

Importance of Establishing a Special Election Judicial Board

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Abstract—The special election courts can provide legal space for disadvantaged parties in the implementation of the stages of the election to obtain legal certainty in the life of a democratic state and accelerate the resolution of violations that occur during the stages of an election. The initial idea of a special election court is a solution to realize one of the most critical components in organizing elections, including legal certainty. Therefore, the special election judiciary, or whatever name will give it, must still be placed as a body that carries out judicial functions, which not only adjudicates disputes over election results but is a unitary problem relating to elections, including criminal acts and their state administration or administration.

Keywords—Judicial, Election, Indonesia.

I. INTRODUCTION

Every citizen must have the right and opportunity, without discrimination and without undue restrictions, to vote and be elected in genuine periodic elections and with universal and equal suffrage, and to be held by secret ballot to ensure the freedom of expression of the will of the voters. In order to give sovereignty to the people, the Indonesian state administration system recognizes a direct election system as stipulated in Article 22E of the 1945 Constitution of the Republic of Indonesia.[1]

The direct election is a manifestation of the sovereignty possessed by the people. Related to this, Miriam Budiarto stated that general elections are a condition sine qua non for a modern democratic country, where through elections citizens temporarily give up their political rights, namely sovereign rights to participate in running the country.[2] In line with this, Dahlan Thaib also stated that: The implementation of popular sovereignty cannot be separated from general elections because elections are a logical consequence of the adoption of the principle of popular sovereignty (democracy) in the life of the nation and state. The basic principle of democratic state life is that every citizen has the right to actively participate in the political process.[3]

Elections and regional head elections as the embodiment of the implementation of popular sovereignty carried out in a direct democratic system must of course be in accordance with the principles and concepts of elections.[4] As it is known that elections are carried out

through several main stages and the possibility of disputes or violations is very likely to occur in every stage of the implementation of the election. This possibility can be caused by fraud, mistakes, or election winning strategies that do not violate the law but reduce public trust (non-fraudulent misconduct).[5]

The discourse to establish a special election court has surfaced since 2009 and continues to appear in every discussion on the revision of the Election Law. However, until now, the institutional design of electoral justice has not materialized.[6] Special election courts are urgently formed as part of efforts to create electoral justice. The current institutional procedures and mechanisms for seeking electoral justice are considered vulnerable to causing overlapping decisions because there are too many doors to seek justice. As a result, the search for justice in the implementation of elections cannot be realized.[7]

A lecturer in constitutional law from Sebelas Maret University (UNS) Solo, Agus Riewanto, said that in the design regulated in Law Number 7 of 2017 concerning Elections, five institutions were given the authority to make decisions related to elections, both regarding administrative violations and violations. Election results and criminal disputes.[8] The five institutions are the Constitutional Court (MK) which decides disputes over election results; Election Organizer Honorary Council (DKPP), which decides violations of the election organizers' code of ethics; The Election Oversight Body (Bawaslu), which decides disputes over the election process; Law Enforcement Center (Sentra Gakumdu) and District Court (PN) which handle election crimes; and Provincial Bawaslu and Regency/Municipal Bawaslu which decide on election administration violations.[9] There needs to be a definite mechanism so that there are not many doors of justice in elections. Because the many entrances to seek justice do not provide benefits because it causes justice not to be achieved.[10]

The design of electoral justice with many doors creates problems because it does not fulfill the sense of justice. Court decisions often only come out when the stages have been completed. In addition, overlapping court decisions are also not uncommon because many courts have the authority to give decisions. This condition also makes the design of electoral justice ineffective and inefficient.[11] The variety of institutions that handle election cases triggers many parties to try their luck by taking advantage of the various doors of justice available when they are not satisfied with a court decision.[12] The legal basis for special election courts, in fact, already

exists and can be used as a basis for lawmakers. The legal basis includes Article 157 Paragraph (1) and (2) of Law No. 10/2016 concerning Regional Elections, Article 24 Paragraph (3) of the 1945 Constitution, and Article 38 Paragraph (1) of Law No. 48/2009 concerning Judicial Power.[13]

The Unitary State of the Republic of Indonesia is a constitutional state based on Pancasila and the 1945 Constitution of the Republic of Indonesia, which aims to create an orderly, clean, prosperous, and just live for the nation and state. According to Roeslan Saleh, the function of Pancasila as the source of all sources of law implies that Pancasila is domiciled as 1) Indonesian legal ideology; 2) The set of values that must be behind the whole of Indonesian law; 3) The principles that must be followed as a guide in making choices of law in Indonesia; 4) As a statement of the psychological values and desires of the Indonesian people, also in the law.[14]

