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## ASPECTS OF DEMOCRATIC CONSTITUTIONALISM IN THE APPOINTMENT OF ACTING REGIONAL HEADS

Athari Farhani

# Aspects of Democratic Constitutionalism In The Appointment of Acting Regional Heads\*

Athari Farhani<sup>1</sup>

Airlangga University, Surabaya



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## **Abstract**

*The upcoming General Elections and Regional Head Elections, which will be held in 2024, will reap probelmatics. One of them is about the appointment of acting regional heads which is considered contrary to democratic aspects, because there is no community involvement or inaccessibility to the mechanism for appointing acting regional heads. On the one hand, the Government does not heed the Decision of the Constitutional Court to issue implementing regulations as a follow-up to Article 201 of Law Number 10 of 2016 concerning Regional Elections. In fact, it is clear that the Constitutional Court is the guardian of constitution as well as the guardian of democracy. This is what makes the author want to do more research to answer the above problems. To answer this, the author uses a normative research method, namely by researching library materials or secondary data as basic materials for research. The approach used is a conceptual and statute approach.*

**Keywords:** *General Election; Democratic Constitutionalism; Acting Regional Heads*

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<sup>1</sup> **Athari Farhani** is a Master of Law Student in Faculty of Law. Airlangga University. Surabaya. Email: [tarilaw835@gmail.com](mailto:tarilaw835@gmail.com)

## A. INTRODUCTION

Indonesia is a country of law as stipulated in Article 1 paragraph (3) of the Constitution of the Unitary State of the Republic of Indonesia of 1945. In the constitution (UUD NRI 1945) the framework of the state and the Indonesian system of government is also strictly regulated, that the Indonesian State is a unitary state in the form of a Republic, where the people are the holders of the highest sovereignty. So that Indonesia can be said to be a constitutional state that presupposes democracy with the form of a unitary Republic (Nucholis, 2007: 100).

One of the main principles adopted by the Indonesian nation in state life is to uphold the understanding of people's sovereignty. The sovereignty of the people itself cannot be separated from democracy, where the realization of a democratic state the people elects its representatives who will make and carry out decisions not only at the central level but also in the regions (Arrsa, 2014: 527). This democratic process is then manifested through an election procedure or what is commonly referred to as elections, which in essence elections have an important meaning in the administration of the state as mandated by Article 22E paragraph (1) of the 1945 NRI Constitution which reads "Elections are held directly, freely, secretly, honestly and fairly every five years." (Gaffar, 2013: 7).

76 years after the founding of the Unitary State of the Republic of Indonesia, the implementation of elections has taken place 12 times under 3 different constitutional legal regimes. Election arrangements in Indonesia also often change over time, this is inseparable from regulatory changes in every election implementation that has legal, economic and socio-cultural political dynamics (Riwanto, 2016: 2). Elections are a tangible manifestation of procedural democracy, although democracy is not the same as elections, but elections are one of the most important aspects of democracy that must also be held democratically. Therefore, it is common in countries that call themselves democracies to direct elections to elect public officials in the legislative and executive spheres both at the central and

regional levels (Prasetyoningsih, 2017: 242). Veri Junaidi stated that elections and democracy are a "*qonditio sine qua non*", *the one can not exist without the others*. In the sense that elections are interpreted as a procedure to achieve democracy or are a procedure for transferring the sovereignty of the people to certain candidates to occupy political offices (Junaidi, 2009).

In 2024, Indonesia will hold a democratic party, namely simultaneous elections and regional elections. As stipulated by the General Election Commission (KPU), simultaneous general elections or elections to elect the President and Vice President, members of the DPR RI, DPD RI, Provincial DPRD and Regency/City DPRD on February 14, 2024. As well as regional head elections, namely the election of governors and deputy governors, regents and deputy regents, as well as mayors and deputy mayors simultaneously on November 27, 2024. Regarding the simultaneous regional elections, there are 271 regional heads completed in 2023 and 101 in 2022, this has caused a vacancy in the position of regional head. Based on law number 10 of 2016 concerning Regional Elections, Article 201 paragraph (9) states that, to fill the vacancy in the position of regional head, an acting regional head is appointed until the election of a new regional head.

