

## ESTABLISHMENT OF A GENERAL ELECTION COURT SYSTEM IN INDONESIA

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### Abstract

*General election disputes in Indonesia frequently cause political and legal issues. Unfortunately, an established dispute resolution institution is not available. This article aims to address this need by addressing the reasons existing legal policy on general election dispute resolution has not succeeded in resolving general election disputes transparently, accountably, and fairly, and the legal policy design and requirements of an ideal general election court for the future. This was a normative legal study using a statutory, case, and conceptual approach. The results of the study showed that the existing legal policy of general election dispute resolution has not been manifested as a strong and stable institution. Two courts, namely the Supreme Court and the Constitutional Court, with different characters and constitutional mandates, alternately have become the forum for resolving general election disputes. The different procedures and decisions between the two courts often negate each other, causing legal uncertainty which ultimately fails to provide justice. In the future, therefore, it is necessary to establish a general election court institution with a special mandate to adjudicate election disputes based on the Election Law to create legal consistency, legal certainty, and fair settlement of election disputes.*

**Keywords:** *legal policy, elections, dispute resolution, special courts.*

### A. Introduction

Democracy has been discussed for more than two thousand years. This was a very long time to come up with a set of democracy-related ideas that could be agreed upon by

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everyone, or almost everyone.<sup>2</sup> According to Miriam Budiardjo, among the many schools of democracy, one of the most important schools is constitutional democracy. Its distinct characteristic is the idea that a democratic government is a government in which the government's power is limited and cannot abuse its power against the citizens. The restrictions on the power of the government are enshrined in a constitution, therefore "constitutional government."<sup>3</sup>

The next political dynamics-related issue is that constitutional democracy and democratization are closely tied to free and fair general elections. This is because elections serve as one of the important instruments to measure the growth and development of both procedural and substantive democracy in a country. Elections provide important momentum for the realization of democracy in a country and a means of political legitimacy.

In Indonesia, changes are made to election regulations in almost every election. Interestingly, efforts to improve the regulations always aim to prevent violations and facilitate the resolution of both process disputes and outcome disputes. The formulated legal norms refer to the legal policy for preventive, corrective, and futuristic purposes.<sup>4</sup>

According to Riwanto, changes in legal norms in each election prove that socio-political changes have taken place in Indonesia.<sup>5</sup> These changes need to be accommodated in the legal policy of elections in the form of a law.<sup>6</sup> The underlying basis for the election system in Indonesia is the 1945 Constitution of the Republic of Indonesia, while other more detailed laws serve as the basis for the conduct in the elections.<sup>7</sup> The entire legal

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<sup>2</sup> The word democracy comes from two Greek words, i.e., *demos* which means people and *kratos/kratein* which means rule. See Miriam Budiardjo, *Dasar-Dasar Ilmu Politik* (Gramedia 2013) 105–109.

<sup>3</sup> Constitutional government is the same as limited government or restrain government. The idea that the power of government should be restricted was once proposed by an English historian, Lord Acton, regarding the fact that government is always run by man and that without exception many weaknesses are inherent in man. His very famous idea is power tends to corrupt, but absolute power corrupts absolutely. Budiardjo (n 2) 52.

<sup>4</sup> Tri Susilo, "Desain Lembaga Peradilan Sengketa Pemilihan Gubernur, Bupati dan Walikota di Indonesia untuk Mewujudkan Keadilan Konstitusional," (Universitas Sebelas Maret Surakarta 2020) 7.

<sup>5</sup> Agus Riwanto, *Hukum Partai Politik dan Hukum Pemilu di Indonesia: Pengaruhnya Terhadap Penyelenggaraan Pemilu Berkualitas dan Sistem Pemerintahan Presidensial Efektif* (Thafamedia 2016) 2–3.

<sup>6</sup> Mahfud MD, *Politik Hukum di Indonesia* (PT Rajagrafindo Persada 2010) 4.

<sup>7</sup> Law No. 15 of 2011 on General Election-Organizing Institutions, Law No. 8 of 2012 on General Election of Members of the House of Representatives, Regional Representative Council and Regional House of Representatives, Law No. 42 of 2008 on General Election of President and Vice President, Law No. 32 of 2004 on Regional Government (including the election of regional heads), Law No. 2 of 2011 on Political Parties, Law No. 27 of 2009 on the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, and the Regional House of Representatives, and Law No. 7 of 2017 on General Elections.

foundation reflects the embedded and constantly renewed Indonesian democratic system. The election model in Indonesia has its own characteristics compared to those in other democratic countries. As a country with a hierarchical government structure, elections in Indonesian are held at almost all government levels, including the executive and legislative branches.

In the context of the process of the conduct of elections as an instrument for obtaining popular legitimacy, law enforcement is key to ensuring that the elections are conducted based on the laws and do not violate the basic norms as its main foundation.<sup>8</sup> Based on this argument, law enforcement<sup>9</sup> aims to prevent fraud in the election process and protect the integrity of the election.<sup>10</sup> The absence of law enforcement in the election process may not only undermine the objectives of the election, but also create massive injustice in the community. Besides, law enforcement in the conduct of an election is a must when connected with the concept of electoral justice<sup>11</sup> which serves as the basis of the conduct of universal elections.

Efforts to improve regulations to minimize violations in the conduct of elections and resolve election disputes have always been on the books. The objective of the regulation is to create a quality election process to realize honest, civilized, and fair elections. The current issue is that disputes are resolved under many fora instead of one judicial institution. Meanwhile, dispute resolution under one judicial institution would help create

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<sup>8</sup> Topo Santoso, *Penanganan Pelanggaran Pemilu* (Kemitraan 2009) 4.