Pancasila as the source of all sources of law is emphasized in MPR Decree No. III/MPR/2000 concerning Legal Sources and Sequencing of Legislation. Article 1 of the MPR TAP contains three paragraphs: 1) Legal sources are sources that are used as material for the preparation of laws and regulations; 2) Legal sources consist of written and unwritten sources of law; 3) The source of the fundamental national law is Pancasila as written in the Preamble to the 1945 Constitution. The TAP MPR emphasizes that the meaning of the term source of law in the Indonesian legal system is the source of law and as a reference for making laws and regulations.[15]

Furthermore, in the body of the 1945 Constitution of the Republic of Indonesia, especially Article 24, it is stated that judicial power is an independent power to administer justice to uphold law and justice so that it is necessary to realize a judicial institution that is clean and authoritative in fulfilling a sense of justice in society. For this reason, in learning democratic, honest, free, and fair elections, one must create an independent judiciary to enforce law and justice, which specifically only handles disputes over election results.[16]

A special court to settle disputes over election results must be established immediately. The existence of the Special Court is to apply the principles of the rule of law, one of which is to uphold the values of democracy and justice, especially in the context of elections. The meaning of the word 'Special' in the Special Judicial Body is that later the Judicial Body will only handle disputes over election results held every five years. There are examples of special courts that have been established so far, namely the Commercial Court, the Special Court for Corruption Crimes, the Special Court for Human Rights, and the Special Court for Children, all of which are within the General Courts under the Supreme Court (MA).[17]

The existence of a special election court that has been mandated by law is a solution to realize one of the essential components in the principles of organizing elections,[18] including legal certainty. Efforts to resolve disputes over election results through special courts do not exist and are only carried out by the Constitutional

Court; however, the spirit of dispute resolution over election results through a special court has been established, which is contained in Article 157 paragraph (1) of the Law of the Republic of Indonesia Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning Stipulation of Government Regulations in place of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors to become Laws. However, before the special court is formed, the Constitutional Court will still resolve the dispute resolution until a special election court is formed.[19]

II. FINDINGS AND DISCUSSION

Regarding the Special Elections Court establishment, Law Number 8 of 2015 concerning Regional Head Elections has been given a mandate. The mandate is contained in Article 157 Paragraph (1) of the Pilkada Law, which states that a special judicial body examines and tries the election results. Then Article 157 Paragraph (2) contains provisions for a special judicial body as referred to in Paragraph (1) to be established before implementing the simultaneous national elections. Then Paragraph (3) mentions the recording of votes obtained due to examination and trial by the Constitutional Court until the establishment of a special judicial body.[20]

The plan to establish a judicial body that appears in this Law is a form of compromise when the Supreme Court and the Constitutional Court do not want to handle the election dispute. So there is an alternative about the need to form a special judicial body that handles election disputes. Preparations to form an electoral judiciary body must be followed up by the government and the House of Representatives immediately. This is because the Pilkada Law states that there is a special court. The problem is that the Law does not specify the time limit for when the agency should be formed. Thus, must follow it up with the Law on the Election Dispute Settlement Body, there must be further regulations related to this body.[21]

Apart from the polemics that occur, the form of this judicial body can indeed vary. There are two choices when discussing special judicial bodies, and there are two choices when discussing special judicial bodies, namely, being under the Supreme Court or the Constitutional Court. The author argues that the judiciary is more suitable to be a special judicial body that is autonomous. Because the Constitutional Court only has four powers and authorities related to impeachment, there is a general judiciary under the Supreme Court. The special tribunal can be under the general judiciary; in principle, the establishment of this special election court must be clear under which judicial institution.[22]

Furthermore, it must also clarify this agency about its design and function. For example, whether the dispute over the results is enough to be resolved in the court of the first instance or can it be compared. If we can compare the results of the disputed decisions, it must also be clear what institution the appeal is submitted to.[12] Then there must also be a rule about how long it will take for disputes over election results to be resolved. Likewise,

with the competence of judges and the recruitment mechanism of this agency, must complete this design immediately.[23]

Article 27 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power states, a special court can only be formed in one of the judicial environments under the Supreme Court as referred to in Article 25. Second, this special judicial body only handles disputes over the results of the regional head elections. Meanwhile, the handling of disputes over election results at the national level remains the authority of the Constitutional Court. Third, this special judicial body for election disputes is a court of first and last instance.[24]

The decision of this special judiciary is final and binding for the sake of speedy trial and legal certainty. Fourth, this special judicial body is domiciled in the provincial capital. Based on these four things, establish a special judicial body for regional election disputes requires careful preparation. Such as the readiness of the rules, judge personnel and their employees who control election issues, infrastructure and facilities, and budget. The importance of immediately realizing the establishment of a special judicial institution for election disputes as mandated by the Constitutional Court's decision no. 97/PUU-XI/2013 and Law no. 10 of 2016.[25]

