

The Establishment of Special Election Courts in Indonesia Based on the State Principles of Democratic Law

Abdullah Abdullah

Law Faculty of Hasanuddin University

*Corresponding author. Email: dhoel82@gmail.com

ABSTRACT

The existence of different settlement institutions for disputes in some courts make law enforcement often run ineffective and inefficient. Disputes over the election process have become too convoluted because those involve many institutions such as Election Supervisory Agency (Bawaslu) in province, regency/city, as well as the Supreme Court (starting with the State Administrative Court). Not only is the process convoluted, dispute resolution in the election process also takes a very long time. In addition, problems in enforcing election law also occur due to the inaccuracy of granting authority to an institution and the inconsistencies in implementing the authority itself. Thus, it is essential to form a special election court in Indonesia. The method of this research is normative law (normative law research) by basing research on secondary data, namely data obtained through library research, which is in the legislation form, books, journals, law dictionaries and others. The results of the special election court institution will be classified into several rooms. There are at least 3 (three) court rooms required, First, the criminal room. This courtroom will try all election crimes that occur. Second, the room for state administration, includes procedures and mechanisms related to the administration of each stage of the elections. Third, the room for dispute results. This courtroom will handle disputes between the General Elections Commission (KPU) and the participants of the candidate regarding the determination of the vote acquisition results from the candidate election which can affect the candidate's vote acquisition.

Keywords: *Special Courts. General Election, Democracy.*

1. INTRODUCTION

Indonesia is a democratic country. This can be seen from the constitutions that have been in force in Indonesia, especially the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia). Even though the constitution is different, the main principle is that sovereignty rests with the people. However, in practice there have been changes in the mechanisms and procedures for the implementation of popular sovereignty in accordance with the development of Indonesia's social, political and constitutional situation. As a democratic country, Indonesia has held elections since 1955. Furthermore, under the New Order regime, it was recorded that Indonesia held six general elections, starting in 1971, 1977, 1982, 1987, 1992 to 1997. In the reform era, Indonesia has carried out five times general elections, starting from 1999, 2004, 2009, 2014 to the last in 2019.

In accordance with the provisions of the 1945 Constitution of the Republic of Indonesia, elections are held in a direct, general, free, confidential, honest and fair every five years. Elections are held to elect the President/Vice President, DPR members, DPD members, Provincial DPRD members and Regency/Municipal DPRD members. To ensure the implementation of democratic, honest and fair elections, Article 22 E paragraph (5) of the 1945 Constitution of the Republic of Indonesia stipulates that general elections are held by an election commission that is national, permanent and independent. It should be noted that this provision only explicitly stipulates the duties and authorities but does not explicitly mention the name of the election management institution. Therefore, the phrase 'election commission' in the provision is written in lowercase. By writing such a phrase, the legislators are given the freedom to determine the name of the election management institution.

The provisions of Article 22 E paragraph (5) of the 1945 Constitution of the Republic of Indonesia were translated by the forming Law Number 7 of 2017 concerning General Elections. Law Number 7 of 2017 regulates three election management institutions, namely the General Election Commission (KPU), the General Elections Supervisory Agency (Bawaslu) and the Honorary Council for General Elections Organizers (DKPP). The relationship between the three election management institutions can be seen from their respective duties and authorities. The KPU is given the task and authority to organize every stage of the election until the election of state administrators in the executive and legislative fields, both at the central and regional levels. The Bawaslu is given the task and authority to oversee the implementation of each stage of the election in accordance with the provisions of the legislation. In addition to KPU and Bawaslu, another element of election organizers is the Honorary Council for General Elections Organizers (DKPP). DKPP is given the task and authority by law to become an ethical judicial institution for election organizers (KPU and Bawaslu and their staff). In addition to election management institutions, several state institutions are also still related to the implementation of elections.