The appointment of the acting regional head also reaped pros and cons, until there was a request for a material test regarding Article 201 of Law Number 10 of 2016 concerning Regional Elections regarding the appointment of the State Civil Apparatus as the acting regional head which was considered to be injurious to democracy and contrary to the principle of people's sovereignty. However, the Constitutional Court rejected the application for the Material Test, because the Constitutional Court in its ruling considered that the appointment of an acting officer from among the State Civil Apparatus to fill the vacancy of the regional head leader whose term of office expired in 2022 and 2023 did not eliminate the constitutional right of the community in choosing regional heads.

As per Law Number 23 of 2014 concerning Regional Government, the appointment of acting regional heads is indeed the prerogative of the president, and the assignment of acting governors and regents/mayors is carried out by the Minister of Home Affairs. However, the process and mechanism for appointing acting regional heads only refers to the provisions of the Regional Election Law, namely Law Number 23 of 2016 which regulates the filling of vacancies in the position of regional head filled by temporary acting until the election of regional heads in the 2024 simultaneous regional elections and regulates the formal requirements for acting regional heads, where the Governor is filled by an Associate High Leadership Officer, while the Regent/Mayor is filled by the Primary High Leadership Officer. Although in the Local Government Law, the acting regional head has the same duties and authorities as the regional head such as: Submitting a draft bylaw, establishing regional regulations that have obtained joint approval from the DPRD, Determining Regional Regulations and regional head decisions, Taking certain actions in urgent circumstances that are urgently needed by the Region or the community, Implementing other authorities in accordance with the provisions of laws and regulations.

However, in the process and mechanism for the selection of acting officers carried out by the government, many parties consider it injurious to the principles of democracy and people's sovereignty, because the government in this case does not prioritize the principle of openness to the election of acting heads who are appointed to occupy the position of acting regional head. The DPRD as a representation of representation even though the community is not involved, and there are not even standard rules that become a reference for the government regarding clear mechanisms and conditions for the appointment of acting regional officers.

So in this case, it is necessary to study further about the principle of democracy in the appointment of regional acting officers, as well as how the responsibility of regional heads with

acting regional heads is and how to categorize acting regional heads in constitutional aspects and local government law.

From the discussion above, the writer focuses on several questions, including: How is the Application of Democratic Principles in Filling the Acting Regional Head? What are the Aspects of Democratic Constitutionalism for the Appointment of Acting Regional Heads?

## **B. METHODS**

This research is regarded as being a component of the regular legal research, which belongs to the field of research carried out in libraries (library research). Primary data, which consists of legislation, and secondary data, which consists of various pieces of literature that are relevant to the subject that is being investigated, are the two forms of data that are utilized in this process. The author of this study uses a descriptive technique for the investigation. This methodology involves data collecting ways and methodologies gathered from library research (library research). During the process of evaluating the data, the content analysis methodology was applied, and the process of checking the validity of the data entailed triangulation, the use of reference materials, examining the data, and testing the dependability of the information.

## **C. RESULTS AND DISCUSSION**

### **1. Application of Democratic Principles in Filling Acting Regional Heads**

After World War II, elections were a constitutional political practice that was very common in many countries. It is a historical application of the victory of democracy in the face of other ideas, ideologies, and regimes. Until now, almost all countries have no one to reject the idea of democracy, even a country that does not practice democracy claims to be a democratic country. Indeed, elections are not just an arena to

express the freedom of the people in choosing their leaders, but also as a means of assessing the performance of their leaders. Thus, the leaders of the people who became representatives of the people and sat in the government, were selected directly by the people. So at this point the pemi showed his ability to translate the idea of democracy and popular sovereignty ([www.rumahpemilu.org](http://www.rumahpemilu.org)).

