

**SETTING THE ASYMMETRY ELECTION OF THE REGIONAL HEAD AS AN ALTERNATIVE FOR
REALIZATION OF DEMOCRACY
(CASE STUDY OF PANCASILA DEMOCRACY IN REPUBLIC
OF INDONESIA)**

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ABSTRACT

The mandate of the 1945 Constitution for the democratic local elections (Pilkada) in Indonesia should be interpreted not only on the direct or indirect election as long as it has been implemented since the beginning of the reform era to the present. Sociologically both models have practiced and the results have not been able to produce credible and accountable local leaders even the impact of the implementation actually bring such practices such as, money politics at both the elite and society and horizontal conflicts that are very harmful to the integrity of the Republic of Indonesia. This is due to the law which was built to regulate the election based on monolithic form in which the models are applied to the whole of Indonesia. Therefore, the next election law should be built to realize democracy at the local level is the law that is based on the values of the original Indonesian life by observing the complexity and heterogeneity of Indonesian society, cultural, social, economic, educational level and safety. To answer the problem of the elections in Indonesia, then the alternative formation of the election law is the law that is responsive to the mode of election which is asymmetric. So the next election law setting responsive to this asymmetric pattern should be able to realize democracy at the local level that are very diverse.

This study is based on doctrinal law with approach to historical, legislation, conceptual, and comparison. Analysis of the findings of this study are descriptive prescriptive not just describe but is able to provide alternative models that can realize the election in accordance with the conditions of life of Indonesian democracy. To support the analysis, the concept of responsive law, legislation and the concept of electoral systems.

The results of this study indicate that setting of the election through the legal order that is responsive with comprising asymmetry election material, able to cope with the demands of justice for a democratic society because of the diversity of cultural patterns, social, economic, educational level and safety conditions as well as the geographical condition of Indonesia. So that the readiness of each region to implement certain election models can be adapted to local conditions themselves but continue to rely on legal arrangements have been agreed.

Keywords: responsive law, asymmetry election, pluralistic society

I. INTRODUCTION

The Changing of 1945 amendment were made during the 1998 reforms have changed the paradigm of life of the nation, both the style and format of institutional, product laws and regulations as well as the mechanism of the relationship between state institutions in Indonesia. It is made to enhance the implementation of the basic rules of democratic and modern state, among others, by doing "powers separation" which are more assertive, a system of "checks and balances" are more stringent and transparent as a replacement system that applies the rule of parliament earlier, respect for human rights and the establishment of institutions of the new state to accommodate the development needs and challenges of the times in accordance with the aspirations and needs of the nation.

State law is an idealized state by the Founding Fathers as set forth in section 1945 Explanation system of government, that the Indonesian state based on law (*rechtsstaat*), not based on mere power (*machtsstaat*). It can be seen from the developments taking place in various countries, both developed and developing countries as the law is a very important instrument, even some countries have applied the rule of law. In the state of modern society, the law can be used as a means of social engineering. In case, the concept of a constitutional state ideology rooted in the rule of law.

The principles of the law of nations are constantly evolving in accordance with the society development. Science and technology progress, as well as the increasing complexity of public life in the global era requires the development of principles of state law. According to Ismail Suny, as consequential Indonesia is a country of law, then Indonesia should pay attention to three (3) basic principles, namely the rule of law (supremacy of law), equality before the law (equality before the law), and law enforcement in ways that does not conflict with the law (due process of law).

Based on one principal of the state law , namely the rule of law (supremacy of law) means that law was superior and became commander. In the state law, the law is interpreted as a whole hierarchy of legal norms order culminating in the constitution. Therefore, the basic rules of the constitution should be the basis and implemented through legislation governing the implementation of state and public life. Thus amendments to the Constitution of the Republic of Indonesia in 1945 should has an effect material as the rules of procedure .

One article changes is regulate of filling the post of head of the region, namely Article 18 paragraph (4) which states that the election of governors, regents, and the Mayor conducted democratically. This article implemented by Law No. 32 Year 2004 on Regional Government. In the provisions of this law that democratic local elections meant the direct election by the people. Such arrangements signify an embodiment of the principle of democracy in local governance.

Before the enactment of Law No. 32 of 2004 was issued Law No. 22 of 1999 which regulates the local elections (elections) is done indirectly, where the head of the region chosen by the parliament. It turns out in practice that indirect election is loaded with money politics in the parliament. Therefore, the law was later amended by Law No. 32 Year 2004 on Regional Government .

