CHAPTER FOUR

FINDING AND ANALYSIS

A. Brief History of Regional Election

The regional elections in lndonesia have been held since the Dutch Colonial era. The model of regional election has been changed in the history of regional election in Indonesia. The changes of the regional elections are divided into five periods, namely (1) The Dutch Colonial Era; (2) The Japanese Colonial Era; (3) Old Order Era; (4) New Order Era; and (5) Reform Era.

1. The Dutch Colonial Era

In Dutch Colonial era, the regulation of regional governance was Decentralisatie Wet 1903. At that time, the arrangement of regional governance was separated between the areas of Java and Madura, and outside areas of Java and Madura.[21]

The levels of government in Java and Madura in the Dutch Colonial era were divided into several hierarchies which could be grouped into *pangreh praja* and *pamong praja* government. The government of *pangreh pradja* at the highest level is called the Province which led by the Governor. Furthermore, each province is divided into Residency which led by the Resident. Each Residency was divided into

[21] Iwan Satrian and Andi Saputra, Faktor-Faktor Kemenangan Calon Incumbent Dalam Pilkada, *Jurnal Konstitusi*, Volume III, Number 1, June 2010, p. 72.

several *Afdelling* which led by Resident Assistant. In the government of *pamong praja*, it consists of regencies which headed by the regents. Then each region is divided into several *Kawedanan* which led by a *Wedana*. Each *Kawedanan* is divided into districts, each districts was headed by the head of district or *Wedana Assistant*. The district includes several villages which headed by a head of village.[22]

While for the areas outside Java and Madura, the highest level of government is called the Province which led by the Governor. Each province was divided into several residences led by Resident. Each Residency is divided into several *Afdelling* which led by Resident Assistants. Each *Afdelling* is divided into several *Onder Afdeling* which led by Controller. Each *Onder Afdeling* is divided into *Kewedanan* or District which headed by *Wedana* or *Demang*. Furthermore each *Kewedanan* is divided into several subdistricts or *Onder-District* which headed by head of district or *Assistant Demang* and each District includes several Villages or *Marga* or *Kuria Nagari* or other names, headed by head of village.[23]

All positions according to Decentralisatie Wet 1903 were carried out with a system of designation and/ appointment by colonial rulers or the Governor-General, with the obligations where the indigenous who occupied the position must give economic compensation (tribute) and

[22] J.Kaloh, *Kepemimpinan Kepala Daerah (Pola Kegiatan, Kekuasaan, dan Perilaku Kepala Daerah Dalam Pelaksanaan Otonomi Daerah),* Sinar Grafika, Jakarta, 2009, p.25.
[23] *Ibid.*

politics. The recruitment of the head of regent at that time was so closed, so the electoral mechanism was full of corruption, collusion and nepotism.[24]

2. The Japanese Colonial Era

In the Japanese Colonial era it had been issued 3 (three) Laws which regulated the governance called 3 (three) *Osamu Sirei*. The three laws were Law Number 27 on the Change of Governance System (dated on 6-8-2602); Law Number 28 on the Rule of the *Syuu* Government (dated on 7-8-2602); And Law Number 30 on the Change the name of the State and Region (dated on 1-9-2602). The Law was the legal basis for the Japanese government to exercise power at the time.[25]

The Japanese government divided the area into a residency called *Syuu* and its resident was called *Syuutoo*. Under the authority of residency there were two divisions of the area called *Ken* and *Si* which headed by *Kyentoo* and *Sintyoo*. At the *Kawedana* level, the village was known by the names *Gunson* and *Ko* while the head of region was called *Guntyoo*, *Sotyoo*, and *Kutyoo*, where the appointment that was appointed by the Japanese government.[26]

The Japanese government replaced the positions of Dutch by their own staff, while the indigenous people were given little chance. The

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[24] Iwan Satriawan, *Op. Cit.*

[25] Joko. J. Prihatmoko, *Pemilihan Kepala Daerah Langsung; Filosofi, Sistem dan Problema Penerapan di Indonesia*, Pustaka Pelajar, Yogyakarta, 2005, p. 38.

[26] Bungasan Hutapea on Dinamika Hukum Pemilihan Kepala Daerah di Indonesia, *Jurnal Rechtsvinding*, Volume 4, Number 1, April 2015, p. 5.

filling of the position was done by appointment and/ or choice system by the Japanese Ruler

Appointment and / or choice systems can also be done by cutting the hierarchy.[27]

3. Old Order Era

There were several legal products underlying the implementation of the regional governance system during the Old Order Era such as Law Number 1 of 1945 on the Regulation Regarding the Position of Regional National Committee, Law Number 22 of 1948 on the Stipulation of the Main Rules Concerning Self-Regions who Eligible to Arrange and Manage their Own Households, Law Number 1 of 1957 on the Principles of Regional Governance, and Law No. 18 of 1965 on the Principles of Regional Governance.[28]

Law Number 1 of 1945 on the Regulation Regarding the Position of Regional National Committee was intended to change the nature of the Regional National Committee into a Regional People's Legislative Assembly which headed by the Head of Region. Article 2 stated that the Regional National Committee shall be the Regional People's Legislative Assembly. Together with the Head of Region shall carry out the work of regulating its regional household, as long as it is not contradict with the Central Government Regulations and the higher Regional Government.

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[27] Iwan Satriawan, *Op. Cit*, p.73.
[28] Bungasan Hutapea, *Op. Cit*, p. 5.

