REORGANIZING PEMILUKADA ARRANGEMENT

PERLUDEM RESEARCH TEAM

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FOREWORD

Direct election for heads of regions and deputy heads of regions has become integral part in the development of democracy in Indonesia. Democracy consolidation at the local level is believed to be the crucial part to achieve stronger and democratic consolidation at the national level. And after the inclusion of Pilkada, also known as Pemilukada, as part of Election regime reaffirms the role and function of Pilkada as an important part of democratization process in Indonesia.

The options to interpret the provision of Article 18 paragraph (4) of the 1945 Constitution stipulate that "*Governors, District Heads and Mayors respectively are the head of provincial, district, and city government which are democratically elected.*" by choosing the mechanism of direct election as stipulated in Law No. 32 Year 2004 on Local/Regional Government is a very suitable option in managing Indonesia transition from the authoritarian era to the era of the real democracy. Election for heads of regions and deputy heads of regions has a better quality after the Constitutional Court decided the necessity participation of independent candidates, which later is strengthen with the Law No. 12 Year 2008 regarding the Second Amendment to Law No. 32 Year 2004.

Nevertheless, it must be admitted there are still many problems in the first period and also the second period implementation of Pemilukada. Those problems are, *first,* confusions and uncertain concept of the legal frameworks that still remains for the election organizer, participants, and also voters, which often resulted in a conflict and security problems in the region. Rules that are not clear and multi interpretations eventually contributes to the series of problems in organizing election stages, for example, the chaotic of voters list and candidacy, uncontrolled campaign, until problems in the voting and counting process.

Second, problems of election system and candidacy method. The candidacy system give chances for political party, coalition of political party, and also individual candidate pairs to nominate the candidates raises so many candidates which followed by problems and high cost practice, both financially and politically (or money politic). Furthermore the chance for non-seated DPRD political party to nominate the candidates who acquire 15% valid votes in the last legislative election brings more troubles than advantage to Pemilukada. Some of the problems are the increasing of many dual supports in candidacy, and loads of political transactions among themselves.

Third, problems regarding the stages of election implementation caused by unprepared of the election organizers, the immaturity of the candidates, and also the voters acceptability for the process of the election stages. We still encounter many election organizers are neither professional nor capable enough in organizing Pemilukada (though we have to admit this happens caused by the contribution of the problematic legal framework). Furthermore, the implementation of Pemilukada usually have no problem (or not being disputed) at the first stages of Pilkada. The candidates and their supporters will protests and refuse at the stages of votes counting result which often ended with riots and horizontal conflicts among them.

Fourth, law enforcement and violation handling problems. The existing regulations cannot respond the actual and complex issues yet. The rules for the procedural law of violation handling are not yet detailed in the existing regulations (and again, it cause confusions in its implementation). The capacity of the law enforcer even creates new problems. This can be understood because there are lack of program to increase knowledge and capacity in handling various Pemilukada violations.

Fifth, Pilkada which presently are scattered in different areas and held at different times increased complexity in its implementation which eventually leads to swell and waste of budget. Even happen in a region that takes the budget for education and health to meet the allocated budget for Pemilukada implementation. Voters sooner or later got bored and run out of energy due to the constantly of election. No surprise there are decreasing graph of voters participation from legislative election to presidential election until Pemilukada.

Because of those various problems, Perludem conduct studies to review legal framework and implementation of Pemilukada which has been started for 2 (two) period (2008-2010). This study also found its momentum because it is done simultaneously with the process of preparing the draft Law on Heads of Regions Election which was initiated by MoHA and become priorities in national legislation program for year 2010 and 2011.

Hopefully the results of studies and recommendations prepared by Perludem can be useful and utilized by the law drafters and makers in the Government and the Parliament, as well as found to be beneficial for civil society groups, academics, media, and the public at large in reorganizing Pemilukada arrangement in Indonesia towards the democratic consolidation at the local level significantly better, to strengthen the integration and also effectiveness of national government.

Perludem's main ideas and recommendations divided into several sections. *First*, recommendations to rearrange the regulation on election system and implementation stages of Pemilukada which include proposed to raise minimum threshold of obtaining seats for party or coalition of parties increased to 25%; the party obtaining no seat cannot propose candidate pairs; support requirements for individual candidate pairs is derived and calculated based on 5% of the population, which previously varied according to population in each region; affirmative action for the women candidacy by reducing the support requirement for pair of candidates whom one of them is a woman. Furthermore, regarding to the implementation of election stages, Perludem recommend as long as Ministry of Home Affairs (MoHA) and Local Government have not managed to establish a population data based on the Single Identity Number (SIN) system, the preparation of voter list must entirely be the responsibility KPUD; need open space to implement e-voting and e-counting methods; the campaign period starts since candidate pairs establishment (not only 14 days as the existing regulation stipulate); and the determination for the elected candidate pair are fairly conducted only in a single round of Pemilukada.

Second, reorganizing Pemilukada arrangement and law enforcement, summarizes the recommendation which include criminal sanctions should be intensified and also associated with the imposition of administrative sanctions; Time limitation (expiry time) of reporting be extended between 1-6 years from the events or even adjusted to the provisions of Article 78 of KUHAP; definition, subject, qualification. and types of sanctions need to be clarified; Types of KPUD decisions and subjects that can be petitioned against should be clarified; there should be clarification also on which institution has jurisdiction over which case, whether it is judicial institutions: (PTUN/PTTUN/MA), or simply to the KPU (such as method of "administrative appeals"); objections against District KPUD decision/determination, should be able to be submitted to Provincial KPUD thereon; objections against the Provincial KPUD decision/determination, should be able to be submitted to the High Court to The last legal measure against the decision of the High Court is the submission of the case to the election special judge in the Supreme Court; MK should focus on disputes that may affect election results, while criminal and administrative violations, as well as administrative disputes, should be handled by other institutions.

Third, reorganizing Pemilukada implementation time, Pemilukada implementation time should be combined, not just in one province, but nationally by determining one period of time for all local elections, namely the elections to elect DPRD members and regional heads. Therefore provision for a transitional period is needed to prepare election schedule in each province or nationally.

In the context of this substance, several specific issues in the draft Law of Pemilukada (government version) that concern Perludem research team are governors election done indirectly by Provincial DPRD; election Head of the region without the Deputy (remove the deputy from direct election candidate pair); and the jurisdiction over Pemilukada result disputes shall be returned to Supreme Court. For the issue governors election done indirectly by Provincial DPRD and election Head of the region without the Deputy, Perludem assume there's no need to do amendment on the existing provisions, because direct election has a clear constitutionality and the most concrete manifestation of the principle of people sovereignty. While for the jurisdiction over Pemilukada result disputes problem, Perludem believe that the jurisdiction must remain under MK's control. Not only to maintain the quality of the disputes resolution but also as a consequence of regional head elections as part of the Election regime.

Finally, on behalf of Perludem, we would like to thank all those who have contributed to the preparation of this study. Thanks to Prof. Dr. Djohermasyah Djohan (MoHA Director General Regional Autonomy), Mr. Ganjar Pranowo (Vice Chairman of Commission II of DPR RI), Mrs. Nurul Arifin (Member of Commission II of DPR RI), Mr. Malik Haramain (Member of Commission II of DPR RI), Mr. Arif Wibowo (Member of Commission II of DPR RI), Prof. Ramlan Surbakti, Ph.D (Senior Advisor Partnership for Government Reform/UNAIR), Mrs. R. Siti Zuhro, Ph.D (LIPI), Prof. Denny Indrayana, Ph.D (Special Staff of the President of Legal Affairs), Mr. J. Kristiadi (CSIS), Prof. Dr. Syamsuddin Harris (LIPI), Mrs. Endang Sulastri (KPU), Mr. Nur Hidayat Sardini (Bawaslu), Mrs. Andi Nurpati, Mr. Dr. Yuddy Chrisnandy, Mr. Bima Arya, Ph.D, dan Mr. Indra J. Piliang.

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Jakarta, March 31, 2011

Titi Anggraini
Executive Director

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Bawaslu	:	Election Supervisory Agency (Badan Pengawas Pemilu)
DPD	:	Regional Representatives Council (Dewan Perwakilan Daerah)
DPP	:	Political Party National Leadership Board (Dewan Pimpinan Pusat)
DPR	:	The People's Representatives Assembly (the National Parliament)
DPRD	:	The Regional People's Representatives Assembly (local Parliament at District or Province level)
DPS	:	Temporary Voter List (Daftar Pemilih Sementara)
DPT	:	Permanent Voter List (Daftar Pemilih Tetap)
ICG	:	International Crisis Group
IDEA	:	Institute for Democracy and Electoral Assistance
IFES	:	International Foundation for Electoral System
MoHA	:	Minister of Home Affairs
KPPS	:	Voting Organizer Group
KPU	:	General Election Committee (Komisi Pemilihan Umum)
KPUD	:	Regional General Election Committee (Komisi Pemilihan Umum Daerah)
LHKPN	:	State Official's Wealth Report (Laporan Harta Kekayaan Penyelenggara Negara)
MA	:	Supreme Court (Mahkamah Agung)
Menkumham	:	Minister of Law and Human Rights
MK	:	Constitutional Court (Mahkamah Konstitusi)
Panwaslu	:	Election Supervisory Committee (Panitia Pengawas Pemilihan Umum)
Parpol	:	Political Party
PBB	:	Land and Building Tax (Pajak Bumi dan Bangunan)
Pemilu	:	General Election
Pemilukada/Pilkada	:	Heads of Regions and Deputy Heads of Regions General Election (Pemilihan umum kepala daerah dan wakil kepala daerah)
Peraturan Pemerintah	:	Government Regulation
Perludem	:	Perkumpulan untuk Pemilu dan Demokrasi
PERMA	:	Supreme Court Regulation
PHPU	:	Regional Election Results Disputes (Perselisihan Hasil Pemilihan Umum)
Pileg	:	Legislative election
Pilpres	:	Presidential election
PMK	:	Constitutional Court Regulation
PN	:	*local District Court* (Pengadilan Negeri)
PNS	:	Civil Servant Employee (Pegawai Negeri Sipil)

PPK	:	Sub-District Election Committee (Panitia Pemilihan Kecamatan)
PPS	:	Village Election Committee (Panitia Pemungutan Suara)
Prolegnas	:	national legislation program (Program Legislasi Nasional)
PT	:	High Court (Pengadilan Tinggi)
PTUN	:	State Administrative Court (Pengadilan Tata Usaha Negara)
RI	:	Republik Indonesia
RUU	:	Draft Law (Rancangan Undang-Undang)
SEMA	:	Supreme Court Circular Letter (Surat Edaran Mahkamah Agung)
SIN	:	*Single Identity Number*
TPS	:	Polling Post (Tempat Pemungutan Suara)
UU	:	Law (Undang-Undang)
UUD1945	:	Constitution of The Republic of Indonesia Year 1945 (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945)

CHAPTER I
INTRODUCTION

A. BACKGROUND

After the first period of 2005-2008, the regional head and deputy election (Pemilukada) has entered a second period of 2010-2013. From the first period many lessons could be learned in order to improve Pemilukada. Unfortunately the tight political agenda of the government and House of Representative's (DPR) have prevented a comprehensive evaluation of Pemilukada implementation that should have involved all stakeholders from being done. Nevertheless the government and DPR have come to realize that in order to increase the quality of Pemilukada process and result, it is necessary to re-compose Pemilukada's laws and regulations. This is why the Law (UU) on Pemilukada has been included in the national legislation program.

In the 2011 National Legislation Program (2011 Prolegnas), the Draft Law on Regional Head Election (RUU Pilkada) is at No. 42, with the Government as the initiator. Furthermore, the Government has appointed the Ministry of Home Affairs (Kemendagri-MoHA) to be in charge of composing Academic Paper and Draft Law on Pemilukada.[1] In fact this Draft Law was already in the 2010 National Legislation Program[2] but it had not been discussed together by the Government and House of Representatives (DPR). Therefore Law No. 32 regulations on Pemilukada that are contained in Law No. 32 Year 2004 on regional/Local government will be deleted from the Law and written into a new law.

In formulating the Pilkada Draft Law (RUU Pilkada), the Ministry of Home Affairs has conducted series of discussions with academics and General Election observers.[3] It is not clear when the discussion on Pemilukada Draft Law will take place in 2011. However the Head of Commission II in DPR indicated that the discussion will only start after the discussion on the Amendment on Law No. 22 Year 2007 on General Election Organizer is completed.

Why is it necessary to make Pemilukada regulation as a separate law? Technically, it will be more easily understood by all parties involved in organizing Pemilukada. Substantially, the Constitutional Court (MK) has put/ Pemilukada within the domain of General Election regime[4], consequently it must be taken out from Law No. 32 Year 2004 which still places Pemilukada within the domain of regional/Local Government regime. With the many problems occurring during the organization at Pemilukada in 2005-2008, it is important to reorganize it[5]. The

[1] For complete details see the List of National Legislation Program in Priority Legislation Draft for 2011 Budget Year.

[2] Draft Regulation (RUU) on Regional Head Election is at No. 53 in the List of Draft Regulations for 2010 National Legislation Program.

[3] Ministry of Home Affairs conducted public consultation on Pilkada Draft Regulation in 4 major cities in Indonesia: Palangkaraya, Mataram, Banda Aceh, and Jakarta.

[4] Constitutional Court's (MK) Decision No. 72-73/PUU/2004 put regional head and deputy election as part of General Election rezime. MK Legal Consideration on the Main Case stated that "Direct Pilkada is General Election which materialy aimed to implement Article 18 of 1945 Constitution" (page 110). Later that Decision is strengthened by the passing of Regulation No. 22 Year 2007 which legitimize Pemilukada as one of the types of Pemilu in Indonesia, Article 1 item 4 of Regulation No. 22 Year 2007 stated that Regional Head and Deputy Election is a General Election to elect regional head and deputy directly in the Republic of Indonesia based on Pancasila and 1945 Constitution."

[5] For example, the International Crisis Group (ICG) recorded about 10% of 200 regional head and deputy elections held in 2010 were related to violence. Such as in Mojokerto; East Java, Tana Toraja in South Sulawesi and Toli-Toli in Central Sulawesi. ICG stated that violence in Pilkada were triggered by weak position of General Election organizer which are Regional KPU and Panwaslu, also conflict between Pilkada participants. Further details see International Crisis Group (ICG): Indonesia: Preventing Violence in Local Elections, Asia Report No. 197 – December 8th 2010. Jakarta/Brussels, December 8th 2010. Aside from that, the high number of problems on organizing Pemilukada, can be seen from the number of dispute cases

problems mentioned above stemmed from the conflicting regulations within the law that serves as the legal basis for Pemilukada as well as the faulty practices during the organization of the election itself.

B. PROBLEMS SURROUNDING PEMILUKADA

Several problems occurred in Pemilukada can be categorized as follows, *First*, candidacy issue. The passing of Law No. 12 Year 2008 on the Second Amendment to Law No. 32 Year 2004 on Regional/Local Government, has made it possible to nominate a candidate pair (regional head and deputy) through three options namely nomination by a single or group of political parties which already obtained seats at the regional parliament (DPRD) or by a group of political parties which have not obtained any seats at the DPRD, or to nominate one's self as an independent candidate who obtained support from voters. Problems often faced by candidate pairs who are nominated by a group of political parties with no seats in the DPRD. Party or group of parties often revoked their support, which caused obstacles that disrupted or cancelled candidacy process nomination which in turn created local political conflicts.

Related to candidacy, often times the discourse developed by the government sparked polemics in society,, such as the idea to put additional requirement on the candidate's moral state. Also suggestion on nominating a head of region separately, meaning he/she would be elected separately from the deputy. This separate arrangement is because the deputy head is to be from the ranks of Civil Servant Employee (PNS).

Second, the issue of voting and counting votes. This problem occurred because there has been no existing synchronization in the electoral mechanism between Pemilukada, Legislative Election, and Presidential Election in 2009. During election, voters were compelled by the law to put a tick on the political party's logo, picture of legislative or presidential candidate. Whereas Pemilukada still utilized the old model, namely to puncture the ballot. Dealing with these situations, it is necessary to find a unified way to cast a vote in order to avoid confusion among voters. In relation to this, the Constitutional Court (MK) through its Decision No. 147/PUU-VII/2009 gave the room to utilize e-voting. Therefore synchronization must also be considered to accommodate e-voting mechanism.

Third, the issue of determining elected candidate. Law No. 32 year 2004 stipulates that elected candidate pairs must obtain a minimum of 30% votes and if that does not happened then a second round of Pemilukada will be conducted for the candidate pairs who obtain the most and second most votes. This sort of model is not only financially costly and increases the people's political agenda, but also creates a new political tension.

Fourth, the issue of enforcing the law and legal settlement. If compared to Legislative and Presidential Election, there were a lot more violations occurred during Pemilukada. Several decisions delivered by the Constitutional Court (MK) have confirmed this. This is due to many unclear Pemilukada regulations which caused various interpretations when applied. Aside from that the light criminal sanction does not invoke the deterrent effect to (future) violators. This is aggravated by the unprofessional conducts of the Election organizers, which cause various kinds of Pemilukada violations, which in turn result in much litigation against Pemilukada results. Furthermore, the Constitutional Court opens its doors to all prospective plaintiffs by putting itself not only the party who settle disputes over Election result but also over other disputes as long as the violation is considered to be a systematic, structured and massive one.