Several institutions that are still related to the implementation of elections are the Constitutional Court, the Supreme Court and its lower ranks as well as institutions related to the Integrated Law Enforcement Center (Sentra Gakumdu). If you look at the design of tasks and authorities as well as the relationship between election management institutions from the previous law, there are efforts to change and improve institutions in order to realize the principles of direct, general, free, confidential, honest and fair elections as mandated by the constitution. However, one important aspect that still needs improvement is related to the arrangement of the electoral court. It must be admitted that in every election, election violations are increasingly complex, both violations of the process and violations of election results. These election violations then lead to disputes, both process disputes and election results disputes.

In general, election disputes arise as a result of, first, participants' dissatisfaction with the election organizers as a result of the actions and policies of the election organizers that are considered detrimental to election participants; second, there are irregularities or fraud committed by election participants. The fraud can take the form of file falsification, intimidation, campaign violations or money politics.

These election problems or disputes should not be left unchecked so that mechanisms and authorized institutions are needed to resolve them. Negligence in resolving election disputes will not only interfere with the smooth/successful election and result in low credibility and legitimacy of the election, but it is also

related to the electoral justice system. In the end, if there is an election injustice, it can threaten and ignore the constitutional rights of the election participants in particular, and Indonesian society in general.

2. RESEARCH METHODS

The research method uses normative law research by basing research on secondary data, namely data obtained through library research, in the form of legislation, books, journals, legal dictionaries and others.

3. RESULTS AND DISCUSSION

3.1 Electoral dispute resolution does not reflect democratic principles

General elections are one of the main means of establishing a democratic political order. Its function is as a means of nourishing and perfecting democracy, not as a goal of democracy. Elections are an acknowledgment and embodiment of the people's political rights and the delegation of these rights by the people to their representatives to run the government. Kansil explained that elections are a means of implementing the principle of people's sovereignty based on Pancasila (Pancasila Democracy) in the Republic of Indonesia.

According to Jimly Asshiddiqie, there are four objectives of holding general elections, namely:

1. To allow for an orderly and peaceful transition of government leadership
2. To allow for a change of officials who will represent the people's leadership in representative institutions
3. To implement the principle of popular sovereignty in representative institutions
4. To implement the principle of citizens' human rights.

From Jimly's opinion, the author can conclude that the purpose of holding the General Election is to replace the old government with a new government, to prevent an eternal government that tends to create a government that is not pro-people. In Indonesia, elections are held once every five years, organized by the General Elections Commission (KPU). It is hoped that the election will provide justice that is expected by the people. For this reason, elections must be supported by the concept of justice in elections.

In the concept of electoral justice, every party involved in the election, such as election participants, candidate pairs, campaign teams and members of the public, should not be harmed or treated unfairly. In order for justice to be achieved, it is necessary to provide a mechanism for resolving legal problems that

occur in elections. There are three mechanisms that can support the concept of justice in the election, namely: ensuring that every action, procedure, and decision related to the election process is in accordance with the legal framework; protect or restore voting rights and; enable citizens who believe that their voting rights have been violated to file complaints, attend trials, and obtain decisions. In addition, elections as a means of people's sovereignty should reflect honesty and justice. An honest election can be seen from all parties who participate in the implementation of the election and must behave and act honestly in accordance with the laws and regulations. Meanwhile, an election that is considered fair is an election that does not differentiate between voters and election participants. Elections must be carried out with a comprehensive legal framework, if elections are conducted without a comprehensive legal framework, are not based on consensus, do not fully refer to democratic principles and values, are not well organized, and there is no available electoral justice mechanism, the election will worsen existing friction will even tend to lead to conflict.

In the process of organizing elections, the election process does not always run smoothly. Various obstacles in the implementation of elections, both during and before the election, are problems that will certainly have a wide impact if they are not immediately resolved properly. The existence of problems in the implementation of elections related to dissatisfaction with the decisions of election administrators or criminal or administrative violations that affect the election results are commonly referred to as election disputes.

