

## The Elimination of Constitutional Court's Authority in The Dispute Case of General Election of Regional Head\*

(Analysis of Decision of the Constitutional Court Number 97/PUU-XI/2013)

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### **Abstract.**

The Constitutional Court as a judiciary solving the election problems replaces the previous Supreme Court roles. The presence of the Constitutional Court as an institution that resolved The dispute over the General Election of Regional Heads has not been able to provide justice to the public. In its development, the Constitutional Court abolished its authority in The dispute settlement of Local Leader's election as stipulated in Decision Number 97/PUU-XI/2013. The Constitutional Court said that the Constitutional Court only has the authority to resolve election The disputes of House of Representatives (DPR), Regional Representative Board (DPD), President/Vice President, because the election is conducted nationally while the election is conducted in certain areas only. In addition, the volume of incoming cases related to election more than the law review case which is the main authority of the Constitutional Court, and than it can also affect the quality of the decisions considering The dispute resolution of the results of the General Election should be terminated within fourteen days.

**Keywords:** The dispute of General Election Result, Local Leaders Election, Constitutional Court

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***Penghapusan Kewenangan Mahkamah Konstitusi  
Dalam Perkara Sengketa Pemilukada  
(Analisis Putusan Mahkamah Konstitusi Nomor 97/PUU-XI/2013)***

***Abstrak.***

*Kehadiran MK sebagai lembaga penyelesai sengketa Pemilukada masih belum mampu memberikan keadilan kepada masyarakat. Pada perkembangannya Mahkamah Konstitusi menghapus kewenangannya dalam penyelesaian sengketa Pemilukada yang tertuang dalam putusan Nomor 97/PUU-XI/2013. MK berpendapat bahwa ia hanya berwenang menyelesaikan sengketa pemilu DPR, DPD, Presiden/Wakil Presiden karena pemilu dilakukan secara nasional, sedangkan pemilukada dilakukan pada daerah tertentu saja. Selain itu, volume perkara yang masuk terkait sengketa pemilukada lebih banyak dibandingkan perkara pengujian Undang-Undang yang merupakan kewenangan utama MK, sehingga hal ini dapat berpengaruh pada kualitas putusan-putusan MK mengingat penyelesaian sengketa hasil Pemilukada harus diputus dalam waktu empat belas hari.*

***Kata Kunci:*** *Sengketa Pemilukada, Kewenangan, Mahkamah Konstitusi*

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## Introduction

Since the enactment of regional autonomy in Indonesia each region is entitled to take care of all the things that become their respective regional affairs.<sup>1</sup> Each region has the authority to regulate the matters that have been submitted by the central government to the regions.<sup>2</sup> The authority is not entrusted by the central government to the regions. In addition to being given the broad authority of the central government, the new thing with the enactment of regional autonomy is the election of regional heads directly elected by the people.

Before the existence of regional autonomy and has been regulated in the 1945 Constitution Article 18 reads that the regional head is elected through a mechanism in the Regional House of Representatives as a regional legislative body. The election of the regional head at that time is regulated in Law Number 22 of 1999. With The election of the regional head at the time of the enactment of Law Number 22 of 1999 does not reflect the course of democracy that has been declared in the reform agenda. Seeing this in Law Number 32 of 2004 regarding Regional Government as a substitute of Law Number 22 of 1999 to change the mechanism of local leaders elections to direct local leader election.

The existence of the direct local leader's election in addition to the demands of the reform agenda is also a consequence of the change of the state administration structure due to the amendment of the 1945 Constitution that is contained in Article 18 paragraph 4. In the article explained that the Governor, Regent, and Mayor respectively as the head of the region elected democratically.<sup>3</sup>

Since the enactment of Law Number 32 of 2004, the development of democracy in the regions have grown tremendously, all regional heads are elected directly by the people in accordance with the mandate of the law, except the position of the Governor of Yogyakarta Special Region (DIY).<sup>4</sup> In some areas

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<sup>1</sup> Sarman, *Hukum Pemerintahan Daerah di Indonesia*, cet.I, (Jakarta: Rineka Cipta, 2012), p. 14.

<sup>2</sup> Republik Indonesia, *Undang-Undang Tentang Pemerintahan Daerah*, Undang-Undang Nomor 32 Tahun 2004 Pasal 10. (*The Act of Local Government Administration, Act No 32 2004, Article 10*)

<sup>3</sup> Philipus M. Hadjon, *Pemilihan Kepala Daerah Berdasarkan Undang-undang Nomor 32 Tahun 2004 dalam Sistem Pemilu menurut UUD 1945*, cet.I, (Jakarta: Prestasi Pustaka Publisher, 2005), p. 16

<sup>4</sup> Republik Indonesia, *Undang-Undang Tentang Keistimewaan Daerah Istimewa Yogyakarta*, Undang-Undang Nomor 13 Tahun 2012. (*The Act Of Special Region of Yogyakarta, Act No 13, 2012*)

the local leader's election gave rise to dissatisfaction which resulted in the appeal of the results of the General Election to the court for various reasons.<sup>5</sup>

The General election of regional head and deputy head of region, or often called Local Leaders Election, is the election of head of region and deputy head of region in one candidate pair which is carried out democratically based on direct, general, free, secret, honest and fair principle. According to Law Number 32 of 2004, the local leader's election raises a new regime in Indonesia. Where the turn of Local Leader's election local government regime become Local Leader's election regime. The purpose of the regime local leader's election is The election of the regional head directly elected by the people in the region. Where before the enactment of the new Regional Government Law Local Leader's election implemented by Parliament as an extension of the people's aspirations in the region.<sup>6</sup>

The existence of direct election of regional head and deputy head of region is realized or cannot cause problems. The problem itself can cause The disputes in the regions. The emerging The dispute could lead to divisions within the community. In the election, the The disputed matters can be in the form of sound bloat, voter list matter and many more. Sometimes The disputes arise may result in prolonged conflict.

To resolve The disputerequires a Judicial institution to solve it. Institutions capable of resolving The disputes fairly and accepted by all levels of society In Law No. 32 of 2004 on Regional Government states that The disputeresolution of the General Election is submitted through legal process in the Supreme Court.<sup>7</sup> Apparently the Supreme Court as an institution that resolved The disputeof the General Election of Regional Heads has not been able to produce a satisfactory verdict among the disputing parties.

This can be reflected in the local leader's election that occurred in North Maluku.<sup>8</sup> The local leader's election in North Maluku reaps community conflict.

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<sup>5</sup> Sarman, *Hukum Pemerintahan Daerah di Indonesia*, cet.I (Jakarta: Rineka Cipta, 2012), p. 3.

<sup>6</sup> Mulyana W. Kusuma, Ari Pradawati ed., *Pemilukada Langsung: Tradisi Baru Demokrasi Lokal*, (Surakarta: Kompas, 2005), p. 46.

