

# **SPECIAL COURTS FOR THE SETTLEMENT OF REGIONAL HEAD ELECTION DISPUTES IN THE CONTEXT OF REALIZING THE PRINCIPLE OF LEGAL CERTAINTY AND ORDERLY GOVERNANCE**

Abd. Rahmattullah Rorano S. Abubakar<sup>1\*</sup>

Atma Suganda<sup>2</sup>

<sup>1,2</sup>Universitas jayabaya, Jakarta, Indonesia

e-mail: doktor\_jayabaya@yahoo.com<sup>1</sup>, atmasuganda7@gmail.com<sup>2</sup>

\*Correspondence: doktor\_jayabaya@yahoo.com

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**Abstract.** Law Number 12 of 2008 violates the 1945 Constitution of the Republic of Indonesia. Article 157(1) of Law Number 8 of 2015 stipulates that the settlement of disputes over the results of direct regional head elections is under the jurisdiction of a special court, but until the establishment of a special court, the Constitutional Court still has the power to resolve disputes over the results of direct elections. The results of the research are expected to be able to answer constitutional issues in Indonesia, especially regarding the urgency of the establishment of a special court for the election of regional heads and the extent to which the design model for special courts for the election of regional heads is in order to ensure the quality of democracy. In addition, as a discourse for students who are in the field of Constitutional Law, it requires constructive thinking. This research uses a normative juridical approach which emphasizes literature research. The portrait of dispute resolution on the results of regional head elections continues to experience dynamics along with interpretations of the institutionalization of regional head elections as part of the general election regime or not.

**Keywords:** special courts, regional head election, legal certainty and orderly governance

## **INTRODUCTION**

General election is one of the most

basic means of channeling the rights of citizens. Therefore, in the context of implementing the human rights of citizens,

it is imperative for the government to ensure the implementation of general elections in accordance with a predetermined constitutional schedule. In accordance with the principle of popular sovereignty where the people are sovereign, all aspects of holding the general election itself must also be returned to the people to determine them ([Istinah et al.](#), 2021). At the government (government) level, general elections are written into regional head election institutions that provide deliberation (participation) space for the community to determine the direction of regional government and determine leadership in the region ([Lathif et al.](#), 2020). This was accommodated for the first time with the enactment of the Law of the Republic of Indonesia Number 32 of 2004 concerning Governance. Regions are precisely in Article 56 which states that *"the election of regional heads is carried out directly by the people"*. Such a situation marks a fundamental change in the mechanism of regional head elections.

The stage of direct democracy which has now become part of the process of transferring power in the country which is expected to be able to realize good governance, at the implementation level has actually begun to cause a number of very complex problems ([Simamora](#), 2011). Especially in the matter of disputes over the results of regional head elections.

Referring to the historical side of dispute resolution of regional head elections for the first time it is the domain of the Supreme Court ([Falco & Kleinhans](#), 2018). After the issuance of Law of the Republic of Indonesia Number 12 of 2008

concerning the Second Amendment to Law Number 32 of 2004 concerning Regional Government, the authority to decide disputes over the results of regional head elections shifted from the Supreme Court to the Constitutional Court ([Petriv](#), 2020). The normative formulation was then affirmed by Article 29 paragraph (1) letter e of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power (hereinafter referred to as the *"Judicial Power Act"*) which states that *"The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are is final for other powers conferred by law"* ([Atmadja](#), 2021). Along with its development, the constellation of institutions authorized to handle disputes over the results of regional head elections were again tested to the Constitutional Court. This was carried out by the Law and Constitutional Study Forum (FKHK), the student Executive Board of the Faculty of law at Esa Unggul University (BEM FH UEU), and the Jakarta Law Student Movement (GMHJ) which examined the constitutionality of Article 236C of Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Regional Government jobs. Article 29 paragraph (1) letter e of Law Number 48 of 2009 concerning Judicial Powers against Article 1 paragraph (3), Article 22E paragraph (2) and Article 24C paragraph of the 1945 Constitution. The petitioners argue that the articles contained in the a quo law is contrary to the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as *"the 1945 Constitution of the Republic of Indonesia"* considering that the regional