Furthermore, for Indonesia, there are three models to choose from. First, the special election judiciary is under the Supreme Court. This agency is more likely if it is under the state administrative court (PTUN). In the second model, Indonesia could form a special election judiciary that is autonomous or independent. Its position can be parallel to the Supreme Court and the Constitutional Court, and this example can imitate the practice in Mexico. The third model, this special judicial body, is carried by Bawaslu, namely by turning Bawaslu into a quasi-judicial institution. However, Bawaslu can only resolve administrative cases, ethics, and the electoral process, for this third model. At the same time, disputes over results remain the authority of the Constitutional Court, and election crimes remain the responsibility of the general court. The difference with the current design of electoral justice is that in this third model, Bawaslu does not act as a supervisor but as an investigator and decision-maker.[26]

In addition, it is necessary to define both the subject and the object of law in the special judiciary, for example, political parties, whether as private bodies or public bodies. When it is known and regulated the position of political parties in the legal structure of Indonesia, then it will be easier to determine in which court should carry out the lawsuit or the search for justice. For example, when a political party is regulated as a private body, a lawsuit against a political party's decision, for example, when there is a dispute with members of the party, is a civil court area.[27] Because both political parties and their members are private bodies, on the other hand, when a political party is referred to as a public body, the decision is a state administrative decision. Therefore all disputes

regarding political parties are handled by the Administrative Court.[28]

Furthermore, there are three models of special election courts to combine or reduce the number of electoral court doors. The first model, a special judicial body under the Supreme Court, is that this trial must be based on new legislation. His job is to handle all election cases, ranging from administrative, criminal, election disputes to disputes over election results. The second model is an autonomous special judiciary separate and parallel to the Supreme Court and the Constitutional Court.[29]

This model can minimize the potential for judicial corruption in the Supreme Court and the Constitutional Court because it contains a new system and people. It is necessary to amend Article 24 of the 1945 Constitution through amendments; this requires political consensus and special momentum. The third model is the transformation of Bawaslu into a semi-judicial (quasi judiciary). Bawaslu's task will be to strengthen the enforcement of administrative cases, the election process, and the code of ethics. Meanwhile, election crimes and disputes over election results remain in the District Court and Constitutional Court.[30]

The special judicial body is deemed more appropriate if it is under the coordination of the Supreme Court, as Article 24A of the 1945 Constitution states that the Supreme Court has other powers granted by law. In line with the concept that all election-related problems, whether criminal acts, administration, or disputes over the outcome, can be resolved in one special election court. The special election court will be designed to have rooms like the Supreme Court. There are at least 3 (three) courtrooms that are needed, First the criminal chamber; this courtroom will later try all election crimes. Thus, the formation of judges consists of at least 3 (persons), or the Panel of Judges with a minimum of one general justice career judge who has attended election crime training.[31]

The other two can be filled by ad hoc judges from academics and legal practitioners. Second, the room for state administration and administration in this room will need to be regulated in detail regarding the authority to hear election administration violations, including procedures, procedures, and mechanisms related to the administration of the implementation of elections in every stage of election administration. Besides that, it also handles electoral State administrative disputes, namely disputes that arise in the field of electoral state administration between candidates for members of the People's Representative Council, Regional Representative Council, Provincial and Regency/City Regional People's Representative Councils or political parties as candidates for election contestants or pairs of candidates for the head.[32]

Regions with the General Election Commission, Provincial General Election Commission, and Regency/Municipal General Election Commission due to the issuance of the decisions of KPU, Provincial KPU, and Regency/Municipal KPU. In this chamber, the formation is in the form of a panel of at least 3 (three) judges, filled with one career judge in the state

administrative court who has attended training in handling election administration disputes, and the other two can be filled by ad hoc judges from academics and legal practitioners.[33] Third, the results dispute room, the courtroom that will handle disputes between the General Election Commission and the participants of the regional head pair regarding the determination of the vote acquisition results from the provincial head election, which can affect the pair's vote acquisition. In this room, the formation is in the form of a panel of at least 3 (three) judges; specifically can be consider this room further whether it must be filled by career judges from the general court must fill it or not, considering the number of judges is still limited.[34]

Moreover, the competencies required are not directly related to the duties of career judges because they are associated with the resolution of disputes over election results. The judges can be drawn from elements of academics and legal or electoral practitioners. Regarding the recruitment of ad hoc judges, it is necessary to select them transparent, credible, and participatory by involving relevant institutions, such as the Government and the Judicial Commission. This special judicial body should be located in the provincial capital and be permanent; considering the nature of the electoral process that requires speed and timeliness, its decision should be final and binding so that it can take no ordinary legal remedies.[35]