<sup>7</sup> Republik Indonesia, *Undang-Undang Tentang Pemerintahan Daerah*, Undang-Undang Nomor 32 Tahun 2004 Pasal 106 ayat (1). (*The Act of Local Government Administration, Act No 32 2004, Article 106, Section 1*)

<sup>8</sup>The holding of leader's election has wreaked havoc and will be wounde up with regard to the problems, parties in Noeth Maluku mwanwhile being said to be incapable to conduct a peace local election in the region in accordance with the rules and regulations. The result of the counting of votes obtained by each region leader's candidate generates controversy, (Retrieved from <http://Okzone.com> on April 11<sup>th</sup>, 2010).

How does not the election as a symbol of democracy growing in the region has been hurt by the Supreme Court's decisions. In the Supreme Court decision No.099/KMA/V/ 2008, it was decided that the central government was given the authority to complete the election of the North Maluku regional head. Seeing the implications of the Supreme Court ruling, it is clear that the legitimacy of the Supreme Court as an institution expected to resolve The dispute over the election has been taken by the government, in this case, the central government.

Therefore, after the amendment of Law Number 32 of 2004, namely Law Number 12 of 2008 on Regional Administration of power transfer in The dispute resolution of the Local Leader's election of the Supreme Court to the Constitutional Court: *"The handling of The disputes on the results of the local leader's election and deputy regional head by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eighteen) months since the law was enacted "*.<sup>9</sup>

The provision is reinforced after the issuance of Law Number 22 of 2007 regarding General Election Organizer, which has enabled the Constitutional Court to decide upon The dispute over local leader's election result. This is due to the change of regime of local leader's election which has been done by Regional House of Representatives (DPRD) to become general election regime which directly elected by society.<sup>10</sup>

The presence of the Constitutional Court as a new Judicial institution in place of the Supreme Court's role brings new hope in the achievement of a sense of justice. With the authority possessed by the Constitutional Court is expected to be able to resolve this The dispute over the election The disputes. However, the presence of the Constitutional Court in The disputes settlement on the results of the General Election of Regional Heads has not been able to reflect the sense of community justice.

The authority granted by the Constitution and the Law is sometimes inappropriately used. The authority of the Constitutional Court as a Judicial Institution in resolving The dispute over Regional Head Election is only to resolve The dispute of it, which is regulated in Law Number 32 of 2004 regarding Regional Government and Law 22 of 2007 concerning the

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<sup>9</sup> Republik Indonesia, *Undang-Undang Tentang Pemerintahan Daerah*, Undang-Undang Nomor 12 Tahun 2008. (The Act of Local Government Administration, Act No 12 2008)

<sup>10</sup> Tim Penyusun Buku Lima Tahun Menegakkan Konstitusi, (Jakarta: Sekretariat Jenderal Dan Kepaniteraan Mahkamah Konstitusi, 2008), cet.V, p. 8.

Implementation of General Election. Beyond that, it is not the authority of the Constitutional Court to resolve it.<sup>11</sup>

However, many Constitutional Court rulings are controversial. One of them can be seen in The disputeresolution of regional head election Kotawaringin West, Central Kalimantan.<sup>12</sup> The decision of the Constitutional Court explains that one of the candidate pairs has committed a structured, systematic and massive violation. Consequently, the Constitutional Court disqualified the candidate pair and the Constitutional Court subsequently won another candidate. According to the Constitutional Court Regulation Number 15 of 2008 regarding the law of The dispute over tthe local leader's election explained that the object of The dispute in The disputeover the local leader's election result is the recapitulation of the vote count which affects the votes of the other candidate pairs. Regarding the violation, aspect is not the authority of the Constitutional Court. This is very inversely proportional to the decision.

In addition, in the regulation explained that the form of amar verdict in the form of 1). An application is unacceptable; 2). The petition is granted by determining the correct result according to the Constitutional Court; 3). Application rejected.<sup>13</sup> From the form of the verdict clearly there is nothing to regulate the disqualification of candidate pairs or directly determine the winner of the election itself. In the case of voting done by the Constitutional Court, the Constitutional Court should not be wrong in determining the correct vote. Communities as voters and owners of valid votes must have been smart and wise in choosing their regional head. Do not let the vote decisions made by the Constitutional Court backfire. It may be that the Constitutional Court has violated the right to vote from the community itself.

Seeing that the Constitutional Court in exercising its authority is unconstitutional because it is not in accordance with what is mandated. The final decision of the Constitutional Court may be a defect in which the decision is derived from the substance of the problem. Seeing this phenomenon can be said that the Constitutional Court has a very wide authority in resolving The disputes election results of this regional head. Not only that which has been

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<sup>11</sup> Gde Febri Purnama, *Meretas Perdamaian Dalam Konflik Pemilukada Langsung*, cet.II, (Yogyakarta: Gava Media, 2009), p. 47.

<sup>12</sup> The upcoming general election dispute began of the winning of Sugianto -Eko soemano in the upcoming general election of the Regent of West Kotawaringin. In fact, both who lost, namely Ujang Iskandar-Bambang Purwanto did not receive and sue to the constitutional court. (Retrieved from <http://www.tribunnews.com> on September 27<sup>th</sup>, 2014).

<sup>13</sup> Republik Indonesia, *Undang-Undang Tentang Mahkamah Konstitusi*, Undang-Undang Nomor 8 Tahun 2011. (*The Act of Supreme Court, Act No 8 2011*)

regulated in the Act but the authority outside it can also be done by the Constitutional Court on the basis of justice and welfare of the community. Do not see if the authority is in accordance with the mandated.

A section of the law shall remain declared valid if the change law is not expressly declared deleted or amended by the formulation of the new article. Law Number 12 of 2008 does not change Article 106 of Law Number 32 of 2004 which is the basis of the authority of the Supreme Court to decide upon The dispute on local leaders election. Article 106 paragraph (1) of Law Number 32 of 2004 reads: "*The objection to the determination of the result of local leader's election and deputy regional head can only be submitted by the candidate pairs to the Supreme Court within no later than 3 (three) days after the determination of local leader's election result and deputy head of region.*"<sup>14</sup>

Until now not a few petition cases of The dispute over the General Election submitted to the Constitutional Court. It is no longer a new thing, even in almost every region that has been running local leaders election, there is a dispute. Either related to the voter's vote or other matters that caused The dispute of local leaders election.

### **The dispute over General Election of Regional Head and Deputy Regional Head**

What is meant by The dispute of General Election of Regional Head and Deputy Regional Head is as regulated in Article 66 paragraph (4) and Article 106 of Law Number 32 of 2004 regarding Regional Government. From these articles, the dispute can be divided into two, namely: a dispute whose authority of settlement is in the hands of the Election Supervisory Committee and The dispute whose authority of settlement is in the hands of the judiciary.<sup>15</sup>

The dispute of local leader's election whose settlement is handled by Election Supervisory Committee is The dispute arising in the implementation of local leaders election. This The dispute is settled under Government Regulation Number 6 of 2005 Article 111 paragraph (4) and (5), which is differentiated into:

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<sup>14</sup> Republik Indonesia, *Undang-Undang Tentang Pemerintahan Daerah*, Undang-Undang Nomor 32 Tahun 2004. (*The Act of Local Government Administration, Act No 32 2004*)

<sup>15</sup> Republik Indonesia, *Undang-Undang Tentang Pemerintahan Daerah*, Undang-Undang Nomor 32 Tahun 2004 Pasal 106. (*The Act of Local Government Administration, Act No 32 2004, article 106*)

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- a. The dispute report containing no criminal element, completed by the Election Supervisory Committee
- b. The dispute report containing elements of a criminal offense, the settlement is forwarded to the investigating apparatus.

