

CHAPTER TWO

LITERATURE REVIEW

A. Regional Election

Definition of regional election is based on Article 1 paragraph (1) of the Government Regulation Number 6 of 2005 on Election, Legalization, Appointment and Dismissal of Head and Vice-head of Region in conjunction with the Governmental Regulation Number 49 of 2008 on Amendment of the Government Regulation Number 6 of 2005. It is defined as the way to implement the sovereignty of the people in the provincial and/ or district/ municipality based on Pancasila and the 1945 Constitution to elect the head and vice-head of region.

Regional Election is an important instrument in organizing the regional government based on democracy, since the form of society as the holder of sovereignty to determine the state policies. The highest power to regulate the governance is in the hand of the society. Through the regional election, society can elect their leaders who further will determine the future of the state.⁶

Article 18 paragraph (4) of the 1945 Constitution which states that "Governors, Regents and Mayors as the heads of provincial governments, district, and municipal elected democratically", did not set the limitation whether the head of region was elected directly by the people or selected by parliament/The House of Representative. There are at least two main principles

⁶ Yusdianto, "Identifikasi Potensi Pelanggaran Pemilihan Kepala Daerah (Pemilukada) dan Mekanisme Penyelesaiannya", *Jurnal Konstitusi*, Volume II, number 2, November 2010, p.44.

contained in the formulation of the "heads that are elected democratically", namely: *first*; head of region must be "elected" through an election process and it is not possible to be directly appointed, *second*; elections are held "democratically". The term democratic in this context is elected directly by the people and can also be selected by the parliament/The House of Representative whose members are also as the result of democratic elections.⁷

The final result of the constitutional interpretation by the legislators toward Article 18 paragraph (4) containing provisions "democratically elected" is the direct election by the people (regional elections). Regional election is one of significant political alternatives in realizing democratization at the local level. It means that democratic governance is reflected in the 'recruitment' of head of government.⁸

Regional elections are part of the process of strengthening and deepening of democracy as well as the efforts to achieve effective governance at the local level. In addition, the implementation of the regional elections basically is also essential as a follow-up or the realization of the democracy principles included in the principles of individual freedom and equality especially in political rights.⁹

The word "elected democratically" generally means that the regional election should be elected by involving the participation of the society. Based

⁷ Hamdan Zoelva, "Problematika Penyelesaian Sengketa Hasil Pemilu oleh Mahkamah Konstitusi", *Jurnal Konstitusi*, Volume 10, September 3, 2013, p.p. 380-381.

⁸ Zainal Arifin Hoesein, on "Pemilu Kepala Daerah dalam Transisi Demokrasi", *Jurnal Konstitusi*, Volume 7, Number 6, December 2010, p.21.

⁹ Siti Zuhro, on "Memahami Demokrasi Lokal: Pilkada, Tantangan, dan Prospeknya", *Jurnal Pemilu dan Demokrasi* Volume 4, December 2012, p.p.30-31

on Article 18 Paragraph (4) of the 1945 Constitution above, then Article 2 Paragraph (1) of Law Number 1 Year 2015 determines that "Elections are held democratically based on the principles of direct, public, free, secret, honest and fair". From these provisions, the Governor, Regent or Mayor shall be elected directly by the people.

Some important considerations of organizing direct regional elections are as follows: *First*, regional elections are as a response to the demands of the people's aspirations due to President and Vice President, House of Representatives, Regional Representatives, even the head of village have been made directly. *Second*, the regional elections are a manifestation of the mandate of Article 18 paragraph (4) of 1945 Constitution. *Third*, the regional election was seen as a means of learning democracy (politics) for the people (civics education). *Fourth*, the regional election was seen as a tool to strengthen the regional autonomy. *Fifth*, the regional elections are an important means for the regeneration process of national leadership.¹⁰

Currently, the legal foundation of the implementation of the regional elections is Law No. 10 Year 2016 on ratification of Government Regulation in lieu with Law No. 1 of 2015 on the Election of governors, regents and mayors that has been changed with the Law No. 10 Year 2016. One of the changes in the Law No. 10 of 2016 is the idea of establishment of the Special Court as an institution that will settle the regional elections dispute.

¹⁰ R.Nazriyah, on "Pelaksanaan Pemilukada di Otonomi Khusus Papua (Studi terhadap Putusan Mahkamah Konstitusi No.29/PUU-IX/2011), p.p.532-534

B. Regional Election Disputes Settlement Body

Etymologically, regional election disputes can be seen from the terms of dispute, as the implication of the emergence of problems that arise in the elections, both disputes arising during the implementation process, and disputes of the results (valid votes which determined by the Regional Election Commission). The results of the research done by Institute for Democracy and Electoral Assistance (IDEA) categorized electoral dispute as "any complaint, challenge, claim or contest relating to any stage of the electoral process".¹¹ From the definitions above, the scope of electoral dispute essentially is comprehensive and covers all stages of the regional elections that influenced the quality of the regional election implementation significantly.

The issues in disputes of the regional elections in Indonesia among others include (1) a criminal offense and the regional election administration; and (2) the dispute on voting results. According to Santoso what so-called disputes in the implementation of the regional elections are cases of administrative violations or cases of dissatisfaction with the decision of the election committee.¹²

The successful of regional elections is not only measured by the implementation of voting, but also determined from how the settlement of disputes that go with it. The problem is that there are so many agencies involved in the settlement of regional election disputes which give bad impact

¹¹ IDEA International, *Electoral Justice: The International IDEA Handbook*, (Stockholm: Bulls Graphics, 2010), p. 199.

