

CHAPTER FOUR

FINDING AND ANALYSIS

General election is a tool for the society to participate in determining the purpose of governance. General Election also has a function as a purpose of political legitimacy for government in charge. Then the reforms in the end of 90s which were followed by amendment of the 1945 Constitution had an impact on changing the general election system. After the amendment of the 1945 Constitution, the election of legislative members and election implementation of executive power were held directly by the people. Based on these changes every citizen has the right to elect the representative as the representative institution such as House of Representatives (DPR), Regional Representative Council (DPD), Regional House of Representative (DPRD), and elect President and Vice President candidate.²⁰

The spirit of democracy in the election of President is determined in the Constitution and it then inspire the development of democracy at the regional level (provincial, district, and city), so that the regional head is also directly elected by the people. Then that spirit is regulated in Act Number 32 Year 2004 regarding regional government as legal basis for conducting the local general election directly elected by the people which was enacted on 15 October 2004.

Local election in district level for the was held for the first time on 1 June 2005 in Kutai Kartanegara Regency, East Kalimantan. The local election were

²⁰ Article 22E paragraph (1) and (2) of the 1945 Constitution

followed by Cilegon, Banten, Pekalongan and Kebumen Central Java on 5 June 2005 and Indragiri Hulu Regency on 11 June 2005. The local election in province level was held for the first time in North Sulawesi on 20 June 2005.²¹ The changes of other election system after the Constitutional amendment has given the authority of the judicial authority (judiciary) to settle disputes over the result of general election, both legislative and executive election. The authority to settle the election dispute (PHPU) of members of DPR, DPD members, and DPRD members, and the President and Vice President are given to the Constitutional Court (MK).²²

While in the general election of the regional head, originally based on Law No. 32 of 2004, it is the authority of Supreme Court to settle the dispute over the result of election of Governor and Vice Governor and the authority of High Court for the election of Regent/Mayor shall be transferred to the Constitutional Court authority since 1 November 2008. Since given the authority to settle here and after called PHPU Head of Region until now, Constitutional Court by its decisions has made legal alternative to guide general election which is implemented democratically according to the Constitution mandate. However, it does not mean that in handling PHPU, Constitutional Court did not face any challenges. Constitutional Court has experienced to decide PHPU of head of region, but many

²¹ Hamdan Zoelva, *Problematika Penyelesaian Sengketa Hasil Pemilukada oleh Mahkamah Konstitusi*, *Jurnal Konstitusi*, Volume 10, Nomor 3, September 2013.

²² Act 24C paragraph (1) of the 1945 Constitution

administrative and criminal violation have not been resolved properly when the dispute become the Constitutional Court cases.²³

On the other side, the administrative and criminal violations are often related to the principle petition which must be decided by Constitutional Court. So the Constitutional Court must give the decision on its authority. Another problem on settlement of the results of local election head of region settlement in Constitutional Court is a limited time of period for 14 (fourteen) working days which in reality only effective for 7 working days but on Law number 8 Year 2015 Constitutional Court shall decide the dispute at the latest 45 (fourty five) days after the receipt of the petition, because there is a calling procedure. If this limited time problem is related to the simultaneous local election, the dispute of the local election cases in the Constitutional Court has difficulty.

A. Historical Review of the Conception of Local Election

1945 Constitution does not regulate whether head of region is elected directly by the people or elected by the DPRD. Article 18 paragraph (4) 1945 Constitution only affirms that the head of region is elected democratically. The “elected democratically” formula was born from a long debate in Ad Hoc Committee 1 about whether the head of region to be elected by the DPRD or the head of region to be directly direct elected by the people.²⁴

²³ Nasrullah, Tanto Lailam, *Dinamika dan Problematika Politik Hukum Lembaga Penyelesaian Sengketa Hasil Pemilihan Kepala Daerah di Indonesia*, *Jurnal Media Hukum*, Volume 24, Nomor 1, Juni 2017.

²⁴Hamdan Zoelva, “Tinjauan Konstitusi Pemilihan Kepala Daerah”, <http://hamdanzoelva.wordpress.com/2008/03/15/tinjauan-konstitusi-pemilihan-kepala-daerah/> accessed on 18 juny.2017, 08.30.a.m. .

At least there are two main principles contained in “head of region is elected democratically” namely, first: the head of region shall be “elected” through the election process and not possible to be directly appointed. Second: election is conducted democratically. The meaning of democratic here does not mean to have direct election by the people, but it can also have a meaning of election done by the DPRD whose the members also elected by democratic general election.

When the Law Number 32 of 2004 on Regional Government is submitted by the government and debated in the DPR, there is no further debate on whether the regional head of region is directly elected by the people or elected by the DPRD. In this case there are at least two causes, firstly, it has been agreed in the third and fourth changes of the 1945 Constitution that the President and Vice President of Republic of Indonesia are directly elected by the people, and secondly, from the collection of people aspirations through out Indonesia, whether conducted by the ministry of home affairs and House of Representatives (DPR), obtained the dominant aspiration by the people.

The issues which have become a debate is how these direct election mechanisms are conducted in each region and wheather there are similar or different practices in each region as regions should adjust election based on their specific condition. The final formulation of Law Number 32 of 2004 on Regional Government clearly indicates that the election mechanism is more adjusted and only about how the campaign and others have characteristic very

technical submitted to the region by each Local General Election Commission (KPUD).²⁵

Implementation of direct Local Election in addition to the availability of the rule as the legal basis of the implementation, detailed mechanisms and procedures and good sanctions and law enforcement (normative aspects), at the same time, need awareness and readiness from the selected people (cultural aspect). Both of these aspect, normative and cultural aspect become very important to be fulfilled for the purpose that Local Election can achieve idealized targets.