<sup>9</sup> According to Jimly Asshiddiqie, law enforcement in a broad sense covers activities to implement and apply the law and take legal action against any legal violations and deviations committed by legal subjects. In addition, in a broader sense, law enforcement also covers activities to ensure that the law as a set of normative rules that regulates and binds legal subjects in all aspects of social life is obeyed and carried out according to its objectives. In a narrow sense, law enforcement is to take action against any violations and deviations from the regulations, in particular, and in a narrower sense law enforcement is done through the criminal justice process involving the roles of the Police, Prosecutors, Advocates or Lawyers, and judicial institutions. See Jimly Asshiddiqie, "Pembangunan Hukum dan Penegakan Hukum di Indonesia," the article was delivered at "Seminar Menyoal Moral Penegak Hukum dalam Rangka Lustrum XI Fakultas Hukum Universitas Gadjah Mada (2006).

<sup>10</sup> Topo Santoso, "Penguatan Penegakan Hukum Pemilu," *Konferensi Memperbarui Penegakan Hukum Pemilu di Indonesia dan Pengalaman Internasional dalam Hal Penyelesaian* (2011) 2.

<sup>11</sup> Electoral justice is any ways and mechanisms to ensure that every action, procedure, and decision related to electoral processes are in line with the law (constitution, laws, international provisions or agreements, and other provisions that are applicable in a country), or any ways and mechanisms to guarantee or restore the right to vote. Through electoral justice, any parties who believe that their rights to vote have been violated are able to file a complaint, attend a trial, and receive a verdict. Electoral justice covers the ways and mechanisms that are available in a particular country and local community at the regional or international level to: (a) ensure that any actions, procedures, and decisions related to electoral processes are in line with the legal framework; (b) protect or restore rights to vote; (c) allow citizens who believe that their rights to vote have been violated to file a complaint, attend a trial, and receive a verdict. See Internasional Idea, *Keadilan Pemilu: Ringkasan Buku Acuan Internasional Idea* (Indonesia Printer 2010) 5.

legal certainty more quickly and more efficiently, given that elections are a series of scheduled activities of which the conduct requires punctuality and work efficiency.

Regarding the importance of establishing a special election court, it is necessary to formulate a legal framework for its establishment. However, it is obvious that the special courts that deal with election disputes are still biased, so a comprehensive study is needed, preventing the established special court from possibly impeding democracy. The special court should have an ideal design and become the benchmark of democracy as an important entity. In addition, the special court should have a more ideal design than the existing dispute resolution institutions. Currently, the authority to resolve election disputes is given to the Constitutional Court. This is still an *ad hoc* solution until a one-roof election dispute court can be established.

Therefore, although in the future there may be a mandate to establish a special court to resolve disputes over general election or regional election results, there are a number of alternatives to the design of courts that would be authorized to resolve not only regional election disputes, but also general election disputes. In other words, both general and regional election dispute resolution bodies must be designed more effectively.

For these conditions, it is necessary to study the establishment of a special court for general elections in Indonesia. This establishment terms of its legal policy, the design of the court, the characteristics of the court decisions, and the harmony of regulations with election-organizing and supervising institutions as well as judicial institutions under Law No. 48 of 2009 on Judicial Authority. This article discusses the legal policy of election dispute resolution to initiate the establishment of general election courts in Indonesia.

## **B. Problem Formulation**

Based on the above-mentioned description, the problem formulation in this study is as follows. First, why does the existing legal policy of election dispute resolution fail to create an accountable, transparent, and fair election dispute resolution? Second, what is the ideal legal policy design of general election court in the future? Third, what are the prerequisites for the establishment of an accountable and transparent election court in a democratic rule of law?

## **C. Methodology**

This was a normative and explanatory descriptive study. A normative descriptive study aims to comprehensively describe a social setting with its underlying laws or with its

legal norms. Various phenomena, particularly about the legal policy of election law and the reality of electoral justice, were explored and clarified. In terms of the typology of legal research, this article is a normative legal study, supported by sociological (socio-juridical) or empirical study.<sup>12</sup> The descriptive research method was used mainly to avoid speculative narrative as well as trial and error procedures.<sup>13</sup> The explanatory method in this study provides an in-depth explanation about the causal relationship among three different aspects of election dispute resolution.<sup>14</sup> In terms of the approach, this study used a statute approach, conceptual approach, and case approach.

## D. Discussion and Results

### 1. Legal Policy Problems in General Election Dispute Resolution

Electoral law enforcement basically serves as a mechanism that protects the people's right to vote, which is intended to ensure that the right to lodge a complaint over voting rights violations can be implemented fairly. Unfortunately, the election dispute resolution in Indonesia is still lacking in terms of accountability, transparency, fairness, and civility. Given the importance of establishing a limited jurisdiction election court, it is necessary to conduct a study on the legal norms as well as the legal policy of its establishment. However, it is obvious that the special courts that deal with election disputes are still biased, so a comprehensive study is needed.

Currently, the definition and practice of the 'new *trias politica*' which covers the definition of the state, society, and business sector are constantly evolving as a response to the needs of the times. The essence of the new and old '*trias politica*' is substantially the same, but there are stronger emphasis and demand for the separation of powers to prevent both the accumulation of power under one hand and conflicts of interest which harm the public interests.

The focus of the three new branches of power should also be separated to avoid conflicts of interests. In the practice of state constitution, a new role of the independent

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<sup>12</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (2005) 50.

<sup>13</sup> Moh Nazir, *Metode Penelitian* (Ghalia Indonesia 2005) 10–15.