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election is not part of the general election regime as referred to in Article 22E because the election of regional heads is regulated in Article 18 paragraph (4) CHAPTER on Regional Administration of the 1945 Constitution of the Republic of Indonesia. Following up on the petitioners' petition, the Constitutional Court then issued a decision Number 97/PUU-XI/2013 which stated that the Constitutional Court no longer had the authority to settle disputes over the results of regional head elections and Article 236C of Law Number 12 of 2008 and Article 29 paragraph (1) letter e of Law Number 48 of 2009 do not have binding legal force (unconstitutional). The Constitutional Court implicitly mandates the legislators to establish a special court to handle the resolution of regional head election disputes (Center for Monitoring the Implementation of Laws, 2018). In general, the idea of establishing a special court began to emerge and develop in the post-reform era. The decentralization of government and the diversification of the functions of state power that are expanding widely along with the liberalization and democratization movements in all areas of life have encouraged the Government to establish a judicial institution of a special nature (copy protected by law, nd). The idea of the urgency of the special judiciary for the election of regional heads is actually one of the most important components in the principles of organizing general elections, in this case "*legal certainty*". The context of legal certainty means that the organizers, supervisors, observers and participants in the regional head election receive well from the process, stages, programs and

schedule of implementation. Furthermore, if there are parties who are not satisfied with the work provided by the General Election Commission (hereinafter referred to as "*KPU*") as the organizer of the regional head election, they can file a dispute in a special court.

The idea of a special court having jurisdiction over disputes over the results of regional head elections is a relevant matter to consider because legal remedies in the process of regional head elections that have occurred so far have often failed to fulfill public justice. For example, a court decision that has just been decided after the stages have been implemented and has layers of legal remedies so that it is counterproductive to the stages of regional head elections which are very limited by the time period. Moreover, these legal remedies are separated in several judicial environments.

Referring to these conditions, legal remedies for the stages of regional head elections face further challenges with a design model of simultaneous implementation in the future because the stages of the process and legal remedies for each stage of the election will be carried out simultaneously so that when using judicial mechanisms as positive law when Of course, realizing a fair election will be difficult to realize ([Arifin, 2021](#)). The establishment of a special judicial body may be possible, especially for the purpose of meeting the demands of the increasingly complex development of justice in society and in line with what has been determined by the 1945 Constitution of the Republic of Indonesia the constitution ([Susanto & Masyhar, 2020](#)).

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The existence of a special judicial body should be established before the implementation of the national simultaneous election or in other words the special judicial body will only function in the national simultaneous regional head election in 2024 (Rajab, 2018). The question is, is it possible that a special judicial body/institution will be formed in due course. Especially when faced with the controversies that often arise in the formation of a law that is thick with political overtones.

Since the decision of the Constitutional Court has been pronounced in a plenary session open to the public, legally it has binding legal force, evidentiary power, and executive power. In addition, there is no further legal remedy to amend the decision which already has permanent and binding legal force, except with the subsequent decision of the Constitutional Court. The parties who feel disadvantaged by the decision of the Constitutional Court, technically juridically, can only accept the empirical facts in accordance with the legal provisions for the settlement of requests for judicial review through the Constitutional Court (Kosař & Šipulová, 2018). Moving on from the description of the problem, of course the reason for the establishment of a special court to settle the results of regional head election disputes needs to be a separate study. Forming a new institution of course will be equivalent to new problems such as institutional construction, organizational structure, readiness of infrastructure and others. Therefore, the authors chose the title of the research as follows: "*Special Court of Dispute Settlement of Regional*

*Head Election Results in the Framework of Realizing the Principles of Certainty and Orderly Administration of Government*".

The theoretical use of this research is as an effort to contribute ideas in the development of specific constitutional law sciences in the formation of special courts for regional head elections so that they can run effectively in order to ensure the quality of democracy.

The results of the research are expected to be able to answer constitutional issues in Indonesia, especially regarding the urgency of the establishment of a special court for the election of regional heads and the extent to which the design model for special courts for the election of regional heads is in order to ensure the quality of democracy. In addition, as a discourse for students who are in the field of Constitutional Law, it requires constructive thinking.

