Progressivity Of Constitutional Court’s Decision: A Study Of Regional Election Dispute In Indonesia

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Abstract: The Constitutional Court as a constitutional court must find a law by studying the legal principles and norms in the constitution. The norm as a measure that must be fulfilled by everyone in relation to other or their surroundings. The type of research was a normative research. The approaches used in the research were statute, case, historical, comparative, and conceptual. The results of the research indicate that the ideal characteristic of the Constitutional Court’s dispute in realize a justice in regional elections, through ways of upholding the principles of progressive electoral law and ultra vires. Based on analysis result, it is necessary a paradigm shift in the Constitutional Court in realize a justice at the regional elections from analytical jurisprudence towards sociological jurisprudence. Constitutional Court to consider the imposition of a decision regarding an offense the elements of systematic, structured and massive along disputes the result of vote counting. In addition, a progressivity is needed in shaping the jurisprudence distribution systems of Special Courts under the judicial authority of the constitutional court.

Index Terms: Constitutional Court, Election Systems, Regional Election

1 INTRODUCTION
Reform agenda in the field of law that initiated more than two decades, brought significant changes, particularly in the context of law enforcement in Indonesia. The dynamics of legal policy is move rapidly and accompanied by changes in the constitutional system of the Unitary of the Republic of Indonesia fundamentally. With the Constitution, a state as a community has a clear goal and will guide towards what aspired. Concretely, the constitution regulate national life cannot be separated from the existence of the state constitution is concerned with the attention to the role and functions of the constitution as a basis and reference for state administration to achieve the aspired goal. The amendment of the 1945 Constitutional had a big impact on the constitutional system of Indonesia. The amendment provides a strong constitutional guarantee for the elections in Indonesia. The General Election Commission (KPU) and the Election Supervisory Body (BAWASLU) placed as the competent body to organizing the direct elections for a period of 5 (five) years periodicity. The characteristics of attribution authority attached to the General Election Commission in the general elections are different in the domain of the Election Supervisory Body. In spite of both of them is presented as an independent institution to be directly involved for throughout all stages of election organizing. The substance of BAWASLU authority, serves as prevention and repression (law enforcement). At the level of prevention, the body perform direct supervisory and socialization through a national organization formed from the center, Provincial/District/City, Sub-district, Village until partisan. While, at the level of law enforcement, its position is resolve violation in electoral administration and disputes.

Although, given the authority to recommend to the authorities on the findings and reports for actions that contain election criminal elements. In the arrangement of the electoral institutions, were also to include the Honorary Board of Election (DKPP) as an institution to examine, hear and decide the problem of ethics of the parties implementing electoral. The existence of DKPP as a quasi-court that handles the problem of moral ethics of organizers, in conducts the tasks of planning, implementation, and accountability for the general election. In the judiciary, there are two legal institutions based on attributions regulate the handling and settlement of electoral. If the object of case (objectum litis) and fundamentum petendi concerning the state administration dispute, then the domain of law to adjudicate such disputes in the sphere of cassation to the Supreme Court to the scope of the appeal in the State Administrative High Court. Meanwhile, if the result of election become problem is now as absolute competence of the Constitutional Court. The sequences of the decision of Constitutional Court judges overtime into the paradigm that departs from legalistic-positivistic mindset towards progressive-legal concepts. A differentiator from other legal concepts such as realism and pure legal, progressive legal emphasizes that the legal is an institution that aims leads man to life a fair, prosperous and make people happy. That is the paradigm of progressive legal indicates that the legal is for humans. Guidance or basic beliefs did not see the law as central to arbitrate, but the man that were at the center of rotation of the law. That law revolves around man as its center. Laws exist for man, not man for the law. Truly the conception of progressive-legal has been practiced the Constitutional Court which explicitly justify that they has authority to question the judicial process to ensure quality not just quantity of election and stated materially has been a violation of election provisions that affect the vote. Reviewed from the aspect of judicial, the Constitutional Court to exercise its authority should not perform the function of criminal justice or administrative but still to question, examine and assess any violations that resulted in the vote count. The limit is assessing administrative violation and electoral are not only the electoral results but the arguments that affect the outcome of elections (electoral process) of Regional Head. In other word, the Court in deciding disputes the election’s results of Regional Head, the decision of ultra vires and ultra petita as legal breakthrough to
enforce restorative justice. Relive the decision of disqualification and structured, systematic and massive against candidates or organizers who commit violations. It may also recover the candidate's damages as a victim of political fraudulence in the fulfillment of material and immaterial. If the legislation cannot reach a sense of justice, the Constitutional Court as a constitutional court must find a law by studying the legal principles and norms in the constitution. Meanwhile, the norm as a measure that must be fulfilled by everyone in relation to other or their surroundings. Thus, between legal principles and norms, should be a fundamental consideration to make regulations and decisions related to the constitutional rights of citizens in the election of governors, regents, and mayors.