Whereas The disputeover the General Election, whose settlement is handled by the judiciary, in this case the Supreme Court, is The disputeover the result of the local leaders election's stipulation (or also referred to as a dispute over the result of local leaders election) as regulated in Article 106 of Law Number 32 of 2004 Jo Supreme Court Regulation Number 02 of 2005 regarding Procedures for Submitting Legal Efforts to Objections on the Determination of Election Results from Provincial Regional General Election Commission (KPUD) and Regency/City KPUD.<sup>16</sup>

### **The dispute Settlement Process of General Election of Regional Head and Deputy Regional Head.**

If we look at the process of the dispute resolution local leader's election in Indonesia, conducted through 3 (three) process of Justice, those are:

- a. Through the District Court/Court of Appeal, relating to the Election Violation, which handles KUHAPidana and Civil.
- b. The Supreme Court concerning the final result of vote counting.
- c. Through the Constitutional Court which is an institution about the testing of matter relating to the law with the basic reference of the 1945 Constitution of the Republic of Indonesia, which serves as a guardian of the constitution and interpreter of the constitution.<sup>17</sup>

### **The authority of the Constitutional Court in the Settlement of The dispute of General Election of Regional Head and Deputy Regional Head.**

The settlement of a dispute over the General Election of Regional Heads to the Constitutional Court will bring new hope because the settlement by the

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<sup>16</sup> Topo Santoso, *Analisis dan Evaluasi Hukum tentang Peran Lembaga Peradilan dalam Sengketa Pemilukada*, (Jakarta: Badan Pembinaan Hukum Nasional Departemen Hukum dan HAM RI, 2008), p. 13.

<sup>17</sup> Tri Cahyo Wibowo, *Makalah 'Sengketa Pemilukada'*, (FISIP UI, 2010), p. 4.



Constitutional Court is relatively unaffected. This is evidenced by the experience of the Constitutional Court in handling electoral The disputes.

Law Number 12 of 2008 on Amendment to Law Number 32 of 2004 has brought major changes to the implementation of local leader's election in Indonesia. Amendments include the transfer of handling of The disputes on the results of General Election from the Supreme Court to the Constitutional Court. This is an affirmation of the entry of local leader's election in the general election regime.<sup>18</sup>

Through Law Number 22 of 2007 regarding the Implementation of General Election, the term of the Regional Head Election is changed to the General Election of Regional Head. Chapter I Article 1 of Law Number 22 of 2007 has the intention that the General Election of Regional Head and Deputy Regional Head is the General Election to elect the Regional Head and Deputy Regional Head directly in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia. Therefore, if the local leader's election enters the general election regime, the handling of The dispute on the result of the election of the regional head shall be the authority of the Constitutional Court in accordance with Article 24C Paragraph (1) Amendment to the 1945 Constitution of 1945. The problem is Law No. 32/2004 still regulates The dispute over Pemilu result the authority of the Supreme Court so that there is a need for further regulation to reinforce the regulation concerning The dispute on the election result of the regional head.

Through Law Number 12 of 2008 on Amendment to Law Number 32 of 2004 on Regional Government, The dispute over the General Election has been transferred from the Supreme Court to the Constitutional Court. The transitional The dispute settlement referred to in Article 236C stating that "The handling of The disputes over vote count results of The election of the regional head and Deputy Regional Head by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eighteen) months since the Act was enacted."

### **Constitutional Court And Case The dispute General Election of Regional Head And Deputy Regional Head**

The Constitutional Court is one of the state institutions that exercise a free of judicial power to administer courts to uphold law and justice. The

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<sup>18</sup> Sarman, *Hukum Pemerintahan Daerah di Indonesia*, cet.I, (Jakarta: Rineka Cipta, 2012), p. 41.

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presence of the Constitutional Court is a new history in the realm of judicial power in Indonesia. The Constitutional Court is a State institution parallel to the Supreme Court and other State Institutions.<sup>19</sup>

As a result of the third amendment of the 1945 Constitution adopted on October 9, 2001. In Chapter IX of Judicial Power in Article 24 paragraph (2) regulating the existence of the Constitutional Court. Then on the composition and position and organization including the procedures for appointment and dismissal of constitutional justices are provided in Article 24C paragraph (1), (2), (3), (4), (5), and (6).<sup>20</sup>

Then to carry out the mandate of the Constitution, then stipulated Law Number 24 of 2003 which regulates the structure, function, and authority and position of the Constitutional Court of the Republic of Indonesia.<sup>21</sup>

### **The obligation and authority of Constitutional Court**

The Constitutional Court has 1 (one) obligation as stipulated in Article 24C Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The stipulation states that the Constitutional Court is obliged to give a decision on the opinion of House of Representatives that the President and/or Vice President are suspected:

- a. Has committed a law violation in the form of reason against the state, Corruption, Bribery, Other serious crimes;
- b. Disgraceful acts; and/or
- c. No longer qualify as President and/or Vice President as referred to in the 1945 Constitution of the State of the Republic of Indonesia.

In addition, the Constitutional Court of the Republic of Indonesia has 4 (four) powers regulated in Article 24C Paragraph (1) of the 1945 Constitution, the following:

- a. Testing the law against the 1945 Constitution of the State of the Republic of Indonesia;

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<sup>19</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, cet.I, (Jakarta: Kencana, 2012), p. 261.

<sup>20</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, p. 263.

<sup>21</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, cet.I, (Jakarta: Kencana, 2012), p. 286.

- b. To disconnect the authority of state institutions whose authorities are granted by the Law of the Republic of Indonesia 1945;
- c. Break the dissolution of political parties, and;
- d. Disconnect the disputes over election results.

Constitutionally, the four authorities and one of obligations above are the concrete manifestations of the function of the Constitutional Court as *the guardian of the constitution*.<sup>22</sup>

Related to that, every effort to guard the constitution becomes the jurisdiction of the Constitutional Court. Thus, the Constitutional Court agreed to be *the guardian of constitution* so that the provisions in the constitution are not merely to be letters and sentences of death, but to be incarnated and practiced in the life of the state. The trick is to provide an interpretation of the provisions of the constitution, whose interpretation results are legally binding, so that the Constitutional Court has a function as *the constitutional interpreter of the constitution*.<sup>23</sup>

### **Testing of the Law and Authority of the Constitutional Court in The disputeCase of the General Election of Regional Head and Deputy Regional Head**

The Constitutional Court has the authority to examine the law. According to Article 1 paragraph (3) a, and Article 10 of Law Number 8 of 2011 on the Constitutional Court, one of the authorities of the Constitutional Court is to examine the law against the 1945 Constitution of the Republic of Indonesia.<sup>24</sup>

Tests conducted are material tests (*materialile toetsingsrecht*) that is on the contents of the rules and formal test (*formele toetsingsrecht*) that is testing the formation procedure formation/form rules. If it is required to test Interim Government Regulation (Perppu), MKRI can only test the content/substance/material of Perppu.<sup>25</sup>

Because the Perppu has the same content as the Act or and the Perppu is the Act in the material sense. While for a formal test of Perppu is done by

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<sup>22</sup> Mahfud MD, *Peran Mahkamah Konstitusi dalam Mengawal Hak Konstitusional Warga Negara*, retrieved from <http://www.mahfudmd.com/>, on Oktober 13<sup>th</sup>, 2014, 20:50 PM.

