

CHAPTER TWO

LITERATURE REVIEW

A. The Protection of Political Rights

The protection of human rights is the result of concept which is called human rights. Human rights can be defined as the rights that someone has, because a person as a human being.⁹ Human rights also is the rights that exist in every human being which is fundamental as a grace of God which must be respected, guarded and protected by every individual, society, government and state.¹⁰ The existence of human rights has been adopted in Indonesia. There are at least two legislations about human rights namely The 1945 Constitution, and Law No. 39 of 1999 on Human Rights.¹¹

As far as the relationship between law and politics is concerned, there are three answers that can give an explanation that is: Firstly, laws relate to politics which mean that political activities are regulated and must be subject to the rule of law. Secondly, politics is related to the law, because law is the result of a political process which interact with each other. Thirdly, politics and law as a social subsystem that is in equal position with the balance between one and the other. When the law arises, all political activities must

⁹ Masyhur Effendi, 1994, *Hak Asasi Manusia dalam Hukum Nasional dan Internasional*, Jakarta, Ghalia Indonesia, p. 47.

¹⁰ Septi Nurwijayanti dan Nanik Prasetyoningsi, 2006, *Politik Ketatanegaraan*, Yogyakarta, LabHukum Universitas Muhammadiyah Yogyakarta, p. 94.

¹¹ Bambang Heri Supriyanto, "Penegakan Hukum Mengenai Hak Asasi Manusia (HAM) Menurut Hukum Positif Di Indonesia", *Jurnal Al-azhar Indonesia Seri Pranata Sosial*, Vol. 2, No. 3, March 2014, p. 155.

be subject to the rule of law, even though the law is the product of political decisions.¹²

Nowadays there is a progress in the modern legal state. According to Jimly Asshiddiqie, the development of human rights can be seen from the pattern of the relationship which is divided into two groups of generations.¹³ The first generation is the conception of human rights and the nature of the relationship is vertical between the ruler and the people. The second generation is the nature of the relationship is no longer vertical, but horizontal.¹⁴ So the basic concept is still the same. But, the problem of human rights still arises between the two subjects means between those who have the power and having no power. In the fact, the contestants or subjects no longer need the country and the people, but it can be anyone.

One of them is the generation of human rights can be divided into three stages of history: First stage, the early period of human rights emergence where human rights protection contains issues of principles of human integrity, basic needs and principles of civil and political freedom.¹⁵

The second stage is part of first generation which all discuss the issue of human rights in the vertical relationship pattern, where the state as the party that has the official authority and the people which is controlled. The second generation is a concept of human rights where the relation is no longer

¹² Mahmud MD, 1998, *Politik Hukum di Indonesia*, Jakarta, LP3ES, p. 8

¹³ Jimly Asshiddiqie is one of the experts of Constitutional Law in Indonesia.

¹⁴ Jimly Asshiddiqie, 2015, *Hukum Tata Negara & Pilar-pilar Demokrasi*, Jakarta, Sinar Grafik, p. 216.

¹⁵ Ibid, p. 214.

vertical, but horizontal which means the subject is not always the state and the people, but it was characterized by the existence.¹⁶

So, in the context of political rights, the author argue, that the pattern of relationships of human rights still vertical, ie between the state and the people. The state shall guarantee all matters concerning the politics which become right to the people. Political stability is the right to vote and the right to be elected is not an obligation of any party to guarantee it other than the state itself. Thus, the pattern of human rights relations in the context of political right is still vertical, because the obligation to guarantee on the state.

One of the political rights is right to vote and right to be elected, in the general election is reflected in the form of public participation to vote in the election and candidates for public officials in the general election and the regional head election (local election).¹⁷ The right to vote is the right of a citizen to elect his or her representatives in an election. This right is granted by the government to a citizen who fulfills the requirement which has been established in the election law. While the right to be elected is the right of citizens to be elected as political officers for example; the positions of the President and the Vice President, the positions of Governors, Regents, and Mayors, and their representatives, and the positions of members House of

¹⁶ Rhona Smith et all, 2008, *Hukum Hak Asasi Manusia*, PUSHAM UII, Yogyakarta, p. 15-16.

¹⁷ Zainal Arifin Hoesein dan Arifudin, 2017, *Penetapan Pemilihan dalam Sistem Pemilihan Umum*, Depok, PT RajaGrafindo Persada, p. 80.

