

# Special Judicial Reform Election in Indonesia

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**Abstract**—Democracy, and elections are two sides that are interrelated and cannot be separated from one of them. A country is called a democracy if it can hold elections peacefully and sustainably. One of the most important things in holding elections peacefully is the availability of a judicial mechanism for eligible participants who are disputing due to dissatisfaction with the implementation and results of the election. This research is empirical normative research with an emphasis on the normative side. The results obtained are that currently there is no special election court in Indonesia. So the establishment of a special election court as mandated by Law No. 7 of 2017 concerning Elections is important to realize along with the mechanism of authority and institutional structure of the judiciary.

**Keywords**—Democracy, Elections and Electoral Justice

## I. INTRODUCTION

A country can be said to be prosperous if the government or the authorities can provide for the welfare and equal justice for all residents or citizens. In its efforts to achieve prosperity and justice for its citizens, the government must run the government following the principles, objectives, and functions, namely as a servant of the people because government comes from the people for the people. As revealed by Abraham Lincoln in 1867 "government of the people, by the people and for the people" [1]. Based on this, then to realize the government of the people by the people and for the people held elections. Elections are an integral part of democracy [2].

Elections are conceptually a means of implementing popular sovereignty. Through elections, the legitimacy of people's power is implemented through the surrender of some of their powers and rights to their representatives in parliament and government. With this mechanism, at any time the people can hold the government accountable for their power [3].

Likewise with the Unitary State of the Republic of Indonesia (NKRI). As a country that has just escaped from the grip of an authoritarian regime towards democracy, realizing honest and fair elections (*judil*)

is a necessity. This is because during the New Order era, although elections were held regularly every 5 (five) years, long before the vote counting was carried out, the winner of the election was predictable.

So the 1998 reform is an entry point for changes in the future of democracy, whether Indonesia will become a democratic country or even fall further into the puddle of oligarchic and plutocratic states.

The 1998 reformation did not only change the ruler from Suharto to BJ Habibie but also changed the government order from despotic to democratic. One of them is through the implementation of elections both at the center and area in a fair manner (honest and fair) and overflow (direct public free of secrets) as mandated by law.

Because even though the election slogan in the New Order era was overflowing (direct public, free and secret), it was only black and white which was not following the implementation in the field. This is then called pseudo-democracy in the sense that formally democracy has been implemented, but materially there are many violations and fraud in it which are ignored and even become a necessity to be realized by involving the state civil apparatus (ASN) and ABRI.

This has implications for Suharto who was able to rule as President of Indonesia for approximately 32 years and Golkar from the first election in the New Order era to the last, namely 1997, always ruled in parliament with more than 50% seats so that when a vote was held to decide whether to accept or reject it. executive policy, Golkar as the party that stands for the government in parliament always wins, and the executive policy swings unhindered by the parliament [4].

Therefore, the implementation of democracy in various countries in the world has its characteristics and specifications, which are usually strongly influenced by the social, economic, cultural, and political conditions and developments of the people in a country. Therefore, the form of democracy in a country should pay attention to the traditional values, social, economic, and local political potential of the country concerned [5].

Even some observers state that democracy is currently experiencing stagnation, erosion, and even recession. So it is not surprising that there is a view that states that democracy is not appropriate to be applied in all parts of the world, especially the failure of the Arab Spring to bring democracy. Apart from the incompatibility between culture and democracy, some argue that the location of the decline in democracy is because the focus of democracy has always been on elections and not on other essential features of democracy [2].

Because the essence of democracy is welfare and justice for all people, not just groups. Democracy is only a tool for a welfare state and justice. This is inseparable in a democratic country every citizen is given the same opportunity to serve the country and there is also a limitation of power to avoid the abuse of power by the authorities. As stated by Lord Acton "Power tends to corrupt, and absolute power corrupts absolutely".

The form of the limitation of power is through the implementation of elections which in several countries experience time differences. Some are every 4 (four) years like the Philippines and the United States, but some are every 5 (five) years like Indonesia. Even in some countries, it is also added that if they have been elected for 2 (two) consecutive times, they may not nominate for a third time so that they can still provide opportunities for other citizens to participate in contributing to the development of the country, either by running for regional head or head of state.