The meaning of democracy dates back to the term Classical Greek in the 5th century BC. The term, which was introduced for the first time in Athens, comes from two words, namely *demos* which means people, and *kratos / cratein* which means *government (rule)* or *power (strength)* (Bastian; Luckham, 2003: 15). In the conceptual realm, democracy can be defined as a government that is carried out based on the sovereignty of the people as the highest peak of power, or what we commonly know as the government of the people, by the people, and for the people (Budiardjo, 2002: 10). Abraham Lincoln in 1867 gave the definition of democracy as "*government of the people, by the people, and for the people*".

Indeed, elections are not the only instrument of democracy, but are very important instruments considering that elections are one of the most important elements for caring for popular sovereignty (Santoso, 2019: 12), as they put the people as the main point of holding primary sovereignty (Fajlurrahman, 2018: 18).

As Powell pointed out that with elections the state is seen as having a democratic political system:

*"Election are not the only instrument of democracy. They must be helped by other organizations and by rules that encourage communication and cooperation. But elections seem to be the critical democratic instrument. They claim to establish connections that compel or greatly encourage the policy makers to pay attention to citizens. There is widespread consensus that the presence of competitive elections, more than any other feature, identifies a contemporary nations-state as a democratic political system."* (Santoso, 2019: 12)

In Indonesia, general elections are held to elect members of representative institutions, the president and vice president regulated in the Constitution article 22E of the 1945 Constitution, the provisions on elections are clearly and in detail, as follows: 1) General elections are held directly, publicly, freely, confidentially, honestly, and fairly every five years; 2) General elections shall be held to elect members of the House of Representatives, the Regional Representative Council, the President and Vice President and the Regional People's Representative Council. 3) Participants in the general election to elect members of the House of Representatives and members of the Regional People's Representative Council are political parties 4) Participants in the general elections to elect members of the Regional Representative Council are individuals. 5) Elections shall be held by an election commission of a national, permanent, and independent nature. 6) Further provisions on elections are regulated by law.

2024 will be the momentum for the implementation of the democratic party, because the elections for the President, Vice President, DPR, DPD, DPRD and Regional Head Elections such as Governors, Regents/Mayors will be held simultaneously. This is in accordance with the decision of the Constitutional Court Number 55 / PUU-XVII / 2019 which is the result of a test of the constitutionality of the implementation of simultaneous elections. Regarding regional head elections (pilkada) which will be held simultaneously in 2024, it has problems, because in 2022-2023 around 500 more regional heads at the Governor, Regent/Mayor level whose terms of office have expired, Thus causing a legal vacuum. Although there have been rules of Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Establishment of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Law which was later referred to as the Election Law. Article 201 Paragraph (9) states that to fill the vacancy in the position of regional head, an acting regional head is appointed until the election of a new regional head.



The position of acting interim (Pjs) of regional heads has also been regulated in the regulation of the Minister of Home Affairs of the Republic of Indonesia Number 1 of 2018 concerning Amendments to the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 74 of 2016 concerning Leave beyond State Dependents for the Governor and Deputy Governor, Regent and Deputy Regent, as well as the Mayor and Deputy Mayor. In this change, the Central Government through the Minister of Home Affairs may appoint a temporary Acting Regional Head of the Province by a person who occupies an intermediate/level high position within the central government and does not have to be from the scope of the ministry of home affairs or provincial local governments only as before. Likewise with the District / City Level which can be filled by a person who occupies a high position of Primary.

In the decision of the Constitutional Court Number 67/PUU-XIX/2021, it has also strengthened the filling of acting regional heads to fill vacancies in positions during the transitional period and as long as the appointed acting officers have met the qualifications by law. Even the filling of the position of regional head is still within the scope of democratic meaning as per Article 18 paragraph (4) of the 1945 NRI Constitution.

However, the mechanism for appointing a temporary acting officer in practice does not prioritize openness and involvement of community participation, as well as representation in the DPRD. This ultimately causes doubt among the people and is alleged to have injured democratic principles that uphold the values of justice and openness. In fact, filling the vacancy of the regional head should be filled by people who have competence, integrity and are in accordance with regional aspirations and regional progress.

