

KEWENANGAN MAHKAMAH KONSTITUSI DALAM MEMUTUS PERSELISIHAN HASIL SENGKETA PILKADA PASCA PUTUSAN MAHKAMAH KONSTITUSI NOMOR 85/PUU-XX/2022

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Abstrak

Berdasarkan Undang-Undang Kekuasaan Kehakiman, Mahkamah Konstitusi berwenang mengadili pada tingkat pertama dan terakhir yang putusannya bersifat final untuk memutus perselisihan hasil Pemilihan Kepala Daerah (Pilkada). Kewenangan ini mencakup sengketa mengenai perolehan suara yang memengaruhi penetapan pasangan calon terpilih di tingkat provinsi maupun kabupaten/kota. Perbedaan antara rezim Pemilu dan Pilkada bermula dari Putusan Mahkamah Konstitusi No. 97/PUU-XI/2013, yang mana menyebabkan MK tidak berwenang untuk memeriksa dan mengadili perkara perselisihan tentang hasil tentang Pilkada. Akan tetapi selama belum terbentuknya Badan Peradilan Khusus maka MK tetap berwenang untuk memeriksa dan mengadili perkara tersebut.

Kata Kunci : Kewenangan, Sengketa Pilkada, Mahkamah Konstitusi.

THE CONSTITUTIONAL COURT'S AUTHORITY TO DECIDE ON REGIONAL ELECTION DISPUTES FOLLOWING CONSTITUTIONAL COURT DECISION NUMBER 85/PUU-XX/2022

Abstract

Based on the Judicial Power Law, the Constitutional Court has the authority to adjudicate at the first and final level, with its decisions being final, to decide disputes over the results of Regional Head Elections (Pilkada). This authority includes disputes regarding vote acquisition that affect the determination of elected candidate pairs at the provincial and district/city levels. The distinction between the Election and Pilkada regimes stems from Constitutional Court Decision No. 97/PUU-XI/2013, which resulted in the Constitutional Court not having the authority to examine and adjudicate disputes regarding Pilkada results. However, as long as the Special Judicial Body has not been formed, the Constitutional Court remains authorized to examine and adjudicate such cases.

Keywords: Authority, Regional Election Disputes, Constitutional Court.

1. INTRODUCTION

Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates that: "sovereignty is in the hands of the people and is exercised according to the Constitution". This provision shows that Indonesia is a constitutional democracy, because the participation of the people in government is the main requirement, especially for filling public positions. This provision explicitly gives the people the right to choose and determine their leaders. In order to exercise sovereignty to the people, the Indonesian constitutional system recognizes the direct election system as stipulated in article 22E of the 1945 Constitution of the Republic of Indonesia. The direct election is a manifestation of the sovereignty given to the people. The implementation of people's sovereignty cannot be separated from general elections because general elections are a logical consequence of adhering to the principle of people's sovereignty (democracy) in the life of the nation and state. The basic principle of democratic state life is that every

citizen has the right to actively participate in the political process.

The amendment of the 1945 Constitution of the Republic of Indonesia has implications for changes in the constitutional system of the Republic of Indonesia. After the reform, the implementation of democracy is not only manifested in general elections but democracy has been manifested in local politics through the decentralization of politics to autonomous regions. The autonomy gives the autonomous region the authority to regulate (*Regulation*) and take care of (*administrative act*) government affairs that are his authority. Autonomy is *the right of self government*. With autonomy, autonomous regions are given freedom and independence to manage and regulate all government affairs that are under their authority. The granting of autonomy is not only limited to managing and regulating the government. However, as discussed earlier, it includes the decentralization of local politics. One of the implementations is in filling the positions of Governor, Regent and Mayor who are directly elected by the people. This is explicitly stipulated in article 18 paragraph (4) of the 1945 Constitution of the Republic of Indonesia "The Governor, Regent and Mayor respectively as the head of the provincial, district and city local governments are democratically elected".