<sup>23</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, cet.I, (Jakarta: Kencana, 2012), p. 291.

<sup>24</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, p. 277

<sup>25</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, p. 280.

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legislative (*legislative review*) because Interim Government Regulation (Perppu) which have been determined need the consideration from House of Representatives whether it is feasible to be approved to become law or not. If a Perppu wants to do judicial review by MKRI then it is like if the Perppu has been approved by the House of Representatives to become a law and promulgated a law stating a certain Perppu into a law.

Interim Government Regulation (Perppu) if not approved by the House of Representatives established a law that promulgates the revocation of the Perppu. "The discussion of the Draft Law on the Revocation of Government Regulation in Lieu of Law is implemented through a special mechanism that is excluded from the mechanism of discussion of the Draft Law."<sup>26</sup>

### **The Authority of the Constitutional Court in The disputeCase of the General Election of Regional Head and Deputy Regional Head.**

The Constitutional Court is one of the state institutions that exercise an independent judicial power to administer courts to uphold the law and justice and the supreme judicial institution that acts as the guardian of the Constitution.

As mentioned before, as a guardian of the Constitution, the Constitutional Court has four powers regulated in the 1945 Constitution of the Republic of Indonesia and Law Number 24 of 2003 regarding the Constitutional Court. Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia affirms that: The Constitutional Court has the authority to hear at the first and final level the decision is final to review the law against the Constitution, to decide upon The disputeover the authority of state institutions whose authorities are granted by the Constitution, decide upon the dissolution of political parties, and decide upon The disputes concerning general election results.<sup>27</sup>

When the Local Leader's election is placed as part of the General Elections regime organized by the General Election Commission, the implication is the disputeover the Local Leader's election to be part of the General Election Result The dispute case which is the authority of the Constitutional Court. Through Law Number 22 of 2007 on the Implementation

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<sup>26</sup> Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: KonPress, 2010), p. 24.

<sup>27</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, p. 274.

of General Election, the term of the Regional Head Election is changed to the General Election of Regional Head.

The provisions in Law Number 22 of 2007 are then reinforced in Article 263C of Law Number 12 of 2008 regarding Amendment to Law Number 32 of 2004 regarding Regional Government. Article 236 C which states that: "The handling of The disputes over the vote count results of the election of regional heads and deputy regional heads by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eighteen) months since the law was enacted".

Thus, the authority of the Constitutional Court which originally only decided upon the disputes over the results of general elections of the President, House of Representatives (DPR), Regional House of Representatives (DPRD) and Regional Representative Board (DPD) was increased by deciding the dispute over the results of the local leader's election.

### **Legal Basis for the Authority to resolve the dispute of General Election of Regional Head and Deputy Regional Head**

Based on Decision Number 97/PUU-XI/2013, the Constitutional Court decided to grant the petition of the petitioners completely and stated that Article 236C of Law Number 12 of 2008 regarding the Second Amendment to Law Number 32 of 2004 regarding Regional Government and Article 29 Paragraph (1) sub-paragraph e of Law Number 48 of 2009 regarding Judicial Power has been declared contradictory to the 1945 Constitution of the Republic of Indonesia and it doesn't have Binding Law Strength.<sup>28</sup>

In its consideration, the Constitutional Court states that by using the systematic interpretation and *original intent*, the meaning of the General Election according to the 1945 Constitution of the Republic of Indonesia is the election held once in 5 (five) years to elect members of DPR, DPD, President/Vice President and DPRD. The Constitutional Court declares that the provision of Article 74 Paragraph (2) of the Constitutional Court Law stipulates that The dispute over the result of the general election constituting the authority of the Constitutional Court is The dispute over the results of the General Election of DPR, DPD, President / Vice President.

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<sup>28</sup> Eka Sihombing, *Penyelesaian Sengketa Pemilukada Pasca Putusan MK Nomor 97/PUU-XI/2013*, retrieved from <http://hariansib.co/view/Hukum/29269/html>, on Oktober 6<sup>th</sup>, 2014.

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Article 74 paragraph (2) stipulates that the resolution of general election results can only be submitted to the determination of election results conducted nationally by the General Election Commission affecting:

- a. The election of candidates for members of the Regional Representative Council;
- b. Determination of the Candidate Pairs who entered in the second round of the election of President / Vice President and the election of candidates for President and Vice President;
- c. Acquisition of the seat of an electoral political party in an electoral district.<sup>29</sup>

Thus, based on the decision of the Constitutional Court, The election of the regional head is not included in the election regime but re-entered in the regime of Regional Government. Consequently the Constitutional Court is no longer authorized to adjudicate the disputes over the results of Local Leader's Election. The verdict indicates inconsistency of the Constitutional Court, wherein the previous decision (Decision No. 072-073/PUU-II/2004), the majority of constitutional judges indirectly interpreted that the determination of the Local Leader's election as part of the general election was an open policy for the legislator (opened legal policy), so that the Constitutional Court may be authorized to adjudicate The disputes over Local Leader's election based on policy choices taken by the government and House of Representatives (DPR).

## The Beginning of Application for Judicial Review by the Constitutional Court

Authority of the Constitutional Court in deciding The disputes concerning general election results Based on the mandate of the Constitution in Chapter VIIB on General Election, Article 22E Paragraph (2) of the 1945 Constitution states that: "*General Election is held to elect members of the People's Legislative Assembly, Regional Representative Council, President and Vice President and the Regional Representatives Council.*"<sup>30</sup>

In this case the implementation of General Election as regulated in the constitution does not mention to elect the head of a region. While the election of

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<sup>29</sup> Republik Indonesia, *Undang-Undang Tentang Mahkamah Konstitusi*, Undang-Undang Nomor 8 Tahun 2011. (*The Act of Supreme Court, Act No 8 2011*).

<sup>30</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, p. 69.

regional heads in the 1945 Constitution, written on different Chapter, namely Chapter IV on Regional Government, in Article 18 paragraph (4) which reads: "Governors, Regents and Mayors respectively as head of provincial, district and municipal government democratically elected".<sup>31</sup> It means that the constitution itself does not include the election of regional heads into chapters that regulate the general election.

It can be said that the local leader's election is not classified as an electoral regime. That is why in Article 22E Paragraph (2) of the 1945 Constitution does not include the phrase of a regional head in the election chapter. So that at the beginning of the election of the Regional Head the authority to handle The dispute of the General Election was handed over to the Supreme Court, and at that time the Constitutional Court continued to focus on its authority in examining the Law against the 1945 Constitution.