From the cultural aspect, generally there are at least 3 pre-requirements that must be fulfilled for conducting direct election, namely: welfare level, good education level of selected and trustworthy law enforcement institution. No matter how the election regulation are supported without these three prerequisites, the democratic elections still face problems. However, it is imposible to wait for the fulfillment of cultural aspect; a new direct election can be carried out, then the regulation, process and enforcement of election law must be well organized and consistent.²⁶

In addition, to ensure the realization of local election that is in accordance with democratic norms, the implementation must be done with a

²⁵ Ibid

²⁶ Hamdan Zoelva, *Masalah dan Tantangan Pemilukada di Indonesia*, Makalah disampaikan dalam Simposium Nasional dengan tema “Masalah dan Tantangan Menghadapi Penyelenggaraan Pemilukada, Pemilu Presiden, dan Pemilu Anggota DPR, DPD, dan DPRD 2014 di Indonesia”, diselenggarakan oleh Fakultas Hukum Universitas Jember bekerjasama dengan Mahkamah Konstitusi Republik Indonesia dan Asosiasi Pengajar Hukum Acara Mahkamah Konstitusi, Jember, 16-17 Maret 2012, hlm. 1-2.

good system, namely the existence of parts that are secondary systems (subsystems) such as electoral regulation, electoral process, and electoral law enforcement. Electoral regulation is any provision or rules concerning the General Election that should be valid, binding and the guidelines for the organizers, candidates and voters in fulfilling their respective roles and functions. Electoral process is all activities directly related to the implementation of the election referring to the provisions of legislation both legal and technical. Electoral law enforcement is a law enforcement of political, administrative, or criminal election rules. Fulfillment of the three parts of the election determines the extent to which the capacity of the system can bridge the achievement of goals and election processes. Each part cannot be separated because it is a unified whole.²⁷

B. The Authority to Adjudicate Election Dispute of Head of Region by the Constitutional Court

The authority of the Constitutional Court is mentioned in article 24C paragraph (1) of the 1945 Constitution as follows:

The Constitutional Court has authority to adjudicate at the first and final level that its decision is final to review the Law against the Constitution, to decide the dispute over the authority of state institutions whose authorities is provided by the Constitution, decide upon the dissolution of political parties, and decide upon disputes concerning election results.”

²⁷ Ibid

Initially the power to adjudicate disputes over the results of the election is the authority of the Supreme Court based on the provision of Article 106 paragraph (1) of Law Number 32 of 2004 on Regional Government. With the enactment of Law Number 12 Year 2008 regarding the Second Amendment of Law Number 32 Year 2004 regarding Regional Government, Law Number 12 Year 2008 includes the election head of region (local elections) in part of the general election regime (election) and on 28 April 2008 and then the signing of the court of authority transferring authority from the Chief Justice of the Supreme Court to the Chief Justice of the Constitutional Court. On October 29, 2008, the Constitutional Court authority officially becomes more expanded in settling the local election dispute, whether it is a member of the DPR, DPD members, DPRD members, President and supplemented by the Regional Head of local election dispute. So article 236C mandates the handling of disputes over vote count results transferred from the Supreme Court (MA) to the Constitutional Court (MK) within 18 months since the Act was enacted. Since then, the petition of the dispute over the election has flowed to the Constitutional Court (MK).

However, on 19 May 2014, the Constitutional Court by the decision confirmed that the handling of election dispute resolution is not the Constitutional Court's authority. Decision number 97/PUU-XI/2013 states that elections according to Article 22E of the 1945 Constitution must be limited in meaning, including elections held to elect members of DPR, DPD, DPRD on Provincial and district , and election of President and vice president

held every five Year. Based on the decision, the meaning of the election once every five years in Article 22E of the 1945 Constitution is the election of candidates for members of the DPR, DPD, DPRD on provincial and district , and the President and its representative simultaneously every five years or the election of five ballot box. In other words, local election is not a general election regime.

Then, how if there is an election dispute? which institution is authorized to examine and try? In the decision, the Constitutional Court fully submits this to the legislators namely the government and the House of Representatives. Then the Government Regulation in Lieu of Law (PERPPU) No. 1 of 2014 which revoked the enactment of Law No. 22 of 2014 was promulgated. It also regulates the mechanism of local election indirectly by the DPRD. At the same time the government also issued Perppu No. 2 of 2014 on Amendment on Law Number 23 Year 20014 on Regional Government which essentially removes the duty and authority of DPRD to elect the head of region.

Government Regulation in Lieu of Law Number 1 Year 2014 was ratified into Law Number 1 Year 2015 on Stipulation of Government Regulation in Lieu of Law No. 1 of 2014 on the election of Governors, Regents and Mayors. Law Number 1 Year 2015 then has been revised with Law No. 8 of 2015 on Amendment on Law No. 1 of 2015 on the determination of the successor of Law No. 1 of 2014 on the selection of Governors, Regents and Mayors to Act (Act of Election). With the enactment

of Law Number 8 Year 2015, the Constitutional Court officially has no more authorities to adjudicate local election disputes. However, all decisions of Constitutional Court on the dispute of local election result since 2008 are still legitimate and have binding legal force because the Constitutional Court's decision is not retroactive.

Indeed, since the issuance of Decision of the Constitutional Court Number 97/PUU-XI/2013, the dispute over the Local Election result is no longer the authority of the Constitutional Court. Moreover since the enactment of Law No. 8 of 2015 (Local Election Act), Article 157 paragraph (1) mentions that cases of election disputes are reviewed and tried by a special body. However, since the special judicial body has not yet established, the dispute of Local Elections is examined and tried by the Constitutional Court, as provided in Article 157 paragraph (3) of the Local Election Act.