In the implementation of Law No. 32 of 2004, which calls for direct elections by the people turned out does not necessarily guarantee the quality of democracy, because democracy at the local level requires different requirements. The effectiveness of direct elections are strongly influenced by factors that exist in the region itself, such as the quality of the voters, the quality council, board recruitment system, the function of the party, freedom and consistency of the press, and the empowerment of civil society, and so on.

Implementation of the election were carried out directly turned out to creat various problems. The following examples can illustrate the issues surrounding the implementation of direct elections, for example:

1. Election of the district / city in the province of Central Java implemented in the period from 2005 to early 2006. Of the 20 elections in the province of Central Java, there are 7 (seven) the determination of the results of the election by the General Elections Commission (KPU) district / city sued objection to the High Court Central Java. Seventh district / city are Magelang, Kendal, Sukoharjo, Semarang , Klaten, Grobogan, and Demak.
2. Election of Governor directly in South Sulawesi Province on November 5, 2007, which was decided by the Supreme Court (MA) for re-election. The Supreme Court decision did not resolve the issue, but it raises new problems, because it conflicts occurred between the supporters of candidates for governor.
3. Similarly, the election of the Governor of East Java province that began in March 2008 and is scheduled to end in July or August 2008. In the election process, it turns out the results of the first round had a conflict because of the alleged fraud. Then the Conflict is taken to the Constitutional Court (MK) to be

solved. Based on the Decision N0 41 / PHPU.D-VI / 2008 on Settlement Election results Regional Head of East Java Province, the Court then commanded the re-election in Sampang, Madura Bangkalan. The main consideration because it found the evidence of fraud structured, systematic and massive. Governor elections in East Java was completed in January 2009, so the election of the Governor of East Java is the governor's race is the longest time (11 months).

See the conflicts that happen in various areas related to direct elections, shows that for the while estimate will happen democratic elections at the local level as well as at the time of the presidential election has not been fully proven.

Election trip either indirectly or directly it still has a pretty serious impact such as the emergence of widespread money politics, conflicts both horizontally and vertically, the emergence of a less preferred result credible even less accountable. This marked a sufficient number of regional heads that ended in court for committing corruption.

The question then arises is why the elections conducted during either indirectly or directly still leaves another problem that if not immediately find a solution to the possibility of future harm enough integrity of Indonesia as a unitary state. The possibility of a political uproar over whether this is due to the law which has not been able to accommodate the needs of existing local democracy? Because the law applicable local governments do not directly and immediately proved to have an uniform substance of the election system to be applied to all regions in Indonesia. That is why there needs to be studies to uncover what kind of law is able to organize the elections in accordance with the conditions of Indonesian peoples in this highly heterogeneous.

This study is expected to reveal how the law setting the election in accordance with Indonesia's current condition. Is it in accordance with the ideals of the reformers, because in reality it turns out loaded with a variety of problems. Harkristuti Harkrisnowo as quoted by Sarundayang conflicts that occurred during the election took place because of weak regulation and enforcement. Therefore, this research is more focused on rules such as what to organize the elections in accordance with the conditions in Indonesia which has religion culture with heterogeneity in the economic, social, educational levels and natural conditions.

II. STUDY CONCEPT

II.1. Concept of Responsive Law

According to Nonet and Selzick responsive law aims to explain the systemic relationships in law and special configurations in which the relationships in the law occurred. The resulting law is open to changes in society with a view to serving the relief efforts of social life and achieve social policy objectives, such as social justice, emancipation of social groups that are abandoned. The point in the formation of responsive law is the result of a democratic political conditions.

Feature responsive law that legal products reflect a sense of justice and meet the expectations of society; formation process is participatory, involving the parties concerned; while the results are responsive to the demands of social groups or individuals in the community, and have a degree of interpretation by strict government.

II.2. Concept of Establishment of Legislation

Laws and regulations in a state of law is as a tool for authorities and citizens is limited and act consistently with the law. Therefore, the law must: be applied to future (prospective), is understood by the public, clear, fixed and certain, and the law applied to anyone intended. Non-compliance with these characteristics, then the law is not considered adequate. The definition is the definition of 'formal' although other broader definition can be made, ie by incorporating fundamental rights, democracy and / or criteria of justice and rights. The formal definition is presented as the most frequently represents another existing definition as a baseline.

One function of the law is to limit the ruler acts in two ways: (i) comply with existing law, and (ii) apply the legal boundaries of the law-making powers. Another function of the rule of law is to maintain order, and grammar-guided behavior in the relationship between citizens. In performing this function, the law is as a regulator of social behavior.

