

Election Dispute Resolution and Justice as Fairness: A Study of Regional Head Elections in Indonesia

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Abstract: The concept of justice is still relevant for debate, involving two political and legal perspectives. However, the two met in the context of resolving election disputes. Namely the election justice mechanism to resolve all forms of election disputes. This study will focus on resolving election result disputes, the 2020 Regional Head Election Results Dispute. John Rawls is a philosopher and political theorist who strongly influenced the tradition of justice theory. The concept of justice is offered from criticism of utilitarianism and intuitionism. Justice as fairness is a concept of justice that is procedurally fair but also justice that benefits as well as opportunities that are just (equal).

Purpose: This article aims to elaborate Regional Head Election Results Dispute from Rawls' justice as fairness approach to resolve election disputes.

Design/Methodology/Approach: The research method used is qualitative research. Using a descriptive approach and literature study as data collection techniques.

Findings: There is still a serious debate about achieving the concept of justice between substantive and procedural justice in electoral studies regarding the equitable

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settlement of election result disputes. A just Regional Head Election Results Dispute indicates the degree of democracy in implementing direct, general, free, confidential, and honest, fair elections (LUBER JURDIL). Constitutional democracy is a meeting point between Rawls' democratic tradition and Plato's nomocracy.

Originality/value: Many articles on Regional Head Election Results Dispute philosophically explain Rawls' justice as a fairness concept. However, this article explores the relationship between Regional Head Election Results Dispute phenomenon through Rawls' philosophical concepts.

Keywords: Election Disputes, Regional Head Election Results Dispute, Justice as Fairness

Paper Type: Research-Article

Introduction

The institution for resolving general election disputes was born out of the post-1998 democratic transition situation in Indonesia. Implementing it for the first time in 2005-2008 triggered various problems of post-election political conflicts, frequently, the long-tailed political conflicts turned into violent political conflicts with mass mobilization of supporters of candidates. Studies of post-election political conflicts in regional heads have been carried out by various groups (Nurhasim 2009; Nuryanti 2006; Rozi 2006; Nurhasim 2005). All of them agreed that the resolution of political conflicts that do not meet the criteria of political justice will have the potential to trigger violent political conflicts in local-level democratic practices. Studies of political conflict in local democratic practices continue today (Chalik 2017; Halim 2014; Haryadi 2012). Regional head elections are explained through a direct election mechanism from the perspective of contestation for political office. The electoral politics studies focus on post-election political elite conflict at the beginning of the implementation of direct regional head elections.

The democratic system is demanding institutionalization of political conflicts. Political violence occurred in several Pilkada areas (2005-2008), where democracy was required to institutionalize democratic conflict to avoid violent political conflict after the general election. Objections to determining the regional head and deputy regional head election results can only be submitted by pairs of candidates to the Supreme Court no later than 3 (three) days after determining the regional head and deputy regional head election results. The Supreme Court carries out the function of the election court to decide disputes over regional head election results. The practice of resolving disputes over the results of regional head elections through the Supreme Court turned out to be ineffective, as evidenced by the Supreme Court Decision in the 2007 Pilkada for the Governor of South Sulawesi, which resulted in violent political conflict after the decision (Nurhasim 2009, 216-17).

The institutional reformulation for resolving general election results disputes took place in 2008 until now. Where the institutional dispute resolution of general election results is within the authority of the Constitutional Court. Article 24C paragraph (1) of the 1945 Constitution states, "The Constitutional Court has the authority to try at the first and last levels whose decision is final to...decide disputes about the results of general elections." Then Article 236C of Law 12/2008 states, "The Supreme Court transferred disputes over the results of the regional head and deputy regional head elections by the Supreme Court to the Constitutional Court...". The Constitutional Court in various countries is often positioned as the guardian of the constitution and interpreter, even the sole interpreter of the constitution through its various decisions in accordance with the authority granted by the constitution of each country, the creed of "The Protector" or the Protector of the Constitution (Fadjar 2010, 1-2). A state institution whose function is to handle certain cases in the

field of state administration in the framework of safeguarding the constitution so that it is implemented responsibly in accordance with the will of the people and the ideals of democracy. Then, the Constitutional Court is a modern democratic institution with specific authority to decide disputes over general election results (Utomo and Mulki Rahman 2023; Jaya Miha 2015).