And then, following the enactment of Law Number 22 of 2007 as amended by Law Number 15 of 2011 regarding the General Election Organizer, classifying the Local Leader's election into the election regime contained in Article 1 paragraph (4) of General Provision reads " *Election of Regional Head and Deputy Regional Head is the General Election to elect the regional head and deputy head of region directly in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia* ".<sup>32</sup>

Then it was changed until Law Number 12 of 2008 on the Amendment of Law Number 32 of 2004 regarding Regional Government was issued. In this Law, the handling of the disputes of a regional head election has been transferred from the Supreme Court to the Constitutional Court. The transitional authority of such The dispute resolution as provided for in Article 236C states that: "*The handling of The disputes over vote count results of regional head and deputy regional head elections by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eighteen) months since the Act was enacted.*"

Meanwhile, in the Constitutional Court Law (Law Number 24 of 2003 and Amendment to Law Number 8, 2011), there is no phrase that adds the authority of the Constitutional Court in adjudicating the case of a dispute over local leaders election. However, the addition of the authority is regulated in Article 29 paragraph (1) sub-paragraph e of Law Number 48 of 2009 regarding

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<sup>31</sup> Sarman, *Hukum Pemerintahan Daerah di Indonesia*, cet.I, (Jakarta: Rineka Cipta, 2012) p. 133.

<sup>32</sup> Republik Indonesia, *Undang-Undang Tentang Penyelenggaraan Pemilihan Umum*, Undang-Undang Nomor 22 Tahun 2007. (*The Act of the holding of the general election, Act No 22 2007*)

Judicial Power, it is said that "*other authorities are granted by law*". Then there is a phrase concerning the addition of the authority of the Constitutional Court in the explanation of Article 29 paragraph (1) letter e which states that: "*in this provision includes the authority to examine, and decide The disputes on the results of regional head election in accordance with the provisions of legislation,*" which becomes legal standing of the Petitioners The disputes results of the regional head.<sup>33</sup>

The implications of the transfer of authority are what then forced the Constitutional Court to share the focus between the authority granted by the 1945 Constitution, especially the examination of the Law, with the tight deadline for The dispute resolution of local leaders electionas regulated in Law Number 24 of 2003 in Article 78 letter a, 14 (fourteen) working days since the application is recorded in the Registration Book of the Constitutional Court Case.<sup>34</sup>

Initially, the Constitutional Court only handles The disputes over the General Election of the President and DPR, DPD and DPRD for 5 (five) years since the delegation of authority over the settlement of The disputes concerning the election result, the Constitutional Court is currently being preoccupied with handling the completion of PHPU routinely. The number of lawsuits submitted, due to the implementation of unpredictable regional head elections which made the Constitutional Court was preoccupied by the General Election case and the narrowness of the 14 (fourteen) day session made the Constitutional Court unable to maximally examine cases of The dispute over local leaders election, and became a gap utilized by unscrupulous certain to play to the ambitious regional head to win at the Constitutional Court,<sup>35</sup> for that would be his first and last attempt in seeking justice.

The description of the authority to settle the disputes concerning the local leader's election which shall subsequently be included in the scope of the Constitutional Court shall be explained in detail in the reasons of the Petitioners. As explained above, the Petitioners consider that the addition of scope of authority of the Constitutional Court to The disputeresolution of regional head election due to the emergence of Article 236C of Law Number 12

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<sup>33</sup> Republik Indonesia, *Undang-Undang Tentang Kekuasaan Kehakiman*, Undang-Undang Nomor 48 Tahun 2009. (*The Act of the Judicial Authorities, Act No 48 2009*)

<sup>34</sup> Republik Indonesia, *Undang-Undang Tentang Mahkamah Konstitusi*, Undang-Undang Nomor 24 Tahun 2003. (*The Act of the Supreme Court, Act No 24 2003*)

<sup>35</sup> Lihat pada Alasan Permohonan Pemohon dalam Putusan Mahkamah Konstitusi Nomor 97/PUU-XI/2013. (*look at the reason of applicant plea in a verdict of the constitutional court No 97/PUU-XI/2013*).



of 2008 regarding the Second Amendment to Law Number 32 of 2004 regarding Regional Government and Article 29 paragraph (1) sub-paragraph e of Law Number 48 of 2009 regarding Judicial Power is contradictory to the 1945 Constitution, among others:

1. Article 1 paragraph (3) which reads: "*The State of Indonesia is the State of Law*"
2. Article 22E Paragraph (2) which reads: "*General Election is held to elect members of the People's Legislative Assembly, Regional Representative Council, President and Vice President, and Regional People's Legislative Assembly*".
3. Article 24C Paragraph (1) which reads:

"The Constitutional Court has the authority to hear at the first and final level the decision of which is final to examine the law against the Constitution, to decide upon The dispute over the authority of state institutions whose authorities are granted by the Constitution, to decide upon the dissolution of political parties, and to decide The disputes over the general election results".

### **The Implementation of General Election of Regional Head and Deputy Regional Head in Indonesia**

General Election of Regional Head or better known as *Pemilukada* is a means taken by the government in the effort of enforcing democratization process in Indonesia. The Indonesian people can directly select and determine who is entitled to occupy the highest position in the composition of government in the region. Prior to direct elections, these regional leaders were elected by the Regional House of Representatives (DPRD), but after various legislation governing the direct election, the old rules changed. People directly elect leaders in their area.<sup>36</sup>

Prior to 2005, the regional head and deputy regional heads were elected by the Regional House of Representatives (DPRD). Since the enactment of Law Number 32 of 2004 regarding Regional Government, the regional head is elected directly by the people through the election of the regional head and

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<sup>36</sup> Sarman, *Hukum Pemerintahan Daerah di Indonesia*, cet.I, (Jakarta: Rineka Cipta, 2012), p. 141.

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Deputy Head of Region or abbreviated *Pemilukada*. It was first held in June 2005.<sup>37</sup>

The legal basis governing the implementation of Local Leader's election is Law Number 32 of 2004 regarding Regional Government and Government Regulation Number 6 of 2005 regarding Election, Legalization, Appointment and Dismissal of Regional Head.

According to the provisions of Law Number 32 of 2004, The election of the regional head does not belong to the category of general election, so that its legal regime is not related to the provisions of Article 22E of the 1945 Constitution of 1945 which regulates the elected officials through general election, but is solely attributed to the provisions in Article 18 paragraph (4) of the 1945 Constitution of the Republic of Indonesia governing the election of Governors, Regents, Mayors.<sup>38</sup>

The implementation of the General Election began to become a discourse when Megawati as President signed the implementation of Law Number 22 of 2003 on the Composition and Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representatives Council and the Regional House of Representatives on 31 July 2003. In Article 62 (1) and Article 78 (1) concerning the duties and authorities of the Provincial DPRD and Regency / Municipal DPRD Law number 22 of 2003 states that the provincial DPRD and the district / city DPRD no longer have the authority to elect the regional head and deputy regional head. The problem is, then how the process of election of regional head and vice regional head will be held.