Fifth, the issue of campaign funding report. Almost all laws on Pemilu do not have any clear guideline about campaign funds, including Law No. 32 Year 2004. This unclear regulation makes campaign funding reporting as a mere formality. Meanwhile behind the election of head of regions' candidate pairs, enormous funds are poured into campaigns. Unclear guidelines on

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over Pemilukada results being submitted to the Constitutional Court (MK) in 2010 alone were about 170 areas where the loosing candidate pairs filed a law suit (further details visit www.mahkamahkonstitusi.go.id).

campaign funds also have prompted pairs of candidate to seek funding from sources that cannot be accounted for, which at the end will become the burden to candidates once they are running the government.

Obviously there are a lot more of Pemilukada problems which can be detailed and mapped based on Pemilukada's organizer experiences to date. For example, the scattered Pemilukada elections' time has resulted not only in enormous wasteful spending but also made them hard to control. A detailed and systematic mapping of Pemilukada's organizer problems is necessary in order to assist lawmakers in determining which issues are appropriate to be inserted into the laws and which ones can be sufficiently determined only by Pemilu organizer regulation. If all of the main issues on Pemilukada can be well formulated then eventually this in turn could help to formulate the Pemilukada draft law.

Law No. 32 Year 2004 also have stipulations that are substantially flawed, and consequently they cannot be applied in Pemilukada organization thus far. For example Article 80 of Law No. 32 Year 2004 stipulates that *"State officials, structural and functional officials, also head of regent/village are prohibited from making any decisions and/or actions which favor or un-favor one of the candidate pairs during the campaign period".* This Article is followed by a criminal provision in Article 116 paragraph (4) Law No. 32 Year 2005 which states *"Every state official, structural and functional official, also head of regent/village who deliberately violate the provision as referred to in Article 83 will be subjected to imprisonment for a minimum of 1 (one) month or maximum of 6 (six) months and/or pay a fine at least Rp 600,000,- (six hundred thousand Indonesian Rupiah) or as much as Rp 6,000,000,- (six million Indonesian Rupiah)."*

Unfortunately the criminal provision in Article 116 paragraph (4) of Law No. 32 Year 2004 refers to the wrong Article in its main text; where it should have referred to Article 80, but instead it refers to Article 83 which stipulates on campaign funds. Therefore in reality, during the organization of Pemilukada, Article 80 and 116 paragraph (4) of Law No. 32 Year 2004 could never be used to seize the violators of the provisions. Not surprisingly, Pemilukada suffered from many cases of abuse of power by the state, structural and functional officials, as well as heads of regency/villages, and their misconduct eventually cannot be processed by the law enforcement. According to the theory of law, any mistake in the regulation, albeit technical is blatant evidence that the regulation is of poor quality and therefore should be replaced immediately.

C. GOAL AND TARGET

In order to respond to the development of the formulation of the legal instruments that specifically regulates the regional head's election, the Association for General Election and Democracy (Perludem) has summarized several Pemilukada problems that appeared both during the organizing of Pemilukada and in the Pilkada Draft Law (RUU Pilkada) which is being prepared by the Ministry of Home Affairs.

Based on the summary and review of various Pemilukada problems mentioned above, Perludem shall propose some suggestions as input and to be considered by the government and the DPR on the formulation and discussion on Pilkada Draft Law that they should conduct together as mandated in 2010 and 2011 National Legislation Program (Prolegnas).

The Main recommendations formulated by Perludem have been discussed a number of times with various Pemilukada stakeholders, such as the chairpersons of political parties (Jakarta, September 23rd 2010), members of Commission II DPR-RI and government officials (Jakarta, September 30th 2010), members of Pemilu organizers (Jakarta, October 7th 2010), members from universities and civil society (Jakarta, October 14th 2010), stakeholders of Aceh Pemilukada (Banda Aceh, November 9th 2010), stakeholders at national level (Jakarta, February 10th 2011)[6].

[6] Aceh Pemilukada is significantly different in its regulation framework compared to the other areas in Indonesia. Other than Law No. 32 Year 2004 in conjunction to Law No. 12 Year 2008, Aceh has Law No. 11 Year 2006 regarding Aceh Government which act as reference and guide in organizing Pemilukada. Several things that differentiate Aceh Pemilukada with

Aside from that a public discussion was also held with Pemilukada stakeholders in Jakarta, March 23rd 2011. During the formulation of the main recommendations, Perludem had the opportunity to meet with the Director General of Regional Autonomy Ministry of Home Affairs, Prof. Dr. Djohermansyah Djohan, and the Presidential Special Staff in Legal Aspect, Prof. Denny Indrayana, Ph.D.

The focused discussions involving various stakeholders and the public discussions were held to map and formulate the Pemilukada's main problems and to identify the main issues that must be regulated in the Pemilukada Draft Law. Through the series of discussions and various insights expressed during the events, this document has been perfected and the results can be viewed in Perludem's main ideas on the reconstruction of Pemilukada Laws and Regulations in Indonesia as described below.

The target is that the Perludem's main ideas can be used as a consideration whether by the Government or the DPR when formulating and perfecting the head's and the deputy;s Pemilukada provisions in Indonesia, so that in turn it will make the democratic consolidation at the local level significantly better, better in quality, and more democratic. Other than that, other related stakeholders are expected to be able to utilize the following main ideas as reference and discussion materials to improve Pemilukada's rules and regulations.

Pemilukada in other areas are Law No. 11 Year 2006 regarding the existence of local political parties, individual candidates are limited to participate only once in Pemilukada (later this provision was revoked by MK Decision No. 35/PUU-VIII/2010 which does not limit individual candidate's participation in Aceh Pemilukada), requirement for regional head and deputy candidates (practice syariah laws and able to read the Qur'an), mechanism in establishing Pemilukada organizer and the composition of the Pemilukada organizer, Pemilukada observers and their office tenure.

CHAPTER II
ORGANIZING ELECTION SYSTEM AND CONDUCTING PEMILUKADA PHASES

A. DIRECT ELECTION

One of the key controversial problems of Pilkada Draft Law (RUU Pilkada) composed by the Ministry of Home Affairs (MoHA) Team is the option to organize provincial head (governor) election indirectly or through the Regional House of Representatives (DPRD).

The provision in Article 2 of RUU Pilkada (February 2011 draft) stated that "*the Governor is elected by the Regional House of Representatives (DPRD) in a democratic manner based on free, confidential, honest and fair principles*." Based on that provision it shows how the government through Ministry of Home Affairs (Kemendagri) wish to remove the people's right to directly vote a governor. The government wants to go back the mechanism of electing the governor through the representatives of the DPRD. This provision later became a debate and a serious concern for manyparties.

There are several reasons to return the governor's election to the DPRD. *First*, on the amount of budget required in organizing Pemilukada, based on Fitra research results, Pemilukada budget at district/city level for one round is between Rp 5 billion – Rp 28 billion. Whereas at the provincial level, Pemilukada budget requires funds between Rp 60 billion – Rp 78 billion.[7]

Second, other than problems related to the budget for the organization of Pemilukada, the high political cost of direct election is also a strong argument utilized by the MoHA to return to the old method of Governor election and therefore revoke the people's right to vote a governor. Direct Pemilukada is considered to be giving a major contribution to the corruption at the local level. Direct mechanism is associated with high political costs borne by the candidates, which in turn prompt the elected to behave corrupt. A report by MoHA showed that until early 2011 there were 17 governors, 135 district heads and mayors found to be involved in corruption cases.

However, budget problem and political costs are definitely not the only arguments to revoke the people's right in governor election. The MoHA's *third* reason is the regional autonomy design, which is "considered" not to be providing a strategic authority to the governor in regional development. This due to the fact that the authority is attained by the district/city government, so the real power is in the hands of the district heads/mayors. Therefore, direct governor election is regarded as ineffective and a mere futility. If one compares between the results and the costs, it will show that the Governor election is not worthwhile.

The fourth problem is that the governor's election by the DPRD is also heavily scrutinized due to the extensive horizontal conflicts and violence that have been taking place during Pemilukada.

Aside from the above aspects, the *fifth* problem is that the discourse to have Governor election by the Provincial DPRD is not considered to be a violation against the constitution. The provision of Article 18 paragraph 4 of the 1945 Constitution does not explicitly instruct for a direct election. The provisions of Article 18 paragraph (4) of the 1945 Constitution which were added in the second amendment state that "*Governors, District Heads and Mayors respectively are the head of provincial, district, and city government which are democratically elected.*" The word

[7] Seknas Fitra, 2011. Recommendation Paper: Efficient and Democratic Pemilukada Budget Policy, Page 9.

"democratically elected" is very flexible; it could be interpreted as direct election by the people or the DPRD as was the practice prior to 2005.

The question therefore is whether revoking the people's right to directly vote a governor is the only way to answer the question mentioned above. To answer that, it is necessary to elaborate the root of the problem in order to avoid taking a wrong recommendation, such as revoking the people's right to vote in governor election.

a. Inexpensive and Democratic Pemilukada[8]

Efficiency in implementing pilkada does not mean setting aside democratic values. The main purpose, namely democracy, shall not be eliminated by technical problems such as the budget. On the other hand it should be regarded as a challenge that must be answered by the government through its agenda on the amendment on the regional/local government law. The amendment is expected to create a new design so that pilkada budget efficiency could be achieved without having to ignore the main principle.

Several alternatives can be developed, such as combining pilkada into a onetime event. Pilkada which presently are scattered in different areas and held at different times, may be considered to be conducted simultaneously just as the Presidential and Legislative Election. This kind of mechanism allows the General Election Commission (KPU), the Provincial KPU and the District/City KPU to work at the same time. With this design, KPU in the future will only conduct the election twice, namely Local and National Elections (for further details see discussion on scheduling the implementation time).

This mechanism is very much possible to be done if the government is serious in redesigning pilkada into an efficient yet still a democratic event. By implementing a simultaneous pilkada, budget's efficiency, particularly with regards to the spending for the honorarium for the organizer, can be maintained. For example, in Fitra's research on the 2010 West Sumatra Pemilukada, it is showed that the implementation of simultaneous emilukada was more inexpensive in comparison to the ones in other provinces due to two reasons: first, West Sumatra implemented simultaneous Pemilukada in more regency/cities; and second the absence of budget allocation for regency/cities to organize Pemilukada in West Sumatra's provincial budget structure. [9]

b. Pemilukada High Political Cost

1. Hijacking Democracy

The fact showed that democracy at local level was hijacked by the interests of capital and power. The practice of money politics and the politization of bureaucracy have dominated the 2010 Pemilukada implementation. Both forms of deceptions became the basis for the Constitutional Court (MK) to cancel Pemilukada's results, which was perceived as denying democratic values. MK called it a systematic, structured and massive violation.

The democracy hijacking operation involves tens of billions of rupiahs, which can be calculated from the spending *items* and the boisterous atmosphere surrounding the competing candidates. The Minister of Home Affairs once stated a figure of 60 to 100 billion rupiahs,(Kompas newspaper (18/1)) had been spent by candidate pairs for nomination/candidacy fee (cost of political vessel), campaign team, survey, campaign attributes, donations to voters, buying votes, campaign using printed and electronic media, up to preparing witnesses during voting time.

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[8] Veri Junaidi. Article: *Inexpensive and Democratic Pilkada*. Suara Karya Newspaper, September 7th 2010.
[9] Fitra, *Op. Cit.*. Page 10.

Those are fantastic figures and do not come close with the official revenue they will receive if elected. A governor for instance, only earns a salary of Rp 8.6 million/month or a total of Rp 516 million for five years in office. Hence, how can these democratic "actors" find the money to recover the capital they have already spent? This is the beginning of this country's bankruptcy, due to the hideous acts of those manipulative democratic "actors". Corruption and coalition (conspiracy) becomes a way to exploit and drain out the people's welfare funds.

2. High Cost Solution

It should be noted and pondered deeply, where is exactly the source of the high cost Pemilukada? At least there are 4 (four) expenditures that cause the high political cost in Pemilukada. The *first* is the cost of finding the vessel for candidacy in the regional head election. It is already a common knowledge that a candidate must reach deep into their pocket to buy a political vessel. This is even more the case if the political vessel is political parties that do not have seats in the DPRD. In order to achieve the 15% of electoral threshold, a party with no seat must engage in coalition with several parties. As a result, each party has an equally strong bargaining position with one another. This means candidates must spend greater cost for the all supporting parties.

In the future, the political party's candidacy mechanisms should be clarified. The political parties should be more open with regards to candidacy but on the other hand the mechanism should not be a mere formality either. A competition involving all cadres will reduce the candidacy trading done by a handful of political parties' elites,; with regards to political parties with no seats, their ability to nominate a candidate should be abolished to avoid more political transactions. If they want to nominate a candidate, they should use the mechanism of independent candidate nomination (for further details see discussion on candidacy method).

Second, the campaign funds for political image politics. Direct Pemilukada indeed presents a challenge for democracy. A liberal democracy system demands the candidates to have a high popularity level in order to obtain majority vote. The goal is for the elected regional head to be closer with the voters. However problems appeared when the political parties and the candidates do not work optimally to obtain votes. When this happens, instantaneous means become the main choice, namely building image through printed materials, electronic media and other public spaces only by posting/displaying their faces. Voters are regarded solely as political commodity. They are fed with political ads without the possibility of knowing the candidates better. Consequently, the capital strength becomes the main supporting factor in the candidacy process.

Such spaces should be regulated in the law on Pemilukada. The State must provide equal campaign spaces for all candidates, such as in the government owned media. Without such regulation each candidate will race to control the media. This means high amount of capital has to be prepared for this purpose. The Candidates and supporting the political parties must be forced to use a relatively narrow space for public campaign. Consequently, they will have to knock on the people's hearts from door to door.

Third, the cost of consultancy and survey to ensure victory. The business of victory-ensuring consultancy and survey is a promising one. This is proven by the increasing number of survey institutions, ready to be used by the candidates to measure their candidacy electability. Certainly the budget required for this is not small.

Fourth, money politics. The Direct Pemilukada which was previously expected to reduce the number of money politics has not been entirely successful. In fact, what has been happening is such practice is distributed more evenly. This problem becomes more severe when the law enforcement mechanism is not strictly designed. For example, with regards to time limitation, it is very unlikely that allegations of money politics can be

resolved within three days. Therefore, the expiration period for processing suspicion on money politics should be extended. As long as the winning candidate is in office, the allegations of money politics can still be processed throughout the duration. Also, the categorization of different forms of money politics may be able to ease the substantiation of such allegation, and any elected regional head and his or her deputy who are found to be guilty of money politics can be forced to step down from their office (for further details see discussion on money politics and campaign funds regulation).

Changing the system of direct Pemilukada and giving it back to the DPRD is not the correct solution. The election of governors by the DPRD does not necessarily mean it could cut the cost of candidacy vessel and transactional practices within political parties. The election by the DPRD also does not mean the elimination of money politics. The problems will persist, but it will only move the money politic practices into a smaller space and naturally will only benefit a handful of elites.

The solution is to fix the system so it could "force" the candidates and political parties "to break a sweat" in obtaining people's support. The formulation of Pemilukada Law is the suitable momentum to consolidate democracy at the local level. The Scurrilous Pemilukada is the result of Pemilukada regime's transition. Now it is the time to reap the results with a good organization, rather than stepping back to the practices of the old regime.

c. Governor as Regional Political Coordinator

Until now governors still bear decentralization duties due to its authority over public service affairs, such as administrating Land and Building Tax (PBB) up to dealing with regional secretary. Therefore, the governors should still be elected directly by the people, rather than by the DPRD. Electing governors through the DPRD can be done if the governor only carries out de-concentration principles.

Direct election provides legitimacy for governors to carry out public services for the people, which are directly related with the regional heads, the district heads and the mayors. If the governors' level of legitimacy decreases, it will weaken their position before the district heads and the mayors.

For example, Gamawan Fauzi's experience when serving as the Governor of West Sumatra for 2 (two) years. He once had a conflict with the District Head of Mentawai. The main problem was the lack of clarity on the governor's position. Therefore in the future, before discussing the appropriate method for governor's elections, the authority of the governors must be clarified first. As long as it is not clarified, then the election will become even more chaotic.

d. Pemilukada's Horizontal Conflicts

The arguments on the number of horizontal conflicts or violence during Pemilukada used as a reason for changing the direct election of the governors into an election by the DPRD is unfortunately not supported by strong data on how high the number really was.. In 2010 there were at least 244 Pemilukadas held, if the violence occurred only in 10-20 regions (such as in Mojokerto, Toraja, Humbang Hasundutan, Sumbawa), it does not necessarily prove the assumption that the Pemilukada is identical with violence. In fact, it is the political education, which is the responsibility of local the government and the political parties, that should be better organized.