As stated by Andrei Marmor in *An Institutional Conception of Authority* states that: *"Practical authorities typically operate in institutional practices, rarely in social practices that have not become institutionalized to some degree. The reason is that practical authorities*

*are constituted by superpowers that must be granted by a fairly complex set of interlocking norms” or which when interpreted is praktek authority usually occurs in institutional practice, rarely in social practices that do not have a certain institutional level. The reason is that the practice of authority is formed by superpowers given by a set of interrelated and fairly complex norms (Marmor, 2011: 248). Therefore, the position of regional officials who are replaced by acting regional heads is considered to have a very strategic role as an acceleration of the development of daerah development can be realized properly.*

## **2. Duties and Responsibilities of the Acting Regional Head with the Head Elected Based on the Regional Elections**

As a state that has a very large area with a diversity of tribes, cultures and regions consisting of provinces, kabupetn / cities, the 1945 NRI Constitution regulates regional government as stated in Article 18 of the 1945 NRI Constitution, which explains that the Indonesian State consists of large regions (Provinces) and small regions (Regencies / Cities) which are autonomous. This causes the existence of local governments as provisions that have been stipulated by the Constitution and need to be realized in the Indonesian government order. As for what is meant by the regions, it is the Regional Government. The concept of regional government based on decentralization and deconcentration will form units of government that are lower than the central government, each of which is led by a head of government, where decentralization will give birth to autonomous regions led by the Head of the autonomous region (Marwi, 2016: 542).

In this case, the role of regional heads has a central role, considering that regional heads are the main component for the success of national development. The position of the regional head is a figure that determines the efficiency of achieving the goals of the regional government he leads. Because the regional head is a scope of office that leads the implementation of regional government. Logeman even explained that a position is a

function in a public organization called the state, which has a detailed work environment function in the entire series of organizations (Setiawan, 2017: 25). The position of regional head is also limited by law, in Indonesia itself regarding the position of regional head for five (5) years. In the event of a vacancy of office because the term of office has expired, a temporary acting officer whose qualifications have been appointed in the Election Law.

As for the authority and duties of the regional head with the acting regional head having the same duties and authorities as stipulated in the Local Government Law. The authority of the acting regional head includes: a). Submit a draft bylaw; b). Establishing bylaws that have received joint approval from the DPRD; c). Establishing regional regulations and decisions of regional heads; d). Take certain actions in urgent circumstances that are urgently needed by the Region and/or the community; e). Exercise other powers in accordance with the provisions of laws and regulations.

Meanwhile, the duties of the acting regional head include: a). Lead the implementation of Government Affairs which is the authority of the Region based on the provisions of laws and regulations and policies established with the DPRD; b). Maintain the peace and order of society; c). Prepare and submit a draft perda on rpjpd and draft perda on rpjmd to the DPRD for discussion with the DPRD and compile and determine the RKPD; d). Prepare and submit a draft perda on the regional budget, a draft bylaw on changes to the regional budget, and a draft bylaw on the accountability of the implementation of the regional budget to the DPRD for joint discussion; e). Represents his county in and out of court, and may appoint a legal representative to represent him in accordance with the provisions of laws and regulations; f). Propose the appointment of deputy regional heads; g). Carry out other duties in accordance with the provisions of laws and regulations.

Regarding the authority of the Acting Regional Officer, it is not only regulated in the Local Government law but also

regulated in the permendagri regulations including: a). Lead the implementation of government affairs that become regional authorities based on the provisions of laws and regulations and policies established with the Regional People's Representative Council; b). Maintain the peace and order of the community; facilitate the holding of elections for governors and deputy governors, regents and deputy regents, mayors and deputy mayors who are definitive and maintain the neutrality of civil servants; c). discuss the draft Regional Regulation and may sign the Regional Regulation after obtaining written approval from the Minister of Home Affairs; d). fill in officials based on the provisions of laws and regulations after obtaining written approval from the Minister of Home Affairs.

Although the acting regional head has the same duties and functions, there are restrictions on the authority of the acting regional head because his existence is based on appointments not election results. The eradication of the authority of the acting regional head is regulated in Government Regulation (PP) Number 6 of 2005 concerning the election, ratification, appointment and dismissal of regional heads and deputy regional heads including: a). Conducting employee mutations; b). Canceling permits that have been issued by previous officials and/or issuing permits that are contrary to those issued by previous officials; c). Make policies on regional expansion that are contrary to previous policies; d). Make policies that are contrary to the government's administration policies and previous official development programs. The restrictions on authority as referred to can be excluded after obtaining written approval from the Minister of Home Affairs.