Representatives (DPR), Regional Representative Council (DPD), and the Regional House of Representative (DPRD) Province, Regency, and City.¹⁸

The political rights of citizens is one of the important instruments in the general election and regional election. To ensure that every political rights of citizens which is facilitated to participate in vote and elected to represent within the government, the rights are not only national but international protected which are regulated in Universal Declaration of Human Right and also in International Covenant on Civil and Political Rights.¹⁹

B. The Candidate of Regional Head Election

In government, every citizen has the same rights.²⁰ However, the rights it is not all citizens to lead or to be a leader in an area or State. The election of a leader also depends on the form of the State itself, whether it is Monarchy or Democracy, so they can represent the society who are in a region.²¹

Based on Law No. 8 of 2015 on Regional Head Election, it states that a local government have a vice head of region. While the definition of regional head is a person which given the task by the central government to run local

¹⁸ Nurul Qamar, 2013, *Hak Asasi Manusi dalam Negara Hukum Demokrasi*, Jakarta, Sinar Grafik, p. 96.

¹⁹ Murhardi Hasan dan Ekastika Sari, “ Hak Sipil dan Politik”, *Jurnal Demokrasi*, Vo. 4, No. 1, 2015, p. 97.

²⁰ Article 28D paragraph (3) 1945 Constitution.

²¹ Bagir Manan, 1996, *Kedaulatan Rakyat, Hak Asasi Manusia dan Negara Hukum*, Jakarta, Gaya Media Pratama, p. 62.

government.²² The Regional Head for the Province is called the Governor, the Regional Head for the District is called the Regent, and the Regional Head for a city is called the Mayor. The term of office of the Regional Head for 5 (five) years from the inauguration and thereafter may be re-elected in the same position for one term only.

Then the requirements or the limitation that must be owned by a candidate to be the basis of whether or not someone can lead to run the mandate of the society. These requirements are regulated in legislation as legitimacy for the realization of leadership.

There are also requirements of the candidates of regional heads, namely; regulate in Law No. 8 of 2015 on Regional Head Election, namely in Article 7 stated that “Indonesian citizen may be a Candidate of Governor and Vice Governor, Regent and Vice Regent, and / or Mayor and Vice Mayor by fulfilling the following requirements”;

- a. Be cautious of God Almighty
- b. Faithful to the five pillars of our country (Pancasila), the 1945 Constitution of the Republic of Indonesia, the Proclamation of Independence of August 17, 1945, and the Unitary State of the Republic of Indonesia;
- c. The lowest education is junior high school or equivalent;

²² Septi Nur Wijayanti, Iwan Satriawan, 2009, *Hukum Tata Negara*, Yogyakarta, Fakultas Hukum UMY, p. 159.

- d. At least 30 (thirty) years old for the Candidate of Governor and Vice Governor and 25 (twenty five) years for Candidate of Regent and Deputy Regent or Candidate Mayor and Deputy Mayor;
- e. Able physically and spiritually based on the results of a thorough medical examination of a team of doctors;
- f. Has never been imprisoned by a court ruling that has obtained a permanent legal force for committing a criminal offense punishable with imprisonment of 5 (five) years or more.²³
- g. Etc.

C. The Local Head Election

The state of Indonesia is unitary state in the form of a Republic.²⁴ The form of the unity of this state is explained again in Article 18 paragraph (1) of the 1945 Constitution which states that: "The Unitary State of the Republic of Indonesia is divided into provincial areas, and the provinces are divided into regency and city, each of which the provinces, regency and city have a local governments regulated by law ".²⁵ With the concept of article 18 paragraph (1) above, which means that the Unitary State of Indonesia consists

²³ Article 7 of Law No. 8 of 2015

²⁴ Article 1 of the 1945 Constitution: "1.The state of Indonesia is a unitary state in the form of a Republic. 2. Sovereignty is in the hands of the people and is implemented according to this Constitution. 3. The state of Indonesia shall be a state based on the rule of law.