The Head of Regions according to Law Number 1 of 1945 were the head of regions appointed during the previous period namely the Japanese Colonial Era. Due to the various situations that arise, such as the political situation, security and constitutional law at that time, the Head of Region was appointed directly to guarantee the implementation of regional governancet as part of the central government incorporated in the Unitary State of the Republic of Indonesia (NKRI) and/ to prevent the vacuum in governance.[29]

Law Number 1 of 1945 was only prevailed for 3 years. In 1948, it changed with the Law Number 22 of 1948 on the Stipulation of the Main Rules Concerning Administration which Eligible to Arrange and Manage their Own Households. Based on this Law, the Head of Province is appointed by the President from the candidates nominated by the Regional House of Representative.[30] Meanwhile, the Minister of Home Affairs was authorized to appoint the Head of the Region or City, the head of region candidate shall be proposed by the Regional House of Representative.[31] The Head of Village was appointed by the Governor.[32]

One of the important things in Law No. 22 of 1948 was that this law was able to give firmness of the separation between executive and legislative functions. The Head of Region was no longer chairman of the

[29] Joko. J. Prihatmoko, *Pilkada Langsung*, Pustaka Pelajar, Semarang, 2005, p. 47.
[30] Article 18 paragraph (1) of Law Number 22 of 1948.
[31] Article 18 paragraph (2) of Law Number 22 of 1948.
[32] Article 18 paragraph (3) of Law Number 22 of 1948.

Regional House of Representative as regulated in Law Number 1 of 1945.

Law Number 22 Year 1948 was revised and resulted the Law Number 1 of 1957 on the Principles of Regional Governance. What made this law different from other laws relating to regional governance was the existence of regional levels. According to the hierarchy, this law is divided the governnance into 3 levels, the Governor leds the first (I) level, the Regent/Mayor led the second (II) level, and the Head of District for the third (III) level.[33]

The last legal product in the Old Order Era was the Law Number 18 of 1965 on the Principles of Regional Governance. The provisions of Regional Election at the time of enactment of Law Number 1 of 1957 and Law Number 18 of 1965 did not experience change, which followed the following provisions[34]:

1. The head of region shall be elected by the Regional House of Representative.
2. The head of region in the firts (I) level shall be appointed and dismissed by the President
3. The head of region in the second (II) level shall be appointed and dismissed by the Minister of Home Affairs and regional autonomy,

[33] Article 2 paragraph (1) of Law Number 1 of 1945.
[34] Suharizal, *Pilkada, Regulasi, Dinamikan dan Konsep Mendatang*, Jakarta, Rajawali Pers, 2012, p. 16.

from candidates nominated by the relevant Regional House of Representative.

4. New Order Era

The political development that took place during the transition from the Old Order era to the New Order era has brought a new nuance in the leadership of the head of region. This situation had brought Law Number 5 Year 1974 on the Principles of Regional Governance. It can be said that the legal product that was passed in this era regulated the mechanism of regional election candidate which in this case carried out by the Regional House of Representative but the appointment was based on the hierarcy.

Since the enactment of Law Number 5 of 1974, the regional election provisions had not changed significantly because the Regional House of Representative holds the power in conducting the regional election. The provisions of regional election in this Law were not different from the Law Number 18 Year 1965.

5. Reform Era

In the Reform Era until present time there have been several laws regulated regional governance. Among those laws were Law Number 22 of 1999, Law Number 32 of 2004, Law Number 12 of 2008, Law Number 23 of 2014, and the last Law Number 8 Year 2015.

In Law Number 22 of 1999 on Regional Administrations, the regional elections were conducted by applying indirect democracy system where the Head of Region and Deputy Head of Region was elected by the Regional House of Representative. The regulation on the filling of the head of region was stated in Article 34 paragraph 1 which says: "The positions of the head of region and deputy regional head shall be filled by the Regional House of Representative through simultaneous election". Furthermore, in paragraph (2) it is mentioned: "Regional head candidates and deputy regional head candidates shall be stipulated by Regional House of Representative through the stages of nomination and election".

Since there were various weaknesses in Law Number 22 of 1999, so that it was revised through Law Number 32 Year 2004 on the Regional Governance. The regional elections were no longer done by Regional House of Representative but turned into a direct electoral system where the people as sovereign holders give active role in conducting the elections.[35]

Furthermore, in an effort to improve the design of democracy in Indonesia, since 2008, the government and the Parliament had approved and enacted Law Number 12 of 2008 on the second amendment to Law Number 32 of 2004 on the Regional Governance. Based on this Law, the head of region and deputy head of region shall be elected in a single

[35] Article 24 paragraph (5) of Law Number 32 of 2004.

candidate pairs that are carried out democratically based on the principle of direct, public, free, confidential, honest and fair.[36]

In further developments, Law Number 23 of 2014 was enacted, however, this law did not clearly regulated the regional election. Because this law did not provide an explanation on the mechanism regional election.

The last law was the Law Number 10 of 2016. According to the Law, the election of Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor, hereinafter referred to as Elections were the implementation of people's sovereignty in the provinces and districts / Elect the Governor and Vice Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor directly and democratically.[37]

B. Constitutional Court and Regional Election Dispute Settlement

1. The Establishment of Constitutional Court in Indonesia

The establishment of Constitutional Court in Indonesia was initiated by the adoption of the idea of the Constitutional Court in the constitutional amendment adopted by the People's Consultative Assembly in 2001 as formulated in the provisions of Article 24 paragraph (2), Article 24C and Article 7B of the Third Amendment 1945 Constitution which passed on 9th November 2001. Idea of the

[36] Article 56 paragraph (1) of Law Number 12 of 2008.
[37] Article 1 paragraph (1) of Law Number 8 of 2015.

establishment of Constitutional Court is one of the modern law developments which emerged in the 20th century.