To realize an election that is overflowing and fair is not only seen from the aspect of the organizer but also more importantly in the aspect of law enforcement. Because starting from the 1955 election until the last election in 2018 there were no clean elections. It is always peppered with the practice of election violations and crimes both committed by election organizers such as the KPU and Bawaslu to election participants through their success teams who are disappointed to lose in the elections in particular.

The design of an independent election management institution is determined by the electoral legal framework that regulates the position, membership, duties, and authorities, selection procedures, filling secretariat positions, and enforcing violations of the code of ethics, as well as sources of election funding [6].

According to Maurice Durverger [7] in an election several conditions are necessary and must be sufficient, namely:

- There must be general freedom of rights (freedom of the press, freedom of assembly, freedom of assembly, freedom of assembly, freedom of religion, and others that are necessary so that the people's rights to vote do not become an illusion, because one choice can

only be made if all elements are known. of what is done;

- Political parties and opposition leaders are highly respected;
- There is no political police whatsoever and no means of coercion against those who completely disapprove of the pancreas in power;
- The pangreh do not exercise their rights when advancing in front of an audience who will vote, so they are on the same level as their opponents.

Meanwhile, Sri Soemantri [8] citing the views of the International Commission of Jurist in Bangkok in 1965 giving the terms of democracy are as follows:

- The existence of constitutional protection;
- The existence of an independent and impartial judicial power;
- There is a general election;
- There is the freedom to express opinions;
- The existence of opposition tasks;
- There is civil education.

In this view it is clear that the first point of a democratic requirement is the existence of constitutional protection, this is a manifestation of the convergence of popular sovereignty which in its implementation requires the rule of law [9].

Based on this background, the writer draws a common thread on the root of the problem which is formulated as follows: 1) How is the dynamics of state institutions in Indonesia after the amendment to the 1945 Constitution?; 2) How is the existence of electoral institutions in Indonesia? and 3) What is the model of special electoral justice in Indonesia.

## II. RESEARCH METHODS

Empirical normative legal research methods with a point of emphasis on formative research were used in this research [10]. This normative legal research emphasizes the legal material, namely the applicable legislation and literature related to the subject matter. This study used primary, secondary, and tertiary legal materials, where the primary legal materials include laws and regulations that are binding and directly related to this study, namely: the 1945 Constitution, Law No. 12 of 2003, Law No. 22 of 2007, Law no. 15 of 2011, Law No. 7 of 2017, Law No. 32 of 2004, Law No. 23 of 2014, as well as other laws related to elections.

In addition to using primary legal materials, the author strengthens the author's research with secondary legal materials, namely written literature related to the subject matter in this study, in the form of books, papers, journals, newspaper articles, and so on.

While the tertiary legal materials are taken from the translation of materials, explanations of primary and secondary legal materials in the form of dictionaries, encyclopedias, and others.

### III. DYNAMICS OF STATE INSTITUTIONS

State institutions (state organs) or state bodies are the nomenclatures given to the bearers of functions in the state administration system, which must work together in achieving the shared goals set [11]. Actually, in simple terms, the term state organ or state institution can be distinguished from the words private organs or institutions, community institutions, or what is commonly called NGOs or Non-Governmental Organizations which in English are called Non-Government Organizations or Non-Governmental Organizations (NGO's). Therefore, any institution that is not formed as a community institution can be called a state institution. State institutions can be in the realm of the legislative, executive, judicial or mixed [12].

The word institution in practice is used in many meanings or purposes. As an equivalent word, the institution is also intended to have the same meaning as the institution. The word institution is also equated with the word institution, therefore it is known as democratic institutions, marriage institutions, pre-judicial institutions, and so on. On the other hand, institutions also mean the same meaning as organizations or bodies, and from this understanding, the names of the Indonesian Institute of Sciences (LIPI), the National Land Agency (Lemhanas) are known [13].

A state institution itself is a government institution or "civilized organization" where the institution is created by the state, from the state, and for the state which aims to build the country itself [14]. In Dutch the conception of state institutions is called *staatsorganen*, while English literature is called Political Institution, while in the Big Indonesian Dictionary (KBBI 1997), the word institution is defined as (i) the origin or future (which will become something); (ii) original form (form, form); (iii) references, ties; (iv) bodies or organizations that aim to conduct scientific investigations or carry out a business; and (v) an established pattern of behavior consisting of structured social interactions [12].