<sup>14</sup> It is the existence of continuously changing legal politics of election law, causing the judicial system of the election results to be "contested" whether it is under the authority (core) of the Supreme Court or the Constitutional Court or others; a weak supervision system when an election is conducted, affecting the effectiveness of the election; and how to reconstruct so the court authorized for election results has certainty and integrated in a judicial system that receives a high level of trust from the community. See Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Liberty 2006) 25; This type of research was once used by Moh. Mahfud MD in his dissertation. See Mahfud MD, "Perkembangan Politik Hukum: Studi tentang Pengaruh Konfigurasi Politik terhadap Produk Hukum di Indonesia", (Universitas Gadjah Mada 1993) 67.

press media in peaceful coexistence has also been introduced. Therefore, the role of the independent press previously referred to as 'the fourth estate of democracy' in addition to the executive, legislative, and judiciary branches, can then be referred to as 'the fourth estate of new democracy' in addition to the power of the state, civil society, and the market. This is referred to as the new '*quadru-politica*' in the macro context, also known as macro *quadru-politica*.<sup>15</sup>

The essence of '*trias politica*' and '*quadru-politica*' in the micro sense is still related to the executive, legislative, and judiciary functions. However, the fourth branch is no longer the independent press, but the function of the general election-organizing institutions as the 'core-business' of democracy. General elections as a means of channelling the principles of people's sovereignty becomes the main pillar of democracy.

Therefore, election-organizing institutions must be positioned independently from the executive, legislative, and judiciary branches of government. The legislative power consists of people who vote in elections. Similarly, the executive power is led by the President and Vice President, as well as the governors, regents, and mayors who are also elected in general elections. Meanwhile, the judiciary power serves to adjudicate the election processes by the Supreme Court and its members, as well as adjudicating the election results by the Constitutional Court.

In this context, election-organizing institutions should be considered the fourth branch of power which complements the definition of '*quadru-politica*' in the micro sense, in addition to the executive, legislative, and judiciary branches of power in the common sense. Also, it is understandable that, to achieve the institutional capacity of election-organizing institutions, it is necessary to design an underlying law to build a state legal system supported by its institutional infrastructure that serves as a special court system intended to maintain the honour and dignity of general elections before the public.

Referring to what has been said by Asshiddiqie, that in the future the Indonesian nation should embrace not only *trias politica*, but also *quadra politica*.<sup>16</sup> That is, in addition to the legislative, judiciary, and executive elements, there should be the fourth branch of power, i.e., an institution that endeavours to conduct honest and fair

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<sup>15</sup> Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi: Perspektif Baru tentang 'Rule of Law and Rule of Ethics' dan 'Constitutional Law and Constitutional Ethics'*, (Sinar Grafika 2014) i–vi.

<sup>16</sup> Asshiddiqie (n 15) i–vi.

elections. This idea is based on objective facts in the field, where there is a need to further strengthen the position of the election organizing institutions. Based on the previous opinion, the legislatives and executives are election voters, so the election-organizing institution should keep distance.<sup>17</sup> Thus, the general election-organizing institutions as a unit that is integrated into a special court or general election court should be properly understood as the fourth branch of power. Therefore, legal policy as well as orderly and well-planned measures are needed to be redesigned by establishing a special court for general election in Indonesia of which the human resources consist of people with unique spirit and character (*volksgeist*).

A good election system is realized not only by successful voting but also by a fair dispute resolution process. The resolution of issues, including violations or disputes over election results, that arise in the course of elections, has been regulated in various laws and regulations. There are at least five institutions that are authorized to resolve election issues, i.e., the General Election Supervisory Board (Bawaslu), the Supreme Court, the District Court, the General Election Honorary Council (DKPP), the State Administrative Court (PTUN), and the Constitutional Court.<sup>18</sup>

The fact that there are many judicial institutions that are authorized to resolve election-related issues has proved ineffective given that each judicial institution requires a considerable time for resolving an issue. Thus, it is necessary to establish a judicial institution that resolves all election-related issues, especially election disputes and violations. Election-related issues usually emerge because of 'lack of rules of the game' which has to be resolved in the future.

*First*, there is ambiguity in the authority of the DKPP. Based on Article 109 Paragraph (2) of the Law on Election-Organizing Institutions, DKPP is authorized to examine and decide on complaints and/or reports of alleged violations of the code of ethics by election-organizing institutions.<sup>19</sup> Ambiguity over DKPP decisions can be

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<sup>17</sup> General Election Commission, General Election Supervisory Board, and General Election Honorary Council.

<sup>18</sup> Dispute and conflict resolution.

<sup>19</sup> The election-organizing committee consists of General Election Commissions (KPU) members, Provincial KPU members, Regency/City KPU members, PPK members, PPS members, PPLN members, KPPS members, KPPSLN members, Bawaslu members, Provincial Bawaslu members, and Regency/City Panwaslu members, Subdistrict Panwaslu members, members of the Field Election Supervisors, and members of the Overseas Election Supervisors. See more in Article 109 paragraph (2) of Law No. 15 of 2011 on General Election-Organizing Committee.

seen in three controversial decisions.<sup>20</sup> In these three decisions, DKPP not only found guilty and sanctioned election-organizing members who were proven to have violated the code of ethics, but also ordered the General Election Commission (KPU) to restore the rights of the complainants, something which was actually under the domain of election administration.

In Decision Number 73/DKPP-PKE-II/2013, for example, DKPP ordered KPU to re-include Selviana Sofyan Hosen (complainant) in the list of candidates.<sup>21</sup> In Decision Number 74/DKPP-PKE-II/2013, in addition to imposing a warning sanction on the Chairman of East Java KPU, Andry Dewanto Ahmad, and suspension of other East Java KPU Commissioners, DKPP also ordered KPU to quickly and properly review the principles and codes of ethics in the protection of the constitutional rights of Khofifah Indar Parawansa as a candidate for the East Java general election.<sup>22</sup> Meanwhile, in Decision Number 83 and 84/DKPP-PKE-II/2013, in addition to imposing sanctions in the form of suspension of the Tangerang City KPU for violating the ethics code, DKPP also ordered the Banten Provincial KPU to restore the constitutional rights of Arief R. Wismansyah-Sachrudin and Ahmad Marju Kodri-Gatot Suprijanto to be the candidates of the Regional Election of Tangerang mayor and deputy mayor in 2013.<sup>23</sup> Based on the applicable legislation, in examining and deciding cases through its three decisions as described previously, it can be said that DKPP had taken actions beyond its authority.