The extension of the authority indicates two things. First, the affirmation that beside as the guardian of the Constitution, the Constitutional Court also have a function as a guardian of democracy. In guarding democracy, the Constitutional Court becomes the final body which has authority to settle the dispute on local election. That role makes the Constitutional Court become aware that the decision not only concerns about the candidates who are competing but determines the fate of the people and democracy especially in areas where the general election is held. Second, the Local Election shall be within the scope of elections as regulated in Article 22E of the 1945 Constitution because it is only the election disputes which

becomes the Constitutional Court authority. In this case, the Constitutional Court must be able to show a better performance in the process of settlement. It means this authority should be implemented optimally and the Constitutional Court must have and prepare adequate support in all aspects.²⁸

Since 2004 the Constitutional Court, has adjudicated the disputes over election of the members of DPR, DPD and Provincial DPRD and regency in Indonesia, also the election of the President and Vice President. This experience then became a valuable provision for the Constitutional Court in handling the case of dispute on Head of Region election. In handling election disputes, legislative elections (DPR, DPD and DPRD, President and Vice President) since 2004 and also election since 2008, all the petition of local election dispute has always been disputed not only the election vote counts appointed by the election organizers, but also various violations within the process and all stages of the election. As a result, the number of election disputes cases were entered and handled by the Constitutional Court, overwhelming with very short periods (30 days for legislative elections and 14 days for presidential and local elections).²⁹

Violations of the law that occurred in the election process not only affect the election of candidate pairs, but also injure the joints of democracy.

Of the various decisions of the Constitutional Court handling the results of

²⁸ Panduan Teknis Beracara Dalam Perkara Perselisihan Hasil Pemilihan Umum Kepala Daerah dan Wakil Kepala Daerah, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2011), p. v.

²⁹ Abdul Mukthie Fadjar, *Memahami Original Intent Makna Pelanggaran Pemilukada Yang Bersifat Sistematis, Terstruktur, dan Masif*, Makalah Diskusi Terbatas Mahkamah Konstitusi, tanggal 29 Maret 2011, p. 1-2.

the election, the Constitutional Court expanded the object of dispute over the results of the election which became the authority of the Constitutional Court as follows:³⁰

1. Vote count results appointed by the provincial or district / city General Election Commission (KPU) influence:
 - a. The determination of the candidate that can follow the second round of local election; or
 - b. The election of the candidate as the head and vice of region.
2. The election process influences the vote acquisition of candidate because the violation of local election has the characteristic of systematic, structured, and massive conducted before, during, and after the voting. The violations of local election not only happen during the voting, so the problem that happen must be traced back to the event that happen before the voting.
3. The violations of the provisions of legislation in the local election process influence the voting and vote count can also be viewed as part of the dispute over the election, including the requirements of the candidate for head of region or deputy.

Since the authority to complete the PPHU of Head of Region is delegated to the Constitutional Court from 2008 until now, the Court has

³⁰Panduan Teknis Beracara Dalam Perkara Perselisihan Hasil Pemilihan Umum Kepala Daerah dan Wakil Kepala Daerah, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2011), p. 10.

received as many as 636 applications and has held 606 cases. The Constitutional Court has decided the 64 accepted cases, and rejected as many as 388 cases, the unacceptable amounted to 130 cases, withdrawn as many as 17 cases and falling as many as 211 cases. In the examination of a number of cases there were many serious problems that not only violated the law, but substantively it can also threaten the continuity of democracy in Indonesia. The following paragraph will describe the problems in examination of dispute of Head of Region election.³¹

C. Law Enforcement of Local Election

Regarding regulatory compliance and law enforcement, there are a number of requirements as the basic development of a good election law enforcement system. These requirements are: i) the existence of effective mechanism and legal settlements; ii) the existence of clear sanctions for election violations; iii) the provision of sufficient detail to protect voting rights; iv) the right of voters, candidates, political parties to complain to election organizers or courts, v) the authority to prevent the loss of voting rights decided by the election or court institution, vi) the right to appeal, an immediate decision, vii) the existence of rules about the time required to decide on the lawsuit, viii) clarification of the implications for violations of

³¹ Hamdan Zoelva, *op. cit.*, p. 3-12.

election rules on election results, and ix) the existence of processes, procedures and prosecutions that respect human rights.³²

In the context of law enforcement of local election, it is certainly not only talking about the law and norms underlying the law enforcement but also the things behind the effectiveness of law enforcement officers Local Election itself. Local Election Law enforcers include: 1. Regional General Election Commission as the organizer of local election which has the authority to give sanction to the perpetrators of election administration violation, 2. Election Supervisory Committee as the supervisor who is authorized to ensure the presence of election violation and settle non-the results of the general election, 3. police officers, 4. prosecutors, and 5. judicial institutions which have authority to investigate, indict and sentence verdicts against the perpetrators of local election, and 6. The Constitutional Court is an institution mandated by the Constitution to resolve election dispute .

If it is viewed from the law enforcement of general election from the Constitutional Court side, there is an interesting phenomenon, namely the high level of submission of dispute petition dispute petition. For example, around 244 election held during 2010, there were 230 local election dispute at the Constitutional Court. This means that only 14 of the Local Election results are not disputed in the Constitutional Court, at least by the defeated

³² Topo Santoso dkk, *Penegakkan Hukum Pemilu: Praktik Pemilu 2004, Kajian Pemilu 2009-2014*, (Jakarta: Perludem, 2006), p. 101-102.

candidates.³³ The high number of local election disputes which were brought to the Constitutional Court indicates that the level of trust and legitimacy the results of the implementation of local election is still low. It means, the participants of local election is still not satisfied with the implementation of local election either the process or the result.

However, on the other hand, it may indicate the basic incomprehension of the lawsuit filed by the participants of the local election and even, many violations and disputes in the election stages should be submitted to other law enforcers instead of being submitted to the Constitutional Court. In several petition dispute cases, participants have included administrative violations, electoral crimes and disputes in the election stage as the basis of the lawsuit.

In fact, these three things are not the authority of the Constitutional Court. For election offenses can be resolved by criminal justice such as police, prosecutors and courts. Meanwhile, administrative violations can be resolved with the local general election commission. Meanwhile, disputes in the process or stages of the election are resolved through the Election Supervisory Body or the Election Supervisory Committee.³⁴ However, because to the nature of the violations that have been structured, systematic, and massive, then to uphold the values of democracy, Constitutional Court

³³ Indonesian Constitutional Court, "Rekapitulasi Perkara Perselisihan Hasil Pemilihan Umum Daerah Mahkamah Konstitusi Republik Indonesia", <http://www.mahkamahkonstitusi.go.id/index.php?page=website.Persidangan.RekapitulasiPHPUD> accessed on 5 July 2017 at 10.42 a.m.