State institutions are sometimes referred to as government agencies, non-departmental government agencies, or simply state institutions. Some are formed based on or because they are given power by the Constitution, some are formed and get their power from the Law, and some are even formed only based on a presidential decree. The hierarchy or rank of position, of course, depends on the degree of the arrangement according to the applicable legislation [12].

To understand the meaning of state institutions or organs in more depth, we can find in Hans Kelsen's view of the concept of the State Organ in his book *General Theory of Law and State*. Hans Kelsen

explained that "Whoever fulfills a function determined by the legal order is an organ" which means that anyone who carries out a function determined by a legal order is an organ [15].

However, in the context of the Indonesian state administration, according to Lukman Hakim in his book *The Legal Position of the State Commission in Indonesia*, it is stated that there is no clear understanding of state institutions [13]. This then requires further explanation governing state institutions, including the conditions for the formation of commissions, whether ad hoc or permanent, as well as the existence of the same standard mechanism in determining and selecting commission members and the accountability mechanism.

Indonesia itself after the amendment to the 1945 Constitution has abolished the highest state institutions. So that in Indonesia there are high state institutions, state institutions, and independent institutions whose existence depends on whether they are ordered by the 1945 Constitution such as the President, Vice President, DPR, DPD, BPK, MA, and MK. Or because it is ordered by law like Komnas HAM [16], Bawaslu [17], DKPP [18], Information Commission [19], Indonesian Broadcasting Commission [20], and the Ombudsman [21].

### IV. THE EXISTENCE OF ELECTION INSTITUTIONS IN INDONESIA

The 1998 reform that gave birth to a period of political transition certainly had an impact on the implementation of elections in Indonesia. Huntington [22] states that the transitional era elections are: first, a sign of the end of the non-democratic regime, as well as the institutionalization of democracy and the rebuilding of social cohesion that has been fractured due to the tug-of-war between various social groups in society. Second, it means the inauguration of a new government or a democratic regime that replaces the fallen government. Third, elections in the transitional era are a manifestation of the consolidation of the democratic system, which is an effort to strictly maintain the return of the status quo regime to occupy the seat of power.

Based on this, the emergence of various independent institutions or independent commissions is unavoidable as a result of the failure of the old core state institutions that did not gain the trust of the people. This includes the emergence of state institutions administering elections from the central to the regional levels.

The election management institutions in Indonesia are divided into three, namely DKPP, Bawaslu, and KPU, each of which has its duties and functions following the mandate of the founding law.

#### A. Election Organizer Honorary Council (DKPP)

In the electoral discourse on a global scale, the attention of the international community in recent years

is no longer only focused on the realization of free and fair elections but has begun to campaign for the importance of electoral integrity. In July 2012, the International Political Association based in Madrid held a world congress on “Prospects and Challenges of Electoral Integrity”. In September 2012, the Global Commission on Election, Democracy, and Security chaired by Kofi A. Annan published a work report on “Strategies to Improve Election Integrity Around the World” and Harvard University, in June 2013 also held a workshop with the theme “Concepts and Indices of Electoral Integrity” [23].

Based on this, the existence of an ethics council in every state institution is important, especially in the implementation of elections that involve many participants and supporters.

The structure of election management has historically been regulated by Law No. 12 of 2003 concerning elections, namely the existence of an ethical body that is ad hoc and can only be formed by the KPU. In the next period, based on Law No. 22 of 2007, the KPU Honorary Council (DK KPU) and the Bawaslu Honorary Council (DK Bawaslu) were formed and were ad hoc.

Then through Law No. 15 of 2011, a permanent Election Organizing Honorary Council (DKPP) was formed which has the authority to maintain the ethical dignity of election organizers. DKPP is given the authority to examine and decide on complaints and/or reports of alleged ethical violations committed by election administrators. DKPP is located in the national capital and its members consist of one Bawaslu element, one KPU element, and 5 (five) community leaders. The DKPP members come from community leaders, followed by the president as many as 2 (two) people and by the DPR as many as 3 (three) people.

