Legal Pluralism in Dispute Resolution on Election Justice

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Keywords: Dispute; Electoral Justice; Legal pluralism, deliberation to reach a consensus.

Abstract: International Democracy and Electoral Assistance (IDEA) determines election justice to be one indicator of democratic elections. Democratic countries are required to have a legal framework that is in line with the country's system, especially instruments for electoral dispute resolution. The problem examined is how the legal framework for electoral dispute resolution and the concept of upholding electoral justice related to legal pluralism in Indonesia is evaluated by normative juridical methods. The results show that Indonesia has already arranged the election process dispute (EPD) resolution. Election Supervisory Board (ESB) is given the authority to complete EPDs whose decisions are final and binding. The adopted settlement principle is deliberation to reach consensus. This model is new and closely related to the pluralism of the Indonesian legal system. Consensus agreement is a living value system and codified in positive law (civil law). However, it is necessary to revise the law to establish formal procedural law that is in accordance with the principles of an effective and efficient election justice system. Furthermore, ESB's design and transformation into a special court of character, strong and credible is needed.

1 INTRODUCTION

The main function of an election supervisory body is to supervise the election process so that it runs according to the legal rules and principles of the election. For this reason, Bawaslu was formed as an institution that works to prevent and enforce election law.

In Law No. 7/2017, the term electoral disputes and disputes was introduced. Typically, the term dispute is known in civil law. But this law also introduces two types of election process dispute (EPD) resolution and disputes over election results. SPP covers disputes that occur between election participants and dispute between election participants and election administrators as a result of the issuance of the General Election Commission's decision (Law No.7 / 2017, article 466). Election Supervisory Board (ESB) as the election oversight institution (EOI) is given the authority to complete the EPD. Bawaslu's decision is final and binding except for 3 (three) things, namely: verification of political parties, determination of the list of permanent candidates (LPC), and determination of candidate pairs. These three things should have the potential to cause election disputes, but why does the law limit them that way. The concept of legal settlement needs to be redesigned (reconstructed) with a model of resolving election disputes that is characterized, strong and trusted in order to realize electoral justice.

2 METHOD

The study was conducted in northern Sumatra by evaluating several cases that occurred in several districts using the normative legal research method. Data obtained from ESB of North Sumatra Province in 2019 as in Table 1.

Table 1: The ESB data problems and solutions.

No	ESB	Cases	Mediation		Adjudication	
			Failed	Consensus	Granted	Decline
1	Province	4	1	1	2	0
2	Regency	22	0	13	7	2
Total		26	1	14	9	2

This case was handled by the ESB of North Sumatra Province and 33 Regencies / Cities during the simultaneous elections in 2019. Out of the 26

Munte, H. and Yuliandri, .
Legal Pluralism in Dispute Resolution on Election Justice.
DOI: 10.5220/0010294100003051
In *Proceedings of the International Conference on Culture Heritage, Education, Sustainable Tourism, and Innovation Technologies (CESIT 2020)*, pages 22-27
ISBN: 978-989-758-501-2

submitted cases, there were one failed because they were absent, 14 cases were resolved by closed mediation mechanism and 11 cases were resolved by open adjudication mechanism. The party who sued was the legislative candidate and the management of the political parties who felt disadvantaged because they were not passed as candidates for the issuance of the decision of the GEC. Data were analyzed qualitatively against Law No.7 / 2017 and International Institute for Democracy and Electoral Assistance (IDEA) standards, then presented systematically in the form of discussions to answer the problem.

3 RESULTS AND DISCUSSIONS

3.1 Implementation of Election Dispute Resolution

Based on case studies in various countries, there are five law enforcement mechanisms for resolving election disputes, namely (1) examinations by the election management board the possibility of appealing to higher institutions; (2) election court or special judge to handle election complaints; (3) general courts that handle objections with the possibility of being appealed to higher institutions; (4) the resolution of election problems is submitted to the constitutional court and / or constitutional court; and (5) resolution of election problems by the high court. (Bisariyadi, 2012).