## **METHODS**

The portrait of dispute resolution over the results of regional head elections continues to experience dynamics along with interpretations regarding the institutionalization of regional head elections as part of the general election regime or not. With regard to the urgency of establishing a special judicial body for disputes over the results of regional head elections, the author finds at least 3 urgencies in this regard, including: 1) Legal politics of the Constitutional Court, 2) Departing from the basic idea of a rule of law which is then elaborated further with the constitutionality of special courts and dynamics Sociologically, the settlement of

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disputes over the results of regional head elections, was born *de lege feranda* which regulates special courts for dispute resolution. The use of research methods aims to make research can be directed and structured considering that a research is an attempt to find, develop and test the truth of a knowledge. Research Approach

This research uses a normative juridical approach which emphasizes literature research.

#### 1. Research Specifications

The specifications in this study are descriptive-analytical. A descriptive-analytical study intends to provide an overview of positive law (applicable laws and regulations) associated with theories, legal principles, and practice of implementing positive law regarding the problems being studied ([Christopher & Hutabarat, 2022](#)). And oriented towards legal improvement. The descriptive stage is carried out to provide an overview of the existing object or event or reality, while in the analytical stage generally accepted conclusions will be drawn from the object to be studied and then compiled in the framework of legal improvement orientation. This research will describe the special judiciary. settlement of regional head election disputes in order to realize the principle of legal certainty and orderly administration of

government. Furthermore, conclusions that are generally accepted and oriented towards legal improvement will be drawn, in this case constructing a special court for resolving regional head election disputes.

#### 2. Types of Data

The types of data used in this study are primary and secondary data.

#### 3. Legal Materials Collection Techniques

Data collection techniques in this study were pursued in 2 (two) ways, namely:

##### a. Library Research

Data collection techniques used were reading and critiquing library materials. ([Soekanto, 1986](#))

##### b. Field Research

The data collection technique used is by conducting interviews. The interview method chosen is semi-structured, namely the interview process is not limited to the list of questions contained in the interview guide, but it is still possible to develop new questions outside the interview guide.

#### 4. Legal Material Analysis Techniques

The analysis used in this study is normative qualitative analysis, namely data analysis methods whose work processes include data preparation and interpretation ([Nurhayati et al., 2021](#)).

## RESULTS AND DISCUSSION

Decision of the Government and the DPR to Give Back the Authority for Settlement of Disputes on the Results of the Regional Head Election to the

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Constitutional Court

### 1. The fabric of regional head elections with the 4th principle of Pancasila

Pancasila as the nation's ideology is the views, ideals, beliefs, and values of the Indonesian nation that must be implemented in the life, society, nation and state in a comprehensive manner. BPUPKI) dated May 31, 1945, Pancasila as the ideal of an integralistic state is an ideal concept where the state unites with all its people to overcome all groups in any field.

Pancasila as an open ideology is a screening-board, standard guidelines are in the form of a cumulative check-list and not an alternative. This means that as a justification tool for every behavior, the test results related to the Five Precepts of Pancasila must be positive, nothing negative. Final decision-making is determined on a case-by-case basis, by assessing positive tendencies. However, it should be remembered that in operationalizing Pancasila as a margin of appreciation, an operator who has professionalism in his field, a strong and ethical leadership spirit, accompanied by strong national insight, is comprehensive, integral, systematic, visionary, imaginative and understands comparative advantage in the middle flow of globalization.

The very broad values of Pancasila are able to trace every aspect of the life of the nation and state, including democracy. Of course, the right optics used are implemented in the values of the 4th precept of Pancasila which

reads that "*People are led by wisdom in deliberation of representatives*". The main points of understanding Pancasila democracy include democracy based on the principle of kinship, religious elements, the basis of truth, love and noble character, Indonesian personality and sustainability; a system of state organization carried out by the people themselves or with the consent of the people; individual freedom that is not absolute, and the unity of the ideals of democracy and the ideals of life for the Indonesian people with the spirit of kinship without a majority or minority.

Democracy in the 4th principle of Pancasila implies the involvement of all parties or their representatives for the sake of mutual prosperity in making decisions. Soekarno explained that democracy is what gives life and creates social welfare as well as creates equality that aims at common prosperity.