As an ethical judicial institution for independent election organizers, DKPP has resolved many complaints of ethical violations committed by state officials. Based on data from June 2012 to December 31, 2014, DKPP has received 561 complaints with details in 2012 receiving 99 complaints, in 2013 as many as 577 cases, and in 2014 as many as 885 complaints [24].

Entering the preparation for simultaneous elections in 2019, Law No. 15 of 2011 was replaced with Law No. 7 of 2017 concerning Elections where the authority of DKPP has not changed, namely resolving cases of ethical violations committed by election organizers, namely the KPU and Bawaslu.

The number of reports from April to August is related to the simultaneous regional elections in 2018 in 17 provinces, 39 cities, and 115 districts throughout Indonesia. This shows that the ethics of election organizers are still weak due to the lack of quality human resources and the recruitment process for

election organizers which is still influenced by the role of political parties in it.

#### *B. Bawaslu*

In 1982 the Election Supervisory Committee (Panwaslak Election) was formed following the mandate of Law No. 2 of 1980 as a replacement for Law No. 4 of 1975. The emergence of the Election Panwaslak was due to demands from the PDI and PPP regarding the number of election violations in 1977. However, this law does not explain the mechanism of supervision. Instead, the supervisory mechanism was left to government regulations which were never honest and independent. Over time, at the end of 1984, for the third time, the government proposed changes to the electoral law. This proposal was accepted by the DPR so that on January 7, 1985, Law Number 1 of 1985 concerning Amendments to Law Number 15 of 1969 concerning the General Election of Members of the Consultative Body/People's Representatives was enacted as amended by Law Number 4 of 1975 and Law No. 2 of 1980 (Law No. 1/1985).

The various changes to the law on elections in the New Order era did not substantially change the general election mechanism. The changes to the law only adjust to the existing conditions in the region and to further legalize the dominance of Golkar in every election held in Indonesia.

So learn from the experience of organizing elections in the New Order era and based on developments in the community, especially after the amendment to the 1945 Constitution. So the KPU as the only election organizing organ is considered to have many shortcomings so that a new institution is needed to assist the KPU's performance. Starting from the issuance of KPU Decree No. 88 of 2003 concerning *Panwas* (election supervision). Then the existence of *Panwas* is evaluated and made permanent with the establishment of BAWASLU. The Election Supervisory Body (BAWASLU) is one of the election management institutions that was permanently established in 2009 due to the mandate of Law No. 22 of 2007 concerning the Implementation of General Elections. Although, in 1997, efforts were made to establish an Independent Election Monitoring Committee (KIPP), it did not run optimally due to the repressive actions of the New Order government. The existence of BAWASLU itself cannot be separated from the importance of monitoring mechanisms for the realization of quality elections.

Similar to the KPU, the results of the evaluation of the 2004 election encouraged the government and the DPR to organize the election supervisory institutions through Law No. 22 of 2007. In this law, election supervisors receive special attention, apart from the name and nature of the institutions that were originally election supervisors. is ad hoc, changed to Bawaslu as a permanent institution at the central level, as well as strengthening on the side of institutional authority [25].

### C. KPU

Elections in Indonesia have a long history. It is also closely related to the election organizers. The organizers of the election are the Election Organizing Body (Law No. 7 of 1953 concerning the Election of Constituent Members and Members of the People's Representative Council), Election Organizing Institutions (Law No. 15 of 1969 concerning the General Election of Members of the Consultative Body/People's Representatives) until finally The General Election Commission and the Election Supervisory Body (Law No. 15 of 2011 as amended by Law No. 7 of 2017 concerning Elections) are formal legal structures that support the realization of democracy in Indonesia [26].

The Constitution stipulates that general elections are held by an election commission that is national, permanent, and independent [27]. Concerning the election management institution, there was indeed a debate as to whether the constitution meant the KPU or other institutions. However, the debate has ended and several references have confirmed that whatever the name of the institution as long as it carries out the task of organizing elections, it is considered as election organizer, such as KPU and Bawaslu [12]. This is because the law on election management also stipulates that the organizers are KPU and Bawaslu [28].

