



## Constitutional Democracy and National Legal Instruments in Resolving Regional Election Disputes

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**Abstract.** Through Law Number 32 of 2004 concerning Regional Government, direct regional head elections (Pemilihan Umum Kepala Daerah/Pilkada) could finally be realized. In accordance with the mandate of Article 24C paragraph (1) of the 1945 Constitution, it stipulates that one of the powers of the Constitutional Court is to decide disputes over election results, which means that this includes post-conflict local election disputes. In this context, the Constitutional Court performs its role to maintain the constitutional democracy adopted in Indonesian legal system to resolve election disputes. Upholding the constitution is a form of protecting the constitutional rights of citizens and is a consequence of the adherence to the notion of constitutionalism that the 1945 Constitution. In this context, the constitution becomes a living constitution in the life of the nation and state. Constitutional values and norms will always be alive in the sense that they are constantly developing and enriched with new values and systems based on the practice of the constitution itself and real experiences in everyday life. To maintain the election process in order to achieve the expected results, it cannot rely on only one or two institutions. It requires the cooperation of all state organs, including KPU, Bawaslu, DKPP, police, prosecutors, courts, and the Constitutional Court. All these state organs must work together to make the local elections a success to maintain the sovereignty of the people.

**Keywords:** constitutional democracy, elections, legal instruments, Indonesia.



**Abstrak.** Melalui UU Nomor 32 Tahun 2004 tentang Pemerintahan Daerah, pemilihan kepala daerah (pilkada) secara langsung akhirnya dapat diwujudkan. Sesuai amanat Pasal 24C ayat (1) UUD 1945 menetapkan salah satu kewenangan Mahkamah Konstitusi adalah memutus sengketa hasil pemilu, yang berarti di dalamnya termasuk pula sengketa pemilukada. Dalam konteks inilah Mahkamah Konstitusi melakukan perannya, yaitu untuk menjaga kemurnian suara rakyat jika terdapat sengketa suara dalam proses pilkada. Penegakan konstitusi merupakan wujud dari perlindungan hak atas konstitusional warga negara, dan merupakan konsekuensi dari dianutnya paham konstitusionalisme yang dipilih oleh pembentuk UUD 1945. Dalam konteks inilah, konstitusi menjadi “a living constitution”, dalam kehidupan berbangsa dan bernegara. Nilai dan norma konstitusi akan selalu ‘hidup’, dalam arti senantiasa berkembang dan diperkaya dengan nilai dan sistem baru, berdasarkan praktek konstitusi itu sendiri, dan pengalaman nyata dalam kehidupan sehari-hari. Untuk menjaga proses pilkada agar mencapai hasil sesuai yang diharapkan, tentu tidak dapat disandarkan kepada satu atau dua lembaga saja, dibutuhkan kerjasama seluruh organ negara, diantaranya KPU, Bawaslu, DKPP, kepolisian, kejaksaan, pengadilan, serta Mahkamah Konstitusi. Keseluruhan organ negara tersebut, harus bersinergi untuk mensukseskan pilkada demi terjaganya kedaulatan rakyat.

**Kata kunci:** demokrasi konstitusional, pemilu, perangkat hukum, Indonesia

## 1. Introduction

At the beginning of the trend of reform that was touted in 1997-1998, participation in the direct role of the community was required to be practiced in determining leaders at the executive level as a manifestation of people's sovereignty which had been guaranteed by the constitution.<sup>1</sup> In the context of the executive leadership at the national level, the voice for reform has become a reality with the amendments to the 1945 Constitution, especially Article 6A. So that for the first time in Indonesia, in the 2004 election the people could elect their President and Vice President directly. The people's strong desire to be able to directly elect their leaders at the regional executive level is a wish that is difficult not to be granted. Although Article 18 paragraph (4) of the 1945 Constitution does not emphasize the procedure for direct election of regional heads, it only requires that the election of governors, regents and mayors be carried out democratically, and further mandates that the procedures for administering regional government are regulated in law. Through Law Number 32 of 2004 concerning Regional Government, direct regional head elections (pilkada) can finally be realized. The first direct local elections were held in Kutai Kartanegara Regency on June 1, 2005. As for the settlement of election disputes at this time, it was held by the judiciary under the Supreme Court.