In every implementation of the regional head election, it is not closed to the possibility of causing disputes that arise. Disputes that arise will certainly be resolved according to the applicable legal provisions (*due process of law*) in accordance with article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia "Indonesia is a country of law". Therefore, as a country of law, every dispute over the Regional Elections must be resolved with the applicable legal provisions. In addition, the settlement of disputes over the results of the Regional Elections must be resolved institutionally so as not to reduce the legitimacy of the implementation of the Regional Elections in accordance with the positive values and universal elements of democracy as the basis for the organizers of the Regional Elections, namely the peaceful and institutional settlement of disputes.

The occurrence of violations in the implementation of Pemilukada is caused by Pemilukada regulations which have many shortcomings, including too light sanctions for violations of Pemilukada rules and the lack of regulations regarding restrictions and financial transparency of Pemilukada funds. The philosophy of sanctions from the election law, including the law that is the legal umbrella of Pemilukada, is based on the assumption that elections are a party of democracy. Therefore, as a party, it is expected that there will be a lot of violations, so that sanctions are not burdened. With such a philosophy, it is inevitable, in practice, that there will be violations that are massive and even systematic and structured, because the participants and candidates know for sure that the sanctions for the violations committed will not be fatal for the candidate even if violations are found

2. IMPLEMENTATION METHOD

The method carried out is a normative juridical approach. The normative juridical approach is used to study laws and regulations related to the authority to adjudicate simultaneous election disputes after the Constitutional Court's decision Number 85/PUU-XX/2022. In connection with the research method used, the author does it by researching regulations, legislation, court decisions, circulars and jurisprudence, legal magazines, legal theories and opinions of leading legal scholars which are secondary data, then associated with the actual situation, namely the authority to adjudicate disputes in the elections simultaneously after the verdict Constitutional Court Number

85/PUU-XX/2022. Legal materials in the form of legal sources in the formal sense (laws and regulations) and literature studies are also used, an approach that aims to obtain applicable regulations regarding the authority to adjudicate disputes in the simultaneous regional elections after the decision of the Constitutional Court Number 85/PUU-XX/2022.

3. RESULTS AND DISCUSSION

In practice, in elections, disputes or disputes often arise. Law Number 32 of 2004 concerning Regional Government as amended by Law Number 23 of 2014 concerning Regional Government states that the settlement of election disputes is submitted through legal proceedings at the Supreme Court on the one hand. Meanwhile, on the other hand, the decision on the dispute over the election of regional heads by the Supreme Court in several regions has reaped controversy. For example, the disputed decision of the South Sulawesi (South Sulawesi), North Maluku (Malut) and Depok regional elections that resulted in the controversy shows the unclarity of the legal decision issued by the Supreme Court (MA). Even though the verdict should reflect the final settlement of the election dispute. The hope of a legal decision that is binding and can be respected by all parties to the dispute seems difficult to achieve. The Supreme Court's decision ordering a re-election or a recalculation of the results was sued again. Of course, the problem will get worse. It is natural that many people are suing the Supreme Court's decision. This causes the level of public trust in the Supreme Court to be somewhat low, and many parties want the settlement of election disputes to be transferred to the Constitutional Court.

After the birth of Law No. 22 of 2007 concerning the Implementation of General Elections, it has allowed the Constitutional Court to decide disputes over the results of the regional elections. This is due to the change in the election regime to an election regime. The existence of the Third Amendment to the 1945 Constitution has given birth to a new institution that is part of the judicial power, which functions to handle certain cases in the field of constitutional law in order to maintain the constitution to be implemented responsibly in accordance with the will of the people and democratic ideals. Article 24C paragraph (1) of the 1945 Amended Constitution affirms that "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final to test the law against the Constitution, to decide disputes over the authority of state institutions whose authority is granted by the Constitution, to decide on the dissolution of political parties, and to decide disputes about the results of general elections". Likewise, Article 10 paragraph (1) letter d of Law Number 24 of 2003 concerning the Constitutional Court, Article 12 paragraph (1) letter d of Law Number 4 of 2004 concerning Judicial Power, and Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Regional Government, states that one of the constitutional authorities of the Court is to decide disputes about the results of general elections.