To realize or embody democracy, an in casu a quo election for regional heads is drawn up. In this regard, the election of regional heads is a stage that provides room for deliberation and then contemplates on determining regional head leaders who also carry out the task of bringing the direction of change for the region concerned towards prosperity.

The reality is that the decision-making method in the election of regional heads prioritizes the deliberation and consensus system. That is, decisions are applied on careful thought from various groups or groups in a contestation of ideas and opinions in achieving common goals. Thus, the

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election of regional heads absorbs the meaning that is based on the deliberation of all the people so that it is automatically coherent with the 4th principle of Pancasila. The question that then arises, philosophically, when it is associated with the 4th precept of Pancasila which mentions the term "consultation/representation" as the basis of reference in democracy, is how the regional head election system is coherent with the meaning contained in the 4th precept of the Pancasila.

Democracy in the context of Pancasila which contains noble principles or values (grundnorm/staatsfundamentalnorm) is still at the normative-abstraction level. values and moral principles that develop in society.

## **2. The raison d'etre of the authority to settle disputes over the results of regional head elections remains with the Constitutional Court**

Constitution In English, it is a term that was first used in the Middle Ages in England, which has its roots in the Latin *constitut* which means "*established, appointed*" which comes from the verb *constituere*, *con* means "*together*" and *statuere* means "*set up*" so it can mean something, which are organized and determined jointly. In the Black's Law Dictionary, the Constitution is defined as the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and

guarantees individual civil rights and civil liberties (translation: The basic and organic law of a nation or state that establishes government institutions and apparatus, defines the scope of government of sovereign power, and guaranteeing individual civil rights and civil liberties).

If examined, it appears that in decision Number 49/PUUXIV/2016, the Constitutional Court has amputated its own authority in handling disputes over the results of regional head elections. Therefore, in the follow-up legislation product from the decision of the Constitutional Court, the legislators may not regulate the norm in such a way again.

Based on the realities in the formulation of the law above, it is indicated that there are 'tricks' of legislators so that the resolution of disputes over the results of the regional head elections remains within the authority of the Constitutional Court.

In fact, compliance with the decisions of the Constitutional Court actually reflects the maturity of a country that claims to be a state of law. Thus, the decisions of the Constitutional Court must be interpreted and not given meaning. The Urgency of Establishing a Special Judicial Body for Disputes over the Results of Regional Head Elections

### **1. Legal politics of the establishment of the Constitutional Court**

The term legal politics, etymologically comes from the Dutch term *Rechtspolitiek*. This term is a formation of the words *rechts* and

politik. In Indonesian, *rechts* means law and politics contains policy. Based on this explanation, legal politics is briefly defined as legal policy. Legal politics is the policy of state administrators about what is used as a criterion for punishing something. This policy may relate to the formation of law, the application of the law, or the enforcement of the law itself.

One of the directions of national legal politics launched by Indonesia after the constitutional reform agenda was to continue the legal reform agenda. The areas of law that require formation and reform are grouped according to the areas required. This field includes: politics and government, economy and the business world, and structuring systems and apparatus. With this footing, the legal form that needs to be drafted and updated is not only in the form of laws and regulations, but also the ecosystem of high state institutions that are relevant to implementation of the law itself. One of them gave birth to a high state institution that gave a new color to the state administration system, namely the Constitutional Court.

## **2. The build-up of the caseload and the shift from constitutional courts to electoral courts**

The institutionalization of Article 18 paragraph (4) of the 1945 Constitution of the Republic of Indonesia changed the face of local democratic parties, one of which was the direct election of regional heads which was a manifestation of the implementation of

people's sovereignty. Direct regional head elections are expected to encourage the growth of strong and quality regional executive leadership and accountability to the people (not to certain groups) so that public policy making is always oriented to the interests of the people, and away from Collusion, Corruption and Nepotism (KKN).

In its implementation, direct regional head elections create new problems with violations that damage the democratic system and order which ultimately leads to disputes over election results. Disputes over the results of regional head elections since 2008 have been resolved through a trial at the Constitutional Court, which was previously the authority of the Supreme Court. The existence of this transfer of authority has led to many cases of disputes over the results of regional head elections that go to the Constitutional Court because almost every regional head election always causes disputes regarding the determination of the results issued by the KPU.