However, in 2007, through Law Number 22 of 2007 concerning the Implementation of General Elections, the pilkada was included in the electoral regime. This naturally also has an impact on post-conflict local election disputes which were originally held by a judiciary under the Supreme Court, now shifting to the Constitutional Court in accordance with the mandate of Article 24C paragraph (1) of the 1945 Constitution which stipulates that one of the powers of the Constitutional Court is to decide disputes over election results, which means that in it including post-conflict local election disputes. To provide an operational basis for the transfer of regional election disputes, Law Number 32 of 2004 was amended through Law Number 12 of 2008 which explicitly states in Article 236C that, "the handling of disputes over the results of the vote count for regional heads and deputy regional heads by the Supreme Court is transferred to the Supreme

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<sup>1</sup> Hutapea, Bungasan. "The legal dynamics of regional head elections in Indonesia." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 4, no. 1 (2015): 1-20.

Court. The constitution shall be no later than 18 (eighteen) months after the promulgation of this Law." Furthermore, through the Law on Judicial Powers Number 48 of 2009 Article 29 paragraph (1) letter e in its explanation explicitly states that, "This provision includes the authority to examine and decide on regional head election results disputes in accordance with the provisions of the applicable laws and regulations."

Subsequent developments, through decision Number 97/PUU-XI/2013, the Constitutional Court has annulled and stated that Article 236C of Law Number 12 of 2008 concerning Regional Government and Article 29 paragraph (1) letter e of Law Number 48 of 2009 concerning Judicial Power, declared not legally binding. By canceling the two norms of the a quo law, the Constitutional Court has restored the paradigm of regional head elections which was originally an election regime, back to its origins and is no longer an election regime.<sup>2</sup> This of course has implications for which institution has the authority to resolve disputes in regional head elections. In Decision Number 97/PUU-XI/2013, according to the Constitutional Court based on the interpretation of the original intent, basically the authority of the Constitutional Court has been clearly and clearly outlined in the 1945 Constitution, so that it is limited and it is not possible to be given other powers. Moreover, this other authority is given by regulations at the level of laws, which are hierarchically level under the Constitution. Therefore, from this perspective, regional elections are not part of the Constitutional Court's authority. However, in order to avoid a legal vacuum, in the final paragraph of its opinion, the Constitutional Court stated that it had the authority to try regional head election disputes as long as there was no law governing this.<sup>3</sup>

The Constitutional Court's decision a quo, received follow-up in the regulation of Law Number 8 of 2015 concerning Amendments to Law Number 1 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayors to become law (Election Law). In the provisions of Article 157 paragraph (1) of the Law a

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<sup>2</sup> Putri, Delasari Krisda. "A review of the authority to review laws by the Constitutional Court of the Republic of Indonesia in protecting the right to vote and be elected in Indonesia (study of the decisions of the Constitutional Court of the Republic of Indonesia regarding the right to vote and be elected in 2003-2018)." (2019).

<sup>3</sup> Janani, Rosiatul. "Revocation of the Authority of the Constitutional Court Concerning Regional Election Disputes (Analysis of Constitutional Court Decision No. 97/PUU-XI/2013)." PhD diss., UIN SMH BANTEN, 2019.

quo, the settlement of disputes over regional head election results (PHP cases) is resolved by a special judicial body. However, considering that a special judicial body has not yet been formed, based on the mandate of Article 157 paragraph (3) of Law 8/2015 it is the responsibility of the Constitutional Court to decide on it until the special judicial body is formed. Based on this provision, although the Constitutional Court has the authority to adjudicate regional election disputes, because regional elections are no longer part of the electoral regime, regional elections can no longer be called post-conflict local elections, although of course this can be debated academically.