The detailed answers to the General Election of Regional Heads are elaborated by Law Number 32 of 2004. Furthermore, the more technical explanation concerning Local Leader's election is regulated by Government Regulation Number 6 of 2005.<sup>39</sup>

Law Number 32 2004 contains Article 57 - Article 67 which regulates the process of the Election of Regional Head, Article 68 - Article 74 contains

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<sup>37</sup> Wikipedia, *Pemilihan Kepala Daerah di Indonesia*, retrieved from <http://id.wikipedia.org/> on November 12<sup>th</sup>, 2014.

<sup>38</sup> Philipus M. Hadjon, *Pemilihan Kepala Daerah Berdasarkan Undang-undang Nomor 32 Tahun 2004 dalam Sistem Pemilu menurut UUD 1945*, cet.I, (Jakarta: Prestasi Pustaka Publisher, 2005), p. 16

<sup>39</sup> Sekjen MPR RI, *Panduan Pemasarakatan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Ketetapan Majelis Permusyawaratan rakyat Republik Indonesia, 2012 (The secretary general of Indonesia. a guide of corrective services of the constitution of the republic of Indonesia 1945 and the command of the house of representatives of the republic of Indonesia, 2012)* p. 119.

with respect to the Voters' Determination, Article 75 - Article 85 contains articles regarding the Campaign, Article 86 - Article 106 pertaining by Voting, Articles 107 - Article 112 concerning the Stipulation of Elected Candidates and Inauguration. Article 113 - Article 114 concerning the Monitoring of Election of Regional Head and Deputy Regional Head, and Article 115 - Article 119 was concerning Provisions on Criminal Election of Regional Head and Deputy Regional Head. Overall Law Number 32 2004 contains 63 articles of 240 articles contained in Law Number 32 2004.

Since the enactment of Law Number 22 of 2007 regarding General Election Organizer, Local Leader's election is included in the election regime, so officially named the General Election of Regional Head and Deputy Head of Region or abbreviated *Pemilukada*. The first regional head election to be held under this law is the 2007 General Election of DKI Jakarta.

In 2011, a new law on the organizers of the elections was issued, namely Law Number 15 of 2011. In this law, the term used is the Election of Governors, Regents, and Mayors (Pilgub).

### **Factors Causing the Constitutional Court Eliminates its Authority Related to The disputeCase of General Election of Regional Head and Deputy Regional Head**

When the Local Leader's election is placed as part of the election regime organized by the General Elections Commission (KPU), the implication is that the dispute of Local Leader's election becomes part of the case of the General Election Result The dispute (PHPU) which is the authority of the Constitutional Court (MK). Through Law Number 22 of 2007 regarding the Implementation of General Election, the terminology of regional head election is changed into general election of a regional head (Pemilukada).

The provisions in Law Number 22 2007 are then reinforced in Article 263C of Law Number 12 2008 regarding Amendment to Law Number 32 2004 regarding Regional Government. Article 236 C which states that: *The handling of The disputes over the vote count results of the election of regional heads and deputy regional heads by the Supreme Court shall be transferred to the Constitutional Court at the latest 18 (eighteen) months since the Act was enacted*.

This matter becomes the juridical cause factor of the Constitutional Court to erase its authority in deciding the disputecase of General Election of Regional Head. Thus, the authority of the Constitutional Court which initially

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only decided the dispute over the election results of the President, DPR, DPRD, and DPD became increased by deciding the dispute over the results of the election.

By looking at the volume of cases, the Constitutional Court tends to be the *Election Court*<sup>40</sup> because the number of The disputed election cases handled more volume than the *Judicial Review* which is the main authority of the Constitutional Court.

The new authority also changed the rhythm of life and working atmosphere in the Court. Election the disputes dominate the sessions at the Constitutional Court. Then with the number of The dispute cases of Election which must be completed by nine judges of the Constitutional Court within 14 days, it is feared could affect the quality of the Constitutional Court's decision on The dispute and reduce the quality of the Constitutional Court's decision in handling The dispute case of General Election of Regional Head result and disrupt the role of the Constitutional Court in deciding the application of *judicial review* which is the primary domain of its authority.

This is the factor causing the Constitutional Court to erase its authority in The dispute case of General Election of Regional Head is reviewed philosophically, because the Constitutional Court has the main role as The Guardian of Constitution. In other words, the Constitutional Court shifted from the Constitutional Court to be as if the Election Court because it handles more election the dispute cases than law testing.<sup>41</sup>

It more worrying when the case of the former Chief Justice of the Constitutional Court Akil Mochtar<sup>42</sup> is involved in corruption in the field of The dispute Local Leaders Election. This case tarnished and damaged the image of the Court. It can not be denied, however, that in reality the Constitutional Court plays an important role in resolving the disputes over the results of the General Election of Regional Heads.

The Constitutional Court was able to facilitate the political conflict that was the result of the election by bringing it from the conflict, which could trigger horizontal conflict among supporters to the Constitutional Court

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<sup>40</sup> Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, cet.I, (Jakarta: Kencana, 2012), p. 241.

<sup>41</sup> The recapitulation of the testing laws and disputes on the matter of the disputes of the outcome of an election in the constitutional inclosed.

<sup>42</sup> Look at the bribery case of the chief of Supreme Court Akil Mochtar, retrieved from <http://www.tempo.co/topik/masalah/3285/Suap-Ketua-MK-Akil-Mochtar> On September 15<sup>th</sup>, 2014, 19:53 PM.

building. In a certain level, the Court has had an achievement in encouraging the implementation of democratic Election.

The impact of the Akil Mochtar case, the impact on the paradigm shift that the Constitutional Court is not worthy to settle the dispute case General Election of Regional Head. This may be considered as a sociological factor affecting the elimination of the Constitutional Court's authority to resolve the dispute over the General Election case.

### **The Constitutional Argument on the Elimination of the Constitutional Court's Authority in the Election The dispute Case**

Law Number 32 of 2004 regarding Regional Government appoints the Supreme Court to decide the disputes concerning the vote count results in the election of the regional head and Deputy Regional Head. Article 106 paragraph (1) to paragraph (7) of the Regional Government Law provides for the settlement of the disputes on the General Election of Regional Heads as follows:<sup>43</sup>

#### Article 106

1. The objection to the determination of the result of the local leader's election and deputy regional head may only be submitted by the candidate pairs to the Supreme Court within no later than 3 (three) days after the determination of the result of local leader's election and deputy regional head.
2. The objection as referred to in paragraph (1) only relate to the vote count results affecting the election of the candidate pair.
3. Submission of objection to the Supreme Court as referred to in paragraph (1) can 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 election of the regional head and deputy head of regency/municipality.
4. The Supreme Court shall decide upon The dispute over vote count results as referred to in paragraph (1) and paragraph (2) not later than

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<sup>43</sup> Republik Indonesia, *Undang-Undang Tentang Pemerintahan Daerah*, Undang-Undang Nomor 32 Tahun 2004 (*The act of Local Government Administration, act No 32 2004*)

14 (fourteen) days after the receipt of the objection by the District Court/Supreme Court/Supreme Court.