Constitutional Court is a judicial institution to run judicial power perpetrators, in addition to the Supreme Court, which was established through the Third Amendment of the 1945 Constitution. Indonesia is the 78th country that established the Constitutional Court. The establishment of the Constitutional Court itself is a modern state phenomenon in the 20th century.[38]

The importance of a Constitutional Court had emerged in the history of the Indonesian before the independence. At the discussion of the Constitution draft of the Committee for Preparation of Indonesian Independence (BPUPKI), Prof. Muhammad Yamin has argued that the Supreme Court needs to be authorized to review the Act. But this idea was rejected by Prof. Soepomo based on two reasons, first, the Constitution that was being prepared at the time (which later became the 1945 Constitution) did not embrace the concept of trias political. Second, at that time the number of law graduates were limited and have no experience on judicial review.[39]

In the New Order era, the concept of judicial review was pioneered and accommodated in various laws and regulations such as Law Number 14 of 1970 on the Basic Provisions of Judicial Power, TAP MPR No. III/

[38] Khelda Ayunita, *Pengantar Hukum Konstitusi dan Acara Mahkamah Konstitusi,* (Jakarta: Mitra Wacana Media, 2017), p.79.
[39] *Ibid*

MPR/1978 on the Position and Relationship of Working Procedures of the Highest State Institutions with or High State Institutions, Law Number 14 of 1985 on the Supreme Court.[40] Nevertheles, all of them were not adequate because it only regulated the judicial review of laws under the law.[41]

In 2001, officially the Third Amendment of the 1945 Constitution (through the Annual Session of the People's Consultative Assembly in 2001) accepted the entry of the Constitutional Court in the Constitution.[42] The establishment of the Constitutional Court marks a new era in the judicial power system in Indonesia. Some cases previously remain untouchable by law, such as judicial review of the law, now it can be protected by the Constitutional Court.[43]

The People's Consultative Assembly make the fundamental changes to Article 24 of 1945 Constitution by amending Article 24 and add it with Article 24A, Article 24B and Article 24C which contain two new institutions, namely the Constitutional Court and the Judicial Commission. Third Amendment of the 1945 Constitution, according to Article 24 paragraph (2) of 1945 juncto Article 24C of the 1945

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[40] Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, (Yogyakarta: Liberty, 1998), p. 24-25.
[41] Ulin Najihah, *Penerapan Sistem Pembuktian Di Mahkamah Konstitusi*, (Yogyakarta: Fakultas Hukum Universitas Islam Indonesia, 2008), p. 22.
[42] Moh.Mahfud MD, 2010, *Membangun Politik Hukum, Menegakkan Konstitusi*, Raja Grafindo Persada, Jakarta, p. 133.
[43] Bambang Sutiyoso, 2009, *Tata Cara Penyelesaian Sengketa di Lingkungan Mahkamah Konstitusi*, UII Press, Yogyakarta, p. 1.

Constitution was decided in the Plenary Session of the People's Consultative Assembly of the Republic of Indonesia.[44]

However, with the legalization of the Third Amendment of 1945 Constitution, it is not by itself the Constitutional Court has been established. To overcome this vacuum, the People's Consultative Assembly decided the Supreme Court to carry out the Constitutional Court's functions temporarily as regulated in Article III of the Transitional Rules of the 1945 Constitution resulting from the Fourth Amendment which states that the Constitutional Court must be established on 17 August 2003. Before it is formed, the authority of Constitutional Court was carrying out by the Supreme Court.[45]

Law Number 24 of 2003 on the Constitutional Court was ratified on 13th August 2003. The time of ratification of Law Number 24 of 2003 set as the brief history of the establishment of Constitutional Court. Under the Constitutional Court Law, the establishment of the Constitutional Court was immediately made through the recruitment of judge by three state institutions; the House of Representatives, the President, and the Supreme Court. After passing the selection stages, finally the House of Representatives, the President, and the Supreme

[44] Laica Marzuki, 2006, Sudi Mampir di Mahkamah Konstitusi RI, "Judicial Review" (Beracara di Mahkamah Konstitusi), Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, Jakarta, p. 7.
[45] Khelda Ayunita, *Op.Cit*, p.84.

Court determined each of the three candidates for the judge of the Constitutional Court.[46]

In 15th August 2003 determined nine judges of the Constitutional Court through recruitment by three state institutions (House of Representative, The President, and Supreme Court). The swearing of the oath of the constitutional judges was held at the State Palace on 16th August 2003. The delegation of the case from the Supreme Court to the Constitutional Court, on 15th October 2003 which marked the operation of Constitutional Court as one of the branches of judicial power according to the provisions of 1945 Constitution.[47]

Some considerations of the establishment of the Constitutional Court as stipulated in Law no. 24 of 2003 on the Constitutional Court are:[48]

a. Whereas, the Unitary State of the Republic of Indonesia is a constitutional state founded on Pancasila and on the 1945 Constitution of the Republic of Indonesia, and aims to establish an orderly, clean, prosperous and fair national existence;
b. Whereas, the Constitutional Court as one of the branches of judicial powers plays an important role in upholding the constitution and the principles of a state which espouses the supremacy of law in

[46] *Ibid*
[47] *Ibid*
[48] Consideration Law no. 24 of 2003 on the Constitutional Court.

accordance with its duties and powers as stipulated in the 1945 Constitution of the Republic of Indonesia;

c. Whereas, in accordance with the provision of Article 24C paragraph (6) of the 1945 Constitution of the Republic of Indonesia, a set of rules is deemed necessary to regulate the appointments and dismissals of constitutional judges, the code of procedures and other provisions regarding the Constitutional Court;

d. Whereas, based on the considerations as referred to in letter a, letter b and letter c, and in view of implementing the provision of Article III of the Transitional Provisions of the 1945 Constitution, it is necessary to formulate a Law on the Constitutional Court;

The Constitutional Court is one of the executors of judicial power, in addition the Supreme Court as referred to in Article 24 paragraph (1) and paragraph (2) of the Indonesian 1945 Constitution. It means that the Constitutional Court is bound by the general principle of implementation of the judicial powers are independent and free from the influence of other institutions in enforce the law and justice.[49]

According to article 24C paragraph (1) and paragraph (2) of 1945 Constitution, the authorities of the Constitutional Court are:[50]

1. Reviewing laws against the Constitution;
2. Determining disputes over the authorities of state institutions whose

[49] Bambang Sutiyoso, Pembentukan Mahkamah Konstitusi Sebagai Pelaku Kekuasaan Kehakiman di Indonesia, *Jurnal Konstitusi,* Volume 7, Number 6, Desember 2010, p. 30.
[50] Article 24C paragraph (1) and paragraph (2) of 1945 Constitution.

powers are given by this Constitution;

3. Deciding over the dissolution of a political party;
4. Deciding disputes over the results of general elections; and
5. The Constitutional Court shall possess the authority to issue a decision over an opinion of the House of Representative concerning alleged violations by the President and/or Vice-President of this Constitution.