In fact, the institution that enforces the code of ethics for election-organizing institutions is not a new 'institution' in Indonesia. During the 2004 to 2009 elections, the institution was known as the KPU Honorary Council (DK KPU). In the 2009 election, as an ad hoc institution, DK KPU achieved a great deal of progress by revealing various violations of the code of ethics committed by the election-organizing institutions.

After the issuance of Decision of the Constitutional Court Number 11/PUU-VIII/2010 which provided a new interpretation of Article 22 E Paragraph (5) of the 1945 Constitution of the Republic of Indonesia, and later adopted by Law No. 15 of 2011, DK KPU then transformed into DKPP with a stronger position and function. The

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<sup>20</sup> Decision of DKPP Number 73/DKPP-PKE-II/2013 DKPP Decision Number 73/DKPP-PKE-II/2013 on the case of violation of the code of ethics of the Election Supervisory Board of the Republic of Indonesia; DKPP Decision Number 74/DKPP-PKE-II/2013 on the case of violation of the code of ethics of the Provincial KPU of East Java; and DKPP Decision Number 83 and 84/DKPP-PKE-II/2013 on the case of violation of the code of ethics of the General Election Commission (KPU) of Tangerang City.

<sup>21</sup> See DKPP Decision Number 73/DKPP-PKE-II/2013.

<sup>22</sup> See DKPP Decision Number 74/DKPP-PKE-II/2013.

<sup>23</sup> See DKPP Decision Number 83/DKPP-PKE-II/2013 dan 84/DKPP-PKE-II/2013.



transformation was based on a new paradigm regarding election-organizing institutions that KPU, Bawaslu, and DKPP are a unit of election administration functions, so each of these institutions must be permanent and independent. The problem related to the authority of DKPP in examining and deciding on alleged violations of the Code of Ethics in the conduct of elections sometimes exceeds the provisions that have been determined by law. This seems to place DKPP in a higher position than KPU and Bawaslu.

Constitutional Court Decision Number 115/PHPU.D-XI/2013 clarifies the characteristics of the previously debated DKPP decisions. Based on the Constitutional Court decision, it is known that the final and binding effect of the DKPP decision is not the same as the final and binding effect of a court decision because DKPP does not hold judicial power but it is an internal part of election organizing institution, so DKPP decisions are binding only for the institutions authorized to follow up on the DKPP decisions.<sup>24</sup> The author argues that it is necessary to review the formulation in the DKPP decision scheme and provide a legal formulation to provide opportunity for testing the decision, especially after the issuance of decision of the Constitutional Court Number 31/PUU-XI/2013, stating that the final and binding effect of DKPP decisions as referred to in Article 112 Paragraph (12) of the Law No. 15 of 2011 may cause legal uncertainty and may not be the same as the final and binding effect of the decisions of judicial courts in general because the DKPP is an administrative body for resolving election violations authorized by Law.

Second, there is an overlap between election-organizing institutions in terms of election law compliance. After the issuance of Law No. 15 of 2011 on Election Organizing Institutions, there are three institutions that carry out the function of organizing elections, namely KPU, Bawaslu, and DKPP. The relationship pattern among these election-organizing institutions can be said to have adopted electoral integrity. This is because one of the indicators of electoral integrity is adherence to moral and ethical values in the entire election processes. In Indonesia, this has been

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<sup>24</sup> Constitutional Court Decision Number 115/PHPU.D-XI/2013, which provides an interpretation of the validity and constitutionality of DKPP decisions that exceed its authority, declares that this is a legally flawed and void decision. This is because this decision shows that the DKPP decision, which is final and binding, has an impact on the KPU and Bawaslu institutions in the form of dismissal or suspension sanctions and has the potential to cause prolonged legal polemics. The decision provides confirmation regarding the supervising authority held by KPU and Bawaslu. As we know, DKPP is not an institution that exercises judicial power as referred to in Article 24 of the 1945 Constitution of the Republic of Indonesia.

manifested in the establishment of DKPP, followed by the formulation of Joint Regulations of the General Election Commission, General Election Supervisory Board, General Election Honorary Council No. 13 of 2012, No. 11 of 2012, No. 1 of 2012 on the Code of Ethics of General Election Organizing Institutions (hereinafter referred to as the Common Code of Conduct). The overlap that can be found is the issuance of DKPP decisions that could step on the jurisdiction of other election organizing institutions. Based on this explanation, the author argues that DKPP is an accumulation of failure in the judicial processes and election law enforcement. Therefore, it is understandable to have an idea of initiating the establishment of a special election court.

## **2. Legal Policy of an Election Court**

Disputes over the conduct of elections are actually cases related to violations of the election administration or cases related to dissatisfaction with the decisions of the election-organizing institutions.<sup>25</sup> The election disputes that were chosen as the object of this study are "criminal or administrative violations that were found during elections which affected the election results of which the legal basis could be sought to file a complaint about the validity of the election results."