Even the International Crisis Group (ICG), which has recorded the number of violence that occurred in over 200 Pemilukada during 2010, concluded that violence "only" occurred in 10 percent of them. Of the three Pemilukada violence cases reviewed by ICG (in Mojokerto,

Tana Toraja, and Toli-Toli), all of them were triggered by events that could not have been anticipated. ICG indeed noted that there were other factors that appeared in all of the cases, such as an incumbent who was perceived as corrupt but tried to extend his power by nominating himself again or his chosen people; the candidates who were overly confident and thought that they could win and could change the status quo; the candidates' supporters who have excessive expectations and acted out of control; the election organizer who was considered taking the side of the incumbent or the candidate of their choice and their failure to disseminate important information; as well as the police who were not ready to deal with mass violence or coordinated attacks.[10]

Therefore it is factually irrelevant and disputable that one of the causes of horizontal violence in Governor (direct) elections is the mechanism of direct election itself. Moreover if we talk about violence in Pemilukada, most of the violence happened during district/city Pemilukada to elect district head/mayor, so then why the option to solve this is to return governor's election to the DPRD? It is a legal and political option which is very contradictory and tends to be groundless.

e. The Constitutionality of Direct Governor Election

1. Original Intent of Democratic Meaning

The provision of Article 18 paragraph (4) of 1945 Constitution states that "Governors, District Heads and Mayors as the head of provincial, district, and city government which are democratically elected." The provision in Article 18 is the second amendment of the Constitution (year 2000). The underlying principle behind it can be seen in the Second Book Volume 3 C of the Minutes of the Ad Hoc Committee Meeting I (2000 Annual Assembly) issued by the Secretariat General of the People's Consultative Assembly (MPR) of the Republic of Indonesia Year 2000. In the Minutes of the 36th Meeting of The Ad Hoc Committee I of the MPR Working Group page 255, which contains the principal view of the PPP Fraction, the following statement can be found:

7. Governors, District Heads, and Mayors are directly elected by the people, directly by the people which is then governed by the Law, this is in line with our wish for a President to be also directly elected ",

then in page 273, the reason is stated, namely,

"Fourth, because a President is directly elected then at the local/regional government, the Governor, District Heads and Mayors are also elected directly by the people. The Law and the regulation will be set on a later date. The Law will be connected to the regional autonomy Law itself. "

2. Democratization of Direct Pemilukada

The Constitution does not explicitly mention that the governors are directly elected by the people during the general election, unlike the president and vice president, the House of Representatives (DPR) members, the DPRD members, and the DPD members. Article 18 paragraph (4) only prerequisites that there is a democratic election of the governors, the district heads and the mayors. This definition of "democratic" is what then used as an argument that there is no prohibition for the governors to be elected by the DPRD. Oddly, however, this logic is only applied for the governors election, whereas the district heads and the mayors are to remain directly elected by the people during pilkada.

[10] International Crisis Group (ICG), *Ibid.*

This logic is not correct because the same provision could not be interpreted differently in different cases. According to Jimly Asshiddiqie (Introduction to State Administration Law Volume I), the provision of articles in the constitution must be interpreted accordingly and must not contradict each other. If the district heads and mayors are directly elected so should be the governors. And, on the contrary, if the word democratic is interpreted as elected by the DPRD, then the district heads and mayors' election should be treated the same way. [11]

If so, where can we find the exact meaning of "democratic"? Based on Jimly's opinion, it can be ascertained that "democratic" should be interpreted as directly elected by the people. This is because, the meaning of "democratic" should be in line with Article 6A paragraph (1) of the 1945 Constitution, namely that the president and vice president shall be directly elected by the people. Because the provisions within the constitution should be in harmony with one another, then the word "democratic" for the regional head elections should be more or less the same with the provisions on the presidential and vice presidential elections.

The evidence of the harmonization of interpretation for the constitution's provisions is evident in how the article on the DPR and DPD members' election is interpreted. Although Article 2 paragraph (1) of the 1945 Constitution does not explicitly mention direct election, but no one disputes that this should be the mechanism for the legislative general elections. In fact, the constitution did not even use the word "democratic" in it. That provision only mentions that the DPR and DPD members are elected through general election.

An interpretation of the meaning of "democratic" could also be found in the Constitutional Court's (MK) decision on the judicial review of article 214 letters a, b, and c of Law No. 10/2008. In that decision, the MK interpreted "sovereignty of the people" as stated in Article 1 paragraph (2) of the 1945 Constitution, as "the supreme sovereignty is in the hands of the people", therefore in various general election activities, the people should be able to directly vote for whomever they wish. This is a very basic constitutional principle. It does not only color and become the spirit of the constitution when establishing a government, but should also be seen as the characteristic of the entire laws and regulations on political matters.

Therefore the thoughts and intentions behind the formulation of article 18paragraph (4) of the 1945 Constitution is that the governors, the district heads and the mayors are to be democratically elected in the same manner with the Presidential election.

The interpretation on the meaning of "democratic" can also be seen from the inclusion of general election's provisions in the constitution. Article 22E paragraph (1) of the 1945 Constitution on General Election was included in the third amendment (Year 2001). The provision on Article 22E paragraph (1) states that "The *General Elections are held in direct, general, free, confidential, honest and fair manners once every five years".* Then paragraph (2) states that "*General Election is held to elect the House of Representatives' (DPR) members, the Regional Representatives Council's (DPD) members, the President and Vice President and Provincial Representatives' (DPRD) members*". Whereas the organization of Pemilu is stipulated in paragraph (5) which states that "*General Election is organized by a national, permanent, and independent general election commission.*"

Therefore, since the amendment of Article 18 of the 1945 Constitution is in the second amendment, whereas Article 22E of 1945 Constitution is in the third amendment, the legal implication is that the implementation of Article 18, particularly with regards to

[11] Jimly Asshiddiqie, *Introduction to State Administration Law Volume I*, Jakarta: Secretariat General of Constitutional Court, July 2006.

regional/local head elections, must refer to Article 22E. The legal logic is, if Article 18 was considered to be in contradiction with Article 22E, then it can be ascertained that the third amendment's formulation in Article 18 would have been changed and adjusted to be in line with Article 22E.

Based on the above explanation, then the definition of "democratically elected" must be interpreted similarly with the election procedures for the President as stated in CHAPTER VIIB on General Election. Specifically Article 22E of the 1945 Constitution. Therefore it is not in contradiction with the wishes of the 1945 Constitution founders if it is stated that Regional Head Election is included within the General Election definition, and thus the principles and the implementation of Pemilukada and the Presidential Election are the same, which is directly by the people.

B. ORGANIZING CANDIDACY SYSTEM

a. Regional Head Candidacy Method

Law No. 32 Year 2004 stipulates that candidate pairs for the regional heads and deputy are nominated by political parties or coalition of political parties. [12] Law No. 12 Year 2008 added that several residents can nominate individual/independent candidate pairs. [13]

Herewith is the discussion with regards to the problems associated with the candidacy system during the regional head and deputy election, and recommendations for better laws and regulations in the future.

1. Too Many Candidate Pairs

a) Number of Candidate Pairs

Under Law No. 32 Year 2004 *conjunction to.* Law no. 12 Year 2008, in the process of organizing Pemilukada, there are three methods of to secure regional head candidacy: *first*, the method based on seats obtained by political parties in DPRD; *second*, the method based on votes obtained by political parties in the legislative elections; particularly applicable for parties which did not obtain any seat in the DPRD, and; *third*, the method that gives opportunity for the people to nominate individual candidate pairs, namely candidate pairs who are not nominated by any political parties. All of these three methods created several problems in organizing Pemilukada, therefore it is necessary to find the solution.

The first method will generate a maximum of six candidate pairs for regional head and deputy. That number is obtained based on the threshold a political party or coalition of political parties has to reach before being able to nominate a

[12] Article 56 paragraph (2) Law No. 32 Year 2004.

[13] Article I Number 3 of Law No. 12 Year 2008, Amendment towards Article 56 paragraph (2) of Law No. 32 Year 2004. Provision on independent candidates in Law No. 12 Year 2008 is a Law and regulations made based on the Constitutional Court (MK) Decision No. 5/PUU-V/2007 of Judicial Review on No. 32 Year 2004 on Regional/Local Government towards 1945 Constitution which was petitioned by Lalu Ranggalawe about the participation of independent candidates in Pilkada. MK in its Decision granted the petition and declared: "According to Law No. 31 Year 2002 on Political Parties is stated in the preamble "Considering" the letter d, which states, "that political party is one of the forms of public participation which is important in developing a democratic life. .. ", so it is appropriate to open another participation mechanism outside of political parties for implementing democracy, that is by allowing individual candidacy in regional head and deputy election. Regional head and deputy is an individual position, so the criteria specified in Article 58 of Regional Government Regulation are the prerequisites for individual candidates. Moreover, in Article 59 paragraph (3) it is stated that political party or coalition of political parties are obligated to open its doors to individual candidates who meet the requirements as stated in Article 58 and to further process the candidates through a democratic and transparent mechanism" (page 56).

candidate pair. The Law stipulates that to nominate a candidate pair, a political party or coalition of political parties must obtain at least 15% of seats in the DPRD.

In terms of the second method, it would be difficult to determine the most number of candidate pairs it can generate. The Law only determines that regional head candidate can be nominated only by political parties or coalitions of political parties that have at least 15% percent votes in the previous legislative election. The difficulty in determining the number of candidate pairs is due to several factors: *first*, because it will depend on the distribution of votes that were obtained by the political parties during Legislative Election in every region. *Second*, because political parties which have seats in the DPRD retain the option to use this method. However, based on the previous experiences in the Pemilukada, this second method will generate a maximum of 3 candidate pairs.

The third method, mathematically based on the provision of Law No. 12 Year 2008, the method that provides the opportunity for the people to nominate individual candidate pairs could generate a maximum of 33 candidate pairs, because it only requires the support from 3% of the total population in the area. But obtaining endorsement from the people is not an easy task, therefore in the previous Pemilukadas, at the most there would be 4 individual candidate pairs.

Based on the combination of these three methods, previous Pemilukada could generate at the most 13 candidate pairs. However, in the implementation of Pemilukada based on Law No. 12 Year 2008, the maximum number of | candidate pairs ever found was in 2010 Pemilukada, which were 12 candidate pairs. That number was found in several Pemilukadas for example in Kaur District, Bengkulu Province. The second highest number of candidate pairs was 12, which was found in Medan City, Pematang Siantar City. The third highest was found in Karo District of North Sumatra which had a total of 10 candidate pairs. [14]

Based on the data collected by Election Supervisory Board (Bawaslu), throughout the 2010 Pemilukada there were 1,083 candidate pairs for regional head and deputy position. That figure consisted of 233 individual/independent candidate pairs, while the remaining 850 pairs were supported by a political party and/or coalition of political parties. [15]

b) Problems encountered

The high number of candidate pairs in Pemilukada has created several problems. *First*, on the budget. Too high of a number of candidates increased the required funds because the ballot's size must be widened in order to fit the pictures of all candidate pairs. Aside from that, the high number of candidates will increase the possibility of organizing the second round of Pemilukada that is required to ensure that there would be a candidate pair who obtains more than 30% votes.

Secondly, from the voters' side, a high number of candidate pairs will make it difficult for the voters to recognize each candidate pair, so the voters will tend to act irrationally when they cast their votes. Other problems appeared when the second round Pemilukada took place, the voters may already be bored, thus it may reduce the participation level during the next Pemilukada.

[14] For example in Medan Pemilukada, out of 10 candidate pairs, 5 of them were individual candidates and the remaining 5 pairs were nominated by political parties. Whereas in Tanjungbalai City, out of 9 candidate pairs who were qualified, 4 pairs were individual candidates. In Purworejo, out of 9 candidate pairs, 3 of them were individual candidates.
[15] See Bawaslu, *2010 Pemilukada Supervisory Report: Supervisory Division,* page 34, Bawaslu: Jakarta, 2010.

Thirdly, related to government's effectiveness, a high number of candidate pairs cause a a very high level of political fragmentation in the DPRD. This will affect the government's effectiveness in policy making after-Pemilukada, because the elected candidate pair must deal with many fractions or factions within the DPRD. In the end, the policy taken was not made with the people's best interest in mind, but rather based on political "trade of interests" between the regional head and the DPRD.

Fourthly, on money politics problems, many candidate pairs believe that money politics (purchasing candidacy requirements and votes) is the easiest way to win, then the number of candidate pairs will be equal to the number of money politic activities occurring amongst political parties as well as the voters.

c) Recommendations

With regards to the four problems created by the large number of candidate pairs as mentioned above, then Pemilukada laws and regulations must minimize the number of candidate pairs as little as possible. Nevertheless, the regulatory framework that attempts to reduce the number of candidate pairs must remain within the principles of a democratic General Election. Political parties and voters are important actors in the electoral process.

Several suggestions put forth could be considered, *first*, to raise the level of seat threshold which must be obtained by a political party or coalition in the DPRD, from 15% to 25%. This method will generate at most 3 candidate pairs.

Second, political parties who do not have seats in DPRD should no longer be given political rights to nominate candidate pairs, because the Legislative Elections results showed that they did not gain the trust from enough voters. Instead, political parties' board members who wish to get involved in the candidacy process could use the candidacy method based on the people's support in order to nominate themselves as candidate pairs (see the following explanation).

Third, the percentage of peoples support for individual/independent candidate pair should be 5% and is equally applied to all regions. [16] That figure is the midpoint of all of the other figures that are determined by Law No. 12 Year 2008, so based on the implementation of Pemilukada so far, the figure is not too easy, and also not too difficult to be achieved by those who wish to become independent candidate pairs (see the following explanation). An equal percentage of total population in each region is necessary to ensure equal legal treatment between regions (except for regions where special provisions are applied according to the constitution and the law.)

[16] Percentage of individual support which is 5% of the population does not apply in Nanggroe Aceh Darussalam Province because Article 68 paragraph (1) of Law No. 11 Year 2006 on Aceh Government states that "... .... individual candidates must obtain support at least 3% (three percent) of the total population which is distributed in at least 50% (fifty percent) of the total number of regency/cities for Governor/Deputy election and 50% (fifty percent) of the total number of sub-regency for district head/deputy election, or mayor/deputy election. " So for Aceh special provision is applied which is related to the support requirements for individual candidates.

Table 1.

Candidate pairs in 2010 Pemilukada[17]

No.	Province	Number of Candidate pairs	Supporter		Number of Incumbent	Remarks
			Individual	Party		
1	North Sumatera	141	56	81	17	-
2	West Sumatera	68	4	64	19	-
3	Riau	16	-	16	2	-
4	Jambi	18	2	16	3	-
5	South Sumatera	20	4	16	6	-
6	Bengkulu	40	10	30	5	*No data yet from 3 regency*
7	Lampung	32	11	21	5	*3 regency were delayed due to insufficient preparation (new administrative regions) and no data from 1 district*
8	Bangka Belitung Islands	14	1	13	3	-
9	Riau Islands	13	-	13	4	-
10	West Java	30	11	19	6	-
11	Central Java	66	9	57	18	-
12	DI Yogyakarta	14	3	11	4	-
13	East Java	70	13	57	16	-
14	Banten	18	8	10	2	-
15	West Kalimantan	30	5	25	7	-
16	Central Kalimantan	13	3	10	3	
17	South Kalimantan	36	7	29	5	-
18	East Kalimantan	25	9	16	3	-
19	North Sulawesi	42	7	35	6	-

[17] Bawaslu, *2010 Pemilukada Supervisory Report: Supervisory Division*, page 34, Bawaslu: Jakarta, 2010.

No.	Province	Number of Candidate pairs	Supporter		Number of Incumbent	Remarks
			Individual	Party		
20	Central Sulawesi	27	4	23	3	-
21	South Sulawesi	62	12	50	10	-
22	Southeast Sulawesi	27	6	21	3	-
23	Gorontalo	11	2	9	3	-
24	West Sulawesi	7	2	5	2	-
25	Bali	20	2	18	6	-
26	NTB	37	6	31	8	-
27	NTT	54	13	41	9	-
28	Maluku	20	1	19	4	-
29	North Maluku	34	7	27	7	-
30	Papua	50	13	37	9	-
31	West Papua	28	2	26	3	-
Total		**1.083**	**233**	**850**	**201**	

b. Non-seated DPRD Political Party Disarray and Money Politics

1) Problems encountered

As stipulated in Law No. 32 Year 2004, the political parties or the coalitions of political parties that obtained at least 15% votes in the previous Legislative Elections, have the right to nominate a candidate pair for the regional head and deputy. [18] This provision applies both to parties that have seats in the DPRD and those that don't (party with no seat). However, in Pemilukada implementation, this provision is more often used by parties with no seat in the DPRD to support their regional head candidate. It means that the candidacy method is widely used by small parties, namely the parties which obtained only small (insignificant) number of votes during the Legislative Elections. Consequently, these parties need to involve other political parties in order to achieve the minimum of 15% votes required to nominate their candidates.