2. The Authorities and Duties of Constitutional Court

According to article 24C paragraph (1) and paragraph (2) of 1945 Constitution, the authorities of the Constitutional Court are:

1. Reviewing laws against the Constitution;
2. Determining disputes over the authorities of state institutions whose powers are given by this Constitution;
3. Deciding over the dissolution of a political party;
4. Deciding disputes over the results of general elections; and
5. The Constitutional Court shall possess the authority to issue a decision over an opinion of the House of Representative concerning alleged violations by the President and /or Vice-President of this Constitution.

The authority of the Constitutional Court of Indonesia in detail are as follows:

1. Reviewing laws against the Constitution (Constitutional Review)

Regarding the judicial review, regulated in Part Nine of Law Number 24 Year 2003 from Article 50 to Article 60, the law is a political product usually a crystallization of the political interests of its makers. As a political product, it may contain interests that are not in line or violate the constitution. In accordance with the principle of legal hierarchy, no contents of a lower legislation should be contradict or not referring to the higher rules.[51]

To review whether a law is contradict or not to the Constitution, the agreed mechanism is a judicial review.[52] If the law or part therein is declared to be inconsistent with the Constitution, then this law product shall be dismissing by the Constitutional Court. Through the authority of judicial review, the Constitutional Court becomes a state institution that guards the law, so there are no law contradicts with the constitution.

The nature of the judicial review is passive and shall not be active, where the Constitutional Court shall review the Act against the 1945 Constitution only if there is a request of review from the

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[51] Janeri M. Gaffar, *Kedaulatan Fungsi dan Peran Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Republik IndonesiaI*, Surakarta, 2009, p.14.

[52] Judicial review is the right of review both material and formal given to judges or the judiciary to review the validity and applicability of legal products produced by the executive, legislative and judiciry in the presence of higher legislation. Review are usually made against legal norms with a posteriori, if done a priori called judicial preview as for example practiced by Counseil Constitutional in France. Judicial review works on the basis of hierarchical legislation.

party who feels aggrieved, not after the law passed by the Legislative and then reviewed.[53]

2. Determining disputes over the authorities of state institutions whose powers are given by this Constitution

A dispute over the constitutional authority of a state institution is a disagreement with disputes and other claims regarding the owned authority by each state institution. This is possible, because relation system between one institution and another entitled the principle of check and balances, which means equal but controlling each other. As a result of this relation, in exercising its authority there is a possibility of dispute in interpreting the mandate of the Constitution. Constitutional Court in this case, will be a judge to solve it. This authority has been regulated in Articles 61 to 67 of Law Number 24 Year 2003.

The object of dispute is a dispute concerning constitutional authority among State institutions, so that it will be decided by the Constitutional Court. Constitutional Court interprets the 1945 Constitution to determine which state institutions have the authority to exercise disputed constitutional authority. The meaning of dispute over constitutional authority must fulfill two elements, namely the

[53] Abdul Latif, *Fungsi Mahkamah Konstitusi dalam Upaya Mewujudkan Negara Hukum Demokrasi*, (Yogyakarta: Kreasi Total Media, 2007), p.164.

existence of constitutional authority specified in the Constitution and a dispute arises in the exercise of constitutional authority as a result of different interpretations of disputing state institutions.[54]

3. Deciding over the dissolution of a political party

This authority is given to settle the dissolution of political parties. It will not stuck on authoritarianism and arrogance, undemocratic, and culminates in the castration of political life being built. A political party may be dissolved by the Constitutional Court if its ideology, principles, objectives, programs and activities are contradict with the 1945 Constitution. Article 74 to Article 79 of Law Number 24 Year 2003 on the Constitutional Court has regulated this authority.

The Constitutional Court's decision in the dissolution of political parties is constitutive, which eliminates a legal situation. So that the political party will break up immediately if the Constitutional Court has granted the government's request. The existence of political party is not recognize and is considered absent, as a result the political party cannot be a participant in the general election in Indonesia.[55]

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[54] Jimly Asshiddiqie, *Sengketa Kewenangan Konstitusional Lembaga Negara*, (Jakarta: Konstitusi Press, 2006), p.12-15.
[55] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia,* (Jakarta: Konstitusi Press, 2005), p. 42.

4. Deciding disputes over the results of general elections

Disputes over the results of general elections are disagreement between the General Election Commission and the General Election Parties regarding the determination of national election results. Disputes over results of general elections may occur if the determination of the General Election Commission affects:

a) Elected members of Regional Representative Council (DPD)

b) Determination of candidate that enter in the second round of president and vice president election also the election of president and vice presidential pairs, and

c) Obtaining seats of political parties participating in the election in an electoral district.

This has been determined in Part Ten of Law Number 24 Year 2003 on the Constitutional Court from Article 74 to Article 79.

5. The Constitutional Court shall possess the authority to issue a decision over an opinion of the House of Representative concerning alleged violations by the President and /or Vice-President of this Constitution.

Law Number 24 of 2003 on the Constitutional Court determines the violations are:[56]

a. Treason against the state, which constitutes a criminal offence

[56] Article 10 paragraph (3) of Law Number 24 of 2003 on Constitutional Court.

against the security of the state as prescribed by law.

b. Corruption and bribery, which constitute criminal offences of corruption and bribery as prescribed by law.

c. Other serious criminal offences, which constitute criminal acts punishable by a prison sentence of 5 (five) years or more.

d. Misconduct is an act which undermines the dignity of the President and/or the Vice-President.

e. Non-fulfillment of the requirements to be President and/or Vice-president which constitutes a condition as defined in Article 6 of the 1945 Constitution of the Republic of Indonesia.