Through Law Number 22 of 2007 concerning the Implementation of General Elections, the terminology of the election of regional heads was changed to the general election of regional heads. Chapter I Article 1 of Law Number 22 of 2007 has the intention that the election of Regional Heads and Deputy Regional Heads is an election to elect Regional Heads and Deputy Regional Heads directly in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia of 1945. Article 1 number 4 of Law Number 22 of 2007 concerning General Election



Organizers (Statute Book of the Republic of Indonesia Number 59 of 2007, Supplement to Statute Book of the Republic of Indonesia Number 4721) stipulates, "The General Election of Regional Heads and Deputy Regional Heads is a general election to elect regional heads and deputy regional heads directly in the Unitary State of the Republic of Indonesia based on Pancasila and the Constitution of the Republic of Indonesia of 1945". If the election of regional heads is included in the election regime, the handling of disputes over the results of the election of regional heads becomes the authority of the Constitutional Court in accordance with Article 24C paragraph (1) of the Amendment to the 1945 Constitution. The problem is, Law Number 32 of 2004 still regulates disputes over the results of the regional elections under the authority of the Supreme Court, so there needs to be further regulations to clarify the regulation regarding disputes over the results of the regional head elections.

Through Law Number 12 of 2008 concerning Amendments to Law Number 32 of 2004 concerning Regional Government as amended by Law Number 23 of 2014 concerning Regional Government, election disputes have been transferred from the Supreme Court to the Constitutional Court. The transfer of the locus for dispute resolution is as stipulated in Article 236C which states that "The handling of disputes over the results of the vote count for the election of regional heads and deputy regional heads by the Supreme Court shall be transferred to the Constitutional Court no later than 18 (eighteen) months since this Law was promulgated. On October 29, 2008, the Chief Justice of the Supreme Court and the Chief Justice of the Constitutional Court jointly signed the Minutes of Transfer of Judicial Authority, as an implementation of Article 236C of Law Number 12 of 2008 above. In the Constitutional Court Regulation No. 15 of 2008 concerning Procedural Guidelines in Disputes over the Results of the General Election of Regional Heads, in consideration letter a it is emphasized that one of the authorities of the Constitutional Court is to decide disputes about the results of general elections, including the results of the election of regional heads. Likewise, in consideration letter b it states that the handling of the dispute over the vote counting of the election of regional heads is transferred from the Supreme Court to the Constitutional Court.

The Constitutional Court as the guardian of the constitution has the obligation to ensure that the implementation of the Pemilu does not violate the constitutional principles of Fair and Free Elections. Therefore, in the trial, the Constitutional Court not only examines the differences in the calculation of the results of the Election but also examines and considers the violations that occurred. When violations injure and damage the principles of *luber and jurdil*, the Constitutional Court has a constitutional obligation to straighten it out. This is the basis for the development of the Constitutional Court's decision for the dispute over the results of the Regional Elections.

The transfer of dispute settlement of the results of the regional head election from the Supreme Court to the Constitutional Court began with the Constitutional Court Decision No. 072-73/PUU-II/2004, dated March 22, 2005. On page 114, number 6 of the decision, the Court considered, among others, the following, "As a logical consequence of the Petitioners' opinion that the direct election is an election as referred to in Article 22E of the 1945 Constitution as described in Law Number 12 of 2003, the dispute regarding the election results, according to the Petitioners, must be decided by the Constitutional Court. Regarding the Petitioners' request to declare Article 106 paragraphs (1) to (7) as contrary to the 1945 Constitution, the Court is of the opinion that constitutionally, the lawmakers can ensure that the direct election is an expansion of the definition of the



election as referred to in Article 22E of the 1945 Constitution so that therefore, disputes regarding the results become part of the authority of the Constitutional Court under the provisions of Article 24C paragraph (1) of the 1945 Constitution. However, the lawmaker can also determine that the direct election is not an election in the formal sense referred to in Article 22E of the 1945 Constitution so that the dispute as a result is determined as an additional authority of the Supreme Court as possible. A copy of this decision is not for and cannot be used as an official reference or evidence.