At the most general level, as proposed by Friedman, the legal system has the functionality to deploy and maintain the allocation of the true values in society (the function of the legal system is to distribute and maintain an allocation of values that society feels to be right). Further described that the function of the legal system are:

1. Justice (justice); where prosperity and respect allocated among the citizens;
2. Settlement of disputes (Settlement of Disputes); providing institutions and places that can be addressed by the citizens to resolve their conflicts and resolve disputes;
3. Social Control (social control); enforcement of the right behavior;
4. The creation of norms (create the norms); act as an instrument for orderly change, i.e. social engineering.

To fulfill the functions necessary legal norms or rules in social life. Norms or rules are institutionalizing the values of good and evil in the form of rules of conduct contains permissibility, recommendation, or command.

In terms of its objectives, the rule of law or the legal norms drawn to the ideals of peace between private life (het recht wil de vrede). Therefore, it is often said that the law enforcement work "to preserve peace". In peace or peaceful state is always there "Order en rust". "Order" order and security concerns, while the "rust" with regard to peace and tranquility. "Order" associated with physical dimension, while the "rust" dimension concerns the "inner". Peaceful state that the final destination of legal norms lies in the balance between the "rust" and "order" it, ie between outward and inward dimension that produces a balance between order and safety, the safety and tranquility.

The purpose of peace coexisting is usually associated also with the task of formulating the rule of law, which is to realize the certainty (certainty), fairness (equity), and usefulness (utility).

How legislation is formed? In order norms or rules described above to be something inherently good in the administration of state and social life. So the purpose of peace living together can be realized in practice.

How should the law be formed? Who should shape it? These fundamental questions posed by many many legal experts. Although very important, because it involves theoretical and practical importance, a systematic discussion of the sources of law has not been satisfactorily addressed in the literature.

Francesco Parisi & Vincy Fon (2009), in his book *The Economics of Lawmaking*, identify the formation of legislation, namely (1) the establishment of law through legislation: codified law (lawmaking through legislation: codified law), (2) the establishment of the law through decisions trial: the law of the court decision: (lawmaking through adjudication: judge-made law), (3) formation through practice law: customary law (lawmaking through practice: customary law), and (4) the establishment by agreement: the law of treaties (lawmaking through agreement: treaty law).

1. The establishment of law through legislation: codified law (lawmaking through legislation: codified law)

Attention modern countries in the world today has more given to sources of written law, although not in its entirety. With the establishment of this law through legislation obtained optimization of the law in terms of specifications, timing and scope of applicability of jurisdiction.

2. The establishment of a court ruling law: the law of the court decision (lawmaking through adjudication: judge-made law)

Formation of the law through court decisions more to be completed in countries that follow the common law. The issues raised in the formation of a court ruling law is the law of efficiency compared to the establishment of law through legislation, the evolution of the law because of the decision of the judge in the court basing on precedent.

3. The formation through practice law: customary law (lawmaking through practice: customary law)

Legal experts define as the customary law practices arising out of legal restrictions on which individuals, organizations, or state spontaneously follow the practices of their interaction. The legal system then adopting and enforcing rules actors practiced by individuals, groups, or nations.

4. The establishment by agreement: the law of treaties (lawmaking through agreements: treaty law)

Testament is a unique source of law and difficult to be analogous to one of the sources of law which has been described previously. One important characteristic of the formation of this law is its consensual nature. Establishment of law through an agreement governed by the notion of participation (privity). Unlike other sources of law are capable of exerting its effect on those who did not participate (or disagree) in the process of its formation, the legal agreement that is binding only on the parties expressly agree to be bound by it.

II.3. Concept of Pancasila Democracy

Characteristic of constitutional democracy is that a democratic government is a government of limited powers and unjustified act arbitrarily against its citizens. Restrictions on the powers of government are listed in the constitution.

Explicitly Indonesia adheres to constitutional democracy, as in the constitution or the 1945 Constitution contained several provisions. More clearly be seen in the explanation of 1945 (before amendment) that there are two principles that animate text governing the system of government, i.e.:

1. Indonesia is a state based on law (rechtsstaat). Indonesian state based on law (rechtsstaat) is not based on mere power (machtsstaat).
2. The constitutional system. Government System based on the constitution (basic law), not absolutism (unlimited power).

Despite the existence Explanation 1945 by some still question as invalid product because it does not contain the norm, but the contents of the trunk opening and 1495 Constitution explicitly mentions the principle of democracy and the recognition of human rights protection, it was evidence that the Republic of Indonesia (Homeland) embrace and accept the rule of law. Even according to Moh. Mahfud MD, "the existence of the Constitution (in this case 1945) is itself a proof that Indonesia adheres to the rule of law and democracy, because the socio-legal and socio-cultural presence of the constitution it is a consequence of the acceptance of the rule of law and democracy.