¹² Topo Santoso, article with the title "Perselisihan Hasil Pemilukada" delivery on Diskusi Terbatas di Mahkamah Konstitusi on Maret 24, 2011 in Jakarta.

to the process of regional election disputes settlement. In other words, the institution for solving the regional election disputes have been changed repeatedly following the rhythm of legal policies on the regional election.

At the beginning, for example, based on the Article 106 of Law Number 32 Year 2004 Supreme Court was appointed as the institute to settle the dispute of the regional election. Article 106 paragraphs (6) and (7) explained that the Supreme Court in exercising its authority can delegate it to the High Court to decide disputes of voting results of the head of region election and deputy heads of districts and cities, and the decision were final.

Supreme Court authority did not last long, since the Constitutional Court Verdict No.072-073/PUU-II/2004 has provided legal options for legislators to put the regional elections became part of general election regime which was mentioned in Law No. 22 Year 2007 on the General Election Implementer. It stated that the regional elections board became a general election regime with the nomenclature of 'regional general election' (pemilukada) and through the provisions of Article 236C of Law 12 of 2008 on the Second Amendment Act No. 32 of 2004 on the Regional Governance. The settlement of local election disputes on voting results are decided by the head and deputy head of the region and then transferred to the Constitutional Court.

According to Zoelva, the expansion of the authority of the Constitutional Court signifies two things: first, the assertion that besides being a guardian of the Constitution, the Constitutional Court also has function as the guardian of democracy. In guarding democracy, the Constitutional Court can make final

solution over disputed election results. Second, authority of the Constitutional Court as regulated in Section 22E of the 1945 Constitution is only to solve general elections dispute.¹³

However, the institution for the settlement of the result of regional election disputes was changed again due to the issuance of the Constitutional Court Verdict Number 97/PUU-XI/2013/2014 dated May 14, 2014. It is stated that "the additional authority of the Constitutional Court to hear the case of disputes on the results of the regional elections regulated in Article 22E of 1945 Constitutional".

The Constitutional Court then gave the authority to the legislators. By the Legislator, the authority was referred back to the Supreme Court. The Government Regulation in Liu with Law No. 1 of 2014 determines that the dispute on the result of the regional election is resolved by the Supreme Court. The Government Regulation in Liu with Law No. 1 of 2014 approved by parliament to become law No. 1 Year 2015. However, the law could not be implemented, but changed into Law No. 10 of 2016 in Article 157 of the last Act stated that the regional election result dispute cases examined and tried by a special court.

Article 157 also arranges that before a special court is established, the authority of the regional election disputes settlement is under the authority of the Constitutional Court. The problem is the clarity on how special judiciary should be implemented and how long the transitional authority is given to the

¹³ Hamdan Zoelva, *Loc. Cit.*

Constitutional Court to resolve local election disputes which had declared by itself as unconstitutional because the original intent of the Election in Section 22E of the 1945 Constitution did not include the local elections.

C. Special Court

Article 1 point 8 of Law Number 48 of 2009¹⁴ on Judicial Power determined “Special Court is a court which has the authority to examine and decide certain cases that can only be formed within the court area under the Supreme Court which regulated in the Act”. Furthermore Article 27 paragraph (1) determine that Special Court can only be established in one of judiciary area under the Supreme Court referred to in Article 25.

The Law Number 48 of 2009 on Judicial Power also gives the authority to the legislator to establish the special court which has the authority to settle the dispute over the results of direct regional election. The special courts of regional election dispute should be established under 4 (four) existing judicial bodies. With the existing judicial structure, it can consolidate all idea of the special court into one of the jurisdictions determined by the 1945 Constitution. All forms and types of special courts must be restored to the nature of the general court, religious court, administrative courts, or military courts.¹⁵

Therefore, the most appropriate place of special court as determined in Article 157 paragraph (1) of Law Number 10 Year 2016 should be established under the administrative court, since the dispute over the direct regional

¹⁴ Article 1 point 8 Law Number 48 of 2009 on Judicial Power.

¹⁵ Jimly Asshiddiqie, “Pengadilan Khusus”, download from http://www.jimly.com/makalah/namafile/126/PENGADILAN_KHUSUS_02.pdf, on Sunday, 6th February 2017, at 20.15 p.m.

election is an administrative dispute.¹⁶ Meanwhile, according to Agung, the appropriate design of special court is an ad hoc and within the Supreme Court. This court has the authority to settle all matters relating to the regional election disputes, either dispute over the process of administration, dispute over the result, as well as administrative and criminal matters, while for the code of ethic violation still under the authority of Election Organizer Ethics Council.¹⁷

In addition, according to Harun, the dispute settlement outside the judiciary has also been adopted in the Indonesian legal system, such as environment dispute settlement, consumer dispute settlement, human rights violation settlement which are not include in the scope of criminal law, industrial relations dispute settlement and information dispute settlement. Therefore, adopting the system of election dispute settlement (including criminal election) also has justification and the institution that will run this function is Election Supervisory Agency.¹⁸

¹⁶ Slmaet Suhartono, on “Konstusionalitas Badan Peradilan Khusus dan MK dalam Penyelesaian Sengketa Hasil Pilkada Langsung” *Jurnal Konstitusi*, Volume 12, Number 3, September 2015, p. 521.

¹⁷ Dian Agung Wicaksono and Ola Anisa Ayutama, “Inisiasi Pengadilan Khusus Pemilihan Kepala Daerah dalam menghadapi Kesenjangan Pemilihan Gubernur, Bupati dan Walikota di Indonesia”, *Jurnal Rechts Vinding*, Volume 4 Number 1, April 2015, p.177.

¹⁸ Refly Harun, *op.cit*, p. 317-318.