## 2. Discussion

### 2.1. Constitutional Democracy and Resolving Election Disputes

The holding of Regional Head Elections, is a mandate of the provisions of Article 18 paragraph (4) of the 1945 Constitution and Article 201 of Law Number 8 of 2015 concerning the Election of Governors, Regents and Mayors (Regional Head Elections/Pilkada) which will be held simultaneously in several stages and starts in from 2015 to 2027. Pilkada which is designed simultaneously is expected to create efficiency in a number of ways. First, simultaneous regional elections are expected to save the use of state funds to finance the holding of regional elections.<sup>4</sup> So that the state budget resulting from these savings can be used to increase the country's ability to achieve other state goals, primarily to promote people's welfare. Second, simultaneous local elections are expected to reduce time wastage and reduce horizontal conflicts or friction in society.<sup>5</sup> More than that, with regional elections being held simultaneously, and this will also be in line with the presidential and legislative elections being held simultaneously, it will become a means of political education for the people, so that they can exercise their right to vote intelligently. because citizens have a stake in building a map of checks and balances from a presidential government with their own beliefs.

Pilkada implementation as mandated by the laws and regulations above, is the responsibility of the General Election Commission (KPU) as the organizer of the

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<sup>4</sup> Chaniago, Pangi Syarwi. "Evaluation of Pilkada Implementation of Simultaneous Pilkada in 2015." *Politik Indonesia: Indonesian Political Science Review* 1, no. 2 (2016): 196-211.

<sup>5</sup> Nazriyah, Riri. "Arranging the implementation of simultaneous regional head elections." *Jurnal Hukum Ius Quia Iustum* 22, no. 1 (2015): 116-141.

election, in addition to the Election Supervisory Body (Bawaslu) as the election organizer, whose job is to supervise the ongoing regional head election process.<sup>6</sup> In addition to organizing elections and supervising the implementation of elections carried out by the KPU and Bawaslu, in the regional election stages there is also a mechanism for resolving election violations which must be carried out according to the type of violation and the respective stages. Some of the violations referred to are violations of the code of ethics which are the authority of the Election Organizer Ethics Council, Administrative Violations which are the authority of Bawaslu,<sup>7</sup> Election Crimes which are the authority of the Sentra Gakumdu and general courts,<sup>8</sup> State Administrative disputes which are the authority of the State Administrative Court (PTUN),<sup>9</sup> and settlement of PHP cases as the final part of the Pilkada process.<sup>10</sup>

Based on Article 157 paragraph (1) of Law 8/2015, the settlement of PHP cases is examined and tried by a special judicial body. However, considering that a special judicial body has not yet been formed, based on the mandate of Article 157 paragraph (3) of Law 8/2015, it is the responsibility of the Constitutional Court to decide on it until the special judicial body is formed. In general, the settlement of PHP cases that will be carried out, compared to regional head general election disputes (*Perselisihan Hasil Pemilihan Umum Kepala Daerah/PHPU* Kada) handled by the previous MK, there are no significant differences except for a few things. The difference that deserves attention is in terms of the implementation of case application registration which was originally limited to no later than 3 working days to 3 x 24 hours [Article 157 paragraph (5) and its amendment paragraph (6)], the timing of regional head elections which are simultaneous in nature is associated

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<sup>6</sup> Handayani, Ririn. "Juridical Study of the Position of the Election Supervisory Board as General Election Organizers in the Indonesian State Administration System." PhD diss., Universitas Muhammadiyah Jember, 2015.

<sup>7</sup> Amal, Bakhrol. "Authority to adjudicate by Bawaslu on Election Process Disputes Stipulated in General Election Commission Regulations." *Masalah-Masalah Hukum* 48, no. 3 (2019): 306-311.

<sup>8</sup> Ramadhan, Muhammad Nur. "Evaluation of Election Criminal Law Enforcement in the Implementation of the 2019 Election." *Jurnal Adhyasta Pemilu* 2, no. 2 (2019): 115-127.

<sup>9</sup> Putrijanti, Aju. "The authority and object of the dispute in the state administrative court after Law no. 30/2014 concerning government administration." *Masalah-Masalah Hukum* 44, no. 4 (2015): 425-430.