The high numbers of such political parties that have to be joined together in a coalition in order to nominate a candidate pair have caused this method to be very susceptible to problems, especially when the coalition is not solid. Each party's position is equally strong so if one party withdraws then the coalition will be over and it will foul

[18] This provision is a regulation made based on the Constitutional Court (MK) Decision No. 005/PUU-III/2005 which decides that not only the political parties that have seats in the DPRD that could nominate candidate pair for regional head, but also parties that obtained valid votes in the previous Legislative Election (though do not have a seat in DPRD), could nominate a candidate pair. MK Decision No. 005/PUU-III/2005 was the answer to the petition filed by Retired Major General Ferry Tinggogoy and friends, related to North Sulawesi Pilkada in 2005. MK Decision No. 005/PUU-III/2005 was released before MK Decision No. 5/PUU-V/2007 which allowed individual candidates to participate in Pemilukada.

the nomination. Based on the previous Pemilukada's experiences, a candidacy process that involved parties with no seat in the DPRD has caused two serious problems. *First*, because the position of each party was very strong, therefore even though they did not have strong support in the society, those parties still possessed strong bargaining power in the eyes of the candidate pairs. This was where the amount of money played an important part; money politics was then at play to secure support in the candidacy process because the political parties' leaders were not under anyone's control.

Second, the negotiation on the price of the candidacy between the candidate pairs and the political parties often did not lead to an agreement, or mired with foul plays during the candidacy process, which in turn terminated or disrupted the candidacy. In this case, if one party withdraws their support before registering the candidate pair then that candidate's nomination will be terminated in the middle of the journey. However, if the support is withdrawn after the registration (so the process to determine them as a pair to contend in the election still proceeds), , this will create a political disturbance which eventually will disrupt the Pemilukada's implementation process. [19] Almost all political tensions, even political conflicts that occurred during the Pemilukada candidacy in various regions, were rooted from this issue.[20]

2) Recommendations

The candidacy method, which is based on votes, has caused more problems, either in form of money politics or disturbances during Pemilukada's implementation. In consideration to this, it would be better to eliminate this method. The failure of some parties to secure the DPRD's seats during Legislative Election actually shows that the parties do not have adequate support in the community. Therefore, if the political party leaders wish to nominate a candidate pair, they should follow the candidacy method based on the people's support and nominate an independent/individual candidate pair. This will also help to find out whether the political party officials (if not their party) still have the support from the people or not. This sort of regulation also acts as a way to minimize the number of political parties in the region because a large number of political parties does not only confuse the voters in determining their choice during the election, but also tends to disrupt the government's effectiveness.

Although in the MK Decision No. 005/PUU-III/2005, it is stated that parties with seats in the DPRD are not the only one that could nominate regional head candidate pair, but also those that have obtained valid votes in the previous Legislative Elections (although they do not have any seats in the DPRD), can also nominate a candidate pair, the elimination of nomination method by the parties with no seat in the DPRD in Pemilukada Law does not violate the constitution. It is because their aspiration can still be accommodated through independent candidacy mechanism, thus their chances to participate in Pemilukada are not by any means eliminated. This is especially the case if one considers the fact that the MK Decision No. 005/PUU-III/2005 was issued before MK

[19] Pemilukada in Depok, Pakpak Bharat, Tolitoli, Humbang Hasundutan, West Bangka, Padang Pariaman, West Pasaman, Hulu Sungai Tengah, Bulungan, North Toraja, Tomohon, South Halmahera, Waropen, and Jayapura are just few areas which candidacy phases are recorded with various turmoil and lawsuits because candidate pairs proposed by non-parliamentary coalition were being aborted/dismissed by the KPUD following te withdrawal of support from parties, due to dual support, or dual management of political parties (dualism stewardship). In Jayapura, there was a case which was filed to the Administrative Court (PTUN) that resulted in a protracted and prolong of the candidacy timeline.

[20] In Depok and Tomohon Pemilukada, dual support from political parties became one of the reasons Petitioners filed a dispute over Pemilukada results to MK. Eventually the (KPUD) was not only overwhelmed by the candidacy case forwarded by political parties which used valid votes during Pemilukada implementation phases, but also overwhelmed after Pemilukada results has been completed. In Jayapura and Yapen Islands, the voting results that were established "had" to be canceled (one of which) because a verification factor regarding supports political party for the candidate pair was not well conducted. So the already complicated issues about support got even more complicated with the also problematic qualification and capacity of the KPUD. See MK Decission No. 196-197-198/PHPU.D-VIII/2010 (Jayapura City Pemilukada) and MK Decision No. 218-219-220-221/PHPU.D-VIII/2010 (Yapen Islands District Pemilukada).

Decision No. 5/PUU-V/2007, which affirms that independent/individual candidates are allowed to participate in Pemilukada.

c. Requirement on Sufficient Independent Support

Law No. 12 Year 2008 states that the amount of people's support required to nominate independent individual candidate pairs are between 3%, 4%, 5%, and 6.5%[21], in accordance to the total population in an area. The formula that applies is: the larger the population in a region, the smaller the number of requirements on people's support needed by the independent candidate pairs. Based on the experiences in the implementation of Pemilukada after Law No. 12 Year 2008 was enacted, it seemed that independent candidate pairs appeared in almost all regions which mean there was at least one candidate pair who had successfully met the requirements on the people's support. In other words, the 3% required support for the large populated regions or 6,5% required support for the small populated regions were equally achievable by the independent candidate pair.

Based on this fact, the different percentages applied to small and large populated regions do not need to be maintained. Regulations must stipulate the same percentage of support in every region so that each candidate pair could seek support which the absolute figure would be determined is in accordance to the number of population in each region. Indeed, the absolute figure must vary because the elected individual candidate pair will bear different leadership burdens between the small and the large populated regions.

If that is the case, what is the reasonable percentage? If the 3% required support applied in large populated regions can still be fulfilled by independent candidate pair, then that figure need to be increased to 5%. This increase of percentage is intended to ensure that the candidate pairs who made it have sufficient support basis so they are able to compete with other candidates proposed by political parties or coalition which have at least 25% seats in DPRD. Again, Pemilukada law needs to limit the number of candidate pairs competing in Pemilukada because the less candidate pairs compete in Pemilukada then the less the number of money politic transactions will be. There will also be less number of confused voters, so they can vote rationally. Moreover, less candidate pairs can also help create effective government during post-Pemilukada.

d. Single Candidate Pair

Although Law No. 32 Year 2004 and No. 12 Year 2008 open the opportunity for many regional head candidate pairs to emerge, however Pemilukada implementation practices showed that in several regions there was only one candidate pair, as occurred in Gorontalo Province. This happened not because no one was interested in becoming the regional head, but the political reality already painted a picture as if the people only supported one candidate pair, therefore whoever decided to compete against them would be guaranteed to loose.

Unfortunately these two Pemilukada Laws did not anticipate the possibility of a single candidate pair, so when KPUD received only one registered candidate pair, the KPUD decided to delay the time limit, in the hope that more candidate pairs would eventually register. Moreover, because the Laws dictate for two or more candidate pairs competing in Pemilukada, what happened then was political manipulation where political forces tried to propose additional candidate pairs to compete in Pemilukada. The presence of those "dummy" candidates then allowed for the Pemilukada to proceed to the next phases.

Of course this is not healthy for democratic development. Therefore, Pemilukada arrangement must anticipate the possibility of single candidate pair. If this happens, then the

[21] This provision does not apply in Aceh which require 3% individual support from total population for all regions in Aceh in accordance with Article 68 paragraph (1) Regulation No. 11 Year 2006.

candidate pair should be put against an empty candidate pair image in the ballot (such as in the case of competing against an empty box during village head election). Thus a single candidate pair are still required to prove themselves, whether the majority of people will choose them or not. This way, the Pemilukada process will not be hampered by time extension for candidate registration, the democracy process will not be manipulated by 'dummy' candidate pairs, and the single candidate pair's legitimacy is proven through an election.

C. DEPUTY GOVERNOR ELECTION

The election mechanism for deputy governor should also be reconsidered, whether he or she should be elected as a running mate of a candidate governor or appointed by the elected governor. The constitution does not address the election mechanism of deputy governors. Article 18 paragraph (4) of the 1945 Constitution only stipulates the election for governors, regional heads and mayors, namely that it should be carried out democratically.

The urgency to reconsider the deputy governor election lies in the ability to resolve conflicts that may arise between an elected regional head and her or his deputy. Generally, the harmonious relation between a regional head and deputy only lasts for 6 (six) months. There is a tendency that because of a candidate head of region and the candidate for her or his deputy as the running mate will go through the candidacy period as one pair; both of them will make the same sacrifice to win the election. When elected, because the deputy regional head feels that she or he has sacrificed equally with the regional head,, then at times he or she may find it difficult to act out a role as mere "spare tire".

Despite that, Perludem still thinks it is necessary to maintain the current practice, namely for a candidate deputy governor to be elected as the running mate of a candidate governor in a direct election. This is because the practice has the function to establish national integration at the local level or as a mechanism for conflict resolution.

For example, when an election mechanism for deputy regional head considers the representation of specific groups within the region. The deputy regional head election in Maluku for example, serves as a conflict resolution mechanism, where the candidacy of a prospective regional head and her or his deputy considers the representation of certain groups. For instance, if the governor candidate is Christian then the deputy must be a Muslim and vice versa. This may also be applicable to promote inter-ethnic integration within one province.

D. CANDIDACY ADMINISTRATIVE REQUIREMENTS

Candidate pairs, either proposed by political parties or individual candidate pairs, must fulfill the administrative requirements before being considered as official candidate pairs by KPUD. Originally Law No. 32 Year 2004 determined 16 required requirement items for regional head and deputy candidates.[22] Later Law No. 12 Year 2008 added one more item, which makes it a total of 17 items.[23]

The additional provision regulates that regional head and or deputy who is still in office (the incumbent) must resign from their position upon the registration of their candidacy. The purpose of this provision is to prevent the incumbent from misusing public facilities for campaign purposes or utilizing public officials and civil servants (PNS) to steer voters. Those two issues were very prominent in Pemilukada implementation throughout 2005-2007, so when the DPR and Government had the opportunity to amend Law No. 32 Year 2004, they reduced the incumbent's influence by stipulating that incumbent must resign when their candidacy is

[22] Article 58 of Law No. 32 Year 2004.

[23] Article I Number 4 of Law No. 12 Year 2008, Article 58 letter q. "resigned starting from the registration applies for the regional head and/or deputy who is still in office."

considered valid.[24] However the MK, through its Decision No. 17/PUU-VI/2008 dated August 1st 2008, deemed this provision to be unconstitutional and therefore could not be applied. But the efforts to limit or reduce the use of public facility/funds or civil servants (PNS) can be done in some other manner, for example by tightening provisions in campaign regulations which may contain the loophole that allows the use of public facility/funds or PNS.

In accordance with efforts to achieve clean governance and the spirit of fighting corruption, Pemilukada Laws and Regulation must also prevent or narrowing the space for elected regional heads and deputy to act corruptly by requiring all candidates to explain/declare their wealth publicly to the public through KPUD. That means, regional head and deputy candidates are obligated to prepare their latest wealth report so the public are aware of their wealth. This wealth report: *first*, can be compared with campaign funding report so the public can assess the candidates' ability in funding their campaigns; *secondly*, can be used to detect the elected candidate pair's honesty because once they are inaugurated, they are required to prepare a state official's wealth report (LHKPN) and a similar report should also be made before their office term ends.

E. INCREASED WOMEN PARTICIPATION IN CANDIDACY

Although there have been occasions when supreme executive positions such as president and vice president, governors and deputy, district heads and deputy, or mayor and deputy had been occupied by women, nevertheless during Pemilukada candidacy process very few women have been involved. Women mostly emerged as part of candidate pairs in East Java and North Sulawesi Provinces. From that very few, one woman was elected governor in Banten Province and as deputy governor in Central Java Province, while several other women elected as district heads and deputy or mayor and deputy in several other regions. The fact that there have been a number of women elected as regional head shows that Indonesian society actually accepts women leadership. But it does not hide the fact that patriarchies still has a strong hold in the society, so the presence of women as regional head candidates is still very few. If the number of female candidate is still very limited, then the chance for women to be elected as a regional head is obviously very little.

Pemilukada candidacy regulations as stipulated in Law No. 32 Year 2004 and No. 12 Year 2008 are actually not discriminatory against a particular gender, therefore every qualified person can nominate his or herself. Those regulations provide equal treatment for male or female candidates. But the equal treatment is in fact detrimental for women. As we know, in patriarchal society, women are always positioned behind men as second class citizens. This patriarchal society treatment, which has lasted for hundreds of years, puts women in lower stature than men. In politics this reality is obvious; very few women become political party functionaries, rendering the political infrastructure completely controlled by men. In the economic sector, women do not have adequate access to control/manage wealth, limiting their ability to take part in sectors that require financial support.

At this point, affirmative policy for women is required, which is a special policy to enable women to catch up and narrow the gap with men. Affirmative policy is temporary, namely when women are already in equal position to engage freely in election competition, then the policy can be revoked. Applying affirmative policy is actually not new to Indonesian political practices. Since 2004 General Election, Law No. 12 Year 2003 has implemented affirmative policy in form of 30% quota for women representation in the list of legislative candidates. The policy was strengthened further through Law No. 10 Year 2008, which was used to regulate the 2009 General Election implementation. In this instance, political parties were not only required to ensure that 30% of the candidates in their list of candidacy are women, but also to put at least one female candidate in every three names of candidates. If affirmative policy has already been applied in Legislative Elections, why not do the same in Pemilukada?

[24] In 2010 there were 201 incumbents recorded which nominated themselves for Pemilukada. See Bawaslu 2010, page 34.

If in Legislative Election the affirmative policy is applied in candidacy method, then the same can also be done for Pemilukada. The difference is if in Legislative Election the 30% quota is placed on the list of candidates, obviously it is impossible to apply in Pemilukada because actually every candidate pair is going to compete for only one seat (seat for regional head and deputy as one unity), in other words, it is impossible for political parties or coalition to propose several candidates, 30% of which has to be women. The most likely affirmative policy for women in Pemilu candidacy method is to reduce the number of requirements and simplify the submission for women candidate pairs or candidate pairs consisting a woman. The definition of women candidate pairs is when both candidates for regional head and deputy are women. Whereas a candidate pair consisting a woman are a pair where the regional head candidate is a woman and the deputy candidate is a man, or the regional head candidate is a man and the deputy candidate is a woman.

In lieu of the two candidacy methods proposed in this manuscript, then in the submission method there should be a stipulation that if a political party or a coalition of political parties propose women candidate pairs or candidate pairs consisting a woman, then the seat threshold in the DPRD is no longer at least 25% but reduced to at least 17%. That means, political party or coalition that have at least 17% of seats in DPRD can propose women candidate pairs or candidate pairs consisting a woman. Where does 17% figure come from? That figure is a round up result of 30% reduction on the 25% threshold.

Similarly, with regards to the submission method of candidate pairs through people's support, women candidate pairs or candidate pairs consisting a woman no longer have to gather the support of at least 5% of the population, but rather only need to gather 3.5%. The figure 3.5% is the round up result of 30% reduction on the 5% threshold support of the population. So,why the percentage reduction of seats in DPRD and people's support requirement comes to a figure of 30%? This is merely the adoption of the 30% quota for women in Legislative Election's candidate list.

Affirmative policy in the form of reducing seats threshold in DPRD or reducing the number of people's support for women candidate pairs or candidate pair consisting a woman is intended to make it easier for women to nominate themselves to become part of regional head candidate pairs. This is necessary to ensure that women whose political mastery are left behind compared to men have more opportunities to become part of candidate pairs, as similar policy already applied in Legislative Elections provide them with more opportunity to enter the list of candidates. However, in the next stages after they become recognized candidates and appear before their voters, they must compete for votes. There is no special treatment here, candidate pairs who manage to get most votes will be determined as the elected candidate pairs.

F. UPDATING VOTER LIST

In organizing Pemilukada, the provisions of Article 70 paragraph (1) of Law No. 32 Year 2004 in fact regulated that *"The voter list used in the last general elections held in the region is used as the voter list for regional head and deputy election*." However, this provision was then "set aside" by Law No. 22 Year 2007 on General Election Organizer, which states that "*In updating voters list, the KPU, Provincial KPU, and District/City KPU are the end user of civil registry data which is prepared and submitted by the Government.*"

As a consequence to this provision, the Temporary Voter List (DPS) and the Permanent Voter List (DPT) are made by KPUD based on the List of Potential Voters (DP4) compiled by the local government. As the result, in many regions wherein Pemilukada has been held it was discovered that the DP4 was of poor quality; KPUD did not perform maximally in repairing it so many voters were not listed whether in DPS or DPT. Therefore these DPT-related problems were brought by most unsatisfied candidate pair as the basis for lawsuit at the MK, for example the South Konawe Pemilukada, which led to MK Decision to repeat the voting and counting in all TPS within South Konawe district.

In this context the way Perludem sees it, as long as the Ministry of Home Affairs (MoHA) and Local Governments have not succeeded in establishing civil registry data based on Single Identity Number (SIN), then the compilation of voter list must entirely become the responsibility of the Provincial KPU and the District/City KPU. It is also in accordance with the spirit to establish KPUD as a permanent agency with 5-year term; one of the reason for this is to enable the KPUD to bear the task of updating voter list in sustainable manner.