The reasons for dismissal of the President and/or Vice-president must be based on the law and not on a policy, so disagreements in the House of Representative can't be used as an excuse to dismiss the President and/or Vice President. Similarly, against disgraceful acts if used as an excuse for dismissal. According to Marzuki, the disgraceful acts referred to in the constitutional article must also be understood in the meaning of a disgraceful act according to the law, meaning that the disgraceful act is related to written rules of law.[57]

Lately, deciding disputes over the results of regional election become the authority of the Constitutional Court while in the past it was the authority of the Supreme Court. The transfer of authority from the

[57] M. Laica Marzuki, "Pemakzulan Presiden/Wakil Presiden Menurut Undang-Undang Dasar 1945", *Jurnal Konstitusi,* Volume 7, Number 1, (February, 2010), p. 18.

Supreme Court to the Constitutional Court is based on the provisions of Article 236 C of Law Number 12 Year 2008 on the Second Amendment to Law Number 32 Year 2004 on Regional Government. Article 236 C of Law Number 12 Year 2008 states that the handling of disputes over the results of voting of regional elections by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eighteen) months since the Act has enacted.

Law Number 22 of 2007 on the Implementation of General Election gave a change of the terminology of regional election to general regional election (Pemilukada). Chapter I Article 1 of Law Number 22 of 2007 has the intention that the general election of the head and deputy of region is the election to elect the head of region and deputy head of region directly in Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia.[58]

Thus, if the regional election participates in the electoral regime, the handling of the dispute over the result of regional election shall be the authority of the Constitutional Court in accordance with Article 24C Paragraph (1) Third Amendment of the 1945 Constitution of 1945. However, Law Number 32 of 2004 on Regional Government still regulates the dispute of the regional election is the authority of the Supreme Court so that there is a need for further regulation to reinforce

[58] Joko Widarto dalam Konstitusionalitas Kewenangan Maahkamah Konstitusi Dalam Menyelesaiakan Sengketa Pemilihan Umum Kepala Daerah, *Lex Jurnalica*, Volume 11 Nomor 2, Agustus 2014, p. 84.

the regulation concerning dispute over the results of regional election.[59]

Law Number 12 of 2008 on Amendment to Law Number 32 Year 2004 on Regional Government contains provisions that disputes on regional election have been transferred from the Supreme Court to the Constitutional Court. The transition of the dispute settlement location as regulated in Article 236C states that "The handling of disputes over the vote count results of the regional election by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eighteen) months since the Act is enacted."[60]

Law Number 12 of 2008 on Amendment to Law Number 32 of 2004 has brought major changes to the implementation of regional elections in Indonesia. Among other changes are the handlings of disputes over the results of the elections from the Supreme Court to the Constitutional Court. This is an affirmation of the entry of elections in the electoral regime, so that at that time started the authority of the Constitutional Court to handle disputes over the results of the Regional Election.

3. Regional Election Dispute Settlement

Article 18 paragraph (4) of the 1945 Constitution states that governors, regents and mayors, respectively head of regional government of the provinces, regencies and municipalities, shall be elected

[59] *Ibid.*
[60] *Ibid.*

democratically.[61] The word "elected democratically" generally means that the regional election should be elected by involving the participation of the society. According to Syahuri the word "elected democratically" can only be interpreted by direct election.[62]

Based on Article 18 Paragraph (4) of the 1945 Constitution above, Article 2 Paragraph (1) of Law Number 1 Year 2015 determine that "Elections are held democratically based on the principles of direct, public, free, secret, honest and fair". From these provisions, the governor, regent or mayor shall be elected directly by the people. The direct regional election is a manifestation of people's sovereignty to participate in the implementation of local government.

Although the regional election is based on the principles of direct, public, free, secret, honest and fair, in practice it has the potential to create the violations and disputes. One of the types of disputes that can arise in the implementation of direct regional election is a dispute over the results of direct regional election.

The dispute over the results of the direct regional election must be settled in accordance with the law (due process of law). This is in accordance with Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that "Indonesia is state based on the rule of law". Therefore, as a rule of law, the dispute over the result of

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[61] Article 18 paragraph (4) of the 1945 Constitution.

[62] Taufiqqurahman Syahuri on Yusak Elisa Reba, Kompetensi Mahkamah Konstitusi Dalam Menyelesaikan Sengketa Hasil Pemilihan Umum Kepala Daerah, (Papua: *Jurnal Konstitusi*, PSK-FH, Uncen, Volume 1, Number 1, June 2009), p. 66.

regional election must be settled through the institution and according to the procedures that determined by law namely the settlement of disputes in peace and institutionalization.[63]

Furthermore, Law Number 32 Year 2004 on Regional Governance give the authority to the Supreme Court to resolve the dispute over the results of the regional election. It was determined in Article 106 of Law Number 32 Year 2004 which states that:[64]

1. Objections to the endorsement of the result of regional head elections can only be raised by pairs of candidates to the Supreme Court in no more than 3 (three) days after the endorsement of the result of regional head and deputy regional head elections.
2. The objections as meant in paragraph (1) are only related to the related to the vote counting result that influences the election of a pair of candidates.
3. The objections as meant in paragraph (1) are filed to the Supreme Court via the appellate court when they are related to the head of regeion and deputy head of region elections and via the district court when they are related to regent/mayor and deputy regent/mayor elections.

With this basis, the Supreme Court has since 2005 resolved the

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[63] Henry B. Mayo on Taufiqurrohman Syahuri, Putusan Mahkamah Konstitusi Tentang Perselisihan Hasil Penghitungan Suara Pemilihan Umum Berdasarkan Undang-Undang No. 24 Tahun 2003, (Bengkulu: *Jurnal Konstitusi*, PKK-FH, Universitas Bengkulu, Vol. II No.1 June 2009), p. 10

[64] Article 106 paragraph (1), (2), and (3) of Law Number 32 of 2004 on Regional Government.

dispute over the results of regional election. However, the terminology of the direct regional election is changed into the General Election of Regional Head (Pemilukada) through Law Number 22 Year 2007 regarding the Implementation of General Election. The amendment basically had started since the Decision of the Constitutional Court Number 072-73/PUU-II/2004, on March 22, 2005.