### D. Comparison of Election Organizers

#### 1) Kenya

The electoral commission in Kenya is known as the Independent Electoral and Boundaries Commission (IEBC), created on 9 November 2011 under the Kenya Constitution of 2010 [29].

The KPU of Kenya is in charge of organizing and supervising the referendum and all forms of elections as regulated and mandated by the constitution, particularly in the following matters [29]:

- Voter registration and updating of voter data;
- Determination of electoral districts;
- Regulation on the political party process;
- Voter education;
- Facilitation of election monitoring, monitoring, and evaluation;
- Regulations regarding political financing by both candidates and political parties in all types of elections;
- Formulation and implementation of codes of conduct for candidates and political parties;
- Supervision of political party compliance with laws and regulations in terms of candidate registration.

#### 2) India

Elections in India are held by the Election Commission of India (ECI). ECI stands as a permanent and independent institution. With the task as a national election organizer as mandated by the Indian constitution Article 324 "superintendence, direction and control of election to vested in an Election Commission". Meanwhile, local elections are held by The State Election Commission (SEC), which are permanent and independent. A member of the SEC is a high court judge filed by the ECI and can only be replaced/dismissed by parliament. This is done to maintain the institution's independence from state government intervention [30].

#### 3) Australia

The General Election Commission in Australia is currently known as the Australian Election Commission (AEC). Initially, in the 1973-1984 period, the Australian electoral commission was named the Australian Electoral Office and was part of the ministry of home affairs. Its status changed to an independent institution on February 21, 1984, since the amendment to The Commonwealth Electoral Act 1918 was made [29].

#### 4) United States of America

Elections in the United States are carried out by a commission, namely the Federal Election Commission (FEC). The FEC was formed in 1975 by congress. Congress created the FEC to administer and enforce the Federal Election Campaign Act (FeCa), the law governing federal election financing [29].

The FEC's six commissioners work full-time and are responsible for administering and enforcing federal election campaign laws. They meet in closed sessions to discuss matters such as law enforcement but remain confidential. Formulate public policies related to elections. Apart from that, it also gives a voice on legal and administrative matters regarding the administration of elections [29].

#### 5) Philippines

The Philippine General Election Commission (COMELEC) is one of the three constitutional commissions of the Philippines. Under the Constitution, Comelec is independent of the executive, legislative, and judicial bodies of the Philippine government. Comelec was formed in 1940 following the amendments to the Philippine constitution in 1935 [29].

Before Comelec was founded, the implementation and supervision of elections were carried out by The Secretary of Interior or the Minister of Home Affairs. However, due to concerns over the partisan attitude of the Minister of Home Affairs to exploit his power and influence to support his party's victory in the elections, the independent electoral institution was established [29].

### *E. DKPP as an Election Court*

The judicial dispute over the results of the general election (election) in Indonesia was born after the amendment to the 1945 Constitution of the Republic of Indonesia (UUD 1945). Article 24C paragraph (1) of the 1945 Constitution gives authority to the Constitutional Court (MK) as a judicial institution that decides disputes or disputes over election results, both legislative (DPR, DPD, DPRD) as well as presidential and vice-presidential elections. In its development, the MK's authority to adjudicate disputes over election results has expanded, including disputes over the results of regional head elections (*pilkada*) since the transfer of authority to adjudicate from the Supreme Court [31].

The inclusion of the Constitutional Court as a judicial institution with the authority to decide electoral disputes makes the Constitutional Court included in the political court because elections are very closely related to politics. The phenomenon of judicialization of politics can be said to be something common in a constitutional democracy, but not a few are skeptical of this phenomenon and criticize it because, with the inclusion of political cases, the court will use political considerations in making decisions. his decision, on that basis Jonghyun Park in his writing stated that the phenomenon of judicialization of politics can destroy the values of the rule of law [32].

The fact is that this additional burden has a very real impact on the draining of energy for the judges of the Constitutional Court so that the implementation of the authority to review laws against the 1945 Constitution seems to have been "beaten" by the exercise of the authority to settle electoral disputes in the presidential, legislative and regional head elections.