³⁴Tribun News, "MK Bukan Keranjang Sampah Penegakan Hukum Pemiluada" <http://www.tribunnews.com/2011/03/19/mk-bukan-keranjang-sampah-penegakan-hukum-Pemilukada>, accessed on 23 Juny, 2017 at 16.20.p.m.

considers it necessary to grant such a request and cancel the results of the local election.

So far, there is a miss perception related to the authority of the Constitutional Court in the settlement of disputes on the local election. The Court adjudicated the matters which are beyond the authority such as prosecution of criminal of local election and local election administrative violation. Indeed, in proceedings in the Court, false witnesses, false documents and false signatures often appear, but that is not the basis of the decision of the Constitutional Court. Data, information and documents relating to criminal acts revealed in the Local Election Dispute trial will basically be submitted to the police.

With the discovery of many violations in the extraordinary local election, with an ineffective supervisory and law enforcement system, the Constitutional Court made legal breakthroughs in order to restore the defect of democratic values resulting from the violation. The decisions may include re-voting, administrative and factual verification of the candidate, disqualifying selected candidate assign the winners, disqualifying candidate are not fulfill, ordering voting for the voters who have right, giving legal status to the candidates who have officially registered, but are not stipulated by the local election commission.

The role of the Constitutional Court to settle the problems arise in the implementation of local election in certain stage received a positive response. With the decisions, Constitutional Court has responded to local election

issues beyond the rigidity of procedural law by of extensive interpretation. In this case, as a guardian of democracy, the Constitutional Court is obliged to ensure that the implementation of local election does not violate the constitutional principles, namely direct, public, free and confidentially (luber) and honest and fair (jurdil) elections. However, it does not mean the legal action of the Constitutional Court did not get a negative response, because it was considered to have overturned the law, even extending its own authority.

Regarding the process of Local Election that has been going on, for the next few years law enforcement problems is estimated to still get many obstacles because of the level of legal awareness and political culture that has not supported well. However, the choice on proceedings in the Constitutional Court, and the avoidance of violent disputes over a number of local election disputes and compliance with the Constitutional Court decision, in spite of opposition to several Local Election cases, indicates a good legal awareness among political actors.

Legal settlement of dispute over local election is expected to be a good precedent for law enforcement in Indonesia considering dispute of Local Election is a sensitive dispute concerning wide public involvement, thus affecting the life of democracy as a whole. Success in dealing with similar disputes in the future will determine the process of consolidating democracy in Indonesia, so that all elements believe the rule of law as the principle of democracy which is the only rule that is adhered to and not tempted to resort to violence contrary to democratic values.

Furthermore, in order to strengthen law enforcement in various stages of the General Election to be more effective administratively and criminally, the role of the Constitutional Court in resolving the issue of Local Election need the support of other institutions such as the effective Election Supervisory Committee. It is intended that the handling of legal matters Local Election is not all brought and ended in the Constitutional Court. Indeed, in some laws the mechanism of election violation settlement has been regulated, both administrative and criminal.³⁵

In fact there are also rules that have determined that a criminal violation case must be completed within 5 (five) days before the General Election Commission determines the election result.³⁶ However, the experience of the Constitutional Court in handling the Local Election indicates that administrative and criminal violations are not handled by the institution authorized to handle it.

With the limitation period of completion also resulted the number of election cases that must be expired. During this time most of the Election Supervisory Committee was paralyzed, unable to perform its duties maximally because the weak position of the institution both in terms of

³⁵ Republik Indonesia, Undang-Undang Nomor 10 tahun 2008 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah, Lembaran Negara Nomor 51 Tambahan Lembaran Negara Nomor 4836 *jo.* Republik Indonesia, Undang-undang Nomor 42 tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden Lembaran Negara Nomor 176 Tambahan Lembara Negara Nomor 492 *jo.* Republik Indonesia, Undang-undang Nomor 32 tahun 2004 tentang Pemerintahan Daerah.

³⁶ Pasal 257 Undang-Undang Nomor 10 tahun 2008 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah *jo.* Pasal 200 Undang-undang Nomor 42 tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden.

budget and organization capacity. Even the decision of dispute resolution process or stages of Local Election that resulted is often neglected, because it is not strong as judicial decision agency. If it is referred to the philosophy of the election organizer, it should be resolved to settle the violations in the General Election in the process, and not to be stacked at the end. However in the fact, very a little violation was resolved in the process due to the various weaknesses above, so that many cases are stacked in the end of Constitutional Court.

D. Kinds of Violations in the General Election

Various election violations according to Law No.10 of 2008 are divided into three matters, administrative violation, criminal violation and general election result dispute.³⁷

1. General Election Criminal Offense

Criminal offense of general election is a violation of election provisions as stipulated in the election act that is threatened with criminal sanctions. The formulation of general election violation is regulated in Article 252 of Law No.10 of 2008 is a violation of the criminal provisions of the general election as regulated in this act that settlement is conducted through general court. If further explored, there are at least 51 articles (Articles 260 to 311) containing the provisions of general election offense,

³⁷ Article 252 ACT No. 10 Year 2008

among others: deliberately remove the right vote of others (Article 260); deliberately giving inaccurate information about oneself or others for filling in the voter register (Article 261); the determination of the number of printed ballots exceeds the amount prescribed by the law (Article 283).

Based on international standards, the legal framework should regulate sanctions for violations of election acts.³⁸ Many countries create election violation rules in their election acts. Any criminal provisions established for legal purposes should reflect the purpose of the drafting of the law. For example: "Any attempt to prevent violations, corrupt practices, and illegal practices in elections; and rules about electoral lawsuits." In order to uphold democracy, the protection of electoral integrity is essential. Therefore, law makers must regulate some fraudulent practices or general election offenses. In relation to electoral rules, the law not only regulates the election process but they also prohibit treatment that could hinder the essence of free and fair elections.