<sup>10</sup> Maksum, Muhammad. "Implementation of the authority of the Constitutional Court in resolving disputes over election results." Bachelor's thesis, Jakarta: Fakultas Syariah dan Hukum UIN Syarif Hidayatullah, 2017.

with the number of regions that participate. conduct elections, namely 266 regions, and the PHP case settlement period which is limited by 45 days from the receipt of the Petitioner's request by the MK [Article 157 paragraph (8)].

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It is in this context that the Constitutional Court performs its role, namely to maintain the purity of the people's voice if there is a vote dispute in the election process. For the Constitutional Court, the people must be placed as the main stake holders who have the highest sovereignty. This is also the basis for the Constitutional Court in deciding Case Number 100/PUU-XIII/2015 related to the issue of a single candidate. The Court uses the approach of the principle of people's sovereignty, in which the people are placed as the highest and sovereign power holders to determine whether a person (a pair of candidates, even if they are single) is entitled or not entitled to sit as regional head. If an area with a single candidate does not hold elections, the constitutional rights of the people in that area will be neglected. In addition, the plan to realize regional elections which will be held simultaneously which will start from December 2015 to 2027 will be threatened, if the issue of a single candidate often arises in every regional election implementation. On the basis of these considerations, the Constitutional Court is of the view that protection of the people's constitutional right to vote and be elected in regional elections is a right that must be protected, even though there is only a single candidate pair to become constitutional. The people as holders of

sovereignty, have the right to determine their choice to agree or disagree with a single candidate in the local elections in their respective regions.

## **2.2. Election Dispute Problems in Indonesia**

The direct election of regional heads as an instrument of democracy to capture national leadership at the regional level, even though it is not carried out simultaneously such as legislative general elections or presidential and vice-presidential elections, arrangements or regulations are needed so as to be able to guarantee the implementation of honest and fair general elections.

In this regard, in holding provincial and regency/municipal regional head elections, it is necessary to have an agency or institution that is independent and independent. According to Article 1 Paragraph (21) of Law no. 32 of 2004 concerning Regional Government: "Regional general election commissions, hereinafter referred to as KPUD, are Provincial, Regency/City KPUs as referred to in Law Number 12 of 2003 which are given special authority by this law to organize regional head and deputy head elections. area in each province and/or district/city."

As an independent institution, the KPUD must be free from the intervention of any state institution in the holding of regional head elections. This provision is quite logical considering that it is very difficult to achieve this goal if the KPUD has to be responsible to other institutions such as the DPRD. This is because the DPRD is elements of political parties that are actors in the competence of regional elections. For this reason, the KPUD must be independent so that interests do not interfere with the institution so that election disputes can be minimized.

In direct regional head elections this will cause many disputes between pairs of candidates who are dissatisfied with the implementation of regional head elections conducted by the KPUD or against the KPUD decision which determines the winner of the Pilkada so that the losing candidate does not accept the determination by the KPUD by filing a lawsuit to the Constitutional Court with various arguments regarding Pilkada fraud.

Actually, the main issue of the dispute in the direct regional election started with the alon pair (paslon) who wanted to sue if the election results were not in accordance with their wishes. It is these disputes that will usually become an obstacle in deciding the results of the regional elections, because the process of resolving regional election disputes requires time and there are several stages and processes that must be carried out and this requires a lot of time. In general,



election disputes occur due to conflicts of interest, for example, disputes over Election Results Disputes (*Perselisihan Hasil Pemilihan/PHP*). So that to resolve the election dispute problem this must be done carefully and look at all the potential causes of the election dispute settlement. Disputes that occurred in the Pilkada regarding Election Result Disputes (PHP) were due to disputes between the Provincial/Regency/City KPU and participants regarding the determination of the vote acquisition results of the election. Because they do not accept it, the candidate pair will file a lawsuit with the Constitutional Court.