The idea of establishing a special court for general election in Indonesia emerged as a manifestation of the provisions of Article 157 Paragraph (1) of Law No. 8 of 2015 on Amendments to Law No. 1 of 2015 on the Enactment of Government Regulations in Lieu of Laws. The *a quo* provision states that, "Disputes over election results are examined and adjudicated by a special judicial institution." The special election court is an independent institution that is authorized to make final decisions concerning election lawsuits. The decisions of the special election court can be appealed to the Supreme Court and/or the Constitutional Court. The final decision on election lawsuits is under the authority of the general courts which are part of Article 24 courts. In such an election dispute resolution system, an independent election-organizing institution has the duties to conduct and manage election processes and has the judicial authority to deal with lawsuits and issue final decisions.

Regarding this fact, all Indonesians are currently contemplating the form of the special election court. The government, House of Representative (DPR), Regional

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<sup>25</sup> Topo Santoso, "Perselisihan Hasil Pemilukada" (2011) delivered in Diskusi Terbatas in the Constitutional Court on 24 March 2011 in Jakarta.

Representative Council (DPD), academicians, and the existing judicial institutions are still figuring out the form of the court that would be established. However, it is not an easy question to answer. It is necessary to view similar institutions that exist in other countries. From the research, it can be seen that many countries authorize the Constitutional Court as the judicial institution to resolve election disputes. Some of these countries are Austria, Germany, Azerbaijan, and Brazil. However, some other countries, such as Mexico, Thailand and the Philippines, have established special bodies to resolve election disputes.

### 3. General Election Court as an Idea

Discourse on establishing a special court for general election is a relevant, because the general election-related legal efforts so far often fail to provide justice, for examples court decisions are issued after election processes have finished and there are a series of election-related legal efforts that are time consuming, being counter-productive with the time-bound election processes. In addition, legal efforts are to be processed in various judicial courts. With these conditions, the efforts to create a fair election process will be difficult, particularly when the elections take place simultaneously.

The existence of a special court for general election in the Indonesian election will help unravel the tangled mess of the democratic processes in Indonesia. The existence of an effective dispute resolution mechanism is essential to maintain the legitimacy and integrity of a general election. Thus, no matter how well-designed an election system is, the possibility remains for violations that could reduce its quality. Based on this argument, the best election system is one that contains a reliable institutional/legal mechanism to resolve various election objections and disputes. In fact, the institutional mechanisms not only resolve election disputes but serve as a place to fight for and protect the rights of the citizens from various violations.<sup>26</sup> As Petit<sup>27</sup> once said that “challenges to election results, or the conduct of elections, should not be considered a weakness of the electoral system, but a sign of its resilience.” When a general election runs smoothly, the existence of an electoral justice system is crucial to

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<sup>26</sup> I Nengah Kastika, “Hak Memilih Prajurit Tentara Nasional Indonesia Dalam Pemilihan Umum di Indonesia” (Univesitas Brawijaya Malang 2009) 1.

<sup>27</sup> Denis Petit, *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System (Organization for Security and Cooperation in Europe)* (ODIHR Rule of Law Expert 2000) 5.

ensure that the rights of the people in the election are upheld and ensure no mistakes. On the other hand, when a fraud or violation is found, then the established electoral justice system should be able to resolve and provide compensation for any losses.

Both administrative and criminal violations have different degrees of error and implications on the quality of the conduct of elections. The most dangerous and fundamental problem is when the public doubts election results.<sup>28</sup> In addition to delegitimizing the results, it can also cause antipathy towards the elected government, even disrupting social, political, and governmental stability.

If further linked with the principles of the rule of law, the urgency of establishing an election dispute resolution mechanism is closely related to the concept of due process of law. This concept emphasises the protection and enforcement of the human rights of citizens as guaranteed by the constitution. The concept of due process of law procedurally requires a fair and proper process before making a decision that can harm individuals.<sup>29</sup> Thomas Fleiner stated that, procedurally, the main objective of due process of law is to guarantee that the fact-finding process in a dispute resolution mechanism also accommodates the conflicting interests between the parties.<sup>30</sup> Therefore, what matters is not only about the existence of a mechanism, but also a proper and fair process.

Various international organizations including IDEA International, The Carter Center, The Organization for Security and Cooperation in Europe (OSCE) and the United Nations Development Programme (UNDP) have gathered to formulate, conceptualize, and frame the basic principles of election dispute resolution. The principle is known as The Accra Guiding Principles on Electoral Justice (Ghana Principles). There are ten key principles in the Ghana Principles, namely:<sup>31</sup>

- a. Integrity: This is a vital principle that contributes to the legitimacy of general election processes and serves as a key in every aspect of the election process.
- b. Participatory: Public voices must be heard, respected, and voiced in an independent, fair, and proper election model. Citizens are the main actors in a representative democracy, so they are entitled to the right to choose

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<sup>28</sup> Rudi Salam Sinaga, "Implikasi Distorsi Demokrasi Pada Pemilukada Terhadap Penguatan Demokrasi Lokal" (2012) 5 Jurnal Perspektif.

<sup>29</sup> Jibong Lim, "Korean Constitutional Court and Due Process Clause" (2006) 6 Journal of Korean Law.

<sup>30</sup> Thomas Fleiner, "Continental Law: Two Legal Systems" (2005) 9.

<sup>31</sup> Electoral Integrity Group, "Towards International Statement of The Principles of Electoral Justice (The Accra Guiding Principles)" (2016).