To ensure free and fair elections, it required the protection for the voters, for the parties to the elections, and folks from fear, intimidation, exploitation, deception and other fraudulent practices that will affect the purity of election results. If elections are won through malpractices, it is difficult to say that elected leaders or legislators in parliament are representative of the people and true leaders. In order to protect the purity

³⁸ International IDEA, *International Electoral Standards, Guidelines for Reviewing the Legal Framework of Elections*, Stockholm: International Institute for Democracy and Electoral Assistance, 2002, h. 93.

of elections, law makers have made a number of fraudulent acts in the election as an offense. Thus, the law on elections in addition to regulating how elections are conducted, the law also prohibits a number of acts that could destroy the nature of free and fair election and threaten perpetrators with punishment.

To provide restrictions on what is meant by general elections offenses, this discussion refers to the provisions in Article 252 of Law No. 10/2008 which broadly states as a violation of the criminal provisions of the general election stipulated in the law.³⁹ Based on the formulation in the provision, it can be interpreted that not all criminal acts that occurred during the election or related to the election, are classified as criminal acts of election. The example is the killing of a political opponent during a campaign, or a candidate for a member of the House of Representatives suspected of fraud. Although the event occurred at the time of the election stage or in connection with certain electoral contestants, but because the criminal is not regulated in the election act; the act is not classified as an election offense but classified as general offense that is stipulated in the Criminal Code.

Similarly, other crimes may be related to the election, but not regulated in the Election Law. For example, financial irregularities in the procurement of ballot papers are not general election offense, but rather a criminal act of bribery. In a short, it can be said that the general election

³⁹ Pasal 252 UU No. 10/2008 selengkapnya berbunyi: *Pelanggaran Pidana Pemilu adalah pelanggaran terhadap ketentuan pidana Pemilu yang diatur dalam Undang-Undang ini yang penyelesaiannya dilaksanakan melalui pengadilan dalam lingkungan peradilan umum*

offense is seen as a seriously prohibited act and must be resolved in order to achieve the purpose of holding the criminal provisions to protect the democratic process through the elections.

The general election offense is set in Chapter XXI, starting from Article 260 to Article 311 of Law No.10/2008. The law is changed every election and it is possible that the arrangement of these general election offense will also change in the coming general election. So, this description only deals with criminal acts in the last election law.

The subject of this election crime includes the administrator of political party; campaign implementer, candidate of DPR/ DPD/ DPRD members; election organizer, election supervisor, up to everyone. In terms of errors, the election offense is deliberate and negligent. In terms of sanctions, electoral crimes are punishable by cumulative sanctions and cumulative penalties (there are words "and") and not alternatives such as Law No. 12/2003. It means, the defendant found guilty must be jailed and fined at the same time. For prison sanctions, there are minimum and maximum criminal threats.

Thus, in terms of legal politics, since in the Criminal Code, law makers have seen the existence of a number of actions related to the elections that are harmful to the achievement of election objectives and therefore must be prohibited and threatened with punishment. There is a tendency to increase the scope and increase of criminal penalties in some election laws that have existed in Indonesia. For example, the number of

general election offense in Law No.10/2008 is more than doubled than the criminal act of election as regulated in Law No.12/2003.

General election offense must be processed through the criminal justice system, through police, prosecutors and courts. The same thing happens in other countries. Criminal sanctions are the most violent so that only the state through a court can bring witnesses to perpetrators of electoral crimes. This is in contrast to administrative sanctions in which government or state institutions (such as the General Elections Commission) are authorized to impose administrative sanctions, without going through the judicial process. Therefore, if any election participant commits an administrative violation, the General Election Commission or Regional General Election Commission which is being forwarded by the report or findings of the election supervisor may process and impose administrative sanctions to the offender.

The subject of crime in Law No. 10/2008 is actually a person, not an institution, company and/ corporation. The mention of the word institution or company in the act is not accompanied by who represents the institution or company that should be responsible. However, since Law No. 10/2008 refers to the subject of "institution" or "company", if there is a criminal offense concerning the articles containing the word "institution" or "company", there must be from the "institution" or "company" that is criminally responsible.

In a criminal law, a convicted person is a person who can be blamed for having committed a prohibited act, i.e a person commits an act which is prohibited or commits an act that has a consequence prohibited by law. So, it should be found who is the person in the "institution" or "company" responsible for the actions or consequences that are prohibited by law. Furthermore, every case must be seen one by one and cannot be generalized. In addition, the criminal law teachings also concern the existence of criminal participation, including those who participate, actuate, order to do a criminal offense, or help criminal offense.

In terms of procedural law, there are developments, namely the determination of a short settlement time from investigation to examination in court. This time short stipulation can be said to be in line with the objectives to be achieved from the electoral criminal setting itself. General election offense can be viewed as a seriously prohibited act. Therefore, the crime must be resolved in a short time so that the purpose of enacting the election criminal provisions can be achieved, namely to protect the democratic process through the election. However, the actual time limitation in Law No. 10/2008 is too short, so it leads to many violations that materially cannot be processed further.

The important developments in the settlement of criminal acts in the 2009 General Election compared to the 2004 General Election are at least five points: (1) investigation, prosecution and examination in court are done more quickly; (2) the time and mechanism of the file movement

movement of the case is regulated in more detail; (3) examination of a case by a special judge; (4) the decision of the district court may be compared to the high court, regardless of the magnitude of the punishment; and (5) there is a need for a court to adjudicate an election criminal case that may affect the election vote acquisition by no later than five days before the election result is determined nationally.⁴⁰ That provision in fact has "buried" many reports of election crimes whether being processed by election supervisors, investigated by the police, handled by prosecutors, or receive to the court.

The settlement of election criminal offenses is conducted through courts within the general judicial scope.⁴¹ Law enforcers who play a role in the settlement of electoral crime are the police, prosecutors, and courts. In the election, the police are on duty and have the authority to investigate reports or findings of election crime received from the election supervisor and submit the case file to the prosecutor within the stipulated time. The public prosecutor has the duty and authority to delegate the file of criminal case of election submitted by the investigator / police to the court within the stipulated time.