The word election dispute when viewed etymologically can be seen from the term dispute. The dispute is an implication of the emergence of problems that arise in the election. Research results from the Institute for Democracy and Electoral Assistance (IDEA) define "electoral dispute, namely "any complaint, challenge, claim or contest relating to any stage of the electoral process." From this understanding, the scope of electoral dispute is basically broad and covers all stages of the general election. Topo Santoso is of the opinion that the so-called disputes in the administration of elections are actually cases of violations of election administration or cases of dissatisfaction with the decisions of election administrators.

The 1945 Constitution of the Republic of Indonesia does not specifically regulate the resolution of disputes over election results, only regulated in Article 24C paragraph (1) which regulates the Constitutional Court (MK), namely that one of the constitutional powers of the Constitutional Court is to adjudicate at the first and final levels whose decisions are final for break PHPU. According to the provisions of Article 74 paragraph (2) of Law Number 7 of 2020 concerning the Third

Amendment to Law Number 24 of 2003 concerning the Constitutional Court, it stipulates that PHPU can only be filed against the determination of election results conducted nationally by the KPU which affects: (a) election of candidates for members of DPR; (b) the determination of the pairs of candidates who enter the second round of the Presidential and Vice-Presidential election as well as the election of pairs of candidates for President and Vice-President; (c) the acquisition of seats of political parties participating in the general election in an electoral district.

Based on the above understanding, the Law granting the Constitutional Court the authority to resolve and decide on the PHPU is only limited to disputes over the number of votes acquired by the election participants determined by the KPU nationally. This means that the Constitutional Court is only given the limited authority to recalculate votes without being able to consider violations that are very likely to occur in the election process. According to Law Number 7 of 2017 concerning General Elections, election violations and election process disputes are resolved by the Election Supervisory Committee and the Supreme Court (in this case Bawaslu in stages).

Article 22E paragraph (1) of the 1945 Constitution states that, "General elections are held in a direct, general, free, secret, honest and fair manner every five years". Therefore, the Constitutional Court must be able to ensure that the elections are transparent and fair at every stage. If the Constitutional Court is only limited to counting the votes mathematically and calculatively, it is clear that the Constitutional Court will not be able to play its role as a guardian of the constitution and democracy optimally. On this basis, in the practice of adjudicating PHPU cases, the Constitutional Court not only dissects the application by looking at the results of the vote, but also examines carefully whether or not there are structured, systematic, and massive violations that can affect the results of the vote and seat gains or winners of the election.

Law Number 7 of 2017 concerning General Elections has brought significant changes in the system of organizing General Elections in Indonesia, one of which is the strengthening of the authority of the General Elections Supervisory Institution which the scope of monitoring also includes repressive authority, namely resolving disputes over the General Election process and the decisions are final and bindings. On the other hand, strengthening the authority can trigger problems if studied more comprehensively. The first problem that arises is regarding the dualism of the function of the General Elections Supervisory Board as a supervisory institution and a judicial institution, which in essence is not suitable if combined in one institution because it can cause a conflict of interest. The General Elections Supervisory Institution has a standard for

assessing administrative violations. However, the General Elections Supervisory Institution will also decide the violation case. In other words, the General Elections Supervisory Institution acts as a gatherer of information, but at the same time also acts as a judge. Thus, the General Election Supervisory Institution's assessment of a case when carrying out its supervisory function will affect its decision when carrying out its judicial function. In fact, every judicial institution, including the General Elections Supervisory Board, actually has a passive nature or in the sense of waiting for reports, complaints or lawsuits from the public.

The second problem is regarding the institutional structure where the authority of Bawaslu in resolving cases related to the General Election can be said to be elusive and complex. There is a multiplicity of institutions in the vortex of General Election cases, including the General Election Supervisory Institution, the State Administrative Court, the General Election Organizing Honorary Council (DKPP), and the Constitutional Court. The problems that surround it are not only limited to confusion of authority, but also the logic of administration with the institution for organizing the General Election, namely the General Elections Commission.