Based on available data since the transfer of authority to decide post-conflict local election disputes from 2008 to mid-August 2013, the Constitutional Court has decided on 598 applications. Whereas since the simultaneous post-conflict local elections were held in 2015, the Constitutional Court has received as many as 88 dispute claims and in 2017 the Constitutional Court received 49 dispute claims so that in total since the implementation of the simultaneous post-conflict local elections, the Constitutional Court has received 137 lawsuits for post-conflict local elections. As for the judicial review, in 2016 the Constitutional Court received 111 applications for judicial review plus the remaining 63 cases in 2015 so that there were a total of 174 judicial reviews throughout 2016. Another and no less important impact is the dragging of several judges. Constitutional Court to cases of violations of the code of ethics [33] and bribery cases [34] involving participants or contestants for the post-conflict local election.

Reconceptualizing or rearranging the concept of dispute resolution on election results, is intended to find alternative solutions to dispute resolution on election results that can provide a sense of legal certainty,

justice, and benefit to the disputing parties or other parties involved [35].

So separating the election disputes from the Constitutional Court becomes a necessity to maintain the dignity of the Constitutional Court which initially aims to test laws against the 1945 Constitution, disputes between state institutions, disbanding political parties, and testing the DPR's impeachment assessment of the president. Because during the dispute over the election results, the Constitutional Court's decision can be guessed between recounting or re-voting in areas or regions that have a significant influence on changes in votes between candidates.

Meanwhile, in the form of data, the majority of countries in the world, i.e. 59% or as many as 132 countries, provide dispute resolution authority to the judiciary. Meanwhile, 37% or as many as 84 countries implement dispute resolution by election management institutions, including Indonesia [2].

Based on this, the authors offer the establishment of a special institution for resolving electoral disputes both at the center and at the local level. This phenomenon is related to the importance of electoral justice not only for participants but also for the voting community.

So releasing the electoral justice from the election administrator becomes a very urgent need. This is intended so that election judges become more focused on resolving election disputes both for the presidential election, DPR, DPD, DPRD, and regional heads.

Within the judiciary, there are currently at least eight special courts under the general, religious, and state administrative courts, namely: juvenile court, commercial court, human rights court, court for corruption, industrial relations court, fisheries court. , sharia courts and tax courts. The first six types of courts are courts within the general court environment, while the last two types of courts are within the religious courts and state administrative courts respectively [36].

One of the forms is by making the DKPP a special election court that is permanent from the center to the regions. Because so far the DKPP has been running the ethics court for election administrators, whose position will be replaced by the ethics council in every election management institution whose existence is only in the center, not in the regions. Why not use Bawaslu as an electoral judiciary? According to the author, if Bawaslu is changed to an electoral judiciary, while election supervision is handed over to non-governmental organizations as a manifestation of participatory supervision, it will be very vulnerable to lawsuits for election disputes by NGOs or the general public.

By continuing to make Bawaslu an election supervisory agency, it will continue to position Bawaslu as the prosecutor's agency, which is a public prosecutor. So that there are still efforts for people who have difficulty resolving election disputes through

lawyers or themselves can report and be accommodated by Bawaslu. This is related to the condition of the democracy index [37] Indonesian society is not yet well, so they still need an official state institution, namely Bawaslu to participate in supervising the implementation of elections.

This can be seen in the Indonesian Democracy Index (IDI) in 2017 which reached 72.11 on a scale of 0 to 100. This figure has increased compared to the 2016 IDI figure of 70.09. The achievement of Indonesia's democratic performance is still in the "medium" category. The classification of the level of democracy itself is grouped into three categories, namely "good" (index > 80), "moderate" (index 60–80), and "bad" (index < 60) [37].

#### V. CLOSING

Separating disputes over election results from the Constitutional Court is an option that must be done immediately to maintain the authority of the Constitutional Court as the highest institution that specifically adjudicates judicial review of laws against the Constitution, disbandment of political parties, disputes over authority between state institutions and alleged violations of the president by the DPR. This is related to so far the decision on the dispute over the election results in the Constitutional Court cannot be separated from the recount or re-voting if the dispute request is accepted by the Constitutional Court.

So redesigning the institution authorized to settle disputes over election results and local elections must be done without creating a new institution but utilizing the existing election management institution. The author tends to make DKPP as an electoral judiciary institution related to so far DKPP has functioned as an ethical institution for organizing elections.

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