The effectiveness of the Constitutional Court's performance in resolving election disputes, especially the Regional Head Election Results Dispute case, can be seen from the decisions that have successfully institutionalized non-violent political conflict. During the 2008-2018, the Constitutional Court received 982 applications for Regional Head Election Results Dispute. The resulting Constitutional Court decisions consisted of 37 (3.8%) granted and 945 (96.2%) rejected or did not meet the elements of Regional Head Election Results Dispute. After the Constitutional Court's decision, political conflicts were relatively more stable. They did not trigger protracted political conflicts caused by factors of compliance with election court decisions from all parties, the *Komisi Pemilihan Umum* (election organizers), political parties and candidate pairs (election participants), and voters (the sovereigns). The Constitutional Court in the 2020 Regional Head Election has received 136 cases of Regional Head Election Results Dispute requests spread across 120 Pilkada areas, namely 6 Regional Head Election Results Dispute in Provincial areas, 14 Regional Head Election Results Dispute in Cities, and 100 Regency areas that are implementing the 2020 Regional Head Election.

According to Carol C. Gould, "Democracy is accordingly interpreted as that form of political rules in which freedom is maximized and in which those constraints that are required for social orders are self-imposed, in that they are determined by a process of mutual consent." In line with this opinion, Geoff Mulgan explained that "in the absence of a strong sense of right conduct, freedom has become synonymous with license."

Responding to this problem, the electoral law (election law enforcement) seems crucial. When the election law enforcement is still problematic, in the process of continuing, the problem will not disappear and will have an impact on the results of the process (Nuryanti 2006, 170-72).

The debate on the concept of justice appears in the dimension of general election law enforcement. How to achieve justice substantially without ignoring the dimension of procedural justice. Furthermore, how can Regional Head Election Results Dispute fulfill the dimensions of political justice to increase the degree of democracy by implementing direct, general, free, confidential, honest, and fair elections?

Methods

The method used in this research is a qualitative research method. The approach used in this research is descriptive, using the data research results from books, archives, documents, journals, and the internet (Moleong 2018). The data collection technique uses literature study because this data collection method leads to searching for data and information through written or electronic documents that can support the writing process.

Discussion and Findings

Measuring Degrees of Electoral Democracy

Several experts on political science are concerned with the view of democracy as a procedural mechanism for the transfer of power of political elites legally, which will implement people's sovereignty through participation in political decision-making for the common good (Schumpeter 2003; Huntington 1995; O'Donnell, Schmitter, and Whitehead 1993).

The comparative-historical perspective illustrates that the journey of democratization in 'young' democratic countries is very diverse and tends to experience a non-linear process. This means that not all countries experiencing democratic transitions easily

achieve conditions of democratization that are increasingly established and consolidated. Democratic transitions are not necessarily continuously within the framework of a consolidated democracy, and democratic transitions can fail and turn into an authoritarian power regime, perhaps even the 'new' authoritarian power regime gets political legitimacy from the democratic system itself. The prerequisite for consolidated democratization occurs if the regime as a result of these democratic processes is able to sustain (likely endure) political stability on an ongoing basis. This kind of democracy consolidation perspective is more focused on the continuity of the democratic regime, which sometimes ignores the dimension of participation as a representation of the relationship between political elites and citizens. Supposedly, the consolidation of democracy as a linkage of empirical facts with the assumption of causality from the behavior of actors, attitudes of actors, and the political structure surrounding it. This means that the consolidation of democracy is influenced and determined by the context of the political structure, which influences the actors' attitudes, and the actors' attitudes will influence their behavior. The relationship between political structure-attitudes of political actors-political structures influenced the condition of a stable democracy. The paradox of democracy as a critique of procedural democracy so far. Democracy is not merely the existence of free and fair elections. Democracy also demands accountability from representatives to those represented. Even democracy demands opportunities for citizens to participate in the political process (Marijan 2010, 138–341).