The changes of terminology have brought fundamental change to the competent institution to resolve the dispute over the result of the direct regional election, from the Supreme Court to the Constitutional Court. The transfer is based on the authority of the Constitutional Court to resolve the dispute over the results of the general election as defined in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that;

> "The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections".

Based on these provisions, Article 236C of Law Number 12 Year 2008 on states that the authority of the Supreme Court to settle the results of the direct regional election shall be transferred to the authority of the Constitutional Court. Article 236C of Law Number 12 Year 2008 determines:

> "The handling of disputes over the vote count of head and deputy of regional elections by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eight months) since the

law is enacted".

The transition of the regional election dispute settlement has created the debate between experts of the constitutional law. It is considered that the provisions of Article 24C of the 1945 Constitution and Article 10 of Law Number 24 Year 2003 only authorize the Constitutional Court to resolve disputes over the results of general elections. Based on the original intent of the general election in Article 24C of the 1945 Constitution, regional election is not part of general elections. Therefore, many experts claim that the transfer of authority over the dispute over the result of direct regional election to the Constitutional Court is unconstitutional.

The pro-contra debate ended in 2013, the Constitutional Court declared that the Constitutional Court was not authorized to adjudicate the dispute over the results of direct regional election. It is stated in the decision of the Constitutional Court Number 97/PUU-XI/2013.

The Decision of the Constitutional Court Number 97/PUU-XI/2013 states that the authorization of regional election dispute settlement to the Constitutional Court given through the provisions of Article 263C of Law Number 12 Year 2008 and Article 29 paragraph (1) sub-paragraph e of Law Number 48 Year 2009 is unconstitutional and must be revoked, because it is contradict with Article 24C paragraph (1) and Article 22E Paragraph (2) of the 1945 Constitution of the Republic of Indonesia and has no binding law. Based on this decision, the

Constitutional Court provides freedom to the legislators to determine the judicial institutions authorized to resolve the dispute over the results of the regional election.

After the Constitutional Court Decision Number 97/PUU-XI/2013, the legislator formulates Act Number 1 of 2015. Article 157 of Law Number 1 of 2015 states that the authority is re-submitted to the Supreme Court. This means that those who have the authority to resolve the dispute over the result of regional election are a high court appointed by the Supreme Court. However, the provision of Article 157 paragraph (1) of Law Number 1 of 2015 is not applied long time, as the legislators had issued Law Number 10 Year 2016.

Article 157 of Law No. 10 of 2016 regulates which judicial institution is authorized to resolve the dispute over the results of the regional election. Article 157 of Law Number 10 Year 2016 determines that:

(1) Regional election disputes cases are examined and prosecuted by the Special Court.

(2) The special court body as referred to in paragraph (1) shall be established before the implementation of the national regional election.

(3) Cases of dispute over vote acquisition the results of election are examined and tried by the Constitutional Court until the establishment of a special court body.

(4) ... etc.

According to this provision, there is a transfer of authorized judicial institutions to resolve the results of direct regional election disputes, where the dispute over the results of the regional election is resolved by the Special Court. However, what special court body is referred to, Article 157 of Law No. 10 of 2016 does not define in a limited manner.

Due to the uncertainty of the competent authority to resolve the dispute over the results of the direct regional election as regulated in Article 157 of Law Number 10 Year 2016, to fill the legal vacuum (*recht vacum*), Article 157 paragraph (3) of Law Number 10 Year 2016 states that the Constitutional Court is authorized to resolve the regional election dispute until the establishment of the special court.

C. Lesson Learned From Some Countries

1. Corte Electoral in Uruguay

The Oriental Republic of Uruguay gained independence in 1825 and, with influences from the Swiss republican model, a unique combination of quasi-presidentialism and multiparty system was formed at the beginning of the 20th century. The Electoral Law of 1924 marks the beginning of an autonomous and independent electoral management body. After almost a century in the hands of the executive power, elections and other election-related issues were finally brought together

under the jurisdiction of the independent and permanent Electoral Court (Corte Electoral) which, as the new leading body of the electoral system, was made responsible for the conduct of elections. In 1934 the existence and power of the Electoral Court were enshrined in the Constitution.[65]

Since 1924, Uruguay is a country that has a special court to handle electoral disputes. This shows that Uruguay has long established electoral courts, making it relevant for Indonesia to make it a benchmark when it establishes an electoral court. In addition to these reasons, Uruguay also has some similarities with the character of Indonesia, namely embracing multi-party system. Election Mechanism in Uruguay is also stratified by region, namely General Election at the state level and General Election at the level of department, similar to Indonesia which has electoral mechanism at national level and elections at local level.[66]

Institutionally, the Electoral Court in Uruguay is established permanently and consisted of Electoral Court at a national level called the Electoral Court and a Regional Electoral Court called the Electoral Boards (Juntas Electorales).[67] Each of the Electoral Court and Electoral Boards is assisted by a secretariat office that deals specifically with administrative matters such as employees and all matters related to the

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[65] Sara Staino, "Case Study: Uruguay: The Electoral Court – A Fourth Branch of Government?", on Alan Wall, *et al.*, Electoral Management Design: The International IDEA Handbook (Stockholm: IDEA, 2006), p. 219.

[66] Dian A. W & Olla A.A on Inisiasi Pengadilan Khusus Kepala Daerah Dalam Menghadapi Keserentakan Pemilihan Gubernur, Bupati, dan Wailikota di Indonesia, *Jurnal Rechtsvinding*, Volume 4, Number 1, April 2015, p. 167.