5. The decision of the Supreme Court as referred to in paragraph (4) the characteristics are final and binding.
6. The Supreme Court in exercising its authority as referred to in paragraph (1) can delegate to the Court of Appeal to decide The dispute over the vote count results of The election of the regional head and deputy head of regency and municipality.
7. The decision of the Court of Appeal as referred to in paragraph (6) the characteristic is final.

As the implementing regulation of the Law on a Regional Government, Government Regulation Number 6 2005 which is set forth in Article 94 paragraph (1) to paragraph (7) stipulates the provision of the dispute settlement on the result of local leader's election which is as follows:<sup>44</sup>

**Article 94**

1. The objection to the determination of the election result can only be submitted by the candidate pairs to the Supreme Court within no later than 3 (three) days after the determination of the election result.
2. The objection as referred to in paragraph (1) only relate to the vote count results affecting the election of the candidate pair.
3. The filing of the objection to the Supreme Court as referred to in paragraph (1) can be submitted through the High Court for the election of the Governor and Vice Governor and the District Court for the election of Regent/Deputy Regent and Mayor/Deputy Mayor.
4. The Supreme Court decides upon The dispute over the 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/High Court/Supreme Court.
5. The decision of the Supreme Court as referred to in paragraph (4) is final and binding.
6. The Supreme Court in implementing the provisions referred to in paragraph (1) can delegate its authority to the Court of Appeal to

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<sup>44</sup> Republik Indonesia, Peraturan Pemerintah Nomor 6 Tahun 2005 (*Government Regulation No 6 2005*)

decide the dispute over vote count results of the election of Regent / Vice Regent and Mayor/Deputy Mayor.

7. The decision of the Court of Appeal as referred to in paragraph (6) the characteristics are final and binding.

Regarding the appointment of Supreme Court institutions to resolve the dispute over the results of the General Election of a regional head, the Government and the People's Legislative Assembly are merely obeying the principle or respecting the law. This is because Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia restricts the authority of the Constitutional Court, which is simply "to decide the disputes concerning election results."<sup>45</sup> It means that the authority to decide The disputes over the vote count results in The election of the regional head and Deputy Regional Head can not be given to the Constitutional Court, but to the Supreme Court.<sup>46</sup>

In addition, the provisions of Article 24 paragraph (1) of the 1945 Constitution of the State of the Republic Indonesia declare that "the Supreme Court has the authority to hear at appeal, to examine statutory laws under the law," and "to have other powers granted by law, invite ". Technically, the procedural procedure in The dispute over the results of the General Election in the Supreme Court is regulated in Article 2 paragraph (1) of the Supreme Court Regulation No. 2. The Supreme Court has the authority to examine the objection to the determination of the final vote count results from the Regional General Election Commission concerning the election of the regional head and Deputy Regional Head of Province".

The provision has an implication that in case of any objection to the determination of local leader's election result then the authorized institution checking is Supreme Court. This provision is in accordance with the duties and authorities of the Supreme Court, which is in charge and authorized to examine and decide the disputes over the authority to hear.

### **The Transition of Authority to Judge General Election of Regional Head The dispute Cases from the Supreme Court to the Constitutional Court**

The Constitutional Court in its development, get additional authority namely the authority to decide the dispute over Local Leaders Election, which

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<sup>45</sup> Rimdar, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, p. 223.

<sup>46</sup> See: Nur Rohim Yunus, *Restorasi Budaya Hukum Masyarakat Indonesia*, (Bogor: Jurisprudence Press, 2012), p.55.

previously was the authority of the Supreme Court. The Constitutional Court obtains this authority after the transfer of authority over the handling of the dispute over vote count results of the General Election of the Supreme Court.<sup>47</sup>

Actually, the handling of election the disputes is the authority of the Constitutional Court based on the 1945 Constitution of the Republic of Indonesia. However, due to the interpretation of Local Leader's election as part of the regional government, so that the implementation is done by the Election Commission. In the implementation, Regional General Election Commission is not responsible to the Central Election Commission but to the DPRD. The matter which made the handling of the General Election at that time was not the authority of the Constitutional Court because the authority of the Constitutional Court only decided upon the dispute over the election result held by the Central Election Commission.

With the existence of Law Number 22 2007 stating that the provincial KPU and Regency/Municipal KPU in organizing Pemilukada responsible to the Central Election Commission. This is what makes the Constitutional Court has the authority to decide the disputes over the results of the General Election. Because it is constitutionally only the Constitutional Court granted the authority to adjudicate the disputes over election results based on the 1945 Constitution of the Republic of Indonesia.

### **The Transition of Authority to Judge The disputes from the Constitutional Court Outside of the Constitutional Court**

The decision of the Constitutional Court Number 97/PUU-XI/2013, the Constitutional Court cancels its authority to examine and decide the dispute over the Regional Head Election. Based on the verdict, the intended election once every five years in Article 22E of the 1945 Constitution is the general election of members of the DPR, DPD, DPRD and President and Vice President simultaneously every five years or the election of five ballots.

The addition of authority scope of the Constitutional Court to The disputeresolution of regional head election due to the emergence of Article 236C of Law Number 12 of 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government and Article 29

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<sup>47</sup> Republik Indonesia, *Undang-Undang Tentang Pemerintahan Daerah*, Undang-Undang Nomor 12 Tahun 2008. (*the Act of Local Government Administration, act No 12 2008*)



paragraph (1) letter e Law Number 48 of 2009 on Judicial Power is contradictory to the 1945 Constitution

Thus, according to the Constitutional Court, the addition of the authority of the Constitutional Court to adjudicate cases of The dispute over the results of regional head elections by expanding the meaning of elections as regulated by Article 22E of the 1945 Constitution of 1945 is unconstitutional.

### **The Analysis of Decision of the Constitutional Court Number 97 PUU-XI/2013**

Through the Decision of the Constitutional Court Number 97 / PUU-XI/2013, the Constitutional Court (MK) cancels its authority to examine and decide the dispute over Local Leaders Election. The test application was submitted by the Law and Constitutional Studies Forum (FKHK), BEM Esa Unggul University, and the Jakarta Legal Student Movement (GMHJ).

Article 236C of Law Number 12 of 2008 regarding the Second Amendment to Law Number 32 of 2004 regarding Regional Government (State Gazette of the Republic of Indonesia in 2008 Number 59, Supplement to State Gazette of the Republic of Indonesia Number 4844) and Article 29 paragraph (1) letter e Law Number 48 of 2009 on Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076) is contradictory to the 1945 Constitution of the State of the Republic Indonesia.

In its legal considerations, the Court gives an opinion that in understanding the authority of the Constitutional Court as stipulated in Article 24C Paragraph (1) of the 1945 Constitution, it must re-look at the meaning of the text, *original intent*, comprehensive grammatical meaning to the 1945 Constitution. Therefore, general election according to Article 22E of the 1945 Constitution must be interpreted in a limited manner, namely elections held to elect members of DPR, DPD, President and Vice President and DPRD and implemented every five years.