The complexity of solving cases of general elections that are elusive in multiple institutions causes the system for organizing general elections at the downstream stage to have the potential to experience a lot of confusion, problems and need critical annotations to reconstruct the effective and effective resolution of general election problems. Considering that the settlement of general election disputes is an inseparable element of the general election justice system. The availability of this mechanism is an important key to the constitutionality of elections. This element can also have implications in the form of legitimizing the results of the General Election, increasing public confidence in the rule of law, and contributing to the institutionalization of democratic norms and practices. In a normative understanding, democracy is something that a country wants to do or implement fairly, as for example we know the expression "Government of the people, by the people and for the people".

Democracy as a principle in governance in Indonesia is stated explicitly in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia that "Sovereignty is in the hands of the people, and is implemented according to the Constitution". The concept of "democracy" is synonymous with the concept of "people's sovereignty". Democracy makes elections as an instrument to realize people's sovereignty. The administration of government is based on democracy as regulated in the 1945 Constitution of the Republic of Indonesia. In essence, the democracy contained in the constitution is imbued with "populist"

Sila IV of Pancasila. Thus, every effort to administer government, including in this case the resolution of electoral disputes, must move within a democratic framework that ensures the establishment of democracy. The popular ideal respects the voice of the people in politics by giving way to the major role and influence played by the people in government decision-making processes, including the election of national and local leaders.

3.2 The Concept of Special Election Courts in Indonesia

In order to maintain the credibility and legitimacy of elections, an electoral justice system is needed that follows the norms and values that are sourced from the culture and legal framework that applies in each country. Of course, it does not deny the existence of the principles of electoral justice that apply internationally. The scope of the electoral justice is:

1. For ensuring that each action, procedure and decision related to the electoral process is in line with the law (the constitution, statute law, international instrument and treaties and all other provisions)
2. For Protecting or restoring the enjoyment of electoral rights, giving people who believe their electoral rights have been violated the ability to make a complaint, get a hearing and receive an adjudication.

The above opinion is in accordance with the opinion of Refly Harun who said that in the event of legal problems in the election, the law must provide space to resolve them so that citizens' voting rights can be protected from the possibility of electoral fraud and violations. However, the existence of electoral dispute resolution institutions in several courts makes law enforcement often ineffective and inefficient. Disputes over the election process have become too convoluted because they involve many institutions such as Bawaslu, Provincial Bawaslu and Regency/City Bawaslu as well as the Supreme Court (starting with the State Administrative Court). Not only is the process complicated, dispute resolution in the election process also takes a very long time. According to Law Number 7 of 2017, the dispute resolution of the election process at Bawaslu takes 15 days and in the Administrative Court 29 days. In fact, one of the principles in electoral justice is the existence of a fair and timely mechanism. This is also in accordance with the principles of fast, simple and low-cost justice.

In addition to the things mentioned above, problems in the enforcement of election law also occur due to the inaccuracy of granting authority to one institution and the occurrence of inconsistencies in the implementation of the authority itself. Bawaslu, for example, compares

it with the previous Election Law, the existence of this institution has been significantly strengthened, both in terms of authority and institutional structure. This is inseparable from the efforts to design election monitoring instruments to be more independent. The supervisory authority by Bawaslu was initially coordinated with the KPU, with the authority to submit findings and reports on election violations which were then decided by the KPU. This authority is considered inappropriate because Bawaslu is considered not to be independent in carrying out its authority and as if it were only a subordinate of the KPU. Therefore, in order to create elections with integrity and justice as mandated by the constitution, Law Number 7 of 2017 provides reinforcement for the existence of Bawaslu. Bawaslu is an institution that has a structure and hierarchy from the central to the regional levels. Bawaslu also has the authority to supervise as well as resolve violations and disputes/election adjudication. Bawaslu's authority is considered complete and comprehensive because it has the authority to resolve election disputes from upstream, namely monitoring and collecting evidence downstream or making decisions. In fact, in disputes over the election process, Bawaslu's decision is final and binding, except for three issues, namely the verification of political parties participating in the election, the determination of a permanent list of candidates and the determination of candidate pairs.