Elections are the simplest (narrowest) meaning of the process of democratization (Rahmawati and Fikri 2022; Indarto and Fikri 2022), often referred to as procedural democracy, namely the competition of political parties and/or candidates for political leaders to convince the people to elect them for positions in

government (legislative or executive) at the central or regional government. Democracy is the right of political parties or candidates who win elections to govern, make and implement general policies related to the public interest. Thus, democracy is understood as the practice of contestation/competition between political parties and/or election candidates and the involvement of citizens who make decisions in support or rejection due to this competition. Democratic procedures and democratic institutions represent a single norm that the degree of democracy in a general election is considered a democratic election (free and fair election) if it fulfills the principle of predictable procedures (certain election rules).

The parameter of the degree of democracy in the general election implementation process consists of several indicators (Surbakti, Supriyanto, and Santoso 2008, 26). First, regulating the stages of holding general elections contains legal certainty (predictable procedure) in that it regulates all matters that need to be regulated, all provisions have a single meaning, and all provisions are consistent. Second, the regulation of each stage of holding general elections is based on the principles of democratic elections, namely direct, public, free, confidential, honest, fair and accountable (free and fair election). Third, the regulation of the process of organizing general elections in accordance with the provisions, but also the results of vote counting are accurate in accordance with the results of the voters' choices (electoral integrity). Fourth, regulating the general election process includes a dispute resolution system with fair (and fast) procedures and decisions for all types and forms of election disputes.

Marry Kaldor and Veivod provide indicators of formal (procedural) democracy in holding general elections, including those that can be applied in the context of regional head general elections. First, inclusive citizenship maximizes public involvement. Second, rule of law respect for laws and regulations.

Regional Head Election implementation seeks to comply with the available rules even though there is controversy regarding the emergence of these rules. Third, there is separation of power, but they still influence each other in the exercise of power and political authority. Judiciary authority lies with the Constitutional Court as the domain of general election law enforcement. Fourth, elected power holders, political power holders are elected through elections. Fifth, a free and fair election fulfills the principle of freedom and is carried out fairly. Sixth, freedom of expression, election by providing means of expression. Seventh is associational autonomy, allowing people to gather and form socio-political groups. Eighth, civilian control over the military, a democratic climate that is free from intervention, especially from military regime power (Nuryanti 2006, 171-72).

Justice as Fairness: A Theoretical Exploration

Satya Anggara elaborates on the theory of Justice as "justice as fairness." Rawls argues that liberty and equality can be combined into one principle of justice. Namely: "Everyone has the same right to fundamental freedoms, and if injustice occurs, it is the people who are left behind who must benefit from it". This principle must be embedded in social institutions if social justice is to be truly realized (Sunaryo 2022). "Justice is the first virtue of social institutions, as truth is of systems of thought". He continues, Rawls limits justice as "fairness", arguing that the government is responsible for caring for the less fortunate (Hasanuddin 2018). His views sparked debate among libertarians who stated that government intervention deprived people of their basic freedoms and communitarians who argued that different principles of justice arise from different communities and therefore cannot be generalized. The view of the theory of Justice as "justice as fairness" seems to be a harsh criticism of libertarians, including the practice of liberal democracy, which exalts justice in the principle of the majority (Anggara 2013, 2).

a. Critique on Utilitarianism

Ujan explained that utilitarianism teaches that the right or wrong of rules or human actions depends on the consequences of certain rules or actions taken. Thus, the good or bad of human action is morally very dependent on the good and bad consequences of these human actions. Utilitarianism demands that institutions maximize the total expected of everyone who deserves it. Everyone can do something to obtain the greatest benefit or, as far as possible, pursue what he rationally sees as a goal worth achieving. Utilitarianism of benefits in utilitarianism encourages material satisfaction, a measure of justice's validity. Utilitarianism emphasizes the principle of benefit too much to forget the principle of rights (Ujan 2001, 21).

b. Critique on Intuitionism

Ujan also explained that intuitionism in the (moral) decision-making process relies more on the ability of human intuition. Value priority will be difficult if everyone uses intuition rather than common sense in making judgments and decisions. Ethical generalizations are considered correct even though they are not supported by truly justifiable arguments (Ujan 2001, 21).