G. ORGANIZING CAMPAIGN TIME

Campaign time arrangement as stated in Law No. 32 Year 2004 is far behind compared to similar arrangement for Legislative and Presidential Elections. Law No. 32 Year 2004 stipulates that the campaign period is only two weeks. This is in accordance to the provision in Article 75 paragraph (2) of Law No. 32 Year 2004, which states "*The campaign referred to in paragraph (1) is conducted for 14 (fourteen) days and concluded 3 (three) days before polling day*."

Whereas Law No. 10 Year 2008 which was implemented during the 2009 Legislative Elections, and Law No. 42 Year 2008 on Presidential Election stipulated that "*the campaign is conducted 3 (three) days after all General Election Candidates have been established as General Election Participants until the start of quiet period*."

Due to this outdated campaign provision compared to the one implemented at the latest election, often times (almost always) campaigns went uncontrollably, voters did not get adequate information about candidate pairs and it led to excessive actions taken by Pemilukada supervisors. More than that, due to limited campaign time, candidate pairs tended to use instant means such as money politics to quickly "buy" sympathy and support from voters and this was considered "cheaper" compared to smart campaigns that convey their vision, mission, and programs.

Perludem therefore recommends that campaign period should start when the candidate pairs are established and limitation is applied only for campaigns involving large mass/crowd in order to avoid conflicts between groups and to maintain conducive campaign implementation. And most importantly, if this recommendation is adopted, voters will have enough time to know all of the competing candidate pairs, and the candidate pairs also will have more time in introducing their vision, mission, and programs.

H. VOTING METHODS

a. Inconsistent Method

Article 88 of Law No. 32 Year 2004 states that "Voting during regional head and deputy election is done by puncturing one of the candidate pairs in the ballot." Apart from that Article, there is no other Article in Law No. 32 Year 2004 relating to voting procedures. Because Law No. 32 Year 2004 was enacted before Law No. 10 Year 2008 on General Election for DPR, DPD, and DPRD and Law No. 42 Year 2008 on General Election for President and Vice President, it is no wonder there are several conflicting stipulations in those Laws particularly relating to voting procedures.

This is interesting because in the 2009 Legislative and Presidential Elections, voters vote by "marking", which was further interpreted by the KPU as "ticking".

Article 153 paragraph (1) of Law No. 10 Year 2008 states "Voting for DPR, DPD, Provincial DPRD, and District/City DPRD members is conducted by **marking** once on the ballot." Whereas paragraph (2) of this Article stated that the stipulation to **mark** once is based on the principle to make it easier for voters, to ensure the accuracy in counting votes, and to ascertain efficiency in organizing Elections. Similar provisions can also be found in

Article 118 Law No. 42 Year 2008. Marking was subsequently interpreted by KPU as giving **√ (tick) sign** – or other terms – on the ballot.[25]

This means that voters, who had casted their vote by puncturing the ballot since 2005 Pemilukada onwards, had to vote by ticking in the 2009 Legislative and Presidential Elections and again had to go back to puncturing method in the 2010 Pemilukada. This is because Article 30 of KPU Regulation No. 27 Year 2009 – which was formulated based on the provisions in Law No. 32 Year 2004 – states that "When voting, voters **puncture** one of the candidate pairs pictures provided in the ballot." Thus, the provision in Law No. 32 Year 2004 on puncturing does not automatically change despite the provisions on "marking" in Law No. 10 Year 2008 and No. 42 Year 2008.

These facts indicate a weakness in Election implementation, namely: (1) this issue confuses voters because the voting procedure keeps changing, from puncturing, ticking, then puncturing, and ticking again; (2) it shows that our Election process is not consistent nor systematic, this happened in a country with almost simultaneous Election time line with different voting procedures, and yet the discrepancy is not promptly resolved by amending the law.

b. *e-voting* Opportunities

In the discussion on voting procedures in Pemilukada, one of the important issue that should be considered is the MK Decision on the judicial review of Law No. 32 Year 2004, particularly Article 88 on voting during Pemilukada.[26] In the MK Decision No. 147/PUU-VII/2009 it is stated that MK partially granted the applicant's petition so that the word "puncture" in Article 88 Law No. 32 Year 2004 can also be defined as using ***e-voting* method**.[27] However, MK still determined a number of requirements related to *e-voting* methods, which include: (1) its application does not violate the *luber* principles (direct, general, free and confidential) and *jurdil* principles (honest and fair), and (2) for regions implementing *e-voting* method they must already be equipped in terms of technology, finance, human resources and software, including the community's readiness in the related region, and other necessary requirements.

Implementing e-voting itself still raises several questions, whether concerning the enactment of the necessary legal instruments, the readiness of , the election organizers, equipment, and technology, and the availability of budget, since the implementation of e-voting is estimated to require a lot of funding. Questions have also been raised with regards to the preparedness of the political parties and candidates, community, as well as other related requirements. Several countries that have tried *e-voting* apparently were not entirely successful, some of them after using *e-voting* even decided to return to the manual method ,[28] while others have opted to change the existing *e-voting* method, and yet others use the method only to accelerate the recapitulation or tabulation of votes.

One of the main problems with relation to *e-voting* is how to ensure the validity and accuracy on election results obtained. Not all *e-voting* systems can give such guarantee, for example voters cannot verify whether or not election results are truly originated from voters, or the system is easily manipulated. There are methods of *e-voting* where the voters cannot verify their choice because they only press a certain button or give a mark on special ballot (which use paper based) and after that they no longer know whether or not their votes are

[25] This is arranged further by the KPU in Article 29 of KPU Regulation No. 35 Year 2008.

[26] The intention to test Article 88 Law No. 32 Year2004 was filed by an Applicant named Prof. Dr. drg. I Gede Winasa (Jembrana District Head at that time), et. all.

[27] The applicant Prof. Dr. drg. I Gede Winasa in his petition to MK defines *e-voting* as a marking method for Legislative Elections, Presidential and Vice Presidential Election, as well as Regional Head and Deputy Election which is done by using touch screen, for complete details see MK Decission No. 147/PUU-VII/2009, page 29. Even though the definition of *e-voting* is not limited to that description alone.

[28] For example in Germany.

indeed calculated in accordance with their choice. A good *e-voting* system is a system where a voter, after exercising his/her right, either by pressing a button or touching a screen or by marking on special ballot, he/she would immediately get a small print out paper from the machine so he/she can verify that his/her choice is counted. This is only one of few examples of problems in implementing *e-voting* in elections in several countries.

Indeed, in this context there are pros and cons related to the use of *e-voting* methods in Indonesia. However, because MK Decision No. 147/PUU-VII/2009 has provided the opportunity to utilize *e-voting* in Elections in Indonesia, we must also consider that matter when drafting the relevant law and regulations. Moreover, in several occasions, either in Focus Group Discussion, Public Discussion, as well as workshops on *e-voting* held by Ministry of Home Affairs (MoHA) or Perludem (for several months in early-mid 2010), it was revealed that out of all three types of Elections, it is more possible to use *e-voting* method for Pemilukada and Presidential Election, and not Legislative Elections, due to the complexity of the Legislative Election itself. This can be understood because the Pemilukada only elect few candidates, which are between two to ten candidate pairs only (or a maximum of 12 pairs as in Kaur District Pemilukada) so the technology, methods and all stakeholders' readiness could be better. This is different from the Legislative Election where the amount of people to be elected is numerous.[29]

Besides that, in several meetings the use of *e-voting* were not recommended to be implemented quickly nor simultaneously, but rather gradually and not necessarily in all regions in Indonesia, considering each region has different levels of capability and readiness. What equally important is prior to using *e-voting,* a Feasibility Study must be done on the use of *electronic voting machines* (EVM), to review whether *e-voting* is applicable or not, what are the weaknesses and constraints to be faced, what are the required preparation, what kind of technology should be used, and what provisions need to be enacted as the legal basis of the implementation.

In addition, it is also necessary to determine what is the need: is it enough to apply *e-counting* or *tabulating* (so votes are cast by using ballot paper and manual marking, and the technology is used mostly to recap and tabulate so the results can be obtained faster), or is *e-voting* necessary namely the technology is used starting from the process of casting votes until counting them.

In several countries it even took years in preparing *e-voting*, before actually practicing it. So by considering all these matters, several issues can be identified should e-voting or e-counting provisions be included in Pemilukada Draft Law as a preemptive measure, namely to have the legal basis ready should one day there are regions that decide to carry it out? In this case, the MK Decision on Article 88 Law No. 32 Year 2004 can serve as the preliminary guidelines to formulate the norms to be set forth in the provisions in the Pemilukada Draft Law. In addition, several discussion results on *e-voting* should also be included, as well as the results from comparison studies with other countries' experiences and, equally important, the standards or guidelines for *e-voting* usage (which should not be binding) but is internationally recognized and used as guidelines.

Why do we need to regulate *e-voting*? Because it has several advantages if applied correctly, such as *quick counting* (fast counting process), *quick generation of results* (fast multiplication of election results – some of them can produce up to 30 copies – to be sent to various parties so that all parties get the same results quickly), and *transparent and auditable canvassing process without human intervention* (vote recapitulation is conducted in transparent and auditable manner, without human intervention). These advantages can

[29] This proposal still considers Pemilukada as a separate Election from the DPRD members' election. Related to General Election schedule recommendation (the division into national and local elections) as set forth in the following sections of this document, where it is proposed Pemilukada is held together with DPRD election, if there are restrictions on election participants, it means there will not be too many participants who will participate in the Election. Therefore this proposed implementation of *e-voting* will remain relevant for submission.

reduce the potential of fraud because until now most fraudulent practices have occurred during recapitulation stage, starting from the polling station (TPS), PPK, up to KPUD. Thus, transactions of buying and selling votes at each level can also be reduced.

Then, if indeed this method needs to be regulated, what are the issues that should be included in that regulation? They can be identified as follows:

1. What sort of preparation should be made to implement e-voting and who should do it?
2. What are the specified requirements for the implementation?
3. What are the matters that must be included in the law and what are the issues that can be regulated and determined further by the KPU?
4. Will the technology be utilized for voting casting, vote counting, up to the recapitulation of votes or is it going to be used only for vote counting and recapitulation (*e-voting* or *e-counting*)?
5. Should there be stipulations that obligate the use of *e-voting* or will this method be optional, namely it can be implemented by regions with the capability to do so but for those without, they can opt to use other means?
6. Does the law allow using two ways during election: manual and *e-voting*? Considering the variety of regions' and community's capability in using this new method?
7. What are mechanisms in place to ensure the "reliability" and "accuracy" of this *e-voting* system?
8. What is the arrangement regarding "back up mechanism" if the *e-voting* system being used fails in practice?
9. What about provisions regarding procurement of components for this election system?
10. What is the mechanism that allows stakeholders to be involved in the process?
11. What is the mechanism for handling lawsuits and verification in accordance to the new system being used?

I. DETERMINING ELECTED CANDIDATES

Regarding the determination of the elected regional head candidate pairs, Law No. 32 Year 2004 has determined a gradual arrangement. The Law stipulates that a regional head candidate pair is appointed as the elected one if they have secured more than 50% of the votes.[30] At this point the majority formula applies. However, the Law stipulates a new formula if no candidate pair obtains more than 50%of the votes. In this case, the Law determines that, if no candidate pair gains more than 50% of the votes, then the threshold of 30% applies. That means, the candidate pair who acquires more than 30% of the votes and is the highest vote gainer will be appointed as the selected candidate pair. However, if there is no candidate pair that gain more than 30% of the votes, then the candidate pairs who won the highest vote and second highest vote will participate

[30] Article 107 paragraph (1) Law No. 32 Year2004.

in the second round election.[31] Afterwards, the candidate pair out of the two that gains the most votes in the second round will be appointed as the elected candidate pair.[32]

Although the majority formula (gaining more than 50% votes) to determine the elected candidate pair is mentioned in Law No. 32Year 2004, actually that formula is not applicable (a.k.a the rule is useless) because the provision is negated by the 30% vote threshold formula. Automatically the majority formula is effective during the second round because election participants are only two candidate pairs. So, when there is one or more candidate pairs who exceed 30% vote threshold, then the plurality formula applies. This means the candidate pair which attains the most votes will be appointed as the elected candidate pair.

If the the plurality formula is used, why must we use the 30% vote threshold? Also, why should there be a second round election for the two candidate pairs gaining the most votes but whose votes are below the threshold of 30%? Law No. 32 Year 2004 makers answered: so that the elected regional head candidate pair will secure legitimacy when they govern. Strong legitimacy is nominally equated with gaining more than 30% vote.

Surely the legitimacy of 30% vote threshold can be disputed. Why not 35%, 40% or 45%, when in reality any of those numbers, while higher than 30, remains to be less than below 50% or more? In other words, no matter what is the percentage of votes, if not over 50%, then the candidate pair actually does not secure a strong legitimacy base, because the voters who did not choose them are more than those who want them in office. In other words, if strong legitimacy is expected from the elected regional head candidate pair, then they should get more than 50% vote. If not, then there should be a second round election for the candidate pairs who have gained the most and second most votes. Only by practicing this, the use of a majority formula is applied consistently.

Conversely, if the choice is to use plurality formula, why not be firm and delete the 30% vote threshold altogether and consequently, the second round election?. From budget perspective, this will obviously will require less funding and ensure better Pemilukada implementation schedule, which in turn will cause less disruption to government operations. From political perspective, this also will not cause many problems. As can be found in the Pemilukada implementation to date, the second round elections have led to a number problems: *first*, for voters, on one hand the second round elections have extended the political tension, on the other hand they have led to election saturation that in turn impacted the voters' participation rate both in the ongoing election and in the next, *secondly*, for candidate pairs the second round means increased campaign costs, so that whoever elected would be burdened with larger Pemilukada "debt", which must be paid when running the government , and, *thirdly*, for the organizers, the Pemilukada second round is adding complexity due to budget limitation.

The question is, if the determination of selected candidates is using the plurality formula, can the elected candidate pair get strong legitimacy based on votes? This question is fair, because in plurality formula it is very possible for the selected candidate pair to gain only a few votes, such as about 10% of the total vote if the competing candidate pairs are more than 10. In this formula, the more candidate pairs are, the less is the elected candidate pair chances to get significant votes.

It should be recalled however that the high number of candidate pairs in Pemilukada, usually only occurs in the first or second election, because the political elites still have the confidence that they have the chance to win the election. They also have not experienced or learned the lessons on the impact of electoral defeat in the form of economic (wasted wealth) and social loss (the collapse of political reputation for not being fit to be the regional leader). But in the subsequent elections, the political elites will behave more rationally, so for those who feel that

[31] Article 107 paragraph (2), (3) and (4) of Law No. 32 Year2004 *conjunction to* Law No. 12 Year 2008. The original content of Article 107 paragraph (2) in Law No. 32 Year2004 (before amended by Law No. 12 Year 2008) is: "If the provision as mentioned in paragraph (1) is not met, the candidate pairs of regional head and deputy who obtained more than 25% (twenty five percent) votes of the total number of valid votes, then candidate pairs with most votes is declared as elected candidate pairs. "

[32] Article 107 paragraph (8) Law No. 32 Year2004 *conjuction to* Law No. 12 Year 2008.

they have less potential of being selected, they will not want to speculate and participate in the election. In addition, if from the beginning the law stipulates that election will apply plurality formula, then the political elites will thoroughly calculate their electability. In the end, the rational attitude of the political elites will lessen by much the contending number of candidate pairs . They will not dare to speculate to face the risk of losing the election because out of the many of candidate pairs, there will only be one that is elected through only one round of election. Nomination regulations as outlined previously will also contribute in reducing the number of contending candidate pairs.

Looking back on the result of the first period of Pemilukada (2005-2008), in fact there were many regional head pairs who gained less than 20% of total votes. The calculation is this: the Pemilukada average participation rate was 70%, meaning that only 70% of voters came to use their rights. There were even several regions which participation rate was only 45%. If the number of voters who participated was 70%, then 25% of 70% was 15%.[33] In the last period's Pemilukada implementation there were not many second round elections, so the number of elected candidate pairs who gained only 15-25% of total votes was not few. But throughout the five years of the term of office, no party questioned the legitimacy base of the regional heads' leadership. Even if the regional head turned out to be problematic, it was more due to management problems and corruption, rather than the matter of legitimacy.

The facts increasingly emphasized the use of plurality formula provides a lot more advantages than the formula stipulated by Law No. 32 Year 2004. Aside from ensuring budget efficiency, reduction in political tensions and simplification of the electoral process, plurality formula also encourages a rational attitude amongst the political elites so that they will work together to build coalitions and to create a simple political bloc, and this in turn will ascertain that the local government will run more effectively.

[33] 25% figure from candidate determination formula is based on a provisions of Article 107 paragraph (2) Law No. 32 Year2004 before amended by Law No. 12 Year 2008, which replaced that formula into 30% if no candidates managed to obtain 50% votes.