2. METHOD OF THE RESEARCH

The type of research was a normative research. This is consistent with the prescriptive character of law science. The approaches used in the research were statute, case, historical, comparative, and conceptual. Source legal material comes from the library research. Library research was carried out against a variety of sources of legal materials that can be classified as primary, secondary and tertiary. The method used in the processing and analysis of legal materials in this study is qualitative as a method of legal material analysis, by describing on a particular issue and associated to the expert's opinion based on the law and regulations applicable.

3. RESULTS AND DISCUSSION

3.1 Juridical-Positivism of the Constitutional Court in Realize Justice for Regional Head Election Dispute

According to Hans Kelsen about law, there are three main formulas, namely the theory of the law, state, and international law. The third problem cannot be separated from one another as interrelated and developed consistently with formal legal logic. Formal logic has been developed and become the main characteristics of Neo-Kantian philosophy which later evolved into the structuralism thought. General theory of law developed by Kelsen includes two important aspects, namely the aspect of static (nomostatics) see the deed or action which is governed by law and the aspect of dynamic (nomodinamic) see the law governing certain acts. The approach taken by Kelsen called The Pure Theory of Law, get place as different from the two poles of a different approach between the thought of natural law with empirical positivism. The values of the theory, because the religious-metaphysical dualism, that has brought its own problems in the science of law, so it should be considered the possibility of a third type, as a middle way between pessimistic and optimistic dualism. Law empiricism sees the law can be reduced as a social fact. While, Kelsen argues that the interpretation of law is relating to non-empirical norm. The norm has a structure that limits the interpretation of law. On the other hand, unlike the thought of natural law, Kelsen argues that the law is not limited by moral considerations. A thesis developed by the thought of natural law called normativity thesis.

Vertical column shows the relationship between the law and morality while the horizontal shows the relationship between law and fact. The main thesis of natural law was morality thesis and normativity thesis, while empirico positivist is separability thesis and reductive thesis. Kelsen's theory was the separability thesis and the normativity thesis, which means the separation between law and morality and also the separation between law and fact. While, the empty column are not filled because if filled will result in a contradiction, because it is impossible holds reductive thesis together with the morality thesis. In practice, a norm can be a formulation about required behavior. In this formulation, the denial of the norm will lead to the sanctions. There are two main propositions underlying this theory. First, the dichotomy between “Is” and “Ought”. Second, ideas or ideologies to assert the legal position as a science (legal scholarship). Both of these propositions cannot be separated from one another, as it would affirm the essence of “purity” of this theory. A law is a proposition which contains the essence of necessity (ought to proposition). The law is a “necessity”, not a fact about something (what is). If all observed the proceedings was regulated and practiced by the Constitutional Court found difference does not away with the civil procedure system and shows a state administrative hearing and deciding the case presented by the parties. Beside formal requirements, there are also material requirements to be met by the main parties both applicant and plaintiff. Proceedings in the constitutional court, specifically to questions about dispute election results of Regional Head undergo fundamental changes. Different if views of the model when the panel ruled on the quasi court for repeat voting. Here, the parties to the dispute in carry out the Court's order already had to submit reports on events and facts in the election. A provision describes facts on repeat voting, organizers charged either of the parties directly or indirectly involved. Court ordered the parties in the implementation of the report of the repeat voting, showed the interest of the organizers have a duty and responsibility related to the burden of proof before the final verdict. Model statements of the parties is currently being developed and enforced by the Court, a close relationship with the formal and material requirements of an application, response, and information related parties. In other words, these reports can corroborate or refute the arguments of the results of re-voting. The Court in various considerations and a dictum of decisions, examine and ensure the implementation of the elections that must be managed with integrity and fair elections. Election Acts has provided a mechanism to bring a legal action for any problems in the process of local elections in Indonesia. Affirmation of the Court regarding the division of attribution authority in problem solving of Regional Head election (election court), explicitly expressed in the following considerations:
“To dispute the determination of the vote counting results is examined and tried by the Court. Thus, the legislators build the legal and political culture so that dispute beyond determine the decision of votes on the vote counting completed in advance by the competent authority at each level through institutions that are provided. That is, the dispute brought to the Court to be examined and judged truly is a dispute concerning the determination of the results of the vote counting and not a dispute or other disputes that have been determined to be the authority of other institutions.