Electoral crimes cases are resolved by the general courts, at the first level by the district court, on appeal and last by the high court. State courts and high courts examine, hear, and decide cases of electoral crimes using the Criminal Procedure Code, plus some special provisions in the law of

⁴⁰ See Article 257 Act Number 10/2008

⁴¹ Article 252 Act Number 10/2008.

election. The examination is conducted by a special judge, a career judge specially designated to examine, hear, and decide upon an election criminal case. High court rulings cannot be made for other remedies.

Although it is called a special judge, the fact is that the readiness and special abilities of various electoral regulations are lacking, so it needs to be improved. It means that this special judge should not be a judge who "merely" gets a warrant as a special election judge, but must be prepared in depth about the election and about the criminal sanction. Thus, the judges are not sufficient just to master criminal law and criminal events, but the subtleties of election must be known.

2. Administrative Violation

The act included in the administrative offense is a violation of the provisions of the election law that are not included in the criminal provisions of the general elections and other provisions stipulated in the General Election Commission Regulations.⁴² Therefore, all types of violations, except those set forth as criminal offenses, fall under the category of administrative violations. The provisions and requirements under election law can, of course, be terms and conditions stipulated both in the electoral law and in the decisions of the General Election Commission which are governing as the rules of implementation of the electoral law. The example of administrative violation are; do not fulfill requirements to become election participants, using government facilities,

⁴² Article 248 Act Number 10/2008

places of worship and educational premises to campaign, do not report the initial accounts of campaign funds, election monitors violate obligations and restrictions.

Referring to this understanding, of course, the number of these administrative violations is overwhelming. An example case on the General Election provisions is: "To be able to exercise the right to vote, the citizens of the Republic of Indonesia must be registered as voters." Under this provision, if any person who is not registered as a voter but vote on the day of voting, administrative violation occurs. Examples of eligibility under the election law are: "education requirements, age requirements of voters, etc." Terms and conditions are also commonly found in General Election Commission decisions. The example is on election campaigns where there are many administrative violations such as the place of installation of campaign attributes, the prohibition of bringing children under 7 years or a ban on cross-regional convoys.

In the case settlement of election crimes, the law provides rules or mechanisms from the reporting, investigation, prosecution, to trial (at least determined the time limit), and settlement of electoral crimes which also impose rules on time limits, even the stages of settlement of disputes. Otherwise, in this administrative violation, the law of election only states that a report constituting an administrative offense is submitted to the General Election Commission. So it is unclear how the General Election

Commission resolved these administrative violations as well as how long the General Election Commission can solve the case.

Electoral administrative violations shall be forwarded to the General Election Commission, Provincial General Election Commission and Regency General Election Commission at the latest within 1 (one) day after being decided by the election supervisor. The forwarding of the report is accompanied by a copy of the reporting report and the result of a review of the report. What are administrative sanctions for electoral violations? Violations of the provisions on the implementation of the election campaigns of members of the DPR, DPD and DPRD as well as the Presidential and Vice Presidential Election shall be subject to sanctions in accordance with the provisions of laws and other relevant laws and regulations.⁴³ Election Supervisory Body and General Election Commission shall jointly impose sanctions on administrative violations by executors and campaign participants, in addition to administrative sanctions mention in Law no. 10/2008 and Law no. 42/2008 on general election of President and Vice President.

How to solve the administrative violation of the election? Completion of violations of electoral administration is intended to maintain the independence, integrity, accountability, and credibility of electoral organizers. The settlement of violations of electoral

⁴³ Article 125 Paragraph (2) Act Number 10/2008 and Article Number 90 Paragraph (2) Act Number 42/2008

administration aims to ensure the holding of elections directly, publicly, freely, confidentially, honestly and fairly.

The election administrative violations are resolved by General Election Commission , provincial General Election Commission, and regency General Election Commission based on reports from Election Supervisory Body, provincial Election Supervisory Body and district Election Supervisory Committee in accordance with their level. Reports of election administrative violations may be submitted by Indonesian citizens who have voting rights, election monitors, or electoral participants. Reports of election administrative violation shall be submitted in writing to Election Supervisory Body, provincial Election Supervisory Body, district Election Supervisory Committee, field election supervisor, and overseas election supervisor, containing the name and address of the complainant; the parties reported; time and place of crime; as well as the event description. In the process of examining documents of election administration violation report; General Election Commission, provincial General Election Commission, and regency General Election Commission can explore, seek, and receive input from various parties for the completeness and clarity of understanding of the violation report.

In it's development, Election Supervisory Body wishes that it is authorized to supervise and simultaneously impose administrative sanctions. This is then responded positively by the legislature in the new Election Organizing Law. Election Supervisory Body aspiration is based

on the difficulties in practice, where when administrative violations are supposed to be resolved quickly, it cannot be done because the process of reporting from the election supervisor to the General Election Commission / Local General Election Commission is not immediately processed quickly and given the decision and action. This is due to the fact that there are no clear types of violations and sanctions by the law and the absence of special units in the General Election Commission / Local General Election Commission that receive, process and impose administrative sanctions.

3. General Election Result Dispute

General election which results in dispute is a dispute between the General Election Commission and the General Election participants regarding the determination of the number of votes elected by the national election.⁴⁴ Disputes concerning the result of the vote refer to only to the difference in the calculation of the vote result which may affect the acquisition of the position of election participants. The competent court body to examine and decide upon the dispute over the results of this general election is in accordance with Article 24 C paragraph (1) of the 1945 Constitution which is further elaborated again with Law N0. 24 of 2003, especially article 10 is the Constitutional Court.