## **3. Denial of the constitution as the basis of the state**

Based on Decision Number 97/PUU-XI/2013, the Constitutional Court stated that regional head elections are not included in the general election regime. Furthermore, the Constitutional Court has exercised self-restraint by removing the "additional authority" with the argument that the authority of the

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Constitutional Court as a state institution has been limitedly regulated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The Court stated that the authority of the Constitutional Court in adjudicating disputes resulting from Regional head elections are contrary to the 1845 Constitution.

4. Design of Special Courts for Disputes over the Results of Regional Head Elections in Order to Ensure the Quality of Democracy.

a. Institutional design

Based on a comparative study, it shows that the settlement of claims resulting from the election through the election adjudication process has long been applied by various countries, of course with their respective characteristics. *First*, institutional structure. Looking at the relevance of comparative studies that have been carried out, in the context of the State of Uruguay and Costa Rica, the electoral court is specifically stated in the constitution, often as the fourth branch of state power. Meanwhile, in Mexico, the electoral court structure is side by side with the Supreme Court (Supreme Court) as the holder of judicial power.

*Second*, the establishment of a judicial body under the Supreme Court must be regulated by law. That is, the establishment of this special court is institutionalized by law. This is then emphasized in Article 1 point 8 of the Law on Judicial Power which states that

*"Special Courts are courts that have the authority to examine, hear and decide on certain cases which can only be established within one of the judicial bodies under the Supreme Court which is regulated in law. - law"*.

b. Law of Procedure

Based on the grand design of the special court as one of the sub-systems of the State Administrative Court, which culminates in the Supreme Court and has limited absolute competence in cases of disputes over the results of the regional head election, a procedural law is needed that can support the function of the judiciary itself. The further explanation regarding this is described as follows.

*First*, relative competence. According to Sudikno Mertokusumo, relative competence is the distribution of judicial power or the relative authority of judges related to the jurisdiction of a court.<sup>447</sup> Talking about the relative competence of a court is essentially inseparable from the position of the judiciary itself. This is because the position of the court will be relevant to its relative competence.

*Second*, despite all the controversies, the High Court was once given the authority to settle disputes over the results of regional head elections. Thus, positioning the court specifically for dispute resolution on election results to merge with the PTTUN compared to the historically more prominent

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PTUN.

*Third*, referring to the provisions of Article 48 jo. Article 51 of the Law on State Administrative Courts

opens the option to place the PTTUN as a court of first instance (before entering legal proceedings in the Supreme Court).

## CONCLUSIONS

The portrait of dispute resolution on the results of regional head elections continues to experience dynamics along with interpretations of the institutionalization of regional head elections as part of the general election regime or not. With regard to the urgency of establishing a special judicial body for disputes over the results of regional head elections, the author finds at least 3 urgencies in this regard, including: 1) Legal politics of the Constitutional Court, 2) Departing from the basic idea of a rule of law which is then elaborated further with the constitutionality of special courts and dynamics Sociologically, the settlement of disputes over the results of regional head elections, was born de lege feranda which regulates special courts for dispute resolution.

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Yang bertanda tangan di bawah ini,

Nama : Prof. Dr. Fauzie Yusuf Hasibuan, S.H., M.H.  
Jabatan : Ketua Program Doktor Ilmu Hukum Universitas Jayabaya

Menugaskan kepada,

Nama : Dr. Atma Suganda, S.H., M.Hum.  
Jabatan : Dosen Program Doktor Ilmu Hukum Universitas Jayabaya

Untuk melakukan penulisan artikel dengan judul : *“Special Courts for The Settlement of Regional Head Election Disputes in The Context of Realizing The Principle of Legal Certainty and Orderly Governance”*.

Demikian Surat Tugas ini dibuat untuk digunakan sebagaimana mestinya.

Jakarta, 5 Mei 2022  
Program Doktor Ilmu Hukum  
Ketua,



Prof. Dr. Fauzie Yusuf Hasibuan, S.H., M.H.

Sekretariat Program Studi Doktor Ilmu Hukum Universitas Jayabaya Gedung Rektorat Lantai VII  
Jl. Pulomas Selatan Kav. 23 - Jakarta Timur 13210, Telp. 4700880/Fax. 4700880 Kotak Pos 4147