Legal arguments above, the Court limit their authorities upon himself to not run the functions of other institutions that have recognized its existence to resolve election disputes.

3.2 Ideal Characteristics of the Constitutional Court’s Decision in Realize Substantive Justice in Regional Head Elections

Discussion of the ideal characteristics of the Constitutional Court’s decision is a rejection and criticism as has been stated at the beginning of the subject matter of the philosophical thoughts of legal positivism-sociological, juridical positivism, and the history. The third of thoughts have affected and became the source for the Court to resolve the dispute of election results. Even took part also have a contribution to support the Court rejected the arguments and evidence submitted by the applicant relating to money politics, intimidation, bureaucratic politics, and the neutrality of the organizers, including other law enforcement integrity. In this discussion chapter also explores the criticism of the legal discovery of the Constitutional judge that build proportions or premises, that decision was set above the legal reasoning of a dispute of Regional Head election result. The logic of law that established by the Court contained in its consideration by legislation and regulations alone, regardless of the social reality in the elections. Election issues are so complex only approached through written law alone. Court shuts them and did not dare to explore values that live in the community. Whereas Article 5 (1) of Act No. 48 of 2009 regarding Judicial Power, as legitimacy and legal substance of Judge in discovering the law and justice, it is stated:

“Judge and constitutional judges shall explore, follow, and understand the values of law and a sense of justice in the society”.

The direct elections in optimistic can be said as a form of affirmation of the people autonomy in the region to determine the head of government. Ideally government elected directly and has a strong legitimacy will carry out the functions in accordance with the aspirations of the people, because the spirit of direct elections is the government closer to the people. The legal principle of freedom inherent in the way of someone who has the right to choose freely given protection to determine figures. Determination of regional leadership is freely principled and very doubtful its existence if confronted to the contestants who have strong influence with central and local government authority. The application of legal principle of free elections is important for the Court as a means of achieving substantive fairness of the elections, by infiltrate the legal formalism. But not with the purpose of exercising the functions of any other competent authority, but possible to question along it have a strong relevance to the result of the counting. That is real of progressive philosophical law that aims to lead men to a fair and prosperous life. Indeed, the Court has understood the reality, but collided with the decision made by himself on the testing of norms Article 57 Jo article 58 of Act No. 8 of 2015. In other words, all forms another attempt to seek the truth in an effort to establish justice, outside the rule of law applicable, cannot be accepted and considered as out of legal thought, even illegal. Thus, it is exactly legal adagium that sometimes the law is often felt cruel when conducted strictly (lex dura sed tamen scripta). The problem of election related to the segmentation of Charles Samford who looks in society there is a full disorder that:

“The non-systemic picture to be drawn in their place is naturally complex but the single word that most captures it is melee: a fluid constantly changing set of interactions in a complex struggle between a large number or groups and institutions. The members of those groups and institutions will have conflicting subjective interest and other values which they will pursue and defend, sometimes individually but usually thought.”