After the Election of Head of Region as the election regime, practically now there are three types of settlement of election dispute (PHPU), namely:

⁴⁴ Article 258 Act Number 10 Year 2008

- a) Election dispute of DPR, DPD, and DPRD members
- b) Election dispute of President and Vice President
- c) Election dispute of Local Election

E. The Institution Provided to Settle the Local Election Disputes Before and After the Issuance of Law Number 8 of 2015

1. Before the Issuance of Law Number 8 of 2015

The dispute over the results of the direct 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 which stipulates that "Indonesia is a state of law". Therefore, as a rule of law, the dispute over the results of direct regional head election must be settled by the institution and must be in accordance with the ordinance prescribed by law. In addition, direct local election disputes must be resolved in an institutional and peaceful manner, and avoid undermining the legitimacy of direct local elections. It is in accordance with the positive values and universal elements of democracy as the basis for direct local elections, namely the settlement of disputes in peace and institutionalization.⁴⁵

With the resolution of the dispute over the results of direct democratic elections, due process of law and institutionalized, it will

⁴⁵ 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 Juni 2009), p. 10

prevent the occurrence of social conflict in the middle of society. The dispute resolution of the results of direct local election can give trust to the people, that the voice they distributed by direct local election is not cheated by anyone. In addition, the dispute resolution of the results of direct local election aims to keep the voice of the people consistently for the sake of the sovereignty of the people by direct democratic local elections. In this case the settlement of local election disputes is resolved by the competent institutions to resolve election disputes with the provisions that have been set and determined by the Act.

a) Based on Law Number 32 Year 2004

In relation about that, the dispute resolution of the direct election result has been known since the adoption of direct Local Election on Law Number 32 Year 2004. Furthermore, Law Number 32 Year 2004 gives the Supreme Court the authority to resolve the dispute over the result of Local Election (Pilkada).⁴⁶ In that case, this law is the role model or reference for resolving disputes on election. The resolution of the election disputes as regulated in Law Number 32 Year 2004 states that the Supreme Court only resolves administrative disputes only.

⁴⁶ Slamet suhartono, Justice Constitutionality of Specialized Judiciary and Constitutional Court in Coping with The Disputes on Direct Election Results: *Jurnal Konstitusi*, Vol.12, Number 3, september 2015.

b) Based on Law Number 12 Year 2008

Article 236C of Law Number 12 Year 2008 stipulated that the authority of the Supreme Court in settling the dispute on results of direct local election is transferred to the authority of the Constitutional Court. “The settlement of local election disputes and the deputy by Supreme Court shall be transferred to the Constitutional Court at least 18 (eighteen) months since the Law is enacted”.⁴⁷

The appearance of Article 236 C of Law Number 12 of 2008 is only to affirm as the legal basis for the transitional authority of dispute resolution of local election result.

c) Based on Law Number 1 Year 2015

Government regulation in Lieu of Law (PERPPU) No. 1 of 2014 which was then ratified by the House of Representatives into Law No. 1 of 2015, regulate the direct elections of regional heads held simultaneously throughout Indonesia, and also including the regulation of election disputes by the High Court and the filing of objections to Supreme Court. Then for the subject of dispute namely the election participants with the provincial/ regency/ city General Election Commission. While the object of the dispute is the determination of a significant vote acquisition and may influence the

⁴⁷ Article 236C of Law Number 12 Year 2008 on the Regional Government.

determination of the elected candidate with the provision, only the acquisition of votes with the difference in the number of votes that may be the object of disputes. But Law Number 1 Year 2015 did not last long, DPR again revised the Act by forming Law No. 8 of 2015.⁴⁸

2. After the Issuance of law Number 8 of 2015

a) Based on Law Number 8 Year 2015

Law Number 8 Year 2015 on Amendment to Law Number 1 Year 2015 on Stipulation of Government Regulation in Lieu of Law Number 1 Year 2014 on the Election of Governors, Regents and Mayors, in the provision of Article 157 provides that the competent authority is a special judicial body. The definition of the special judicial body itself is mentioned in Article 1 number 8 of Law Number 48 Year 2009 namely:

“The Special Court is a court which has the authority to examine, hear and adjudicate certain matters which can only be established within one of the jurisdictions under the Supreme Court governed by law. Further, Article 27 Paragraph (1) of Law Number 48 Year 2009 stipulates that "a special court may

⁴⁸ Indra hendrawan, “Resolving Disputes on Electoral Result from the Local Election for Regional Leaders after the Verdict of the Constitutional Court No.97/PUU-XI.2013”: *Jurnal Rechtsvinding*, vol.4 No,1, April 2015.

only be established within one of the courts under the Supreme Court as referred to in Article 25".⁴⁹

For the subject matter of dispute which is handled is the election participants with provincial/ regency/ municipal General Election Commission with object of dispute namely determination of significant vote of vote dn may influence the determination of candidate to progress to next round or determination of elected candidate with the provision that only vote by difference of certain number of votes which can be the object of disagreement.

However, before the establishment of the special judicial body, to fill the legal vacuum (*recht vacuum*), article 157 Paragraph (3) of Law Number 8 Year 2015 stipulates that the settlement of election results disputes is directly resolved by the Constitutional Court until the establishment of a special judicial body has the competence to resolve the dispute over the results of direct election. The provision is indeed specified in dictum number 2 of the Constitutional Court Decision Number 97/ PUU-XI/ 2013 which stipulates that: "The Constitutional Court is still authorized to adjudicate disputes over the results of local elections as long as there is no law regulating the matter".

⁴⁹Article 1 Number 8 ACT Number 48 Year 2009

F. The Procedures of Local Election Disputes Settlement by the Institution Provided Before and After the Enactment of Law Number 8 of 2015

1. Before the Enactment of Law Number 8 of 2015

a) Based on Law Number 32 Year 2004

For the Local Election Dispute settlement we can see into Law Number 32 Year 2004 in Article 106 which mention that:⁵⁰

- 1) An objection to the determination of the result of the head and deputy head of local government election may only be submitted by the candidate to the Supreme Court within no later than 3 (three) days after the determination of local election and deputy.
- 2) The objection as referred in paragraph (1) shall only be related to the vote count results affecting the election of the candidate
- 3) Submission of objection to the Supreme Court as referred to in paragraph (1) shall be submitted to the high court for the election of the regional head and the deputy head of the provincial region and to the district court for the local election and deputy.
- 4) Supreme Court adjudicates the dispute over vote count results as referred to in paragraph (1) and paragraph (2) no later than 14 (fourteen) days after the receipt of the objection petition by the District Court/ Hihgt Court / Supreme Court.