Based on the verdict, the intended election once every five years in Article 22E of the 1945 Constitution is the general election of members of the DPR, DPD, DPRD and President and Vice President simultaneously every five years or the election of five ballots.

The Constitutional Court give opinion that if the inclusion of Local Leader's election becomes part of the general election so that it becomes the

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authority of the Constitutional Court to resolve The dispute over the results, not only does not match the *original intent* meaning of the election as described above, but also will make the General Election, not only every five years, but often, because the local leader's election is very much done in every five years with different time.

In addition, as has been the establishment of the Constitutional Court in the consideration of its decision No. 1-2/PUU-XII/2014 About the Tests of Law Number 4 of 2014 About Stipulation Perppu Number 1 of 2013 About The Second Amendment To Law Number 24 of 2003 About The Constitutional Court dated February 13, 2014<sup>48</sup>, the authority of the state institution which is limited by the 1945 Constitution of the Republic of Indonesia can not be increased or decreased by the Law and the Court's decision because it will take on the role of the 1945 Constitution.

Thus, according to the Constitutional Court, the addition of the authority of the Constitutional Court to adjudicate cases of the dispute over the results of local leader's election by expanding the meaning of elections as regulated by Article 22E of the 1945 Constitution of 1945 is unconstitutional. For the avoidance of doubt, legal uncertainty and the vacuum of the competent authority to settle the disputes over the results of the local leader's election due to the absence of a law regulating such matter, the resolution of the disputes over the results of local leader's election can remain the authority of the Court.

In the verdict, three constitutional judges have different opinions, namely Vice Chairman of the Constitutional Court Arief Hidayat, Constitutional Justice Ahmad Fadlil Sumadi, and Anwar Usman,<sup>49</sup> Arief revealed the duties and authorities of the Constitutional Court, should not only try to find the intentions of the constitution-makers but also try to find the meaning desired by the text of the constitutional norm itself to solve the legal problems faced in the present and the future. In addition, the Constitutional Court also has the authority to be able to live the constitution from time to time (the living constitution) to face various challenges that certainly will be different in each era.

While Anwar gives an opinion that if the Constitutional Court declares that it is not authorized to adjudicate the dispute over the General Election of

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<sup>48</sup> *The decision of the constitutional court number 1-2/PUU-XII/2014 about testing the act no 4/2014 on the provision of Perppu No 1 2014 on the second amendment of the act No 24 2003 on the constitutional court.*

<sup>49</sup> Look at the '*Dissenting Opinion*' on the decision of Supreme Court No 97/PUU-XI/2013, p. 65.

Regional Heads with the consideration not regulated in Article 24C Paragraph (1) of the 1945 Constitution, it should be stated since the first receipt of the petition for The dispute resolution in 2008. As it concerns absolute authority brings its own legal consequences.

Similarly, Fadlil's constitutional judge explained that since the system and mechanism of recruitment of regional head is the general election as referred to in Article 22E, the dispute over election result based on the above description is the dispute over election result (PHPU). Results The disputes are part of the system. Outcome The dispute as a system problem must be resolved.

For that there must be a forum that solves it. PHPU is a constitutional law The disputes related to the election as a mechanism in the implementation of constitutional rights in the political field, in a particular the *right to vote* and the right to be elected (*right to be voted or to be a candidate*).<sup>50</sup> The Constitutional Court is the judicial organizer as the dispute settlement forum by upholding law and justice based on the constitution. Therefore, based on Article 24C Paragraph (1), the Constitutional Court is authorized to hear PHPU regional head and thus the Petitioners' petition should be rejected.

Fadlil gives opinion that the provision of Article 236C of Law Number 12 of 2008 relates to Article 29 paragraph (1) sub-paragraph e of Law Number 48 of 2009 regarding Judicial Power which states: The Court has the authority to hear at the first and final level the decision of which is final to: e. other authorities granted by law.<sup>51</sup>

The authors hold that the General Election intended by the 1945 Constitution of the Republic Indonesia is the Presidential Election and the legislative election. Therefore, General Election is not the authority of the Constitutional Court, but the authority of the Supreme Court and the judiciary institutions under it. Because The dispute over the General Election of the decision of state institutions, namely the General Elections Commission, The dispute of Local Leader's election is included in the competence of the State Administrative Court (PTUN). While the handling is done by the High Administrative Court (PT TUN). It is intended to facilitate supervision or control as well as the range of authorities which includes the election of the Governor and Regent / Mayor.

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<sup>50</sup> Mahfud MD, *Politik Hukum di Indonesia*, cet.V, (Jakarta: Rajawali Pers, 2012), p. 214.

<sup>51</sup> Republik Indonesia, *Undang-Undang Tentang Mahkamah Konstitusi*, Undang-Undang Nomor 8 Tahun 2011 (*the Act of Constitutional Court, Act of 8 2011*)

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Concerns about anarchist action by supporters are not substantive issues in law because anarchist actions are influenced by many factors that can also occur in court at the Constitutional Court. Related to the possibility of Local Leader Election by DPRD the writer is of the opinion that the choice does not have an effect on the authority of the dispute settlement, because the election by DPRD or directly by the people is not an election regime intended by the 1945 Constitution.

## **Conclusion**

The implementation of General Election of Regional Head in Indonesia was initially done politically, where the Regional Head was elected through the DPRD since the enactment of Law Number 32 of 2004 regarding Regional Government. Then Since the enactment of Law Number 32 of 2004 regarding Regional Government, the regional head is elected directly by the people through the election of the regional head and Deputy Head of Region or abbreviated *Pemilukada*. *Pemilukada* was first held in June 2005.

Since the enactment of Law Number 22 of 2007 regarding General Election Organizer, General Election of Regional Head is included in the election regime, so officially named the General Election of Regional Head and Deputy Head of Region or abbreviated *Pemilukada*. In 2011, a new law on the organizers of the elections was issued, namely Law Number 15 of 2011. In this law, the term used is the Election of Governors, Regents, and Mayors.

Several factors causing the Constitutional Court to remove its authority to decide The disputecases of Regional Head General Election are among others: 1). Judicially reviewed, Law Number 22 of 2007 and Article 236C of Law Number 12 of 2008 which became the reason of the Constitutional Court increased its authority which initially only decided The dispute over the election results of the President, DPR, DPRD and DPD to increase by deciding The dispute on the general results. Second, Judging Philosophically, the Constitutional Court tends to be the Election Court because the number of the disputed election cases handled more volume than the Judicial Review which is the main authority of the Constitutional Court. Third, Sociologically Reviewed. The name of the Constitutional Court is false in the case of a bribery case in the Election The dispute over the former Chief Justice of the Constitutional Court Akil Mochtar, whereas in fact it has an important role in the settlement of the dispute over the General Election of Regional Heads.

For now, The dispute on the Result of the Regional General Election (PHPUD) is brought to the Supreme Court according to the new Law related to the Election of Regional Head, namely Perppu Pemilukada Number 1 of 2014.

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