Samford’s main idea, who interpret the melee as the fluid, so it does not has a formal format or certain structure and not rigid. Human relationships are melee, both in social life and in law. Law is built on human relationships that melee in which social relations between individuals and the overall variation and its complexity. The condition tends to asymmetrical. So the law is subject to centrifugal forces that create an organized regulation but in same time subject to the centrifugal forces that create disorder, chaos, and conflict. Proving the assumption of Samford on legal melee can be observed condition in the Regional Head candidates to make sense of the rules, so that the meaning is determined by the position of the candidate. The problems of violations of fair play principle, a lot of coloring the use of money politics in the activities undertaken by the political party (either an individual or institutional) to influence voters by giving gifts/promises in the form of money or goods to individuals or institutions that at election time may vote for a party or candidate. Since the passing of direct election in Indonesia, found a series of money political as winner materials of candidates (majoritarian democracy), it is the Constitutional Court finding the trial facts of applicant who submit those arguments. Approximately 147 requests from 132 region, where as many as 128 cases of election disputes filed by the regent candidate, 11 cases for mayor, 6 cases for governor, 1 case election monitoring in Tasikmalaya district, and 1 applicant is not candidate of head region of Boven Digoel district in Papua. The problems above, the Election Supervisory Body has inventoried the types of election violations, among others it is quite diverse and prominent is money political with 30 index of a number of variables and other vulnerability indicators. With that purpose, it is relevant with not optimal the implementation of organizer tasks (General Election Commission of Provincial, District/City, Provincial Bawaslu and Supervisory of District/City), so raises other legal way (rule breaking) for justice seekers in question the process and vote counting results. Despite recognized by the applicant that it had been confronted with the formal and material requirements that must be met in applying for. Court in the viewpoint of applicant with institution symbol a court
(court of law) that includes prosecute law system to achieve justice system itself. Operation of legal formalism in the Court indicates stopped progressive law. In turn hard to achieve fairness substance. The consequence will take effect on the Election, the candidates and organizers freely ignoring the legal principles of fair elections. Election regulations are only legal texts alone. Can be understood that the Court keeping himself to not enter the legal jurisdiction of other agencies, but as an institution of the courts' legal system, fair elections as the principal legal systems in the elections in order to protect the pair of candidates to dispute the process and the results. Whereas, the basic law of progressive law is the legal substantive as one of elements in the legal system. Indeed, the difference of legal dimension of Court’s decision, more due to each subject to the regulations of the different elections. In addition, the nature of material law, its differentiator is procedural law (formal). While, the models of violations that surfaced in the trial either of the deeds of the defendant, relevant, organizers, and law enforcement officials have the same legal motives. Departing from this, different points of view to understand and deliver justice, raises critical studies, if the Court were full apply the law and justice substance. The role and existence of the Constitutional Court is desperately needed for the settlement of disputes the election results of Regional Head for the roots of the constitutional state itself is enforced the law and law between laws is constitutional. The constitutional court within a country is in an effort to strengthen the system of checks and balances between the branches of power were deliberately separated to ensure democracy. In modern legal perspective, the role of the Constitutional Court as a law forming organs (positive legislator) has been applied in several countries. In general, the role of a constitutional court as a positive legislator regarded as a logical consequence of the implementation of the theory of separation of powers that cannot be implemented rigidly without any slice inside it. Just as occurs in the Supreme Court of the United States, Congress responded hardly that action beyond the authorities. Congress assumes the position of Supreme Court cannot interfere the legislative authority in shaping legislation to examination (negative legislation).

4 CONCLUSION
The paradigm of the Constitutional Court in realize a justice at disputes of regional election using positivism-sociological approach, juridical positivism, and Historische Rechtsschule, emphasized the Court's decision based on written Acts and the intention of legislator. Consideration of the Constitutional Court in realize a justice at the regional election dispute based on the request of the applicant, the answers, trial facts, report and petition the respondent and related parties that questions the dispute of vote result. The ideal characteristic of the Constitutional Court's dispute in realize a justice in regional elections, through ways of upholding the principles of progressive electoral law and ultra vires. Based on analysis result, it is necessary a paradigm shift in the Constitutional Court in realize a justice at the regional elections from analytical jurisprudence towards sociological jurisprudence. Constitutional Court to consider the imposition of a decision regarding an offense the elements of systematic, structured and massive along disputes the result of vote counting. In addition, a progressivity is needed in shaping the jurisprudence distribution systems of Special Courts under the judicial authority of the constitutional court.

REFERENCES