Reflection of democracy can also be seen in the body of the post-amendment of the 1945 Constitution, i.e. Article 1 paragraph (2) provides that sovereignty belongs to the people and carried out according to the Constitution. It is understood that the power of government and power formation of legislation is the right of the people. Because the people are the supreme authority and organizing power is of the people, by the people and for the people. Thus article it is the rule of democracy because it is the people who hold sovereignty means the power of government and the making of laws and regulations is a right people. Indonesia with the complexity of diverse groups in a very wide area, can not be managed efficiently without institutions and offices to carry power efficiently. Therefore, the implementation of which is submitted to the people's sovereignty is clearly not to be efficient, it will be submitted to the institutions of state and government to run the government to gain legitimacy and oversight by the people.

Article 6 A of paragraph (1) of the 1945 Constitution the President and Vice President elected as a pair directly by the people. This implies that for filling the positions of President and Vice President implemented by the system of direct democracy. Likewise, at the election at the provincial, district and city, regional head election conducted democratically (Article 18 paragraph (4)). Further understanding of democratic local elections at the provincial and district / city in the implementing regulations of the election shall be defined directly (Act No. 32 of 2004). The selection of leaders in the provincial and district / city by way of directly elected by the people reflect their legitimacy from the people. The issue is whether the direct elections that reflect the legitimacy of the people of the area already reflects democracy as desired by the Indonesian constitution? Because the reality is still fraught with various problems that arise during the period 2005 to the present, for example, the election lawsuit in the Constitutional Court is still continues to flow, conflicts in various regions around the election is still in progress. Such a situation is highly questionable, in fact there is what the election in Indonesia? Is the implementation of democracy is already underway in accordance with the democratic values of Pancasila which are characteristic of the Indonesian nation, lest long run this is a democracy based on the characteristics of liberal democracy? Indonesia

adheres Pancasila democracy, it is reflected from almost all the articles of the provisions of Constitution Republic of Indonesia 1945.

In the Indonesian context, democratization in politics began to emerge in the early 1980s was marked by the emergence of intellectuals and civil society. Democracy and democratization movement reached its peak in May 1998 reform marked by the fall of the Soeharto government.

This event has been pushing for reforms in all sectors, including conducting elections as soon as possible. The first elections after reforms implemented in 1999 which resulted in a new government, which was then followed by the last elections in 2004 and elections in 2009. From the elections are expected to be born a new, more democratic government in Indonesia.

The democratic process at the central government level which is characterized by direct elections for President and Vice President. This affects the process of democracy and democratization in the region who have been calling for direct election as a manifestation of the consequences of any reform of local autonomy. In this case the local autonomy must be able to ensure a harmonious relationship between the regions and the central government and between governments in the region, so as to create a mechanism of checks and balances, which in turn can improve the welfare of the people who are part of the national goal. Thus the size of the direct election of democracy in mustinya not just follow the principle of political democracy alone but must also pay attention to the basic principles of economic democracy by consensus to achieve social justice for all Indonesian people. This is in line with the concept of Pancasila democracy as the Founding Fathers desired. Pemilukada considered democratic if either during the preparation process, the implementation process until the inauguration of the elected officials running order without turmoil or conflict either horizontally or vertically, then at the time of running the government officials can make the relevant areas into regions that increased economic and community benefit in increase their standard of living, then that is actually expected from the implementation of Pancasila democracy.

III. METHODOLOGY

The method is used based on doctrinal legal research using historical approach, the approach concept, approach legislation and the comparative approach. While the analysis carried out on material both primary and secondary law descriptively prescriptive, not only describe the object to be studied, but the results of this study should be able to produce a draft law setting the next election in accordance with the conditions of Indonesian society.

IV. DISCUSSION

Article 18 paragraph (4) the presence of the phrase "democratically elected" in the minutes of the formation of this article is intended not only to use the models uniformly, menginagt territory of Indonesia is a country with many islands, diverse customs, education level, economic and soial are also diverse , it is possible to not refer to just one model. Such as for DI Yogyakarta until today still calls for local elections based on the then existing descendants of King setting process by Parliament. This is in line with Article 18 B in which the state shall recognize and respect the local government units that are special or privileged and units of traditional society with rights tradisiolnya extent not inconsistent with the development of society and the Homeland.

Indonesia has about 13 466 islands, more than 400 tribes and more than 600 languages and dialects. From the distribution of the population, the island of Java, which covers only 7% of Indonesia's land area, inhabited by 60.1% of the population (census 2010) With the diversity of ethnic, social, economic as well as cultural and political understanding, it will affect the process of filling the positions of the leaders in the region. While the Constitution of the Republic of Indonesia in 1945 only provide a benchmark that, the election should be conducted honestly and fairly in accordance with the principles of the election.