### **3. Analysis of Aspects of Democratic Constitutionalism Appointment of Acting Regional Head**

The appointment of the Acting Regional Head and the inauguration of the Acting Head have taken place on May 12, 2022, as for the head of the province who was inaugurated by the Acting Governor of Banten, Acting Governor of the Bangka

Belitung Islands, Acting Governor of West Sulawesi, Acting Governor of Gorontalo, Acting Governor of West Papua. The appointment of the acting regional head is the impact of the implementation of the Simultaneous Regional Elections which will be held in 2024.

The implementation of simultaneous elections including simultaneous regional head elections is the implementation of the Constitutional Court decision Number 55 / PUU-XVII / 2019. In the decision of the Constitutional Court, it does not only refer to its decision on simultaneous elections but what is interesting is that the Constitutional Court has also provided valuable legal reasoning for the renewal of constitutional interpretation, especially regarding the legal framework-design of the simultaneous election system, in a quo, 3 aspects of ratio decidendi or legal considerations that are the main aspects in the opinion of the Panel of Judges include: The meaning of conducting simultaneous elections based on the original intent of the 1945 NRI Constitution, Tracing the meaning of simultaneous elections in the Constitutional Court Decision Number 14/PUU-XI/2013 and the relationship between simultaneous elections in order to strengthen the presidential system in Indonesia.

Indonesia itself has regulated the implementation of democratic elections through the regulation of election principles as mandated by Article 22E paragraph (1) of the 1945 NRI Constitution, namely the principles of direct, general, free, confidential, honest, fair, legally certain, orderly, open, proportional, professional, accountable, effective and efficient. As for the election of regional heads, it is regulated in the second amendment to the 1945 NRI Constitution which confirms that: Governors, Regents and Mayors respectively as heads of government of provinces, districts, and cities are democratically elected.

In addition, the implementation of simultaneous regional elections also refers to Law Number 10 of 2016 concerning the Election Law. The law has also been carried out a Material Test

related to the provisions of Article 201 regarding the appointment of ASN as acting regional head because it is considered contrary to the principle of people's sovereignty. However, the Constitutional Court rejected the application, because according to the Constitutional Court, the acting regional head is only temporary to fill the vacancy in the position of regional head, and the vacancy of regional head leaders whose terms end in 2022 and 2023 do not eliminate public constitutional rights.

If referring to the Constitutional aspects and provisions regarding the appointment of acting regional heads does have a legal basis, we can see in Article 4 of the 1945 NRI Constitution that the President Holds government power according to the NRI Constitution of 1945, Article 18 (2) which regulates the affairs of local government according to the principle of autonomy and auxiliary duties, Article 18 paragraph (4) concerning heads of regional governments elected democratically, and Article 18A (1) regarding the need to pay attention to the specificity and diversity of the region.

Meanwhile, at the level of the regulatory framework including: Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Establishment of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Law, this law regulates the provisions of Simultaneous Regional Elections, as well as Acting Regional Heads, Regional Government Law Number 23 of 2014 Jo Law Number 9 Year 2015 Jo Law Number 11 of 2020 concerning the Job Creation Law which regulates the principle of autonomy, the authority of local governments and regional heads, the NSPK in the Job Creation Law, government administration law number 30 of 2014 which regulates the principles of good governance, conflicts of interest and discretion, there is also Government Regulation (PP) Number 17 of 2020 Amendments to Government Regulations Number 11 of 2017 concerning Civil Service Management regarding the requirements for intermediate high

positions and primary heights, Government Regulation (PP) Number 12 of 2018. Drafting Guidelines The Rules of the Provincial, Regency, and City Regional People's Representative Councils which regulate the authority of the DPRD to elect regional heads in the event of a vacancy of more than 18 months, and there is also a regulation of the Permendagri Number 1 of 2018 concerning Leave for governors/deputies, regents/deputies, mayors/deputies, this permendagri regulates the authority and duties of temporary officials.