- who should represent and arrange their lives. A general election must provide the widest possible space for participation, involving novice, female, and vulnerable voters.
- c. Law-abiding: For the results of the general election to be legitimate, each stage of the process and violations thereof must be clearly regulated. A general election will be respected if conducted in accordance with the laws and regulations that are applicable in the community. Legislation must also be formulated in accordance with international norms, reflect the principles of electoral justice, and provide clear sanctions.
  - d. Fair and impartial: The impartiality and fairness principles ensure equal treatment between voters and contestants. This means that relevant regulations should be applied equally to the entire community. This must be in line with the level playing field principle for all parties. This principle should apply at every stage, during the election stages and dispute resolution.
  - e. Professional: Managing elections requires technical knowledge on various electoral issues. This way, competence and professionalism are expected from not only election-organizing institutions but also election dispute resolution institutions. The professionalism principle should govern the conduct and supervision of each stage of an election. Some of the key indicators of professionalism are experience, expertise, objectivity, efficiency, accuracy, commitment, and effectiveness.
  - f. Independent: The independence principle should be upheld by every official involved in holding elections. Complaints or dispute resolution must be respected and protected by law. No interests should be allowed to interfere.
  - g. Transparent: Transparency is a key element involving openness at every election stage, including easy and fast access to information, justification for every decision-making, honesty, and prompt correction of irregularities so as to increase trust and credibility of each stakeholder.
  - h. Non-violent: Each election stage must be conducted without violence, intimidation, coercion, corruption, or other actions that could interfere with the conduct of the election to comply with the basic principles of electoral justice.
  - i. Regularity: Elections should be held periodically, at regular intervals. This must be clearly regulated by the law.
  - j. Acceptance: It is undeniable that election results must reflect the will of the people. Thus, every person must comply with/or be willing to accept the results, respectful of a peaceful transition of power, and the legitimacy of the election results must also be admitted by the international community.

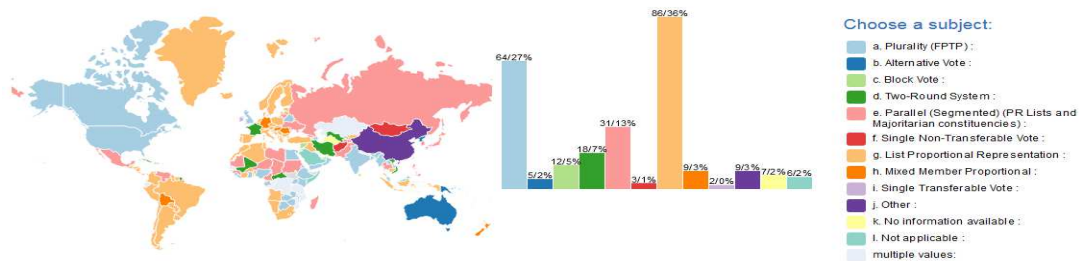
There are various election dispute resolution systems applied in countries throughout the world. The variation is related to the regulations and institutions involved in it. In terms of the availability of an election dispute resolution mechanism, the Ace Project<sup>32</sup> recorded three main models of election dispute resolution bodies in various parts of the

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<sup>32</sup> Ace Project, "Legal Framework Encyclopaedia" (2012).

world, namely judicial resolution institutions, resolution by election-organizing institutions, and special institutions for election dispute resolution. In addition to these three models, some countries also use other mechanisms, such as dispute resolution through parliament or constitutional council. This is in line with a statement by Firdaus that, in general, the models for election dispute resolution in the world are divided into three components: *first*, the Election Management Body; *second*, the Election Complaint Commission; and *third*, the Election Tribunal. The distribution of the above-mentioned dispute resolution models can be seen in the following map:<sup>33</sup>

Figure 1. Map of Distribution of Models for Election Dispute Resolution Institutions in Various Countries



Source: <http://aceproject.org/epic-en/>

Based on the data, the majority of the countries (59% or 132 countries), authorize dispute resolution to judicial institutions. Meanwhile, 37% or 84 countries implement dispute resolution by election management bodies.<sup>34</sup> In addition, there are 12% or 27 countries that have resolution models through special institutions for election dispute resolution. The remaining 11% or 25 countries have special mechanisms for election dispute resolution.

The election dispute resolution described in the previous chapter makes it possible for disputes to be resolved through a competent institution. Bawaslu has recommended an institution authorized to resolve disputes. If there are too many election-organizing institutions, there is a risk of overlaps and conflicts between institutions. For examples, regarding the drafting and enforcement of election laws, if there is only one court to resolve election cases, this will certainly be more effective because there are only few check and balances activities to do.<sup>35</sup> On the other hand, resolving violations and disputes through some institutions is ineffective because each institution has a different resolution

<sup>33</sup> Ace Project (n 32).

<sup>34</sup> Including Indonesia

<sup>35</sup> Abhan and others, *Bawaslu Mendengar: Menghimpun Masukan untuk Membangun Pondasi Pengawasan Pemilu* (Badan Pengawas Pemilu Republik Indonesia 2017) 11.

system and process, making it difficult to achieve legal certainty. In addition, the conduct of elections and their stages are scheduled by law, so if the dispute resolution takes place in some institutions, it could hinder the conduct of elections.

Consideration of the above problems underscores the importance of a special institution to resolve election disputes in Indonesia. The establishment of a General Election Court may be able to accommodate the resolution of election violations or disputes to achieve elections with integrity which has a legal foundation based on the legal framework. Thus, a General Election Court is highly needed as a means or a place for resolving conflicts or cases. Judicial institutions play a role in providing a forum for and even help for those who feel that their rights have been violated and force certain parties to take responsibility for their actions. Some of the reasons why dispute resolution processes should be done by a special court are:

- a. There are too many institutions involved in election dispute resolution, including Bawaslu, the police, prosecutors, general courts, state administrative courts, and the Constitutional Court;
- b. The existing courts have limitations in adjudicating certain election disputes, either because the procedures of these courts cannot follow the time-bound general/regional election processes or because their authority has a limited scope; and
- c. With so many mechanisms and institutions involved, almost all who seek justice fail to receive redress for violations.