²⁵ Joko J. Prihatmoko, 2005, *Pemilihan Kepala Daerah Langsung: Filosofi, Sistem, dan Problem penerapan di Indonesia*, Yogyakarta, Pustaka Pelajar, p. 5

of regional governments which consist of provinces and also contains the regency and city governments.²⁶

The election of regional head and vice of regional head shall be implemented in order to realize the sovereignty of the people at the local level, as well as carrying out the mandate of the 1945 Constitution.²⁷ The constitutional foundation in the local elections regulated in the provisions of article 18 paragraph (4) of the 1945 Constitution which stated that: “Governors, Regents and Mayors, respectively as head of regional government of the provinces, regencies, and city, shall be elected democratically”.²⁸ Therefore, democratic election can be done directly or indirectly. By the implementation of direct election is expected money politics can be minimized, assuming money politics will be more difficult because voters are all citizens who have the right to vote.²⁹

To ensure that all citizens have voting rights, they may exercise their right of course certain procedures are required. The procedure is also needed to avoid the possibility of electoral fraud that is contrary to the principle of “Luber”³⁰ and “Jurdil”³¹, such as the possibility of a voter using their voting

²⁶ Article 18 paragraph (1): “The Unitary State of the Republic of Indonesia is divided into provincial areas, and the provinces are divided into regency and city, each of which the provinces, regency and city have a local governments regulated by law”.

²⁷ Jimly Asshiddiqie, 2006, *Perkembangan & Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta, *Konstitusi Press*, p. 236.

²⁸ Article 18 paragraph (4).

²⁹ Nanik Prasetyoningsih dan Nurikah, “Kemandirian dan Pertanggungjawaban KPUD dalam Penyelenggaraan Pilkada Secara Langsung oleh Rakyat”, *Jurnal Media Hukum*, Vol. 14, No. 2, December 2007, p. 157.

³⁰ Luber : Direct, Public, Free and Confidentially

³¹ Jurdil : Honest and Fair

rights more than one time.³² In addition, the procedure is also needed in planning and distribution of logistics related to the regional election and determination of polling stations. However the establishment of procedures should not preclude substantial things that meet the rights of voters to vote.

The head and the vice region shall be elected directly by the people whose requirements and procedures shall be stipulated in legislation.³³ The regional head and vice regional head can be the candidate pairs, which is filed in a package of candidate pairs. Initially, based on Law No. 32 of 2004 on Regional Government, the candidate of regional heads can only be candidate by a political party or a combination of political parties.³⁴ However, after the Constitutional Court conducted a judicial review of the law, then the candidate of the regional head, without through a political party or a combination of political parties, can be a candidate by a political party or a combination of political parties, and may also be an independent candidates which propose themselves as candidates for regional head.³⁵

D. The Development of Constitutional Court

Period of 2002 is an important for legal reform in Indonesia which succeeded in amending the 1945 Constitution. One of the most fundamental changes in the field of Indonesian administration is in the branch of judicial

³² Yusnani Hasyimzoem et all, 2017, *Hukum Pemerintah Daerah*, Jakarta, Rajawali Pres, p. 162.

³³ Pratikno, "Calon Independen Kualitas Pilkada dan Pelembagaan Parpol", *Jurnal Ilmu Sosial dan Ilmu Politik*, Vol. 10, No. 3, March 2007, p. 417.

³⁴ Septi Nurwijayanti dan Nanik Prasetyoningsi, Op. Cit. p. 92.

³⁵ Askuri, 2007, *Panduan Pendidikan Pemilihan (Mengantarkan Pemilih Cerdas)*, Yogyakarta, KPU Provinsi DIY, p. 124.

power, namely the establishment of a judicial institution of constitutionality of the law which we have known as the Constitutional Court of the Republic of Indonesia.³⁶ The existence of the Constitutional Court which have the function to be a check and balances³⁷ among state institutions will be contrary with the position of the People's Consultative Assembly (MPR) as the highest state institutions which supervise other state institutions.³⁸

With the amendment of this Constitution and the establishment of the Constitutional Court it's officially shifted the supremacy era of People's Consultative Assembly to supremacy of the Constitution. This can be seen in the amendment of Article 1 Paragraph (2) of the 1945 Constitution which stated that "sovereignty is vested in the people which conduct completely by the People's Consultative Assembly to be the Sovereignty is vested in the people and carried out according to the Constitution". With the changes of the MPR is no longer recognized as the highest state institution and each state institution has an equal position and the checks and balances are indirectly imposed by the Constitutional Court.³⁹

³⁶ Article 24 Paragraph (2) The 1945 Constitution, stated that : *The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, Military Court, and state administrative courts, and by a Constitutional Court.*

³⁷ Check and balance system is arrangement of governmental power whereby powers of one governmental branch check or balance those of other branches.

³⁸ Jimly Asshiddiqie, 2007, *Konstitusi dan Ketatanegaraan Indonesia Kontemporer*, Jakarta, the Biography Institute, p. 277.