The authority related to deciding disputes over election results by the Constitutional Court was originally only a general election for the president, DPR, DPRD, and DPD. However, in its development, this authority increased by deciding disputes over election results. The definition of "pilkada" was changed to "pemilukada" based on Law Number 22 of 2007 concerning the Implementation of Elections. Constitutional Court In rulings related to disputes over election results, there are controversial rulings. The Constitutional Court with its decision seems to have expanded its authority which was originally only related to disputes over the results of the "*mathematical count*" but can also examine the processes during the implementation of the election. The Constitutional Court argued that "the Constitutional Court must uphold justice and democracy in the election process, so that if in the process there are violations that have injured democratic values that have affected the results of the Constitutional Court can examine the case".

Responding to the implementation of direct Regional Head elections (Pilkada) which is increasingly receiving attention from various circles, the House of Representatives is trying to revise the election law. The main issue that is developing is the many negative impacts of direct elections, including money politics, social conflicts, and the partiality of organizers. Finally, the Regional Elections directly produced corrupt regional heads and *shadow governments* by successful teams, who were even more powerful. Although Pemilukada directly received a lot of criticism from various parties, Law No. 1 of 2015 concerning the Election of Governors, Regents, and Mayors, still uses a direct election system to elect Governors, Regents, and Mayors. Some people still want regional heads to be elected by the people directly. This is partly because experience shows that so far the wishes of the DPRD have often been out of sync with their aspirations with their people. Furthermore, in a democratic system, the high position of the people's sovereignty must come first and the aspirations of the people must not be reduced by any institution. The people's sovereignty is realized through direct elections every five years.

Through decision No. 97/PUU-XI/2013, the Constitutional Court granted the plaintiff's application and canceled two Articles 236 Letter c of Law No. 12 of 2008 concerning Regional Government and Article 29 Paragraph (1) Letter e of Law No. 48 of 2009 concerning Judicial Power which is the basis of the Constitutional Court's authority to adjudicate election disputes. One of the important clauses in the decision is that the authority to adjudicate election disputes as long as there is no law regulating it remains in the hands of the Constitutional Court. The reason is so that there is no hesitation, legal uncertainty, and a vacuum of institutions that resolve election disputes.

The Constitutional Court's decision above received responses from several experts, including Refly Harun, who considered that the Constitutional Court's decision was inappropriate. This is because the interpretation carried out by the Constitutional Court is very textual. Elections are interpreted by the Constitutional Court as only general elections to elect members of the DPR, DPD, DPRD, as well as the president and his

deputies. Indeed, at the constitutional level there has been no agreement on the direct election of regional heads, so it is impossible for the constitution to include regional elections as elections. Therefore, it was decided to be democratically elected. The definition of democratically elected is optional. It can be chosen directly, or indirectly. The Constitutional Court interprets that if elected indirectly, the House of Representatives is elected, so it is not a general election with the word "election". Because it is not an "election", it is certain that the dispute is not in the Constitutional Court but in the Supreme Court. Even though the instruments used in elections and regional elections are the same, namely the KPU, Bawaslu, Panwaslu. Election disputes and regional elections are constitutional conflicts of both must be brought to the Constitutional Court.