[67] Chad Vickery (Ed.), *Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections* (Washington DC.: USAID and IFES, 2011), p. 124.

financing of the Electoral Court. The office of this secretariat at the national level is called the National Electoral Office, while at the local level it is called the Departmental Electoral Office.[68] Due to the subordinate nature between national and departmental organizations, Electoral Boards must always report their activities on the Electoral Court, as well as the Departmental Electoral Office is required to report its activities to the National Electoral Office.[69]

The authority of the Electoral Court as mentioned in the Constitution of Uruguay includes 3 (three) things, namely:

1. Responsible for the making of the rule of election and procedures;
2. Be the center of coordination of all matters relating to elections including on electoral financing (to exercise directive, disciplinary, advisory, and economic supervision over electoral organs), and
3. Deciding the disputes over the results of election (to render final elections on all appeals and claims that may arise and act as judges of all elections to all elections, and of plebiscites and referendums).[70]

Due to the subordinate nature, the authority of Electoral Boards is part of the authority of Electoral Court which is limited to the regional level. The authority of the electoral courts in Uruguay appears to be very broad including all matters relating to elections start from the making of its regulations, its implementation, to the settlement of its dispute. This

[68] Sara Staino, ”Case Study: Uruguay: The Electoral Court – A Fourth Branch of Government?”, Loc.cit.
[69] *Ibid.*
[70] Article 322 of the Constitution of Uruguay 1966 (reinst. 1985, rev. 2004).

then made the Uruguay Electoral Court termed the fourth branch of the state for being able to take over the legislative, executive, and judicial functions.[71]

The Electoral Court consists of nine members elected by both houses of Parliament. Five are politically impartial members, nominated on the basis of their professional skills, and elected by a majority vote of two-thirds; and four are representatives of the leading political parties, and four are elected by proportional vote by the members of the respective party in the legislature. According to the constitution of 1952, the candidate with the highest number of votes among the five impartial members is chosen as president of the Electoral Court.[72]

2. Tribunal Superior Electoral in Brazil

Election law enforcement in Brazil only began with the establishment of the Tribunal Superior Electoral in 1932, although the first elections in Brazil were held in 1821 when Brazil was still a Portuguese colony.[73] Brazil has two types of elections, namely elections at federal and elections in the state territory. Compared with Indonesia in the form of a unitary state, certainly the electoral mechanism is different, but viewed from the party system both Indonesia and Brazil have in

[71] Sara Staino, ”Case Study: Uruguay: The Electoral Court – A Fourth Branch of Government?”, Loc.cit.
[72] *Ibid.*
[73] Superior Electoral Court, ”History of the Elections”, available at http://english.tse.jus.br/the-brazilian-electoral-system/elections/elections, accesses on Monday, June 13, 2017, at 15.34 p.m.

common multiparty, so this will also affect the running of elections.[74]

The adjudication system utilizes a Superior Electoral Court (Tribunal Superior Eleitoral, TSE), a Regional Electoral Court in the capital of each state, plus one in the Federal District. Larger cities have municipal election judges, and smaller towns have local election boards. The Brazilian Constitution details the composition of the Electoral Courts and states that a supplementary law should be adopted to define the "organization and competence of the electoral courts, judges and boards." Constitutional provisions and Parliamentary acts that establish complaints adjudication institutions help to protect the right to judicial review in electoral matters.[75]

Electoral Court in Brazil is the part of the Electoral Justice System, namely:

1. Superior Electoral Tribunal;
2. Regional Electoral Tribunals;
3. Electoral Judges; and
4. Electoral Boards.[76]

The composition of the judge on the Superior Electoral Tribunal consists of 7 (seven) judges with a composition of 5 (five) judges, elected 3 (three) judges from the Supreme Federal Tribunal and 2 (two) judges

[74] Dian A. W & Olla A.A, *op. cit.* p. 168.
[75] Chad Vickery (Ed.), *Op.Cit*, p. 121.
[76] Article 118 of the Constitution of Brazil 1988 (rev. 2014).

from the Superior Tribunal of Justice, while 3 (two) judges Again appointed by the President with an advocate background.[77] The judge of the Regional Electoral Tribunal consists of 7 (seven) judges with a composition of 4 (four) judges, elected 2 (two) judges from the Tribunals of Justice and 2 (two) judges from state courts appointed by the Tribunals of Justice, while Composition of 3 (three) judges, elected 1 (one) judge from Federal Regional Tribunal and 2 (two) judges again appointed by President with advocate background.[78]

The decision of the Superior Electoral Tribunal can't be appealed, so it is final and binding.[79] There are, exceptions to the decisions that may be appealed:

a) They contravene an express provision of this Constitution or law;

b) A divergence exists in the interpretation of a law between two or more electoral courts;

c) They deal with ineligibility or issuance of certificates of election in federal or state elections;

d) They annul certificates of election or decree the loss of federal or state elective offices; and

e) They deny habeas corpus, writ of security, habeas data or a mandate of injunction.[80]

[77] Article 119 of the Constitution of Brazil 1988 (rev. 2014).
[78] Article 120 of the Constitution of Brazil 1988 (rev. 2014).
[79] Article 120 paragraph (3) of the Constitution of Brazil 1988 (rev. 2014).
[80] Article 120 paragraph (4) of the Constitution of Brazil 1988 (rev. 2014).

3. Tribunal Supremo de Elecciones in Costa Rica

The Supreme Electoral Tribunal (Tribunal Supremo de Elecciones) of Costa Rica was established as an independent agency in 1946. Before then, election administration was the responsibility of the internal affairs secretary, who was part of the executive branch of government. The Tribunal Supremo de Elecciones was incorporated into the new constitution of 1949 as a constitutional agency with full powers to administer elections. Since then it has become one of the most prestigious institutions in the country.[81]

The Tribunal Supremo de Elecciones has power to organize, implement and supervise all elections, including presidential, legislative and local elections. It serves as the election complaints adjudication mechanism. The constitution provides that the Tribunal Supremo de Elecciones is responsible for the authoritative interpretation of both the constitutional and legislative norms regarding electoral matters. This means that the constitution gives the Tribunal Supremo de Elecciones constitutional, legislative and judicial powers.[82]

The decisions and resolutions of the Tribunal Supremo de Elecciones are not subject to appeal. This is a remarkable and important attribute, because no one can contest the results of an election in court. During the election campaign period, which lasts three months, the

[81] Chad Vickery (Ed.), *Op.cit*, p. 122.