**Table 1.** PHPU Dispute Data at the Constitutional Court 2008 – 2018.

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Total	12	230	139	113	208	22	0	152	60	72

Table 1 showed that the number of regional election disputes is directly proportional to the number of regional elections held. Even though not all local elections end in disputes in the Constitutional Court, the data above does not cover election disputes that occur in other institutions such as PTUN and Bawaslu/Panwaslu or the KPU itself. So we can be sure that the number of disputes that occurred during the 2008 – 2018 period was more than the data recorded above. If the elements of the dispute include aspects of election criminal law enforcement and the code of ethics then it is certain that the number will be even greater. One of the problems in compiling comprehensive data on election disputes in Indonesia is that data on dispute settlements that occur are spread across several institutions which complicates the compilation of the data as well as the analysis due to the possibility of duplication of reporting by the disputing parties.

Another problem regarding this complex election dispute resolution data is that the electoral legal system in Indonesia distinguishes disputes over results from disputes over the electoral process. The lack of clarity over the mechanism for resolving process disputes in elections often increases the number of disputes over election results at the Constitutional Court as a mechanism guaranteed by law for resolving election result disputes. The ambiguity of dispute resolution mechanisms like this and the spread of responsible election dispute settlement bodies not only complicates the dispute resolution process but also makes it difficult for the

disputing parties to provide legal certainty, because the decisions of one institution can be refuted by another.

The main areas of election complaints in the administration of elections include: compilation of voter lists, lawsuits against candidates, appointment of EMBs and ad hoc committees, intimidation, campaign violations, voting and counting violations, violations of vote tabulation and seat allocation.

### **2.3. Legal Instruments in Resolving Regional Election Disputes**

The election dispute resolution system also includes a punitive function, namely the imposition of punitive sanctions on people responsible for election violations and election crimes.<sup>11</sup> The punitive function of the electoral dispute resolution system is a series of procedures to ensure that election obligations and responsibilities are carried out, punishing perpetrators or persons responsible for election crimes or election violations. Imposing criminal sanctions on someone who is responsible for election violations and crimes requires several prerequisites such as a clear definition of a criminal offense, the sanctions and penalties that will be given for violations, and must be clearly stated in the law. Second, legal provisions stipulating an administrative violation or criminal offense and appropriate sanctions or punishments must embody the principles of legal certainty and objectivity. Third, provisions stipulating sanctions or punishments need to be interpreted and applied strictly. The principles of legality require that no argument by analogy is applicable, and no common sense arguments should be applied. Use of such arguments will lead to uncertainty as to whether or not the behavior or omission is punishable.

In addition to the formal election dispute resolution system, there are other mechanisms for handling election disputes. Such mechanisms are generally called informal or alternative electoral dispute resolution mechanisms. Settlement of election disputes outside the court is not something new. Communities in various parts of the world have long used non-judicial, local or informal methods to resolve election conflicts and other disputes. Alternative election dispute resolution has

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<sup>11</sup> Lendrawati, Lendrawati. "Settlement of Disputes Between Participants in the Governor and Deputy Governor Elections and Election Organizers in 2015 at the Riau Islands Province Bawaslu Based on Election Supervisory Body Regulation Number 8 of 2015." *Journal of Judicial Review* 18, no. 1 (2016): 133-144.

been developed, in terms of its use and institutionalization throughout the world, especially in post-conflict societies in recent years.

Alternative solutions have been used widely and effectively in various countries: Afghanistan, Mozambique, Malawi, Democratic Republic of the Congo to deal with election disputes through the assignment of function and authority to decide cases to civil-based structures. Ghana and Botswana, often seen as the benchmark for democracy in Africa, use inter-party relations committees and other community-based structures to help the KPU achieve transparent and credible elections through effective conflict resolution, management and mediation. The main aim of alternative settlement mechanisms is not to replace formal methods, but to support and complement in terms of credibility, cost, political and institutional crises, any deficiencies in the design of the electoral dispute resolution mechanism.