The Constitutional Court's Decision In the perspective of the constitution, it provides room for debate, especially when there are differences in interpretation in similar constitutional issues that have been decided before. In Decision No. 072-073/PUU-II/2004 dated March 22, 2005, the majority of constitutional judges have indirectly interpreted that the determination of regional elections as part of general elections is an open *legal policy*. Examined, it appears that the Constitutional Court's decision to revoke its own authority in handling Pilkada disputes, has accommodated the wishes of several parties who do want the settlement of Pilkada disputes to be returned to the Supreme Court. We can see this in the Election Bill Article 30 paragraph (1) which emphasizes that candidates for governor and deputy governor (cagub-cawagub) who feel aggrieved or have preliminary evidence of political allegations that occurred before, during, and after the election, can file an objection to the Supreme Court.

The proposal of the Ministry of Home Affairs (MoH) to return the settlement of Pilkada disputes from the Constitutional Court to the Supreme Court contained in the Draft Pilkada Bill received many responses from various circles. For example, an expert in constitutional law at the University of Khairun Ternate, Margarito Kami, stated that the Ministry of Home Affairs' proposal could actually damage the constitutional order. According to him, the draft made by the Ministry of Home Affairs is considered to play with the constitutional law that has been neatly arranged in the 1945 Constitution (Constitution) and various other laws in resolving election disputes. If the settlement of the Pilkada dispute is moved from the Constitutional Court to the Supreme Court, it will change many laws related to the regional elections and it will damage the constitution. This action is unconstitutional, where there are several laws, especially those used by the government as reference materials for the proposal. Margarito also said that the proposal actually shows that lawmakers are inconsistent and make only based on the political tastes of the rulers without thinking about the design of democracy and law enforcement.

The same thing was expressed by constitutional law expert Irman Putra Sidin. According to him, the Ministry of Home Affairs' proposal is unconstitutional because the Constitutional Court is an institution that has the authority to resolve election disputes. Elections are elected by the people, disputes are resolved at the Constitutional Court, not at the Supreme Court. Meanwhile, Professor of Constitutional Law at the University of Indonesia (UI) Yusril Ihza Mahendra said that there was no problem with the authority of election disputes being transferred to the Supreme Court. However, it depends on the legal apparatus related to the regional elections. If this is implemented, it will change all laws related to the regional elections. It all depends on the legal tools that will be used, whether or not they are ready if they are going to be tried at the Supreme Court. The former minister of law and human rights said that one of the laws that need to be amended is Law No. 12 of 2008, in this law it is explained that the settlement of election

disputes is resolved by the Constitutional Court, not by the Supreme Court.

In addition, with the existence of a political policy to carry out simultaneous Regional Elections, this will raise problems, how if there is a dispute in the implementation of the simultaneous Regional Elections, it is impossible for one institution to examine and decide hundreds of cases of Pemilukada disputes at the same time. The process of resolving disputes in the Regional Elections also has a predetermined time limit.⁴² For this reason, the institution that is considered the most appropriate to handle election disputes is the Supreme Court by delegating to the High Court in each region. If the litigant is not satisfied with the High Court's decision, then they can file an objection to the Supreme Court. Meanwhile, Law No. 1 of 2015 concerning the Election of Governors, Regents, and Mayors, still leaves it to the Constitutional Court (although it is temporary) to resolve Pilkada disputes. For this reason, it is necessary to immediately establish laws and regulations that regulate which institutions are authorized to resolve Election disputes.