⁵⁰ See on article 106 Act Number 8 Year 2004

- 5) The decision of the Supreme Court as referred to in paragraph (4) shall be final and binding.
- 6) The Supreme Court in exercising its authority as referred to in paragraph (1) may delegate to the Hight Court to decide the dispute over the vote count results of the head and deputy head of local election.
- 7) The decision of Hight Court 1 as referred in paragraph (6) is final.

Related to the deadline of the petition of the case which is 3 days after the determination of the result of the head and deputy head of local election by Local General Election Commission. Then the deadline of the trial is 14 days from the receipt of the application of the case, and for the deadline for filing the objection is not determined because the decision of the High Court or Supreme Court is final and binding.

b) Based on Law Number 12 Year 2008

Based on Law Number 12 of 2008 the resolution of the election dispute is resolved by the Constitutional Court as mentioned in article 236 C. The procedure in this article start from the deadline for the petition that is 3 days after the determination of the result of the local election and deputy by Local General Election Commission. Then the deadline of the trial is 14 working days since the application has recorded in the register book of constitutional

cases, while for the deadline filing the objection is not regulated or not determined because the Constitutional Court decisions is the first and final courts where it's decision is final and binding.⁵¹ For the dispute settlement procedure itself based on Law Number 12 Year 2008 is not much different and only a few different sections if compared with the previous Law namely Law Number 32 Year 2004.

c) Based on Law Number 1 Year 2015

After the Constitutional Court Decision Number 97 / PUU-XI / 2013, the Law maker (*wetgever*/legislator) set Law No. 1 of 2015. Article 157 of Law no. 1 of 2015 stipulates that "In the event of a dispute over the determination of the vote of election results, the Election contestant may apply for the cancellation of the determination of the vote count results by the Provincial General Election Commission and Regency / City General Election Commission to the High Court appointed by the Supreme Court". This means that the authority to resolve the dispute over the direct election result is a high court appointed by the Supreme Court.⁵²

The election dispute resolution procedure as stipulated in Law Number 1 Year 2015 for the deadline of the case petition is 3 x 24 hours since the announcement of the vote acquisition by the Election

⁵¹ Indra hendrawan; *op.cit*

⁵² See on Article 157 ACT Number 1 Year 2015

Commission. Then, the trial time limit is 14 days from the receipt of the application either in the High Court or Supreme Court, and to the deadline for filing an objection to the Supreme Court is 3 days after the decision of the High Court .

The Law Number 1 Year 2015 regulating the way of settling some disputes about local election also regulate that:

1. Violations of ethic code of the election organizer are regulated in Article 137.
2. Administrative violation is regulated in Article 138.
3. Interpersonal dispute elections and disputes among the executing organizer are ruled in Article 142.
4. Settlement of criminal offense is governed in article 146.
5. Settlement of administrative dispute is regulated in Article 154.
6. The election result dispute is bound in Article 156.

2. After the Enactment of Law Number 8 of 2015

a) Based on Law Number 8 Year 2015

The dispute settlement as regulated in article 157 of Law Number 8 Year 2015 is as follows:

- 1) The election dispute cases are reviewed and tried by a special judicial court
- 2) Special court as mentioned in Paragraph (1) shall be established before simultaneous national election.

- 3) The dispute acquisition result elections case shall be examined and tried by the Constitutional Court until the establishment of a special judicial court.
- 4) Election candidates may submit an application for cancellation of the determination of the vote count results by the Provincial General Election Commission and Regency General Election Commission to the Constitutional Court.
- 5) The election contestant shall submit the application to the Constitutional Court as referred to in paragraph (4) no later than 3 x 24 (three times twenty four) hours after the announcement of the election result result obtained by General Election Commission of Provincial General Election Commission and General Election Commission of Regency
- 6) Submission of application as referred to in paragraph (5) shall be completed with evidence and decision of the provincial General Election Commission and regency General Election Commission on the result of vote count recapitulation.
- 7) In the submission of application as referred to in paragraph (5) is incomplete, the applicant may correct and complete the application no later than 3 x 24 (three times twenty four) hours from the receipt of the petition by the Constitutional Court.

- 8) The Constitutional Court shall decide the dispute over the result of the election result at the latest 45 (forty five) days after the receipt of the petition.
- 9) The decision of the Constitutional Court as referred in paragraph (8) shall be final and binding.
- 10) Provincial General Election Commission and Regency General Election Commission shall follow up the decision of the Constitutional Court.

The procedure for settling the disputes in local election in Law Number 8 Year 2015 regulate the limitation of the case petition that is 3 x 24 hours since the announcement of the vote acquisition by the Local General Election Commission. Then the deadline of court case 45 days from the receipt of the petition. Further deadline to objection is not specified in this Law because the Constitutional Court Decision is the first and final court whose decision is final and binding. However, based on these provisions, there is a transfer of authorized institutions to resolve the results of direct local election disputes, in which the dispute over the results of the elections is finalized by the special courts. Moreover, what particular court of law is concerned, Article 157 of Law Number 8 Year 2015 does not define in a limited manner.

In addition to the institutions authorized to resolve disputes of local election above, there are some other institutions related to the settlement of other election law, such as:

1. Criminal violations: investigated by the police then the settlement is forwarded to the district court for examination, trial, and termination. The court's decision can be appealed to the high court.
2. Administrative violation: checked by Election Supervisory Body and then completely handled by General Election Commission of provincial/ regency/ city.
3. The election result Dispute: the competent institution is the Constitutional Court.
4. Violations of ethic code of the election organizer: examined and decided by the General Election Honor Organizer (DKPP).
5. Administrative disputes: Handling through administrative efforts in Bawaslu (Election Supervisory Board) of the Province or Panwaslu (Election Supervisory Committee).