[82] *Ibid.*

Tribunal Supremo de Elecciones assumes direct control of the Civil Guard (part of the domestic security forces). This is intended to guarantee that elections are free and without interference from the political authorities.[83]

The Congress cannot enact any law regarding electoral matters later than six months before polling day or earlier than six months after polling day. The Court must be consulted in advance on every proposal for legislation regarding electoral matters; if this is not complied with, the resulting law is null and void. For the Legislative Assembly to enact legislation contrary to the opinion of the Tribunal Supremo de Elecciones, a majority of two-thirds of its members is required.[84]

Political parties generally have full confidence in the independence and impartiality of the Tribunal Supremo de Elecciones, mainly due to the Tribunal Supremo de Elecciones's ability to deliver elections on schedule and to remain neutral and transparent throughout the electoral process. Civil society groups' views about the quality of the working relationships they enjoy with the Tribunal Supremo de Elecciones are positive. Their contacts with the Tribunal Supremo de Elecciones have always been open and based on mutual trust.[85]

[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

D. The Urgency of Special Court for Regional Election Dispute Settlement in Indonesia

The importance of the establishment of the Special Court of regional election in the implementation of regional election is a legal aspiration (*ius constituendum*) whose purpose is to protect the constitutional rights of citizens and election participants. The Special Court of the regional election may provide legal space to the aggrieved parties in the implementing the regional election to get the legal certainty in the life of the democratic state, as well as an effort to accelerate the settlement of regional election disputes.

The idea of special court of the regional election is actually a solution to realize one of the most important components in the principles of election such as legal certainty. If there are parties who are not satisfied or feel aggrieved in the implementation of the regional election to get the legal certainty, they can propose the issue to the Special Court. So with the Special Court, the regional elections will be resolved effectively, which previously many of them unresolved well and piled up in the Constitutional Court.

Currently, to realize the Special Court of the regional election is not impossible anymore, as proven in Article 157 of Law Number 10 Year 2016 on ratification of Government Regulation in lieu with Law No. 1 of 2015 on the Election of governors, regents and mayors has clearly determined that:

1. Dispute over the results of the Regional Election is examined and tried by the Special Court Body.
2. The special court body as referred to in paragraph (1) shall be established

before the implementation of the national regional election.

3. Dispute over the results of the Regional Election shall be examined and tried by the Constitutional Court until the establishment of a special court body.

Indeed, this body is not clearly defined in law no. 10 of 2016, but Article 1 number 8 of Law Number 48 Year 2009 states that:

> Article 1 point 8 of Law Number 48 of 2009[86] on Judicial Power determined "Special Court is a court which has the authority to examine and decide certain cases that can only be formed on the court area under the Supreme Court which regulated in the Act". Further article 27 paragraph (1) of Law No. 48 of 2009[87] on Judicial Power determined that "Special Court can only be formed in one of judiciary area under the Supreme Court referred to in Article 25".

Law Number 48 Year 2009 gives the authority to the legislator to establish a special court body, including a special court body which has the authority to resolve the dispute over the results of direct regional election. The special courts of regional election dispute should be established under 4 (four) existing judicial bodies. Therefore, the special court determined in Article 157 paragraph (1) of Law Number 10 Year 2016 should be established under the administrative court, since the dispute over the direct regional election is an administrative dispute that assesses the validity of the decision of the local election organizer related to the results of the direct regional elections.[88]

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[86] Article 1 point 8 Law Number 48 of 2009 on Judicial Power.
[87] Article 27 paragraph (1) of Law Number 48 of 2009 on Judicial Power.
[88] Slamet Suharto dalam Konstitusionaitas Badan Peradilan Khusus dan Mahkamah Konstitusi Dalam Penyelesaian Sengketa Pilkada Langsung, *Jurnal Konstitusi*, Volume 12, Number 3, September 2015, p. 521.

If the Special Court can be established, it will certainly be a solution of the regional election dispute settlement system has not been resolved effectively by the Constitutional Court. There are several problems of the Constitutional Court in resolving the election dispute, namely:[89]

1. Centralization of the Constitutional Court

   With the centralistic nature of the Constitutional Court cause the accumulation of disputes over the results of the regional election at a certain time and making the seeker of justice from the distant regions of Indonesia, such as the regions outside of Java, moreover from the western and eastern of Indonesia, have limited access to the Court and creating difficulties for citizens to get justice.

2. The number of the Judges is nine judges

   With the number of judges of the Constitutional Court just nine judges, it will be difficult to resolve election disputes effectively. While every year there is an accumulation of the cases in the Constitutional Court. Moreover if it is associated with the main domain of the Constitutional Court is actually as the "guardian of the Constituttion".

3. The deadline for the dispute settlement is short enough ie 45 days

   The deadline for the disputes settlement that give to the judges of the Constituional Court is very short, just only 45 days. It is impossible

[89] Iwan Satriawan dkk, 2012, *Study on the Effectiveness of the Settlement of Local Election Dispute by the Constitutional Court*, Pusat Penelitian dan Pengkajian Perkara, Pengelolaan Teknologi Informasi dan Komunikasi Mahkamah Konstitusi Republik Indonesia, Jakarta.

for the judges of the Constitutional Court to resolved the regional election dispute effectively. While compare with the number of the regional election dispute that accepted by the Contitutional Court is so much.

4. The extension of the scope of the Constitutional Court's authority through the Court's own decision

In certain cases it becomes a serious obstacle for the Constitutional Court in resolving disputes over the results of the regional election. According to Refly Harun, with this conditions, the settlement of the dispute over the results of the regional election in the Constitutional Court will be not effective. It is also hard for citizens who are far away from the Capital Region of Jakarta such as Aceh and Papua.

Relevant to the problems, there are two issues that can arise if there will be a Special Court for regional election disputes settlement. First, the issue of institutionalization of the Special Court whether the court will be under the High Court or the High Administrative Court. Basically, putting the election court to the existing courts is part of problem of the previous agenda of political reform.

Second, the issue of public trust to the existing courts. Every body know that the reason why the authority of regional election disputes was given to the Constitutional Court. That was because there is no public trust to the existing courts. Accordingly, if the special court is established, there should be independent judges with integrity