The regional administration in Indonesia with diverse shapes and particularities of each region, based on the principle of decentralization, it seems that the concept of decentralization decentralization is not just ordinary, but needed a new way of thinking that emphasizes on the need to pay attention to the differences between the regions and the uniqueness of each region masinh, at the same objective interests as a nation state as a basis for designing future decentralization policy. In Indonesia recognized the existence of a special strip, ie Jogjakarta by Act No. 13 of 2012; Special Region Aceh with Law No. 18 of 2001; Special Autonomous Region of Papua by Act

No. 21 of 2001 and the Jakarta Special District Related to Law No. 29 of 2007. This allows for a variety of election which allows to do with not uniform anyway. However, actually it is also possible that the elections be different for specific regions are highly vulnerable to conflict is the main area during the conflict-ridden election.

The Region Election asymmetry or diverse area is the use of multiple models of the elections in the local election process according to suitability in an area, by selecting one of the models, the chosen parliament, elected directly, or mix, namely the election by parliament *dipeluas*, direct selection was narrowed (popular vote) or election by custom.

The results of the study in the dissertation Mukti Ridwan said that based on the area, the direct election of the most appropriate models implemented in Java and Sumatra, Riau Islands except for a suitable used *dipeluas* representation system. Later models of the election with *dipeluas* representation system suitable for implementation in Bali, Sulawesi island, and the island of Borneo, including Jakarta propose *dipeluas* representation system.

Model election by direct election system suitable diterapkan narrowed in NA Darusallam. Untuk adatforums suitable models applied are Buleleng District (Bali),. Bau Bau District (Buton Island), Jogjakarta Province, Regency-districts in the province of Papua. While the model of the election by parliament representative system suitable to be applied in South Sumatra, including Papua Province

Results of research conducted by the Department of Politics and Government Faculty of social and political science, University of Gajah Mada (UGM JPP-2010) shows there are at least five reasons why decentralization asymmetry: first, the reason Reason separatist conflicts and demands; second, the reason the capital; Third, state the reason the border; Third, historical and cultural reasons; fourth. *Pebatasan* reasons, and the fifth, the reason for the economic development center. The fifth reason for the existence of asymmetric decentralization impact the way of filling the post of head of the region.

While Ni'matul Huda himself ideally decentralization asymmetry found in Indonesia is not based on sporadic demands of the area, but it is a carefully prepared design that considers all aspects based on the uniqueness of the area. Because through decentralization *asimetri*, certain regions within a country are given special powers which are not granted any other region. Thus the issue of asymmetry election will also follow the conditions of the region concerned because the elections are an integral part of the existing decentralized system in the region, particularly at the district or city.

This is the importantly of special autonomy as a form of decentralization (political) asymmetry acts as a middle ground. On the one hand people are still able to exercise their rights to self-determination by exploiting the political space, social, economic and culture that has been created through a special *onomi* without having to constitute a threat to the sovereign state. On the other hand, the government, particularly the central government, no need to worry that the implementation of special autonomy will lead to disintegration. This is what is meant by an internal self-determination or internal self-determination. Thus in a good arrangement of the provision included in its autonomy is autonomy in the political aspect, which is when the local elections. Submitted to the regional selection model based on the readiness of the region in realizing local democracy that is expected to facilitate the political participation of local communities. So that the mandate of the Constitution of the Republic of Indonesia in 1945 as a reflection of the values of Pancasila, especially about democracy can be implemented by local people, which in turn is expected election can take place with honest, fair and confidential and generate qualified local leader able to bring people to the public welfare area.

So the expected future government and parliament in establishing the legal regulatory framework, especially for the elections for the provincial, district, and city need to consider several factors, among others:

1. From the substance, then framer should pay attention to the diversity of cultures, customs, geography, level differences in economic, social, educational, political knowledge, and security.
2. From the side of the establishment shall observe the guidelines for the establishment of laws and regulations as stipulated in Law No. 12 of 2011.
3. From the process of formation, it must pay attention and listen to input from various parties ranging from customary law community, representatives of the regions through the Regional Representative Council, local governments.

V. CONCLUSION

Basing on the above description, then the conclusion is that a fact Indonesia has a heterogeneity of cultural, social, political, educational and economic levels are varied. Setting the elections in Indonesia, which has been going on with the uniform model for the entire region turns out leaving a dangerous conflict disintegration, which is why the next election design well adapted to the special autonomy, specifically, as well as customary law suits. This implies that the alternative model of asymmetric election can be a solution for the establishment of local democracy in Indonesia.

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