The above-mentioned problems become the reasons why establishing a special court is relevant to consider because the election-related legal efforts have so far failed to provide the public justice. For example, court decisions are issued after election processes have finished and there are a series of election-related legal efforts that are time consuming, being counter-productive with the time-bound election processes. In addition, the legal efforts are to be processed in various judicial courts. With these conditions, the efforts to create a fair election process will be difficult, particularly when the election processes take place simultaneously.

A special institution for resolving election disputes would play a role of providing a place and even help to those who feel their rights have been violated and force certain parties to take responsibility for their actions. This is in line with an argument by Satjipto Rahardjo who said that the presence of a legal institution is the realization of an abstract concept or draft of law. It is through the institution and through the work of the institution

that an abstract concept can be realized in society.<sup>36</sup> The author believes that the establishment of a General Election Court in the future may have several advantages, including:

- a. The judicial court has been well-established, so if a special court for resolving regional election disputes is established under the Supreme Court, it would not become an issue, especially in relation to the underlying regulations, organizations, resources, and procedures.
- b. The judges in Indonesia's judicial institutions have expertise in examining, deciding, and resolving disputes. In addition, since the very beginning, these judges already have judicial independence, allowing them to take no sides when resolving regional head election disputes.
- c. The structure of Indonesia's courts covers all the regions in Indonesia, making it possible for all the Indonesia' courts to resolve regional head election disputes properly.
- d. It will promote governmental legitimacy because election-related decisions are made based on the laws to create justice, legal certainty, and political stability.
- e. It may prevent abuse of power by the dominant party in the legislative institution by paying attention to the minority as well.
- f. Despite being political, it is recognized that regional head election disputes are a legal issue, so the resolution should be based on the constitution and laws.

However, this concept is not flawless. Admittedly, that there are some possible weaknesses of a special court for election disputes, including:

- a. The controversy over a decision decided by the high court and the Supreme Court in the past which resolved the regional head election disputes certainly burdened all the judicial institutions under the Supreme Court because they had to resolve the regional head election disputes.
- b. The level of public trust in the regional election dispute resolution by the judicial institutions is still low.
- c. Most judges have not specifically studied regional election disputes, so it is necessary to conduct training and certification of judges handling regional head election and to involve experts who can testify before the court.
- d. It can trigger political influence from those who do not agree with the decisions made by the judicial institutions who question the capacity or impartiality of the institutions.
- e. It can be dangerous if judges are involved in the legal issues of partisan politics.
- f. There is a risk judges could be appointed based on political criteria instead of the result of procedural justice selection.

Election dispute resolution through some institutions would certainly impact the quality of decisions issued by each institution. In addition, the disputes at the election

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<sup>36</sup> Satjipto Rahardjo, *Teori dan Metode dalam Sosiologi Hukum* (Undip Press 2017) 36.



stage must be resolved first before moving to the next stage, certainly requiring a longer wait time for decisions to be issued by the relevant resolving institution. This will eventually hinder the enforcement of the law on election dispute resolution.<sup>37</sup>

The fact that there are several institutions authorized to resolve election disputes has caused many conflicts and inconsistencies. *First*, many parties do not understand election disputes. *Second*, a lot of energy is spent following up on the resolution processes, but the results are minimal. *Third*, there is institutional injustice. If analysed further, too many complaints filed at the Constitutional Court and the Supreme Court are a consequence of not understanding the underlying law of the lawsuit to be filed. There are many violations and disputes in the election stage that should be resolved by the Election Supervisory Committee (Panwaslu) or law enforcement institutions but submitted to the judicial institutions.<sup>38</sup>

In relation to general election or regional head election disputes, grievances have included administrative violations, election crimes, and disputes in the election stage as the basis of the lawsuit. However, all these three things are an authority of neither the Constitutional Court nor the Supreme Court to resolve. Election offenses should be resolved by the criminal justice system (police, public prosecutors, and courts). Administrative violations should be resolved by the KPU or the Regional General Elections Commission (KPUD). Meanwhile, disputes in the election process or stage should be resolved by General Election Supervisory Agency (Bawaslu) and Panwaslu. Unfortunately, although the decisions of Panwaslu or Bawaslu have a final and binding effect, the effect is not as final and binding as the decisions of judicial institutions, rendering them often ignored. Meanwhile, what is defined by the disputes over the election results are disputes over the decisions of the KPU or KPUD regarding the election results. Unfortunately, the disputes over the election results are limited to disputes about counting errors made by KPU or KPUD. In the context of elections, the Constitutional Court has the authority to resolve them.

The existence of a General Election Court in Indonesian would help unravel the tangled mess of the democratic processes in Indonesia. Therefore, this article proposes to immediately establish a General Election Court in Indonesia.

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<sup>37</sup> Nofi Sri Utami, "Problematika Pola Penyelesaian Persoalan Pemilu (Pelanggaran & Sengketa) yang Terpisah Pisah," *Evaluasi Pemilu Serentak 2019 Bidang Evaluasi Aspek Hukum Pemilu* (2019) 19.

<sup>38</sup> Utami (n 37) 20.

For the greatest chance of success, a General Election Court must be independent. In terms of the history, the idea to establish an autonomous special judicial body was once proposed by Bawaslu. Law No. 7 of 2017 on Elections has made Bawaslu an enforcement body that decided on election disputes or violations. Apparently, Bawaslu with its task of "resolving electoral matters" had the potential for creating conflicts of interest. Both authorities had the same weight and could burden Bawaslu. Finally, Bawaslu was considered unreliable and a troublemaker with its own conflicts of interests. Based on this condition, experts like Jimly Ashidiqie and Refly Harun thought that Bawaslu's tasks were too difficult.

An alternative to establishing an autonomous General Election Court is better than establishing a special court under the Supreme Court. This alternative is relevant to creating a General Election Court in two alternative models. First, designing a special judicial institution with the same position as the Supreme Court and the Constitutional Court as implemented in Mexico and Brazil. Second, Bawaslu could be transformed into a quasi-judicial institution, the main task of which would be to resolve election disputes.