Justice here, as justice as fairness, will only be reflected properly if the structure of the society itself is fair. So, we need an ideal society that allows the principles of justice to be applied effectively. Rawls's theory presupposes a well-ordered society. Such a view is considered utopian in the midst of a societal structure that makes it difficult to achieve a position in the basic structure of a just society.

Constitutional Democracy: A Meeting Point

Rawls's view of democracy was connected with the term election and protection of individual rights (Tambunan 2008). This notion is the view that giving too much power to the majority can lead to an oppressive state in which the rights of minorities are ignored or diminished while giving too many constitutionally

protected rights can lead to narrowing the circle of democratic decision-making. Of course, the first threat is the tyranny of the majority. Second, the threat of political weakening is a very important but least talked about. Liberal democracy is a system in which something like a right balance is struck between the ideas of majority rule and minority protection (Tambunan 2008; Karina 2019; Arta 2020). One can typically find a written or unwritten constitution, ongoing debates, and decision-making in broad areas of politics not defined by the Constitution. The rights protected by the constitution safeguard the basic liberties of the population, but the people can make their own decisions on less fundamental issues.

Rawls' view of justice theory and democracy seems to be the basis for the argument for forming the idea of constitutional democracy. Namely the practice of democracy that is fully regulated in the country's constitution that allows justice as fairness between the majority and minorities to be fully protected by the country's constitution. The practice of general election as the pinnacle of liberal democracy certainly rests on the principle of majority truth, in which the winner is the pair of candidates chosen with the most votes. Then, how is the constitutional protection of minorities? In contestation practice, if a majority victory is obtained through means that violate the moral principles of implementing democratic general elections, the parties who feel aggrieved are allowed to raise objections to the process and results of the general election. Gaffar and Fadjar explain the combination of democracy and nomocracy living in the spirit of constitutionalism, which gave rise to the concept of a democratic rule of law and a democratic state based on law, referred to as a constitutional democracy (Gaffar 2012; Fadjar 2010). Constitutional democracy, after the amendment to the 1945 Constitution, has reformulated modern democratic institutional governance (Hidayat and Oktari 2023), one of which is the

establishment of the Constitutional Court as a state institution that carries out the functions of general election courts to decide disputes over general election results.

Electoral Legitimacy in Question: Dissecting Disputes over Regional Head Election Results

Ramlan explained that the dispute over general election results can be interpreted as an objection (petition) submitted by election participants who feel they have lost their seats due to the decision of the election organizers regarding the determination of election results (Surbakti, Supriyanto, and Santoso 2008, 318). The integrity of the election results will be materialized if the results fulfill the legal-procedural dimension and the dimension of political legitimacy by fully accepting the election results as a true reflection of the voters' choices. Regional Head Election Results Dispute mechanism is institutionalized through trial procedures and court decisions whose decisions are final to decide disputes about the results of general elections. Regional Head Election Results Dispute decision is expected to become a constitutional mechanism to guarantee legal certainty while at the same time restoring the integrity of general election results. The Constitutional Court has been proven to have decided on Regional Head Election Results Dispute. It is evidenced that during the 2008-2018 period, it succeeded in handling 982 cases, 37 of which were granted, 26 were temporarily granted, and 919 were rejected because they did not fulfill the elements of a dispute over the general election results. How will Regional Head Election Results Dispute 2020 be completed? What are the prerequisites for restoring the integrity of the 2020 Regional Head Election results? This question is relevant as a framework for increasing political legitimacy for the 2020 Regional Head Election results.