Alternative election dispute resolution mechanisms include three models: first, unilateral, if the party submitting the dispute or complaint voluntarily withdraws the complaint or petition it submitted. Second, bilateral or multilateral through compromises and transactions or peaceful settlements of the disputing parties. Third, third party intervention, through conciliation, mediation and arbitration mechanisms. The use of alternative mechanisms does not mean that there are weaknesses in the election dispute resolution system, but rather to speed up and reduce the cost of dispute resolution. Formal and informal dispute resolution systems can work side by side and complement each other.

Election dispute resolution experts agree that a good election dispute resolution system must fulfill the following elements:

1. The existence of the right to obtain election dispute resolution;
2. There are clearly defined standard instruments and election procedures;
3. The existence of a board of judges (arbitrators) who are knowledgeable and impartial;
4. The existence of a justice system that facilitates the achievement of decisions;
5. There are clear arrangements regarding the burden of proof and clearly defined standards for filing evidence;
6. the existence of an effective and meaningful settlement system and
7. effective stakeholder education

In the context of Indonesia, the settlement of elections, especially regional elections, has direct authority in the Supreme Court and can also be in the Constitutional Court or form a special body to complete elections, especially regarding regional head election elections. Since Indonesia carried out reforms in the government sector after the fall of the New Order, general elections, especially head elections, have been carried out by independent institutions where people's votes can be channeled correctly through free and honest elections.

For this reason, Law Number 32 of 2004 concerning Regional Government was issued whereby the regional election organizers are KPUD which are considered independent. This law also regulates the procedures for regional election disputes if the losing party takes legal action, the institution authorized to handle disputes under this law is the Supreme Court which is then transferred to the Constitutional Court through Law no. 12 of 2008 concerning Amendments to Law No. 32 of 2004 concerning Regional Government, the settlement of regional election disputes is the authority of the Constitutional Court.

The authority of the Constitutional Court in directly resolving regional election disputes was questioned by the passing of Law no. 22 of 2014 concerning Regional Government where regional head elections are carried out with a representative system. And this means that there are no disputes over regional election disputes because the committee is a committee formed by the DPRD and the voting participants are DPRD members so that there is no need for disputes regarding regional head elections. The regional head election dispute occurs when the regional head election is carried out directly by the people. Institutions that have the authority to resolve election disputes directly can be the Supreme Court, the Constitutional Court and can also be special judicial institutions.

After the President issued PERPU No. 1 of 2014 concerning direct election of regional heads, which was followed by the passing of Law no. 1 of 2015, and amendments were made to Law no. 9 of 2015, the authority to dispute regional head election results is the authority of the Constitutional Court. Subsequent developments with the Constitutional Court Decision No. 97/PUU-XI/2013 deciding regional election disputes is not the authority of the Constitutional Court so that Law No. 8 of 2015 which mandates the establishment of a special judicial body to resolve election disputes, before the special judicial body is formed, disputes regarding regional election disputes become the authority of the Constitutional Court. Then the last one was issued Law no. 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Stipulation of

Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayors to Become Laws. Article 157 paragraph (8) contains provisions: The Constitutional Court decides cases of disputes over election results no later than 45 (forty-five) working days after receiving the request. Thus, the authority of the Constitutional Court in directly dealing with regional election disputes according to the provisions of this law is temporary while waiting for the formation of a special judicial body authorized to resolve regional election disputes in Indonesia.

### **3. Conclusion**

Upholding the constitution is a form of protecting the constitutional rights of citizens, and is a consequence of the adherence to the ideology of constitutionalism that was chosen by the 1945 Constitution. In this context, the constitution becomes "a living constitution", in the life of the nation and state. Constitutional values and norms will always be 'alive', in the sense that they are always developing and enriched with new values and systems, based on the practice of the constitution itself, and real experiences in everyday life. In order to maintain the election process so that it achieves the expected results, of course it cannot be relied on just one or two institutions, it requires the cooperation of all state organs, including the KPU, Bawaslu, DKPP, police, prosecutors, courts, and the Constitutional Court. All of these state organs must work together to succeed in regional elections in order to maintain people's sovereignty.

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