However, the construction of Bawaslu's authority actually creates new problems in the resolution of election disputes. The supervisory authority should not be combined with the court's authority because it will affect the objectivity of handling disputes and election violations. In addition, this authority will be vulnerable to causing confrontational relations between fellow election organizers. This can be seen in various events leading up to the 2019 general election, such as the case of the nomination of former corruption convicts by several political parties. The search for electoral justice through Bawaslu also has weaknesses because structurally, Bawaslu does not have a qualified law enforcement element. It must be admitted that not all Bawaslu members from the central, provincial to district/city levels have competent and professional knowledge and experience in the legal field. This is certainly contrary to the principles of human rights, where every citizen has the right to a legal process and competent, unbiased (objective), accountable and fair law enforcement.

Not only in process disputes, the dispute resolution of election results carried out by the Constitutional Court is also not without problems. The Constitutional Court's authority to settle disputes over election results is the mandate of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Initially, the Constitutional Court was proposed to have three powers, namely the right to judicial review of the law

and below, to issue decisions related to authority disputes between high state institutions and to exercise authority otherwise provided for by law. The Constitutional Court's authority to settle disputes over election results was then born from the third authority. However, in its development, finally the drafters of the 1945 Constitution of the Republic of Indonesia stated explicitly the authority of the Constitutional Court to resolve disputes over election results.

The choice of the phrase 'dispute over general election results' can be understood because its scope is more specific than election problems, election cases and election disputes. However, during the process of formulating the phrase 'dispute over general election results', no one stated that the MK's authority was limited to vote counting disputes that affected the general election results as later formulated in Law Number 24 of 2003 concerning the Constitutional Court. With its existence as the guardian of the constitution, every authority of the Constitutional Court, including the authority to settle 'disputes over the results of the general election' must be interpreted within the framework of maintaining and upholding the constitution. In the context of elections, the Constitutional Court must maintain and enforce constitutional elections. A constitutional election is an election based on the values stated in the 1945 Constitution of the Republic of Indonesia, namely direct, general, free, confidential, honest and fair. However, in practice, the Constitutional Court turned out to be inconsistent. On the one hand, the Constitutional Court is determined to adjudicate disputes over results, but on the other hand, several decisions of the Constitutional Court are also related to the dispute resolution process.

Compared to several countries in the world, it is very rare for the authority to settle disputes over election results to be given to the Constitutional Court. This is inseparable from the background that the main authority of the Constitutional Court is related to judicial review of the Constitution. Meanwhile, the authority to resolve election disputes is mostly carried out by the Supreme Court or the Election Special Judicial Institution. New problems then arose when in the Constitutional Court's Decision Number 97/PUU-XI/2013, the Constitutional Court stated that it was not authorized to resolve disputes over the results of regional head elections. As a follow-up, Article 157 of Law Number 10 of 2016 stipulates that this authority will then be exercised by a special judicial Institution. Constitutionally, elections and local elections are two different entities. However, it must also be acknowledged that in terms of methods and stages of implementation, these two things are very precise. Thus, it will be effective if the election dispute resolution institution and the future regional elections are the same institution.

To solve these problems, the establishment of a special election court is a necessity. Indeed, Article 157 of Law Number 10 of 2016 has mandated that a special judicial institution needs to be formed to settle disputes over the results of the Regional Head Election. However, it seems that there is a need for discussion and drafting of a comprehensive electoral court concept. This is in line with the concept that all problems related to elections and local elections, whether criminal acts, administrative disputes or disputes over results, can be resolved in one special election court. The special election judiciary institution will be designed to have rooms. There are at least 3 (three) court rooms required, First, the criminal room. This courtroom will later try all election crimes that occur. Second, the room for state administration. This room will later need to be regulated in detail and detail regarding the authority to hear election administration violations, including procedures, procedures, and mechanisms related to the administration of the implementation of elections in each stage of the 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 DPR, DPD, Provincial and Regency City DPRD or political parties as candidates for election contestants or pairs of regional head candidates with KPU, Provincial KPU, and Regency/Municipal KPU as a result of the issuance of the decisions of KPU, Provincial KPU, and Regency/Municipal KPU. Third, the room for dispute results. The court room that will handle disputes between the KPU and the participants of the regional head pair regarding the determination of the vote acquisition results from the regional head election which can affect the pair's vote acquisition. Therefore, a comprehensive arrangement of electoral justice requires changes to the level of the Constitution. The reason is simple, to strengthen the position of the electoral court, its institutions need to be regulated in the Constitution. In addition, the presence of the electoral judiciary will also have implications for the authority of other state institutions regulated in the Constitution such as the Constitutional Court.