An alternative to not establishing a judicial body under the Supreme Court and the Constitutional Court is the most possible alternative based on a consideration of constitutional comparison. There are several reasons as follows:

| Reasons why not under the Supreme Court   | Reasons why not under the Constitutional Court  |
|---|---|
| <ul style="list-style-type: none"> <li>a. A General Election Court does not hold general but special courts;</li> <li>b. A General Election Court offers a speedy trial in line with the election mechanism with a limited time frame;</li> <li>c. The decision of a General Election Court is final and binding, there is no further legal action;</li> <li>d. A General Election Court adjudicates administrative disputes or violations of election laws, while election crimes would remain under the absolute authority of the general court. Provisions on the mechanism for resolving criminal violations through the general courts are mandated in the Law on Election Courts</li> </ul> | <ul style="list-style-type: none"> <li>a. The Constitutional Court can exercise its authority as mandated in the 1945 Constitution of the Republic of Indonesia, so the Constitutional Court focuses only on its duties and authority as the guardian of the constitution, instead of dealing with election disputes which will hinder its main duties and authority that should be completed quickly;</li> <li>b. The Constitutional Court is not designed to have inferior courts like the Supreme Court;</li> <li>c. In the modern constitutional system, it is possible to establish an independent state institution that is not included in the <i>trias politica</i> framework.</li> </ul> |

The underlying legal basis for establishment of a special court refers to Article 22E Paragraph (5) of the 1945 Constitution that general elections are held by a national, permanent, and independent general-election commission. That is, the general election commission is the election-organizing institution, and as the organizer, it is national, permanent, and independent. Finally, the establishment of a General Election Court would answer the needs that there have so far been many cases of dissatisfaction with and irregularities in election results. It is the electoral justice that is to be achieved, to ensure legitimate and fair elections.

If this idea is linked with simultaneous conduct of elections, it will certainly affect the pattern and systems of election dispute resolution. The resolution of general election disputes through some institutions today leaves some open issues regarding the enforcement of election law. The problems are: (1) the resolution of election disputes has become ineffective given that each institution has its own resolution procedure and requires a lot of time. Meanwhile, elections, including presidential and House of Representatives elections, are to be conducted simultaneously, so it is possible that there are issues, such as violations or disputes, simultaneously; and (2) The public will be confused about the resolution procedures through some institutions because the procedures in different institutions are different and tiered. In other words, general election dispute resolution involving many institutions raises problems that must be resolved immediately by the government.

From the transformation that is done, establishment of a General Election Court should be a central (under-one-roof) election dispute resolution in Indonesia. Even if it is not central, any division should be clearly regulated. This division aims to prevent any overlaps in the process. For example, if there is a criminal element in the election dispute, then the case should immediately be referred to the general court, starting from an investigation by the police, as regulated in the Criminal Code. On the other hand, for administrative disputes, the case should be processed directly by this special court.

Arguably, it is necessary to redesign the institution that is authorized to resolve disputes over election results as well as disputes over election law, by establishing a special election court. This is done by simplifying the systems and institutions involved in resolving election disputes. In this context, it is necessary to follow up the mandate of the establishment of a special court that will be authorized to resolve disputes over election

results using a comprehensive thinking framework. For more details, the following describes a General Election Court for election dispute resolution in the future.

### **E. Conclusion**

The legal policy underlying election dispute resolution has so far not been effective in conducting an accountable, transparent, and fair resolution of election disputes because there has been no clear regulation on which judicial institution is authorized for this matter. Meanwhile, at the practical level, Bawaslu and DKPP are often considered to work beyond their authority, which further makes the dispute even more complicated, lack of legal certainty and justice. At the institutional level, election dispute resolution is practically contested by the Constitutional Court and the Supreme Court. This is inseparable from the debate, whether Pilkada (regional head election) and the general election are in different or the same regimes. Finally, Law No. 8 of 2015 on Amendments to Law No. 1 of 2015 on the Enactment of Government Regulation in Lieu of Law No. 1 of 2014 on the election of governors, regents, and mayors into law which clearly states that "[d]isputes over election results shall be examined and adjudicated by a special judicial institution." The issuance of the law clearly implies that the General Election Court has so far not been accountable, has not had legal certainty, and has not been able to create justice.

The design or legal policy of the law to be establish should have the character of "*volksgeist*" to comprehensively resolve election disputes. The legal policy of the General Election Court in the future should certainly answer the current needs. The establishment of the General Election Court should be effective and aim to bring electoral justice, namely: (a) ensuring that every action, procedure, and decision related to the election processes are in line with the legal framework; (b) protecting or restoring the right to vote and creating legal certainty; (c) allowing for any citizens who believe that their rights to vote have been violated to file a complaint, attend a trial, and receive a verdict that is accountable and fair. One of the prerequisites for the establishment of a General Election Court (as the first option) is that the institution should be *delegatie provisio*, which means that the institution does not have to be established by its own law, but it can also be established under its own law. If it is under the Supreme Court, the establishment can be regulated in provisions on special election courts in the Election Law, for example. Most importantly, its institutional duties are not ambivalent unlike Bawaslu or DKPP. This

institution is designed to handle administrative election disputes, while election crimes are to be referred to the general court. The second alternative is to establish a General Election Court as a state institution, instead of establishing it under the Supreme Court or the Constitutional Court. The legal basis for the establishment of a special court is Article 22E Paragraph (5) of the 1945 Constitution, that general elections shall be held by a national, permanent, and independent general-election commission. This means that the general election commission is the election-organizing institution, which is national, permanent, and independent.

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