4. CONCLUSION

The background of the Constitutional Court obtaining the authority to resolve Pemilukada disputes is based on Law Number 12 of 2008 concerning Amendments to Law Number 32 of 2004 concerning Regional Government as amended by Law Number 23 of 2014 concerning Regional Government which contains provisions that Pilkada disputes have been transferred from the Supreme Court to the Constitutional Court as stipulated in Article 236C which states that "The handling of disputes over the results of the vote count for the election of regional heads and deputy regional heads by the Supreme Court shall be transferred to the Constitutional Court no later than 18 (eighteen) months after the promulgation of this Law." However, the authority of the Constitutional Court in resolving the Pemilukada is not in accordance with the values of the Constitution as the highest law in the Unitary State of the Republic of Indonesia. Through decision number 85/PUU-XX/2022, the Constitutional Court revoked its authority to handle Pilkada disputes with the consideration that, the lawmakers can also determine that the direct Pilkada is not an election in the formal sense mentioned in Article 22E of the 1945 Constitution so that the dispute over the results is determined as an additional authority of the Supreme Court. The authority to adjudicate election disputes as long as there is no law regulating it remains in the hands of the Constitutional Court. The reason is so that there is no hesitation, legal uncertainty, and a vacuum of institutions that resolve election disputes.

5. BIBLIOGRAPHY

- [1] Ubaedillah dan Abdul Rozak, *Pancasila, Demokrasi, HAM, dan Masyarakat Madani*, Kencana Prenada Media Group, Jakarta, 2013.
- [2] Bagir Manan, *Menyongsong Fajar Otonomi Daerah*, FH UII, Yogyakarta, 2014,
- [3] C.F. Strong, *Konstitusi-Konstitusi Politik Modern*, Nusa Media, Bandung, 2011.
- [4] Dahlan Thaib, *Implementasi Sistem Ketatanegaraan Menurut UUD 1945*, Liberty, Yogyakarta, 2013
- [5] Hamdan Zoelva, *Problematika Penyelesaian Sengketa Hasil Pemilukada*, Mahkamah Konstitusi, Jakarta, 2013.
- [6] I Dewa Gede Atmadja, *Sistem Pemilihan Langsung dan Pertanggung jawaban Kepala Daerah*, Fakultas Hukum Universitas Udayana, Bali, 2014.
- [7] Janedjri M. Gaffar, *Politik Hukum Pemilu*. Konstitusi Press (Konpress), Jakarta,

- 2012,
- [8] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, Syaamil Cipta Media, Jakarta, 2016.
 - [9] Bandura, A. (1986). Social foundations of thought and action: A social cognitive theory. Prentice-Hall.
 - [10] Bloch, F. S. (Ed.). (2011). The global clinical movement: Educating lawyers for social justice. Oxford University Press.
 - [11] National Cyber and Cryptography Agency (BSSN). (2024). Indonesia's cybersecurity annual report 2023. BSSN of the Republic of Indonesia.
 - [12] Hidayat, A., Nugroho, B., & Ramadhani, C. (2023). The effectiveness of experiential legal education programs in improving people's digital legal literacy. *Journal of Legal and Human Rights Education*, 11(2), 89-107. <https://doi.org/10.20885/jpham.vol11.iss2.art5>
 - [13] Indonesian Child Protection Commission (KPAI). (2024). Child protection complaint data in the field of pornography and cybercrime 2022-2023. KPAI of the Republic of Indonesia.
 - [14] Nashriana. (2023). Criminal law protection for children in Indonesia (4th edition). PT RajaGrafindo Persada.
 - [15] Regulation of the Minister of Communication and Information Technology Number 2 of 2024 concerning the Classification and Security of Internet Content. (2024). Ministry of Communication and Information of the Republic of Indonesia.
 - [16] Prasetyo, B., & Andayani, T. R. (2022). Cyberbullying in Indonesian adolescents: Prevalence, characteristics, and psychological impact. *Journal of Social Psychology*, 20(1), 45-62. <https://doi.org/10.7454/jps.2022.5>
 - [17] Raharjo, S. T., & Astuti, S. I. (2023). Legal protection of children victims of cybercrime: A normative and empirical analysis in Indonesia. *Journal of Law IUS QUIA IUSTUM*, 30(3), 521-545. <https://doi.org/10.20885/iustum.vol30.iss3.art4>
 - [18] Sitompul, A. (2022). Internet law and user protection in Indonesia (revised edition). CV Utomo