There are three substances regulated in the Regional Head Election Law. First, the Constitutional Court was given 45 days from the date the application was received to decide on the

Regional Head Election Results Dispute case. Second, restrictions on the object of the dispute, in the form of determining the vote acquisition results of the election. Third, the dispute over the determination of vote acquisition significantly affects the determination of the elected candidates. Furthermore, the criteria for determining significant vote acquisition are defined as the threshold difference in disputed votes using the ratio between the number of residents and the valid votes acquired for each pair of candidates. A significant vote difference is the main prerequisite for whether the Regional Head Election Results Dispute application can be accepted/rejected. It continues to the trial stage and determines the decision on the election result dispute. Unfortunately, the prerequisites for a significant vote difference stipulated in the provisions of Article 158 Paragraphs (1) and (2) regarding the application for annulment of the vote counting results were ignored by the applicants for the Regional Head Election Results Dispute application. Most Regional Head Election Results Dispute applications cannot be accepted or tried by the Court.

For example, the application by candidate pair number 3 in the election for the governor of Bengkulu Province in 2020. The applicant's argument that as many as 65 thousand ballots were declared invalid resulted in a loss in vote acquisition for candidate pair number 3. The results of the provisional recapitulation show the votes acquired by candidate pair number 1 of 327,769 valid votes (32.2%), candidacy number 2 of 418,409 valid votes (41.1%), and candidacy number 3 of 271,603 valid votes (26.7%) (SIRECAP: 22/12/2020, 15.39). The difference in votes between the candidate pairs for candidate number 3 and candidate number 2 amounted to 90,640 valid votes (8.91%). If referring to the provisions of Article 158 Paragraph 1, the application does not meet the element of a significant difference in votes for the dispute because it exceeds the 2% threshold for Provinces with a population of ≤ 2

million people. With these considerations, the Constitutional Court will likely reject the application for candidate number 3. Cases like this will occur in some of the submissions for Regional Head Election Results Dispute, such as the Medan City with a difference in votes reaching 6.94% or in the Surabaya with a difference of 13.98%, being the argument for the Court rejecting the application for Regional Head Election Results Dispute.

Miguel's dissertation entitled "When, where, and under What Conditions Are Election Results Accepted? A Comparative Study of Electoral Integrity" from the University of Sussex comprehensively explains the prerequisites for general election results to be accepted by all elements of the general election. Martinez said there were at least three reactions of candidates responding to the election results, accepting, objecting, or completely rejecting the general election results. Expressing objection to the election results was expressed by challenging the election results to the courts. This pattern of election result disputes is temporary. It tends to be resolved by a court ruling on disputes over general election results involving political parties or candidates with general election organizers (Otoala 2017).

On the other hand, rejection of the election results was expressed in the form of social protests involving masses of supporters and delegitimizing the election results. Patterns of disputes of this kind cannot be completely resolved solely through the electoral court but also through political reconciliation between supporters of political parties or candidates. The pattern of rejection of election results lasted a long time, and even political conflicts continued even though the election court had decided on the dispute over general election results. Rejection of election results tends to erode the political legitimacy of the government elected through general elections.

Political parties play an important role in post-contestation political reconciliation. The institutionalization of political conflict

will determine the level of acceptance (legitimacy) of general election results. The stronger the dimension of institutionalization of political parties tends to increase the political legitimacy of the general election results. Michener and Bersch explain that the legitimacy of general election results is determined by the conditions of invisibility (transparency in the process) and inferability (accuracy in the results) (Michener and Bersch 2013). Institutionalization of political conflicts as a democratic settlement of election results disputes through the rules of the game that fulfill the principle of legal certainty regarding the results of general elections.

Conclusion

John Rawls' "justice as fairness" theory of justice has made a major contribution to the practice of justice in politics and law. Constitutional democracy is a manifestation and a combination of the two traditions of democratic justice and nomocracy. Justice is no longer solely based on the truth of the majority but also provides equal opportunities to protect minorities. The notion of constitutional democracy ensures the protection of democratic principles for all. The integrity of modern democratic institutions is a challenge in maintaining and fully implementing the practice of constitutional democracy. Election law enforcement is one of the important pillars in maintaining the continuity of constitutional democracy in Indonesia.

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