Election process disputes in the law stipulate that the EPD covers dispute between participants and the election organizer as a result of the issuance of GEC decision. The law does not explain in more detail about the definition of election disputes but only describes the legal subjects of the election participants and the GEC as a party. The object of the dispute is in the form of a decision (*beschikking*), legal actions of the subject and legal consequences of the actions of the GEC.

The concept of this election dispute should be clearly defined. According to the dictionary term, a dispute is a conflict or dispute between two or more parties to a certain object that causes legal consequences or losses for one party. Election disputes are disputes between two or more parties regarding a thing or a violation of rights that are detrimental to the interests or rights of election participants due to the issuance of the GEC decision.

The application of legal settlement carried out by EOI is carried out in two stages, namely the mediation stage to reach consensus. However, if mediation fails, an adjudication stage is carried out to determine the final decision. In practice, mediation works and many fails until adjudication. Based on the decision data, this failure was caused by each party holding their respective positions.

Referring to Cruz (De Cruz, P, 2014), norms can be approached teleologically in the form of sociological or economic demands (effective and efficient). In this context the electoral process may not be a violation or denial of the constitutional rights of citizens by the government (GEC) and if it occurs then it must be resolved. Election disputes must be resolved according to the mechanism or means available if there is a claim or complaint on the rights of the injured citizens. The purpose of this legal norm is in line with the concept of the rule of law in accordance with the mandate of the Third Amendment to the 1945 Constitution of the Republic of Indonesia which states that the Indonesian state is a state based on law.

According to JimlyAsshiddiqie, there are twelve main principles of the rule of law and one of them is the constitutional justice (JimlyAsshiddiqie, 2006). The principle of state administrative justice is answered by the existence of mechanisms and means of administrative appeal in the law. The country is represented by the GEC (central, provincial and district / city) as a state administrative function in the electoral field. The actions of state administrative officials who are mistaken or wrongly requested, corrected or monitored through the administrative justice process. But there is still a need to study so that ESB is considered appropriate to be a means of electoral justice in overseeing the GEC legal actions in the holding of elections.

Hart revealed that the law is an order from a sovereign ruler and must be obeyed (Hart HLA, 1997). The law is a recognized order and must be obeyed because it was formed by the sovereign authority in Indonesia. The legislator gave the mandate to order the central, provincial and district / city ESBs to receive, examine and decide on disputes in the electoral process that were submitted to him.

Based on the data in Table 1, there were 14 cases resolved in the mediation stage (consensus) and there were 11 cases resolved during the adjudication stage of the ESB decision. Looking at the data, one side of mediation (consensus) is a useful tool for justice seekers rather than continuing to an open hearing. However, the 14 mediated cases prove that the case sitting is not complicated and that there is already a willingness / recognition of the GEC to correct its mistakes. ESB only carries out procedural

and administrative mediation agreements only. The results show that in the mediation process, the ability and professionalism of a mediator must be prominent and very decisive in mediating election disputes.

The exercise of this authority has not yet been equipped with standard procedural law in the context of enforcing its material law. This is because there is no firmness in the law related to the evidentiary law in force (whether it refers to the proof of civil or mixed law). The assertion of this norm is important so what HLA said. Hart that primary (material) law requires secondary law (formal law). The concept of the law in question will have positive consequences for the development of an electoral justice system for the better.

3.2 Election Justice Enforcement

The Republic of Indonesia Constitution has stipulated that elections must be held fairly and fairly. There is no further explanation of what is meant by fair (Refly Harun (2016). The law governing the election is aimed at realizing fair and integrity elections (Law No.7 / 2017). The third paragraph mentioned that the holding of good and quality elections will increase the degree of healthy competition, participatory, and representation that is getting stronger and can be accounted for. In this study it was found that the explanation or definition of good and quality election benchmarks must be affirmed. There are three important processes of electoral governance that go beyond just electoral administration, namely the establishment of regulatory bodies and rules, application of rules and dispute resolution. Electoral governance begins with the process of enacting laws and regulations, then administrative enforcement and judicial assessment (dispute resolution) and concludes when the process returns to the beginning, either through judicial interpretation or recommendations by the legislature. (Torres And Díaz, 2014).