CHAPTER III
ORGANIZING AND
LEGAL ENFORCEMENT OF PEMILUKADA

A. ELECTION VIOLATION SETTLEMENT

Problems in managing and enforcing the law in Pemilukada are often rooted on the absence of specific regulations in Law No. 32 Year 2004. This is very different to the management of and the law enforcement in elections for the DPR, DPD and DPRD members, about which Law No. 10 Year 2008 on Elections for the DPR, DPD, and DPRD members explicitly provides adequate regulation space. The provisions on the settlement of legislative elections violations are described as follows:

Table 2.

Settlement of Legislative Election Violations According to Regulation No. 10 Year 2008

Handling Election Violation Report	Election Administrative Violation	Election Criminal Violations
Article 247 (1) Bawaslu, provincial Panwaslu, regency/ city Panwaslu, sub-district Panwaslu, Field Election Supervisor and Foreign Election Supervisor received election violation report at each stage of election implementation. , (2) The report referred to in paragraph (1) may be submitted by: a. Indonesian citizen who has the right to vote; b. Election observers; or c. Election Participants. (3) The report referred to in paragraph (1) shall be submitted in writing to Bawaslu, provincial Panwaslu, district/city Panwaslu, sub-district Panwaslu, Field Election Supervisor and Foreign Election Supervisor by at least including: a. name and address of the reporter; b. party reported; c. time and place of the incident; and d. description of the incident. (4) The report referred to in paragraph (1) shall be	**Article 248** Election administrative violation is a violation of the provisions in this Law that is not a criminal provision of the election and other provisions set forth in KPU regulations. **Article 249** Election administration violations are settled by KPU, provincial KPU, and district/city KPU based on reports from Bawaslu, provincial Panwaslu, district/city Panwaslu according to its level. **Article 250** KPU, provincial KPU, and district/city KPU investigate and adjudicate Election administration violations in a period of no later than 7 (seven) days from the receipt of report from Bawaslu, provincial Panwaslu, district/city Panwaslu.	**Article 252** Election criminal violation is a violation of criminal provisions of the election stipulated in this Law which settlement is carried out through a court in the General Court. **Article 253** (1) Indonesian National Police investigator submits the investigation along with case files to the public prosecutor no later than 14 (fourteen) days after receiving a report from Bawaslu, provincial Panwaslu, district/city Panwaslu. (2) In the event that the investigation was not completed, within a period of no later than 3 (three) days the public prosecutor returns the case files to the police investigator along with guidelines about measures to be completed. (3) The Indonesian National Police investigator within a period of no later than 3

Handling Election Violation Report	Election Administrative Violation	Election Criminal Violations
submitted no later than 3 (three) days from the occurrence of election violations. (5) Bawaslu, provincial Panwaslu, district/city Panwaslu, sub-district Panwaslu, Field Election Supervisor and Foreign Election Supervisor shall review any violation reports received. (6) In the event the report referred to in paragraph (1) is substantated, Bawaslu, provincial Panwaslu, district/city Panwaslu, sub-district Panwaslu, Field Election Supervisor and Foreign Election Supervisor shall follow up the report no later than 3 (three) days after reports are received. (7) In the event Bawaslu, provincial Panwaslu, district/city Panwaslu, sub-district Panwaslu, Field Election Supervisor and Foreign Election Supervisor require additional information from the reporter regarding the follow-up as referred to in paragraph (3) it shall be carried out no later than 5 (five) days after reports are received. (8) Election administration violation reports are forwarded to KPU, provincial KPU, and district/city KPU. (9) Election criminal violation reports are forwarded to Indonesian National Police investigator.		(three) days from the date of receipt of the files referred to in paragraph (2) must submit the case files back to the public prosecutor. (4) The prosecutor delegated the case files referred to in paragraph (1) to the district court no later than 5 (five) days after receiving the case files. **Article 254** (1) District court in examining, hearing and adjudicating election criminal cases shall apply the Criminal Procedural Code (KUHAP), unless otherwise provided in this Law. (2) The trial of election criminal case referred to in paragraph (1) shall be presided upon by special judges (3) Further provisions concerning special judges are regulated by he Supreme Court Regulations. **Article 255** (1) District court is to examine, hear, and adjudicate election criminal cases no later than 7 (seven) days after the transfer of case files. (2) In the event of an appeal is filed on a court decision referred to in paragraph (1) the notice of appeal shall be filed no later than 3 (three) days after the verdict was read. (3) District court submits the appeal case file to the High Court no later than 3 (three) days after notice of appeal is received. (4) High Court is to examine and adjudicate the appeal as referred to in paragraph (2) no later than 7 (seven) days after notice of appeal is received. (5) The high court's decision referred to in paragraph (3) is final and binding and there

Handling Election Violation Report	Election Administrative Violation	Election Criminal Violations
		shall be no other legal efforts. **Article 256** (2) The court's decision as referred to in Article 255 paragraph (1) and paragraph (4) must be submitted to the prosecutor no later than 3 (three) days after the verdict was read. (3) The court's decision as referred to in Article 255 should be implemented no later than 3 (three) days after the decision is received by the prosecutor. **Article 257** (1) The court's decision on election criminal violations cases which according to this Law may affect an Election Participant's vote gain must be completed no later than 5 (five) days prior to the KPU determining a national election results. (2) KPU, provincial KPU, and district/city KPU shall follow the decision of the court referred to in paragraph (1). (3) A copy of the court decision referred to in paragraph (1) must be received by KPU, the provincial KPU, or district/city KPU and Election Participants on the day the court verdict was read.

Provisions on election violations settlement as listed above can also be found in Law No. 42 Year 2008 on Presidential and Vice Presidential Election. However, the provisions concerning election violations settlement cannot be applied immediately to Pemilukada because Law No. 32 Year 2004 does not regulate it. Not a single clause states that the provisions on electoral violations settlement for either Legislative or Presidential election shall also be applicable to Pemilukada. The absence of regulation means that local election violations settlement refers entirely to the Criminal Procedural Code (KUHAP)[34] (for criminal cases) and other regulations, such as KPU Regulation.

Therefore the law enforcement on violations in the legislative elections and the Presidential Election are not synchronized with the law enforcement for violations during Pemilukada, for example with regards to the time limit for filing report, report assessments, investigation,

[34] Regulation No. 8 Year 1981 on Criminal Law.

prosecution, and court examination. There is also no regulation on the stages for the court examination- specifically the stipulation that assigns such cases to the district court and the high court as the final appeal..

Table 3.

Handling Violation Reports on the 3 Types of Election

No.	Subject	Legislative Election	Presidential Election	Regional Head Election (Pemilukada)
1.	Legal Basis	Law No. 10 Year 2008	Law No. 42 Year 2008	Law No. 32 Year 2004 *conjunction to* Law No. 12 Year 2008
2.	Deadline for Receiving Report and Violations Handling by Election Supervisor	1) The report shall be submitted no later than 3 days after the violation. 2) Election Supervisor shall follow up the report no later than 3 days after the receipt of the report. 3) In the event additional information is required from the reporter, follow-up by the Election Supervisor shall be done no later than 5 days after the receipt of the report.	1) The report shall be submitted no later than 3 days after the violation. 2) Election Supervisor shall follow up the report no later than 3 days after the receipt of the report. 3) In the event additional information is required from the reporter, follow-up by the Election Supervisor shall be done no later than 5 days after the receipt of the report.	1) The report shall be submitted to Election Supervisor Committee according to its jurisdiction no later than 7 days after the violation. 2) Election Supervisor Committee shall decide to follow up or not to follow up the report no later than 7 days after the receipt of the report. 3) In the event Election Supervisor Committee requires additional information from the reporter to complete the report, the decision on the follow-up shall be done no later than 14 days after the receipt of the report.
3.	Deadline for Resolving Violations by Law Enforcer	1) Investigator submits the investigation along with case files to the public prosecutor no later than 14 days after receiving a report from Bawaslu/Panwaslu. 2) The prosecutor delegates the case files to the district court no later than 5 days after receiving the case files. 3) District court is to examine, hear, and adjudicate election criminal cases no later than 7 days after the transfer of case files. 4) High Court is to examine and adjudicate the appeal case no later than 7 days	1) Investigator submits the investigation along with case files to the public prosecutor no later than 14 days after receiving a report from Bawaslu/Panwaslu. 2) The prosecutor delegates the case files to the district court no later than 5 days after receiving the case files. 3) District court is to examine, hear, and adjudicate election criminal cases no later than 7 days after the transfer of case files. 4) High Court is to examine and adjudicate the appeal case no later than 7 days	1) Investigation on disputed reports containing elements of criminal acts is to be carried out in accordance with the Criminal Procedural Code (KUHAP). 2) The investigation on criminal acts completed within period in accordance with the applicable laws and regulations.

No.	Subject	Legislative Election	Presidential Election	Regional Head Election (Pemilukada)
		after notice of appeal is received. The high court's decision is final and binding decision and there shall be no other legal remedy6) he court's decision on election criminal violations cases which may affect an Election Participant's vote gain must be completed no later than 5 days prior to KPU setting a national election results.	after notice of appeal is received. 5) The high court's decision is final and binding decision and there shall be no other legal remedy 6) The court's decision on election criminal violations cases which may affect an Election Participant's vote gain must be completed no later than 5 days prior to KPU setting a national election results.	

Actually, to synchronize and harmonize the elections law enforcement between the different types of election (legislative, presidential, and regional heads) the provisions applicable for legislative and presidential elections should be adopted into Pemilukada Regulation. If this is done, then in the Laws regulating each election (Legislative, Presidential, and Pemilukada) there shall be the same rules on law enforcement. In addition, the crimes regulated in the three types of election are largely similar.

However, would having the same stipulations repeated in three laws be an unnecessary repetition? If so, would it not be possible to take another way, namely to have all election violations (criminal, administrative, and ethical codes) along with the sanctions (criminal, administrative, and ethical sanctions) as well as the legal resolution process (criminal procedural process, as well as the settlement process for administrative and code of conduct violations) regulated in one Law, and then include an article in each election Law which stipulates that all breaches of election regulations and the settlement shall be in accordance to the Law on Election Violations and Settlement. As a comparison, several countries have an Election Offenses Act (Law on Election Violations).

As stated above, the purposes of synchronization Pemilukada Law should also include law enforcement provisions as contained in the Law on Legislative Election. However there are a number of matters that need to be reviewed, so that when the the above provisions are adopted we may also improve them at the same time. Why in Pemilukada Law it is necessary to include provisions on law enforcement?

In various guidelines for a good election, there are a number of requirements that become the foundation for the development of election law enforcement system. The requirements are:

a. The existence of effective legal mechanisms and settlement.

b. The existence of rules regarding penalties for election violations.

c. The existence of detailed and adequate provisions to protect the right to vote.

d. The existence of rights for voters, candidates, and political parties to file complaint to election organizers or the court.

e. The existence of decision to prevent the loss of voting rights from election organizers or the court.

f. The existence of the right to appeal.

g. The existence of immediate decision.

h. The existence of rules regarding the time needed to adjudicate the lawsuit.

i. The existence of clarity on the implications of election rules violations towards election results.

j. The existence of processes, procedures, and prosecutions that respect human rights.

The legal framework should be able to guarantee the implementation of democratic Pemilu (General Election) and Pemilukada (Local Head Election)The legal framework should regulate effective legal mechanisms and settlement to enforce the right to vote because voting right is a human right. Therefore, the legal settlement for the violations against the right to vote should be one that treats them as violations of human rights. The legal framework for elections should establish detailed and adequate provisions to protect the right to vote.

The legal framework should stipulate that every voter, candidate, and party reserve the right to file a complaint to the election organizers institution or a competent court if there are alleged violations on the right to vote. Election Law should obligate the election organizers institution or the competent court to immediately issue a decision in order to prevent the loss of the victims' right to vote.

The decision of the court must be rendered as soon as possible. The legal framework should determine how long it will take to consider and decide a complaint. The delivery time of the decision to the complainant must also be specified. Also special consideration should be given if the decision is urgent for the election. An immediate settlement can often prevent minor problems from escalating into major ones. [35]

B. DEADLINE FOR REPORTING AND HANDLING VIOLATIONS

Can the fast track guarantee the justice and the achievement of the objectives of Pemilu?

Although time regulation is required, we still need to criticize the time limit provision to ensure that it is not in conflict with the intent and objectives of the election. The reporting deadline of 3 (three) days as stipulated in Law No. 10 Year 2008 is almost the same as the similar provision in Article 131 of Law No. 12 Year 2003 (the previous general election regulation). But there is an important difference, namely Law No. 12 Year 2003 gave the limit of 7 (seven) days to file the report to Bawaslu/Panwaslu in . In other words it gave 4 (four) more days than the provisions in Law No. 10 Year 2008. [36]

The deadline of 3 (three) days is very short, especially because in Article 247 of Law No. 10 Year 2008 it is not clear whether "days" means "working days" or "calendar days". In practice,

[35] To determine whether the international law enforcement principles are guaranteed, International IDEA proposes four checklists on legal framework material that will govern the implementation of elections, namely: (1) Does Election governing laws regulate effective legal mechanism and settlement for General Election law enforcement? (2) Does Election governing laws clearly state who can file a complaint on Election governing laws violations? (3) Does it also describe the process for filing the complaints? Does an Election governing regulation set the right to appeal on the decision of election organizers institution to a competent court? (4) Does Election governing laws set the deadline for filing, inspection, and determination of the legal settlement of a complaint? See International IDEA, *International Standards for General Elections*: *Guidelines for Judicial Review on General Election Legal Framework*, Jakarta: International IDEA, 2004.

[36] This rule actually has been filed for a judicial review by the MK in 2009, but the Court declared that the time limit provisions in the law were not contrary to the Constitution.

police and prosecutors interpret "days" in Article 247 as "calendar days" instead of "working days". This interpretation has important implications.[37]

The shortened reporting deadline from 7 (seven) days in Law No. 12 Year 2003 into 3 (three) days in Law No. 10 Year 2008 is a setback in election law enforcement, because it does not take into account the condition in various regions in Indonesia, and this has resulted in many election crimes not being able to be processed further because they were considered to be reported too late. In terms of the purposes and principles of election, the very short "expiry" provision leads to the possibility of escape for many election crime perpetrators and for DPR, DPD, and DPRD members to be elected through a fraudulent process that violates the law. This is clearly contrary to the constitution and regulations.

This election offenses are considered grave not only because of the criminal sanction but also because they have serious impact since an Election crime perpetrator who was not convicted (due to time limit) can become an elected representative either in the DPR, DPD or DPRD. This indeed stands in a blatant conflict with the intention of the rules on the election offenses in the election law.

Why are there provisions that restrict the reporting time for election violations in Law No. 10 Year 2008? One of the reasons often heard is that the settlement process of election violations must be completed before the election stage is completed, so that the criminal process does not interfere with the election agenda and thus ensuring that after the election is completed (and the members of the DPR, DPD or DPRD are inaugurated) there will be no more problems brought up against the elected members. Thus all violation and dispute settlement processes are shorter and faster than that of an ordinary crime. This is known as the “fast track” in the election violation and dispute settlement processes. The clearest example of the argument from the makers of the Law canbe found in Article 257 (1) Law No. 10 Year 2008 which states that:

"The court's decision on election criminal violations cases which, according to this Law, may affect an Election Participant’s vote gain must be completed no later than 5 (five) days prior to the KPU determining the election results nationally."

The impact of this kind of arrangement is the failure to process various manipulation and other crimes against the official report or certificate of vote counting result at the most crucial period in the elections, which is the vote recapitulation stages at PPK, District/City KPU, and Provincial KPU. Thus the regulation that rushes the settlement process of election offenses with the above spirit has clearly caused or provided a the loop-hole to commit election fraud without having to deal with law enforcement. This, of course, is ironic, and is certainly not expected in a democratic election process.

The above aspects raise the following question:

a. Are settlements of election disputes (including the disputed election result) the only ones supposed to be on the fast track, or this approach is also applicable for the settlement of election crimes?

b. Does the quick settlement of election crimes include shorter expiry period for election crimes or the election crimes’ reporting time?

c. Is "justice" guaranteed when the settlement of election crimes take place quickly, but not precise and accurate? Are "justice" and "legal certainty" guaranteed if many of the election crimes are not settled in court and the perpetrators can avoid punishment just because the time limit of 3 (three) days fails to be fulfilled, and thus creating many instances of "impunity"?

[37] If the election crime occurred on Thursday night, then he will fail to report to the Election Supervisory Body on Monday, because it will have been more than 3 (three) calendar days. If this situation occurs in regions that are geographically hard to reach (hills, mountains, and islands) it will be even more difficult to meet the deadline.

d. Is it true that if the expiry date and the settlement process of election crimes are the same as any other crime; they will "disrupt the election process"?

Therefore the above questions should be answered as follows:

a. The ones in the fast track should only be the settlement of administrative violations, disputes in process, and dispute of election results because the settlement of these problems indeed greatly affect the election stages which have clear time limitation (for example the determination of election participants, nominations, campaigns, voting and vote counting, and the determination of results). Without a firm and clear time limitation, the election process may be hampered and delayed and it eventually will disrupt the running of the government.

