

The democratic process in Indonesia raises many opportunities for corruption. Because the democratic process in this country requires a huge cost. Regional election always had negative tendencies, ie transactional politics. In fact as many as 346 regional heads and deputy regional heads tangled legal cases. A total of 11.45 percent of the approximately 500 regencies thick with dynasty politics. In addition, many of the elections results in the past were broken joint between the head and deputy head of the regions. Currently there is no criminal chapter on money politics and the criminal chapter on the political dowry thus causing dirty political practices in the elections.

Implementation of the simultaneous election is originally meant to reduce the high cost of politics and money politics turn out to be an illusion. Financing campaign charged to revenue and expenditure budget can actually increase money politics. Regional head candidates would have more funds in view of campaign financing that become the responsibility of Regional Election Commission. By doing so, the candidates will have more funds to carry out the practice of vote-buying. Money politics also can occur when optimizing campaigns at the limited meeting. They can take advantage of unlimited meetings, where money politics is packaged in such a way in the meeting. Simultaneous regional elections in 2015 will be rife of money politics, in addition to political dowry, voters buying, that are also used to bribe electoral administration in the regions.

In addition, the use of campaign funds would also be a vulnerable point for the implementation of simultaneous elections, and misused to improve electability of candidates. Election campaign is more widely used as imaging media, is not applied for a work program. Also the 'game' between the candidates by state officials still leaves a problem in any election in Indonesia until now. Education and political socialization to voters take lack of decent places. Misappropriation of budgetary funds and state facilities can also occur, such as social grants (Bansos), school operational funds (BOS), and funds from the budget, as well as vehicle or building facilities into a campaign tool.

#### **5. Violations and Dispute of Election**

Elections Supervisory Board (Bawaslu) is not given the authority to execute the offense. Therefore, Bawaslu action is limited to giving recommendations. If the violations are administrative, submitted to the Commission and forwarded to the police. Simultaneous handling of cases of electoral violations this year will refer to the two laws. In addition to using the Law of the Elections, a number of violations will be processed by using the Criminal Code, such as inflate the voices and the problem of money politics. Money politics will be charged under Article 149 of the Criminal Code concerning bribery in elections, under penalty of nine months in prison. Perpetrators of votes are subject to Article 263 of the Criminal Code on forgery penalties of six years in prison. If there is a criminal offense, the police soon take over. For administrative violations, the Provincial Election Supervisory Committee (Panwaslu) directly provide recommendations to the Local Commission. Statements relating to the code of conduct is directly forwarded to DKPP. For disputes between participants and the Commission, the case will be solved alone by the Supervisory Committee.

#### **IV. Dispute of Election Result**

The Constitutional Court only processed 7 cases of the total 147 cases challenging the result of 2015 Simultaneous Head Regional Election. The Constitutional Court rejected mostly the election disputes due to failure to meet margin limit of differential votes gained by the conflicting parties.

Seven cases could meet the formal requirements in filing a lawsuit to the Constitutional Court, which filed for a maximum of 3 x 24 hours after the vote was announced the establishment of the election results by the Election Commission locals. In addition, the difference in the vote between the applicant and the other pair at most 2 percent. Two other terms are the object of a lawsuit petition appropriate and legal standing for applicant has filed a lawsuit.

Of the 40 cases that was read, 35 cases ultimately can not be processed further for submission has passed that deadline is 3 x 24 hours after the determination of election results by the Election Commission.

Pair new candidates can apply for the cancellation of the vote count results to the Constitutional Court, if the number of votes they consider problematic in dispute can change the outcome of the election by a margin of between 0.5 to 2 percent by the results of which are established by the Commission .

## CONCLUSION

The the Constitutional Court has played an important role in securing the democracy in line with the election of head of local government by the court decision issued during the legal process over the dispute of result of local elections. The court punished the candidates of head of local government proved of guilty committing irregularities during the elections. As result of the court decision, people could have leaders elected in the truly fair and just elections.

## REFERENCES

1. Asshiddiqie, Jimly, *The Constitutional Law of Indonesia*, Selangor: Sweet & Maxwell Asia, 2009.
2. Bambang Sugeng Rukmono, Pujiyono, *Obstacles In The Commission For The Supervision Of Business Competition (Kppu) In Disclosing The Practice Of Corporation Cartels In Indonesia*, *International Journal of Advanced Sciencem and Technology* Vol. 29, No. 4, 2020.
3. Dicey, A.V. *Dicey. Introduction to the Study of the Law of the Constitution [1915]*, edited by Roger E. Michener, Indianapolis: Liiberty Fund, Inc., 2011.
4. Hans Tholen, *Indonesia and the Rule of Law, Twenty Years of 'New Order' Government*, London: Frances Printer Publishers, 1987.
5. Harman, Benny K., *Considering The Constitutional Court, the History of Ideas of Constitutional Review*, Jakarta: Penerbit Gramedia, 2013.
6. Nasution, Adnan Buyung, *The Aspiration of Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959*, translated into Indonesian by Sylvi Tiwon, second edition, Jakarta: 2001.
7. Pujiyono Pujiyono, Bambang Waluyo, Reda Manthovani, *Legal threats against the existence of famous brands a study on the dispute of the brand Pierre Cardin in Indonesia*, *International Journal of Law and Management*, Emerald Publishing Limited 1754-243X, DOI 10.1108/IJLMA-01-2018-0006, 2018.
8. Rochaeti, Nur and Pujiyono, Pujiyono, *Implementation Study of Restorative Justice for Juvenile Criminal Justice System by Customary Court in Mainland Sulawesi*, *IOP Conference Series: Earth and Environmental Science* Sci. 156 012044, 2018.
9. Syahrial, Ahmad. *The Constitutional Court, a Study of Constitutional Adjudication as Mechanism to Settle Conflicting Norms*, Jakarta: Pradnya Paramita, 2006.
10. Siahaan, Maruarar Siahaan, *The 1945 Constitution, The Living Constitution*, Jakarta: The Constitutional Court of Republic of Indonesia, 2008.
11. *The Constitutional Court of Republic of Indonesia, Blue Print of Building the Constitutional Court as a Trust and Modern Tribunal Court*, Jakarta: The Secretariat General of Constitutional Court of Republic of Indonesia, 2004.
12. Wade, E.C.S. and G. Godfrey Phillips, *Constitutional Law, an Outline of the Law and the Constitution, including Central and Local Government and the Constitutional Relations of the British Commonwealth*, London: Longmans, Green and Co, fith edition, 1957.
13. Wolfe, Christopher, *The Rise of Modern Judicial Review, from Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, Inc., Publishers, 1986).
14. <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=1>, *The History of Constitutional Court of Republic of Indonesia*.
15. <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=1>, *The History of Constitutional Court of Republic of Indonesia*.
16. *The 1945 Constitution of Republic of Indonesia*
17. <https://m.tempo.co/read/news/2016/01/26/063739564/mk-hanya-terima-tujuh-gugatan-sengketa-pilkada-2015>, search 20-06-2016.