4. CONCLUSION

The existence of different settlement institutions for disputes in some courts make law enforcement often run ineffective and inefficient. Disputes over the election process have become too convoluted because those involve many institutions such as Election Supervisory Agency (Bawaslu) in province, regency/city, as well as the Supreme Court (starting with the State Administrative Court). Not only is the process convoluted, dispute resolution in the election process also takes a very long time. In addition, problems in enforcing election law also occur due to the inaccuracy of granting authority to an institution and the

inconsistencies in implementing the authority itself. Thus, it is essential to form a special election court in Indonesia. The method of this research is normative law (normative law research) by basing research on secondary data, namely data obtained through library research, which is in the legislation form, books, journals, law dictionaries and others. The results of the special election court institution will be classified into several rooms. There are at least 3 (three) court rooms required, First, the criminal room. This courtroom will try all election crimes that occur. Second, the room for state administration, includes procedures and mechanisms related to the administration of each stage of the elections. Third, the room for dispute results. This courtroom will handle disputes between the General Elections Commission (KPU) and the participants of the candidate regarding the determination of the vote acquisition results from the candidate election which can affect the candidate's vote acquisition.

REFERENCES

- [1] Ayman Ayoub And Andrew Ellis (Ed), *Electoral Justice: The International IDEA Handbook*, (Stockhol: International IDEA, 2010),
- [2] C.S.T. Kansil, 1986, *Memahami Pemilu dan Referendum*. Hill-Co, Jakarta
- [3] Eri Yulikhshan, 2016, *Keputusan Diskresi dalam Dinamika Pemerintahan (Aplikasi dalam PTUN)*, Penerbit Deepublish, Yogyakarta
- [4] H.Rusli Karim, 1992, *Pemilu Demokratis Kompetitif*. PT Tiara Wacana, Yogyakarta
- [5] Khairul Fahmi, 2012, *Pemilihan Umum dan Kedaulatan rakyat*, Raja Grafindo, Jakarta,
- [6] IDEA, *Electoral Justice: An Overview Of the International IDEA Handbook*, Terj. Dua Bahas, Indonesia Pintar, Jakarta, 2010
- [7] IDEA International, 2010, *Electoral Justice: The International IDEA Handbook*, Stockholm : Bulls Graphics
- [8] Refly Harun, *Pemilu Konstitusional Desain Penyelesaian Sengketa Pemilu Kini dan Ke Depan*, (Jakarta: PT Rajagrafindo Persada, 2016),
- [9] Refly Harun, 2018, *Mendesain Penyelesaian Sengketa Proses dan Hasil Pemilu*, Makalah disampaikan dalam Konferensi Nasional Hukum Tata Negara (KNHTN) V, (Batusangkar: November 2018, 2018),
- [10] Ria Casmi Arsa, "Pemilu Serentak dan Masa Depan Konsolidasi Demokrasi", *Jurnal Konstitusi* 2, (Juli-September 2014), hlm. 522.

- [11] Topo santoso, 2011, "*Perselisihan Hasil Pemilukada*" makalah disampaikan pada acara Diskusi Terbatas di Mahkamah Konstitusi pada tanggal 24 Maret. Jakarta.
- [12] Hamimah, Siti, 2018. Memperkuat Peran dan Fungsi Bawaslu dalam Pengawasan dan Penegakan Hukum PEMILU", Jurnal Seminar Nasional Hukum Universitas Negeri Semarang, Vol.4, No.3