According to International IDEA, the electoral justice is defined from the perspective of a fair and timely election dispute resolution system. The election justice in International IDEA's view is limited to the realm of electoral legal problem solving systems in the context of upholding citizens' voting rights. Electoral justice includes the means and mechanisms available in a particular country that aims to:

A. Ensuring that each action, procedure and decision are realted to the total process is in line with the law (the constitution, statute law, international instruments and treties, and all other provisions); and

B. Protecting or restoring the enjoyment of electoral rights, giving people who believe their electoral rights have violated the ability to make a complaint, get a hearing and receive an adjudication. (Ayman Ayoub & Andrew Elli, 2010).

As a reference for comparison, the limits made by International IDEA are quite good and can be applied. To maintain the credibility and legitimacy of elections requires a system of electoral justice that follows principles and values that originate from the culture and legal framework of each country or international legal instruments.

The system must run effectively and show independence and impartiality to realize justice. In this context, the electoral justice paradigm must protect citizens' voting rights. If these rights are manipulated, the electoral justice system must be able to restore or restore it (Center for Electoral Reform, 2010).

Ramlan Surbakti said not only limited election justice to the availability of an electoral legal framework, one important criterion was fair and timely resolution of election disputes (Ramlan Surbakti, 2014). The author agrees that the legal system in force in the International can be adopted but must adjust to the conditions, needs, values, culture and legal system in the country. The system that lives or is adhered to by the Indonesian people, namely the values that exist in Pancasila.

In its implementation, the implementation of electoral justice enforcement currently involves numerous and scattered institutions. For example, there is a GEC for election administration services, a State Administrative Court for state administrative disputes, a District Court for criminal acts, an Election Organizer Honorary Board (EOHB) for ethical violations, a Constitutional Court for disputes over election results and finally there is an ESB for administrative justice and election process disputes.

Scattered institutional variations and overlapping authorities make dispute resolution long and protracted. Several articles that clash, namely article 468 with articles 469, 470, 471 and article 472. Comparing with the data collected, the ESB was able to resolve disputes arising both in the mediation and adjudication processes. The principle of one forum can answer concerns about uncertainty and the potential to reduce the principle of seeking fair and timely elections. (Ady Thea DA, Variety of Problems in Election Disputes). In this context strengthening SPP in a strong and trusted institution

is needed. The ESB can be transformed into an electoral justice system to ensure fair and timely resolution of election disputes. (InsiNantikaJelita, 2019).

3.3 SPP in Legal Pluralism Perspective

The settlement of the existing election case brings the parties to the case together to be mediated. The goal is to find a solution based on the deliberations and consensus of the parties. This concept is quite good because it reflects the value of living (living law) that comes from Pancasila. Positive law (law 7/2017) absorbs and revitalizes noble values in resolving conflicting general election laws.

According to Werner Menski (Werner Menski, 2008) the three main types of approaches to the triangular concept of legal pluralism are used: law created by society, law created by the state and laws arising through values and ethics of the nation (AchmadAli , 2009). This view is supported by Erman Rajagukguk who states that legal pluralism is generally defined as a situation where there are two or more legal systems that exist in a social life.

Legal pluralism as a characteristic of Indonesia must be recognized as a reality of society. Each community group has its own legal system which differs from one another to the others such as in the family, age level, community, political group, which is a unity of a homogeneous society. With many islands, tribes, languages and cultures, Indonesia wants to build a stable and modern nation with strong national ties. So, according to him, avoiding pluralism is the same as avoiding different realities about the perspective and beliefs that live in Indonesian society. (M-1, Legal Pluralism Must Be Recognized). Legal pluralism is characterized by the existence of a variety of governing authorities, each of whom requires compliance with the members or citizens he governs. Legal pluralism is now widely accepted and has seen a marked increase in interest since the turn of the century, not least in light of its broad range of perspectives on the state it seeks to interpret and possess. (Benda-Beckmann and Turner, 2018). The global perspective on law and history related to the legal tradition has become a dialectic inherent in globalization, as well as several 'de-' and 're-traditionalisation' trends, often being strengthened by law and becoming legal traditions even more topical at the global level. (Duve, 2017). Legal pluralism has become a fact of life for a long time before the formation of the Indonesian state itself.