Meanwhile for election crimes, the process involves trying to determine whether a crime has occurred, processing people who are suspectedc / accused of having done the crime, and punishing those who are found guilty. This process is not just about the actions of a person but also her or his culpability. This of course is different from the settlement of administrative violations or disputes. What is sought in solving crimes is the material truth. Surely all must be done accurately, thoroughly, and carefully and should not be in a hurry. If the only benchmark is time, then many election offenses will not be processed by law, and the state shall loose its right to criminalize those crimes. Another impact is the loss of public confidence in the law and the state that allow numerous crimes to escape from the law because the filing of the report exceeded the extraordinarily short expiry period of 3 (three) days.

So, in conclusion, the Law makers were WRONG in generalizing the reporting time limit to 3 (three) days for all types of violations or disputes. Election crimes should have a more reasonable expiry period (if adjusted to Article 78 of the Criminal Procedural Code or KUHAP, then the expiry period is 6 years or 12 years instead of 3 days).

b. Even if the lawmakers intend to speed up the process or at least limit the duration of election crimes settlement (so a protracted resolution such as what happened in the 1999 elections will not be repeated), then the restriction should be done on the investigation, prosecution, or examination by the court, and not by limiting the reporting period to 3 (three) days after the incident.

Provisions to limit the period of investigation, prosecution, or examination in court may be applied, as found in several other Special Laws. With the time limitation it is expected there will be certainty that the election crimes will be completed within a reasonable time and not protracted. However, the time limitation should not be applied to the reporting of election crimes, because sometimes an incident is only discovered after a few days, weeks, months or even years. To guarantee fairness and equality, the stipulation on election crimes should be made in accordance to the provisions on expiry in Article 78 of the KUHAP. Or, if lawmakers intend to make special rules, the time limit should be made more reasonable, for example between 1 to 6 years after the incident.

c. Quick settlement by limiting the reporting period, *i.e.* 3 (three) days after the incident, will only assure "certainty" by ignoring all reports filed within more than 3 (three) days after the act and will only process those filed within the pre-determined time period. While this may make it easier for law enforcement to refuse to handle cases, but the result will be many crimes shall “vaporize" and the perpetrators will not be touched by the law. People do not get justice. Election process is colored with violations that are not processed properly. The perpetrators are not punished and therefore there will not be any deterrent from repeating the act in the future. In short, setting a short reporting limitation will damage the principles of election, especially the one that dictates that election should be conducted honestly and fairly.

d. Why is the election crime's expiry period is not specified longer (e.g. 6 or 12 years if in accordance to Article 78 of the KUHAP) or with other reasonable limitations (for example 1 to 6 years instead of 3 (three) days)? One of the arguments to justify the short reporting period is that longer time is allowed, and then maybe the election results will be continuously disputed by the losing parties, in other words it can happen that false reports are filed to obstruct the election stages. Criminal process could also disruptive if the parliamentarian has already sat in the DPR, DPD or DPRD or the candidate has already become a governor, head of district, or mayors.

   Both arguments should be refuted. *First*, the Indonesian criminal law (both in and outside KUHAP) already criminalizes false or defamatory report so if the losing party intends to disrupt the process by slandering the other party she or he will be processed in accordance to the applicable law. *Second*, if the resolution of an election crime is completed after the perpetrator is elected or if the candidate who committed the crime has been inaugurated as a member of the DPR, DPD or DPRD then the Court Decision should be the basis for him or her to be subjected to Periodic Substitution and thus she or he shall be replaced by another candidate in accordance to the applicable laws and regulations. This is certainly more just than to let a candidate continue to occupy a seat he or she has obtained fraudulently. It is also more in line with the objective of elections.

C. LIMITATION AND SANCTIONS OF ELECTION ADMINISTRATIVE VIOLATIONS

Another note is about election administration violations in which Law No. 32 Year 2004 also does not explain. Definition of election administrative violations here refers to the provisions contained in Law No. 10 Year 2008 which states that administrative violation is a "violation of the provisions of election regulation that is not an election criminal provision and other provisions set forth in KPU regulation" (Vide Article 248 Law No. 10 Year 2008). The definition is too wide and the benchmark is not very clear, because it raises following question:

a. Who are the subjects/offenders of election administrative violation? Are they only election participants/candidates? Or do they include voters, observers, and even the Election organizers (KPU and Bawaslu/Panwaslu)?

b. Are violations of all of the provisions in the Law or KPU Regulation considered to be an administrative violation? Or does it only comprise of the violations of crucial provisions that will have serious consequences?

c. Is there any limitation of administrative sanction for administrative violations? Is there any categorization of light, moderate and severe violations with different sanctions for every category?

d. What are the sanctions of election administrative violations? Is it a verbal warning, written warning, temporary or permanent suspension of activities (e.g. campaigns), the disqualification of election participant, fine, etc.?

e. Is there any distinction between administrative violations in each stage or for each issue/problem? Is there any distinction between the processing time limit of different qualification of violations?

f. Who has the authority to impose sanctions for each stage of the election or issue/problem? Are all administrative violations sanctions to be imposed by KPU/KPUD? Or could by Bawaslu/Panwaslu (e.g. for the campaign)? Or can it be done by the court? If indeed the one imposing sanctions can be different institutions, what determines that?

g. Is there any legal measure available to appeal the administrative sanctions imposed? Can the administrative sanctions imposed by District/City KPU be reversed by the Provincial KPU? Can administrative sanctions from Provincial KPU be reversed by the KPU?

The above issues have not been adequately regulated both in Law No. 32 Year 2004 and in Law No. 10 Year 2008, nor in Law No. 42 Year 2008. Whereas during election these issues often lead to problems and differences of opinion and in legal interpretation. Therefore, they should be carefully regulated in Pemilukada Laws (and other election legal instruments) in order not to complicate election law enforcement.

D. HANDLING AND SETTLING PEMILUKADA ADMINISTRATIVE DISPUTES

a. Problems surrounding Pemilukada Administrative Disputes

Pemilukada Implementation cannot be separated from the role of the Provincial KPU and District/City KPU (or KPUD) as election organizers. KPUDs organize several phases of Pemilukada. Implementation stages conducted comprise of the determination of voters lists, the registration and determination of regional head/deputy regional head candidates; the campaign, the voting, the vote counting, and the determination of candidate pairs.

In each stage as stipulated in Article 65 paragraph (3) Law No. 32 Year 2004, KPUD can issue a decision or determination that may potentially trigger disputes, namely when there are parties who feel harmed by the decision/determination. Such dispute is known as "Pemilukada administration disputes", namely when the substance of the dispute is not a crime, an administrative violation, nor an election result dispute.

The problem lies in the fact that Law No. 32 Year 2004 conjunction to Law No. 12 Year 2008, does not clearly state what legal effort that can be done by parties who feel harmed over the publication of the KPUD decision/determination. Whereas the availability of the legal effort to seek resolution is required to ensure the election process runs in democratic, honest, and fair way for all parties involved in the election.

Moreover in practice, when an administrative dispute on an unfavorable KPUD decision/determination is reported to the Panwaslu, the final result will only be in the form of Panwaslu recommendations, which generally will be ignored by the respective KPUD. Consequently there emerge the assumptions that all KPUD decisions or determinations during the stages of Pemilukada, except in the case of result dispute, cannot be 'touched' and are absolute.

Actually there is a loophole that allows legal effort through the domain of state administrative law, namely the litigation in the State Administrative Court, which can serve as a temporary answer to the above problems. However, in practice, this mechanism has also created many new polemics in Pemilukada implementation. One of the reasons is that the information on State Administrative Court procedures and mechanism has not been properly socialized.

Aside from the issues pertaining the disputes due to KPUD decision/determination as mentioned above, this chapter will also discuss Pemilukada disputes where the settlement authority is with Panwaslu. Law No. 32 Year 2004 *conjunction to* Law No. 12 Year 2008 does not firmly regulate the definition of “dispute” and what the procedures are. This also includes the absence of stipulation on the binding power of the determined dispute resolution to the parties involved.

Election administrative disputes are disputes caused by election organizers’ decisions or actions which are considered harmful to certain parties, in this case are the citizens (who have the right to elect and be elected), election participant parties, prospective legislative candidates, legislative candidates, prospective presidential/vice presidential candidates, and prospective regional head/deputy regional head, as well as presidential/vice presidential

candidates, and regional head/deputy regional head candidates, which are issued or occurred during election stages.[38]

In Pemilukada implementation, administrative disputes that occur in Pemilukada stages particularly can harm the following parties: citizen (who has the right to elect and be elected), prospective regional head/deputy regional head candidates, and regional head/deputy regional head candidates.

The principal problem in this issue is about KPUD's decision/determination which causes disputes or loss for a particular party during Pemilukada phases. The legal effort that can be done by parties injured by KPUD decision/determination is not clearly stated in Law No. 32 Year 2004 *conjunction to* Law No. 12 Year 2008.

As for the articles associated with KPUD's decisions/determinations that seem to be absolute, and the lack of stipulation on legal effort to protest or rectify it, can be found in Law No. 32 Year 2004 *conjunction to* Law No. 12 Year 2008, as follows:

Table 4.

Articles associated with Pemilukada Administrative Disputes

No.	Article	Subject	Article Reads	Potential Problems
1.	Article 60 paragraph 3c and paragraph 5 Law No. 12 Year 2008	on determination of Candidate Pairs	(3c) If an independent candidate is rejected by provincial KPU and/or district/city KPU because they do not meet the requirements as stipulated in Article 58 or Article 59 paragraph (5a), the candidate pair cannot re-nominate. (5) If the candidate file examination results as referred to in paragraph (4) do not meet the requirements and are rejected by the provincial KPU and/or district/city KPU, the political parties, coalitions of political parties or independent candidates can no longer nominate candidates.	Often problems occur where KPUD decision is considered incompetent. Problem related to candidate pairs administrative requirements include issues such as falsification of individual support data, and questionable validity of diploma replacement certificate, and health certificate from the Indonesian Doctors Association, and they often become principal lawsuit substance for PHPU.[39] Not to mention the interpretation of the application of "local wisdom" in the form of passing and determining of candidate pairs, to avoid clashes in the community.[40]
2.	Article 61 Law No. 32 Year 2004	on determination of Candidate Pairs	(1) Based on the examination result as stipulated in Article 60 paragraph (2) and paragraph (4), KPUD	*Idem*

[38] Topo Santoso, et al, "Election Legal Enforcement on 2004 Election Practices, 2009-2014 Election Review", Jakarta: USAID-DRSP-Perludem, 2006, page 96.
[39] See cases on candidates requirement that occurred among others in Karimun and Karawang Regency.
[40] Presented by Panwaslu from Papua region during briefing on PHPU preparation at MK (the Constitutional Court) which held by Bawaslu on 9-11 November 2010 at the Aston Pasteur Hotel, Bandung.

No.	Article	Subject	Article Reads	Potential Problems
			determines the candidate pairs, at least 2 (two) candidate pairs , the determination shall be outlined in the Minutes of Candidate Pairs Determination. (2) Candidate pairs who have been determined as stipulated in paragraph (1) are to be publicly announced no later than 7 (seven) days since the completion of the examination. (3) Towards candidate pairs who have been determined and announced, then performed an open lottery to assign the identification number for each candidate pair. (4) Determination and announcement of candidate pairs as stipulated in paragraph (3) shall be final and binding.	
3.	Article 74 Law No. 32 Year 2004	on determination of Permanent Voters List (DPT)	(1) Based on the voters list as stipulated in Article 70 and Article 73, the Vote Committee (PPS) shall prepare and determine the temporary voters list (DPS). (2) DPS as stipulated to in paragraph (1) shall be published by PPS to gain public response. (3) Voters who are not registered in DPS can register with PPS and recorded in the additional voters list. (4) DPS and additional voters list are established as DPT. (5) DPT is approved and announced by PPS. (6) Voters registration procedures are determined by the KPUD	There are many times when the DPT determined by KPUD is found to be problematic and can harm candidate pairs in the election. Some examples of the issues found are: double DPTs, un-updated DPTs, and fictitious DPTs.[41]

[41] See DPT cases in Batam City, West Halmahera District, South Buru District, North Bengkulu District, West Tanjung Jabung District, Pacitan District, Merauke, Falkirk, Bontang, East Kutai, Nduga, and Yalimo.

No.	Article	Subject	Article Reads	Potential Problems
4.	Article 75 paragraph 9 Law No. 12 Year 2008	on determination of campaign implementation schedule	The schedule of Campaign implementation is determined by the provincial KPU and/or district/city KPU **by considering suggestion from candidate pairs**	If KPUD's neutrality as Pemilukada organizer is in doubt, the possibility can occur where KPUD gives more consideration to suggestions from the incumbent candidate pair as the party that is still "in power", so the other candidate pairs may feel their suggestion is not accommodated or even harmed by the KPUD's decision/determination on the campaign schedule.
5.	Article 81 paragraph 3 and paragraph 4 Law No. 32 Year 2004	on sanction in the form of campaign activities termination	(3) The procedure for sanctions imposition against violations of campaign implementation prohibition as stipulated in paragraph (2) is determined by the KPUD. (4) Violations of provisions on the campaign implementation prohibition as stipulated in Article 79 are punishable by termination campaign during campaign period by the KPUD.	KPUD's assessment for any violation on campaign implementation prohibition can be questioned by the candidate pairs against whom the sanction is imposed. Especially when KPUD is already considered not neutral or has allegiance to a particular candidate pair.
6.	Article 85 paragraph 3 Law No. 32 Year 2004	on sanctions in form of cancellation as a candidate pair due to matters related to campaign funds	(1) Candidate pairs may not accept donations or other assistance for campaign from: a. foreign countries, foreign private organizations, foreign NGOs and foreign citizens; b. contributors or donors that are not clearly identified; c. Government, state owned enterprises/BUMN, and local government owned enterprises/BUMD. (2) A Candidate pair who accept donations as stipulated in paragraph (1) is not allowed to use these funds and shall report them to the KPUD in no later than 14 (fourteen) days after the campaign period ends and hand over such donations to the local treasury.	Compare this stipulation with Article 82 paragraph 2 of Law no. 32 year 2004 that determines that the penalties in form of cancellation as a candidate pair is imposed only after a pre-existing and binding court decisions on the case of money politics is issued. On the contrary, this article places the decision on cancellation of candidate pair status by the KPUD , and only based on the recommendations of the Panwaslu and assessments of the KPUD.

No.	Article	Subject	Article Reads	Potential Problems
			(3) Candidate pairs who violate the provisions as stipulated in paragraph (1) are subject to sanction in form of cancellation of candidate pairs status by the KPUD	
7.	Article 90 paragraph (3) Law No. 32 Year 2004	on determination of quantity, location, shape, and layout of polling stations (TPS)	(3) Quantity, location, shape, and layout of TPS are determined by KPUD	Issues that may occur include the emergence of fictitious TPS and no regulation that accommodates TPS establishment in hospitals.
8.	Article 91 paragraph (2) Law No. 32 Year 2004	on determination of quantity, material, shape, size and color of ballot boxes	(2) Quantity, material, shape, size, and color of ballot boxes as stipulated in paragraph (1) are determined by KPUD by referring to the existing law and regulations.	Issues that may arise, among others, the poor quality ballot boxes and those that do not accommodate the geographical conditions in specific areas that have special requirements (the islands), for example if the ballot boxes have to be transported by boat through bad weather.

The finality of KPUD's decision/determination with regards to the Articles can cause various problems in Pemilukada's implementation. *First*, in the event when there are doubts on the neutrality, integrity, accountability, professionalism and transparency of the KPUD members when they issue decisions/determinations in a particular stage in Pemilukada, which is included in the domain of administrative disputes.

Second, the emergence of the assumption that KPU's decisions/determinations as not appealable or have no other legal remedy against them, and therefore they apply absolutely and set aside the principle of "fair", especially for those who feel harmed by or object to the decisions/determinations.

Third, the legal instruments related to Pemilukada, in this context Law No. 32 Year 2004 *conjunction to* Law No. 12 Year 2008, only accommodate the Pemilukada administrative disputes related to vote counting, but do not accommodate the issues that occur in the stages before the vote counting.

In addition, *fourth*, the institutionalization of the law in Pemilukada failed because substantially Law No. 32 Year 2004, and even Law No. 12 Year 2008 do not clearly regulate the legal measure, both material and formal, which can be taken in dealing with administrative disputes in Pemilukada stages. For example, Article 61 Law No. 32 Year 2004, which regulates the determination of candidate pairs; there is no stipulation on the legal mechanisms available for a pair who objects to the KPUD's decision on the candidate determination.

Finally, several issues that arise related to the release of decision/determination by KPUD as state officials on various Pemilukada stages that is not regulated in laws related to Pemilukada (Vide Law No. 32 Year 2004 *conjunction to* Law No. 12 Year 2008), namely the institutionalization of the law on the settlement of Pemilukada administrative dispute, whereby the KPUD's decisions are actually within the domain of state administrative law.

b. Pemilukada Disputes

The provisions on Pemilukada disputes are regulated only in Article 66 paragraph (4c) Law No. 32 Year 2004 which states that one of the duties and authorities of Panwaslu is to settle Pemilukada disputes. Meanwhile the material substance and formal mechanisms of the dispute itself are not regulated in Law No. 32 Year 2004 *conjuction to* Law No. 12 Year 2008. As the result, there are various problems in practice on the field.