Constitutional aspects and various regulations govern comprehensively regarding the Acting Regional Head. Even the decision of the Constitutional Court through decision Number 67/PUU-XIX/2021, Decision Number 15/PUU-XX/2022, Decision Number 18/PUU-XX/2022, the Constitutional Court expressly rejected the petitioners' application entirely, the Constitutional Court also stated that the holding of national simultaneous regional elections in 2024 and the filling of the acting as a consequence is something constitutional, the Constitutional Court's decision is a solution and a way to deal with various controversies and speculations regarding legitimacy and accountability appointment of acting regional head.

Although the Constitutional Court rejected the application, the Constitutional Court gave signs in consideration. The signs in the Constitutional Court's decision include:

- The national elections in November 2024 are part of the *transitional provisions* that contain adjustments to the regulation of legal actions or existing legal relations based on the old laws and regulations..
- The Constitutional Court considers that the delay in the fulfillment of the right *to vote* and the right to be candidate in some regional *elections* in order to carry out the 2024 regional elections is still within the framework of limiting the constitutional rights of citizens as specified in Article 28J Paragraph (2) of the 1945 Constitution.

- The Constitutional Court also emphasized the process of filling the vacancy of the regional head's office which is still within the scope of the meaning of "democratically" as stipulated in Article 18 paragraph (4) of the 1945 NRI Constitution. So it needs to be considered and considered for the government to issue implementing regulations as a follow-up to Article 201 of Law Number 10 of 2016, so that there are measurable and clear mechanisms and requirements that the filling of acting regional heads does not ignore democratic principles and can provide assurance to the public that the mechanism for filling in acting is open, transparent, and accountable to produce competent leaders, intrudent and in accordance with the aspirations of the region and work sincerely for the community and the progress of the region
- Given the central role possessed by regional heads and deputy regional heads by considering the length of time the regions are led by the acting regional heads, the Constitutional Court provides a view that it is necessary to consider the granting of the authority of the acting regional head in the transition to the same national elections as the definitive regional head. This is because, with the full authority possessed by the acting regional head, the acceleration of regional development development is still realized without any difference between the regions led by the acting regional head and the definitive one.
- TNI soldiers and members of the National Police of the Republic of Indonesia cannot become acting regional heads unless they have withdrawn from the asset service and have the status of JPT Madya, or JPT Pratama in accordance with the provisions of the ASN Law, which is obtained openly and competitively. More explicit legal considerations of the Constitutional Court are contained in the decision of the Constitutional Court Number 15/PUU-XX/2022 which confirms that active TNI/Polri



personnel cannot be appointed as acting regional heads (contained on pages 50-52)

- The process of appointing acting regional heads, the government first makes a mapping of the real conditions of each region and the needs of acting regional heads who qualify as acting regional heads and pay attention to regional interests and can be evaluated at any time periodically by authorized officials. So as to produce qualified acting regional heads in leading the region.

#### **D. CONCLUSION**

The regions are a central part in the implementation of national development and welfare equally, this causes the position of regional heads as implementers of the principle of centralization and deconcentration to be important and strategic. With the implementation of the upcoming 2024 Simultaneous Regional Elections, as many as 500 more regional heads whose terms of office have expired. This led to a legal vacuum in the position of regional head. Even though there are regulations governing the filling of vacancies by appointing acting regional heads at the Provincial and Regency / City levels, the author considers that it still has various weaknesses. Because there are no clear rules governing the mechanism, selection, and appointment of Acting Regional Heads, especially in the context of simultaneous regional elections. the absence of clarity on the authority of the acting, whether it refers to the authority of the definitive regional head or the PJs(ementara). The government should comply with the signs in the Constitutional Court Decision regarding the need to issue implementing regulations set by the President which contain details about the mechanism for selecting candidates for acting, requirements for candidates for acting, mechanisms for determining acting, authority of acting regional heads during their temporary tenure, mechanisms for supervision and sanctions against acting regional heads during their temporary tenure, as well as the involvement and participation of regional communities.

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