To understand the law and the way to rule in Asia, Werner Menski offers a legal pluralism approach. Legal pluralism approach is an interrelation between aspects of the state (positive law), social aspects (socio-legal approach), and moral / ethical / religious (natural law). The method of law that only relies on positive law with rules and logic and its rule bound only leads to a deadlock in the search for substantive justice. The legal pluralism approach as referred to by Menski is illustrated in the manner shown in Figure 1. Based on the exercise in Figure 1, it is found that the legal world includes a large plurality of triangles in space and time. Law is so plural, it is impossible to be absorbed in a whole theoretical, but by itself becomes a configuration in a simple model. Legal pluralism is a perfect integration to understand and enforce law in a plural society.

Figure 1: Legal Pluralism in Plural society.

The legal pluralism approach in the form of a link between positive law, socio-legal approach and natural law is formulated in articles 466 - 469 of Law 7/2017. The social aspect approach (socio-legal approach) is taken from the cultural roots of Indonesian people who are accustomed to deliberation to reach a problem. This natural law approach is reflected in the values of the four precepts of Pancasila: democracy, wisdom of wisdom in consultation / representation. By borrowing the term Menski in the legal pluralism approach, the paradigm of electoral dispute resolution in Indonesia can be seen in Figure 2.

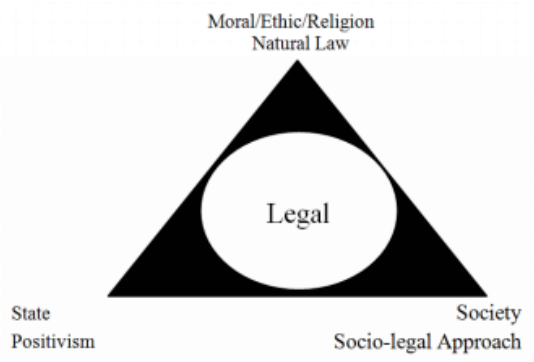

Figure 2: Pluralism-based paradigm of electoral dispute resolution.

The opinion in the Figure 2 has strong relevance underlying the legal norms in the dispute resolution process. The goal is that the spirit of kinship and mutual cooperation be maintained according to the philosophy of the Pancasila rule of law. This thinking concept is very suitable for the implementation of fair and timely elections. In this context the concept of deliberation and consensus is actually ideal and suitable to be constructed as a means of justice to correct or correct mistakes, mistakes, violations and other election cases (except criminal and election results). Correction mechanism can be carried out for the stakeholders of the election implementation both by election participants, GEC, and the community. Errors or errors of procedures, mechanisms, other administrative (except criminal and the results of the vote) can be tested through the means of electoral justice designed based on the principle of dignified election means fair and timely. The development of a dignified electoral justice system is closely related to the philosophy of the Indonesian state, namely creating a spirit of mutual cooperation and the unity of Indonesia in wisdom and wisdom. The paradigm that must be built is to solve the problem not merely to try the case.

4 CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

Based on the discussion results, the following conclusions are drawn: The model of electoral dispute resolution in Law 7/2017 with mediation mechanism is highly needed but it is still problematic in terms of mediator's capacity and professionalism for the ESB members in resolving election disputes. The concept of upholding electoral justice by prioritizing deliberation and consensus is a reflection of Indonesia's pluralism (*volksgeist*) but is still problematic in terms of procedural law and proof systems that are not yet standard.

4.2 Recommendations

In order to ensure election justice, articles 468, 469, 470, 471 and article 472 need to be revised by reconstructing the dispute resolution process in one forum on the ESB as well as standard evidentiary laws. The draft and transformation of ESB is needed to become a special judiciary that is characterized by strong and trusted aspects to realize the electoral justice system.

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