This is also in line with the wishes of the Supreme Court, which seems reluctant to be given more authority because, in the end, it can increase the burden of cases in the Supreme Court. In addition, because it is permanent, the settlement of village head election disputes can be carried out by this special judicial body. It is considering that currently, the lawsuit related to village head election disputes in the regions is still being carried out through the local District Court. Equally important, after this special judicial body is established, it is necessary to draw up the procedural law in each courtroom comprehensively. Furthermore, it can also use this special judicial body to handle violations of the electoral code of ethics by the Election Organizers Honorary Council and the handling of breaches of the principle of ethics of judges of special election courts by the Judicial Commission.[36]

The establishment of a special judicial institution for general elections (Pemilu) is very urgent. So far, almost all election problems have been handled by the Election Supervisory Body (Bawaslu). Only disputes related to the results are transferred to the Constitutional Court (MK). This is considered to potentially create injustice in the Bawaslu democratic party as if it were the police, judges, and prosecutors. Some powers accumulate in one institution. When it gets from upstream to downstream, starting from supervision, prosecution, adjudication, the negative impact becomes more significant, and justice is difficult to obtain.[37]

There are several reasons why it is necessary to establish a special election court. First, there is no excessive authority in one institution, for example,

Bawaslu, which is considered to have the power to monitor criminal election violations to take action. The second reason why there is a need for a special election court is that it is considered to speed up the electoral dispute process in the Constitutional Court. Moreover, in the 2024 presidential election, the Indonesian House of Representatives, the Regional Representative Council (DPD), and the provincial and district/city DPRD's will remain at the same time. With limited resources and many cases coming from all levels, the workload of the Constitutional Court has also become even heavier with 9 (nine) judges. The following reason why a special election court is needed, according to him, is to prevent overlapping decisions.[38]

In the election so far, many issues have not been resolved until the election process ends. In addition, the settlement of disputes over election results, starting from the Regional People's Representative Council, Regional Representative Council, People's Representative Council to the presidential election, all pile up in the Constitutional Court. With limited resources, the resulting decisions are often not optimal. The electoral justice in the country has been a very anomaly. Many cases are decided after the election phase is over. When the election phase ends, people imagine that the case verdict has been completed, but in reality, it has not been, and finally, justice has not been achieved.[39]

Not to mention there are overlapping judicial decisions that make legal certainty not achieved. The polemic of overlapping findings makes the judicial process ineffective and inefficient. After going through long stages, costing the state quite a lot, the decisions that emerged were confusing; in the end, the results did not reach the goal. Therefore, it is essential to create a special judicial institution that focuses on solving problems related to elections. The goal is that the election results have legal certainty so that they can realize justice. However, the establishment of the judiciary requires a long process to find a suitable scheme. Must be able to determine what the institution's design will be like, what kind of reach, do not just replicate existing institutions.[40]

Agus Riewanto, an expert on constitutional law from the Faculty of Law, Sebelas Maret University, in an online discussion entitled 'Measuring the Urgency of the Special Election Court,' which was held by Perludem, said that there are five doors in the judicial system of election cases in Indonesia. Namely, cases of administrative violations at Bawaslu up to the district/city level, criminal election violations at the Integrated Law Enforcement Center and district courts, electoral process disputes at Bawaslu, the code of ethics for election administrators at the Election Organizing Honorary Council, and election results disputes at the Constitutional Court (MK).[41]

The practice of 'justice in many rooms' opens up opportunities for people to make a profit. If this place fails, look elsewhere. Of course, this endangers our electoral system because it becomes uncertain and makes people try it out. For example, in the case of General Chairman Hanura Oesman Sapta Odang (OSO), who is

also a candidate for the Regional Representatives Council of the Republic of Indonesia in the 2019 Election. At that time, the General Elections Commission thwarted his nomination because it was based on the Constitutional Court's decision that candidates for the Regional Representatives Council could not come from political parties. OSO then sued the Supreme Court, which later granted it. [42]

However, in the end, the General Election Commission still adhered to the Constitutional Court's decision which was considered superior. In addition, there is the case of Ngadiono, whose name was removed from the list of candidates for election violations in the form of using an official car based on a district court decision. The Gerindra Party politician then took the path of the State Administrative Court and was not proven guilty. The cases above trigger uncertainty in election law and reduce the authority of the judiciary. So overlapping court decisions, making legal certainty not achieved and making it difficult for justice seekers and eliminating the court's power.[43]

III. CONCLUSION

The judicial body is made effective to handle Disputes over Election Results, the Constitutional Court will continue to handle post-conflict local election cases before forming the special judicial body. The deadline for establishing a special judicial body is before the implementation of simultaneous national elections, which means that this special judicial body must exist before 2024. The need for special election courts in the implementation of simultaneous elections is a legal ideal whose purpose is to protect the constitutional rights of citizens and participants in the election. The Special Election Courts can provide legal space for disadvantaged parties in the implementation of the stages of the election to obtain legal certainty in the life of a democratic state and accelerate the resolution of violations that occur during the stages of an election. The initial idea of a special election court is a solution to realize one of the most critical components in organizing elections, including legal certainty.

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