³⁹ Indra Rahmatullah, "Rejuvinasi Sistem Checks and Balances dalam Sistem Ketatanegaraan di Indonesia", *Jurnal Cita Hukum*, Vol. 1 No. 2, December 2013, p. 218.

As for the authority of the Constitutional Court which is implemented the authority of judicial review, decide disputes on the result of general election, decide disputes on the result of regional head election, etc.⁴⁰ While the authority of the Constitutional Court which has not been done to this day is the authority to dissolve the political party, as well as the obligation of the Constitutional Court to decide the dismissal of a president who is violation of law.⁴¹

The authority of the Constitutional Court which will be discussed in this paper is the authority on the judicial review which is contradict to the 1945 Constitution. As known that the purpose of the establishment of the Constitutional Court is to be guardian of the constitution.⁴² Constitutional protection is simply conducted by the Constitutional Court to protect every regulation not contradict to the 1945 Constitution.⁴³ In this case, the regulation in the form of law which made by the legislative, so how to protect is with the implementation of judicial review. For every society if it feel that the constitutional right has been detrimental by a law, so there have the right to filed a judicial review to the Constitutional Court.⁴⁴ Therefore, if proven this law violate the rights of petitioner, than the law must be declared null and

⁴⁰ Jimly Asshiddiqie, Op. Cit. p. 367.

⁴¹ Hifdzil Alim, "Pembubaran Partai", *Kompas*, March 20th, 2017, taken from <https://nasional.kompas.com/read/2017/03/20/16472621/pembubaran.partai>, accessed on April 4th, 2018, at 03.30 p.m.

⁴² I Dewa Gede Palguna, 2013, *Pengaduan Konstitusional*, Jakarta, Sinar Grafika, p. 310.

⁴³ Ibid, p. 315.

⁴⁴ Mahfud MD, "Rambu Pembatasan dan Perluasan Kewenangan Mahkamah Konstitusi", *Jurnal Hukum*, Vol. 16 No. 4, October 2009, p.447-448.

void. In other words can it be said that judicial review is the main spirit of the purpose of establishment of the Constitutional Court.⁴⁵

Especially in the case of judicial review, the Constitutional Court decision has several form, namely: granted, rejected and unacceptable. These three forms of decisions are regulated in Law no. 24 of 2003 on the Constitutional Court Jo Law no. 8 of 2011 on the Constitutional Court. During the leadership of Mahfud MD⁴⁶, the Constitutional Court is carrying out its duties to protect the constitution with the symbol “enforce substantive justice”.

Substantive justice is a justice which given accordance with substantial legal provisions regardless of procedural errors which not effect on the rights of plaintiff. Substantive justice is more to justice in real, its different with the procedural justice, where is the procedural justice must accordance with the rules, although it will reduce the rights of the petitioners.⁴⁷

In relation to substantive justice enforcement then the Constitutional Court found that it is very difficult to enforce substantive justice if the form of Constitutional Court decision is only three basic forms. With that substantive reason, than the three decision which regulate in Article 56 Law No. 23 of 2003 on Constitutional Court Jo to the Law No. 8 of 2011 on the

⁴⁵ Ibid. p. 449.

⁴⁶ Mahmud MD as the chairman of the Constitutional Court since 2008-2011 and, in the next period Mahfud MD again elected to be the chairman of constitutional court for the term of office on 2011-2014.

⁴⁷ Anwar C, “Problematika Mewujudkan Keadilan Substantif dalam Penegakan Hukum di Indoneisa”, *Jurnal PUSKASI FH Universitas Widyagama Malang*, Vol. 3 No. 1, June 2010, p. 133.

Constitutional Court, it is considered less fulfill the substantive justice and closer to procedural justice. Because of that was born a new decision by Constitutional Court namely: Conditionally Constitutional.⁴⁸

Conditionally constitutional decision is a decision which stated that a provision of the Law is not contrary to the constitution and give the requirements to state institutions in implementation the provisions of the Law which are already examined.⁴⁹ However, if the state institutions which concerned does not implement the provisions of the Law which are already examined, then logically this Law it can still be examined again in the Constitutional Court.

⁴⁸ Ibid. p. 140.

⁴⁹ Faiz Rahma dan Diana Agung Wicaksono, "Eksistensi dan Karakteristik Putusan Bersyarat MK", *Jurnal Konstitusi*, Vol. 13 No. 2, June 2016, p. 356.