First, the definition or the understanding of "Pemilukada disputes" is not regulated in Law No. 32 Year 2004 *conjunction to* Law No. 12 Year 2008. At the time of election implementation, the definition of the disputes is constructed by the KPUD itself in its regulations on disputes.

Second, the absence of clear qualification for those who are eligible to be a 'mediator' in Pemilukada disputes settlement, other than Panwaslu. *Third*, the lack of formal mechanisms for Pemilukada dispute settlement. *Fourth*, issues related to the binding power of Panwaslu recommendations on disputes settlement to the parties involved. *Fifth*, the lack of stipulation on measures that can be taken against a Panwaslu's recommendation on disputes settlement by parties who object to, do not accept or feel harmed by it.

c. Recommendations

1) Handling and Settling Administrative Disputes

The legal effort that can be done to accommodate the parties harmed by KPUD's decision/determination in administrative disputes is to open a space to rectify the decision/determination. The mechanism is through the submission of the objections against the KPUD's decision/determination by parties who feel harmed to court institutions or special judges assigned to this task.[42]

The objections resolution mechanism must meet the standards of "clear rules" (transparency), "definitely" (measurable), and "easily applied" (applicable).[43] Therefore, the mechanism should allow the objections to be filed gradually to a different and/or higher institution than the maker of the objected decision/determination. For example:

a. Objections to District/City KPUD's decision/determination should be submitted to the Provincial KPUD
b. Objections to Provincial KPUD's decision/determination should be submitted to the High Court
c. The last appeal against the decision of the High Court should be submitted to the election special judge at the Supreme Court.

The election special panel of judges in the High Court and Supreme Court should consist of career judges and election law experts.[44]

Next there should also be a fixed time limitation for objection submission by parties who claim to have been harmed by KPUD's decision/determination and the handling of the objection handling by the above institutions. The maximum time limit for an objection's settlement must be set to ensure that the interest of all parties to follow the next election stages will not be impaired.[45]

[42] Topo Santoso et. al., *Opcit,* page 63
[43] *Ibid.,* page 113
[44] *Ibid.,* page 112
[45] *Ibid.,* page 132

Aside from objection raising mechanism, the Pemilukada related laws can also afirm the validity of legal measures on administrative disputes through the State Administrative Court (PTUN). This legal measure actually has already been made available by the Circular Letter of the Supreme Court (SEMA) No. 7 Year 2010, which provides opportunities to settle Pemilukada legal issues on all stages, except those related to vote counting stage in the PTUN.[46]

Administrative dispute settlement in Pemilukada stages can be done through PTUN based on Article 1 paragraph (10) of Law No. 51 Year 2009 on the second amendment to the law No. 5 Year 1986 on PTUN states:

> *State Administrative Disputes are disputes that arise within the state administration domain between individual or civil legal entity with a state administrative agency or official, may it be in central government or in regional, due to the release of a state administrative decision, including personnel disputes according to the applicable laws and regulations.*

KPUD members who issue a decision/determination if evaluated based on Article 1 paragraph (8) of Law No. 51 Year 2009 on the second amendment to the Law No. 5 Year 1986 on PTUN, are considered to be a *state administrative agency or official who implement government affairs according to applicable laws and regulations.*

Meanwhile, Article 1 paragraph (9) of Law No. 51 Year 2009 on the second amendment to the Law No. 5 Year 1986 on PTUN, explained the definition of State Administrative Decision, namely *a written determination issued by state an administrative agency or official which contains a state administrative legal action in accordance to the applicable laws and regulations, which is concrete, individualized, and final, which generate a legal effect to an individual or legal entity*.

Therefore in the context of Pemilukada, KPUD's decision/determination can be the object of dispute in PTUN. But there are exceptions, namely in the case where the KPUD's decision /determination is related to the Pemilukada's results. Whereas Article 2 letter g of Law No. 51 Year 2009 on the second amendment to the Law No. 5 Year 1986 on PTUN, states:

> *Not included in the definition of State Administration Decision under this Law is KPU decisiosn, both at central and regional level, on the election results.*

Thus, other than on the election results, then all disputes during Pemilukada stages have the opportunity to be litigated through the mechanism of state administrative law, bearing in mind that each stage of the election has a legal basis, namely the KPU Decree (SK KPU). Therefore, it is the SK KPU on each stage that is likely to be the object of a case submitted to the PTUN. Although from historical point of view, the implementation of PTUN Law stated above does not automatically run well. This is because n the beginning of the implementation SEMA No. 8 Year 2005 on Technical Guidelines for Pemilukada Disputes was issued, and in item 2 of the SEMA there is a regulation that, when linked to Article 2 letter g of Law No. 51 Year 2009 on the second amendment to the Law No. 5 Year 1986 on PTUN, render KPUD decision/determination not being able to be litigated in the PTUN, and PTUN not having the authority to examine and adjudicate the said decision/determination.

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[46] The discussion on SEMA was excerpted from: Irvan Mawardi, "Responding to SEMA No.07 Year 2010: The Legal Institutionalization of Pemilukada Stages", Monday, May 31st 2010, http://www.hukumonline.com/berita/baca/lt4c033e1db2e9e/merespon-sema-no07-tahun-2010-institusionalisasi-hukum-tahapan-Pemilukada.

The Circular Letter of the Supreme Court (SEMA) No. 8 Year 2005 regulates that although what explicitly stated in Article 2 letter g is the decision on election results, but the stipulation should be interpreted as also including the decisions related to the elections. This is because, if there is differentiation between which judicial institutions have the authority to decide over which decision/determination, while the ruling is over decisions/determinations that are the product of the same entity, namely KPUD, and they are related to the same legal event, namely the general election, then the difference in authority may generate court decisions that are inconsistent,, differ from or contrary to one another.

SEMA No. 8 Year 2005 also refers to the Decision No. 482 K/TUN/2003 dated August 18, 2004 as the jurisprudence of the Supreme Court which affirmed that the examination and adjudication of decisions related to and included within the scope of politics in elections are not the authority of PTUN.

PTUN Decisions' that affected the implementation of the 2009 election stages, among others, are:

First, the Jakarta PTUN Decision to grant the petition of four parties that achieve electoral threshold in the 2004 elections to participate automatically in the 2009 election.

Second, the Jakarta PTUN Decision which favored Republiku Party lawsuit against the KPU's Decision that the party was ineligible to participate in the election. Republiku Party by the Jakarta PTUN was considered to be eligible to participate in the election because the facts at trial proved that Republiku Party had party structures in 29 provinces, exceeding the minimum requirement of 15 provinces. KPU did not pass them in the verification process because KPU considered Republiku Party only had structures in 14 provinces. In this case the KPU also lost in the High Court appeal, so at that time KPU had to file an appeal to the Supreme Court.

Third, interlocutory Decision issued by Jakarta PTUN which favored Gus Dur's PKB, which had filed a lawsuit against the takeover of the party's DPP (National Leadership Board) secretariat by Muhaimin's PKB. PTUN Decision reversed the Minister of Law and Human Rights (MenkumHAM) decision that stated that the address of PKB's DPP Secretariat is at Jalan Siliwangi, Jakarta.

Fourth, the rejection of Gus Dur's PKB litigation by Jakarta PTUN against the Ministry of Law and Human Right's decision authorizing the management of Muhaimin Iskandar's PKB version.

The four lawsuits can be categorized into two categories, namely those occurring in the election participants verification stage and those associated with the legal eligibility of political parties to participate in the 2009 election. All these cases are within the domain of disputes during election stages that are not related to election results.

Finally, SEMA No. 7 Year 2010, which confirmed Article 2 letter g of Law No. 5 Year 1986, namely that the decisions or determinations issued by KPU/KPUD on election results cannot be litigated in PTUN. Thus the decisions that have not yet or do not constitute "election results" can be classified as a decision in the field of government affairs and therefore as long as the decision fulfills the criteria in Law No. 51 Year 2009 on the second amendment to Law No. 5 Year 1986 on PTUN Article 1 paragraph (9), then it remains to be under the jurisdiction of the PTUN to examine and adjudicate. This is because the decision is beyond the exception as determined in Article 2 letter g of the PTUN Law.

SEMA No. 7 Year 2010 has provided opportunities for parties harmed by a KPUD decision/determination to settle Pemilukada legal issues at all stages at PTUN, except for grievances related to the stage of vote counting results.. The Circular Letter also contains

guidance from the Supreme Court that *First*, the examination of disputes by PTUN should be treated as a priority, by accelerating the dispute settlement process. *Second*, in the judicial process, the Chairman of PTUN or the panel of judges appointed to examine the disputes should consider the cases in a wise and prudent manner, deliberating for each case the benefit to the plaintiff or the defendant if a stay order is issued as regulated in Article 67 paragraph (2), (3), and (4) of the PTUN Law.

2) Handling and Settling Pemilukada Disputes

When referring to the dispute cases occurring in the working period of the 1999 General Election's Panwaslu, it appeared that the so-called dispute cases at that time were actually administrative violations or breach of procedures.[47] For example, during the 1999 Election campaign period there occurred many cases of conflicts related with campaign sites amongst the participants, which by many were referred to as disputes. But after investigation, they proved to be administrative violations or breaches of procedures, because the election committee had already determined the allocation of campaign location utilization, but there were contestants who did not know the location designation or chose to ignore it.[48]

The legal basis of the 1999's Panwaslu at the time was Law No. 12 Year 2003 and Law No. 23 Year 2003, which did not define "disputes" in detail. So the definition of "disputes" was eventually constructed by the 1999 Panwaslu itself based on the understanding of disputes in civil law, namely as follows:[49]

> *Disputes between two or more parties which arise because of differences in interpretation among the parties, or a specific disagreement, which relate to the fact of activities and events, law or policy, in which an allegation or opinions of one of the parties is rejected, acknowledged differently, or the avoidance of other parties, which occurred in the election implementation.*

The disputes in 2004 Legislative Elections also showed that the number of cases reported was not many, and only appeared at the stage of nomination, campaign, and determination. The principal issues also revolved around the candidates who were not satisfied with the decision of their political parties in determining the numerical order of the candidates. This was actually an internal issue within the party itself,[50]

The experience in managing dispute cases in the 1999 and 2004 elections have shown that what was referred to as "disputes" in election implementation did not actually happen during the election implementation. In other words, the so-called disputes were actually election administrative violations.[51] Thus the term "disputes in election implementation" should be omitted from the nomenclature of election regulations[52], including from Article 66 article (4c) Law No. 32 Year 2004.

E. ELECTION COURT/ELECTION SPECIAL JUDGES

Neither in Law No. 32 Year 2004, Regulation No. 10 Year 2008, nor Law No. 42 Year 2008 there is any rule on the Election Court. Law No. 10 Year 2008 only contained the heading

[47] Topo Santoso, et. al, *Opcit,* page 50
[48] *Ibid.*
[49] *Ibid.,* page 52-53
[50] *Ibid.,* page 56-57
[51] *Ibid.,* page 86-87
[52] *Ibid.,* page 87

"settlement of election violations and election result disputes" and did not use the term “Election Court”. However, there is the term “Special Judge” in Article 254 of Law No. 10 Year 2008:

Article 254

(2) District court in examining, adjudicating and deciding Election criminal cases is to use the Criminal Procedural Code (KUHAP), unless provided otherwise in this Law.

(3) The examination trial session of Election criminal cases as referred to in paragraph (1) shall be conducted by special judges.

(4) Further provisions concerning special judges are to be regulated by Supreme Court Regulation.

Actually in the discussion of election draft law (which later was passed as Law No. 10 Year 2008) there was a proposal to include provisions which would allow the establishment of an Election Court, but it was later abandoned. Several parties also put forth the same proposal after the completion of the 2009 election. . Is an Election Court needed in the context of election law enforcement in Indonesia?

1. If so, how is the format and at which regional level should it be established (per province or district/city), and what should the nature of the institution be (ad hoc/permanent)?
2. What are within the jurisdiction of the Election Court?

Election Court and Election Judge generally settle Election lawsuits (election petition). The litigation basis can be wide, either related to counting error or election offenses or even issues related to the election organizers, and so forth. In several countries election lawsuits are even settled by General Court (not the Election Court).

It is not common to give Election Court and Election Judge the authority to settle election crimes. There are two ways for people to question the election results. *First*, by election petition filed to request the cancellation of election results due to various reasons; and *second*, by criminal case proceedings. The result of such criminal proceedings, for example, a guilty verdict against a candidate for "bribery" or "money politics" then serves as the basis for the KPU to cancel the election results.

In several countries the result dispute can also be settled by institutions outside the judiciary, such as by a Commission or other institutions. But, in general election crimes are solved through common criminal justice system. In Indonesia, the role of Election Court or Election Judge is attained and exercised by the MK according to the 1945 Constitution. Therefore, the establishment of an election court or appointment of election judges in accordance to the above concept shall obstruct the jurisdiction of the MK in deciding over election result disputes.

The most possible way is to optimize the criminal justice and "disputes in progress" processes which to date have been decided by the Federal Court and PTUN and to ensure that they comply with the election’s legal framework, systems, and purposes. In other words, strengthening the existing judiciary by taking special measures such as appointing special judges who understand the intricacies of election as well as building the capacity of judges who handle election offenses and disputes in the election process. Creating another new institution such as the Election Court or Election Judges, especially in all regions in Indonesian at various levels will only raise the number of the already numerous institutions in the country, add to the state expenses, and increase institutional overlapping.

So which institution should handle and settle disputes or conflicts that arise during election implementation stages (dispute on election stages) that may occur between voters/election participants with election organizers?

Legal conflicts should be settled by the judiciary because the judiciary has the authority and legitimacy in settling legal conflicts. The problem is, there are concerns that our judiciary has lack of capacity and credibility in settling disputes in election process/stages. This should be corrected. The conflicts can be settled by the General Court or PTUN, but with a footnote that the institutions should be strengthened.

There is no need for Election Judiciary (Election Court) or Election Judge as commonly defined, namely an institution to resolve election petitions, because there is already the MK. Whereas for the settlement of objections against KPU decision, there is already General Court or PTUN. What is required is the capacity building for judges who handle election criminal cases and "legal disputes in election process" to ensure that they conform with the election's legal framework, systems and purposes.

F. HANDLING AND SETTLING PEMILUKADA RESULT DISPUTES

What is the ground of petition against an election? What actually is the basis for objections in an election results dispute? Does it only include objections with regards to the vote counting results that affect the parliamentary seat acquisition or the election of candidate pairs (for the presidential and regional leader's elections)?

In several election dispute cases, there were several issues that were attempted to be filed as ground of petition, among others, error in voter registration, frauds (especially money politics, bureaucracy deviation, and intimidation), impairing KPUD decisions, and others.

These grounds of petition ultimately determine the extent to which the court will decide the cases, whether only the cancellation of counting and the orders for recounting, or declaring an election result null and void and to conduct re-election.

What can be decided by MK in an election result dispute? What limits MK in deciding disputes submitted? The answer is of course related to what can be petitioned in any election dispute/conflict. The grounds of petition and the Decisions have been clearly determined may it be for legislative, Presidential, or regional leader elections that . Previously, a decision containing an order to hold "re-election" or "recounting" did not exist in the procedural law on election dispute settlement in Indonesia.

In the beginning of its implementing its jurisdiction over result disputes, the MK conducted field inspection and issued the order to the organizers (KPUD and staff) to open the ballot boxes and recount the votes at the locations where vote results had been questioned. This was done to strengthen the evidence and become a consideration for the MK to make its decision. However, the MK did not order KPU to organize a re-election. Re-election order is also not in line with the concept that the settlement of election disputes is on the fast track.

Why there were so many election disputes being settled at the MK? *First*, if observed, there were too many petitions submitted to MK that were due to the lack of comprehension on the grounds of petition that should have been filed. *Second*, many of the violations and disputes in election stages which should have been settled by Panwaslu or law enforcer were submitted to the MK instead.

Table 5.

Recapitulation of o Regional Election Results Disputes

Constitutional Court of the Republic of Indonesia

Year 2008 up to January 5, 2011

No	Year	Remaining Cases from the Last Period	Accepted	Total (3+4)	Decided				Total Decision (6+7+8+9=10)	Remaining Cases This Year (5-10)	Remarks
					GRANTED	REJECTED	INADMISSIBLE	WITHDRAWN			
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(13)
1	2008	0	27	27	3	12	3	0	18	9	
2	2009	9	3	12	1	10	1	0	12	0	
3	2010	0	230	230	26	149	45	4	224	6	
4	2011	6	2	8	0	0	0	0	0	8	
Total		**15**	**262**	**277**	**30**	**171**	**49**	**4**	**254**	**23**	

In the petitions on election/Pemilukada result disputes it has been found that the applicants filed election administrative violations, election crimes, and election stages dispute as the grounds for petition. Whereas those three issues are not under MK's jurisdiction to settle. Election crimes, they should be settled by the criminal justice system (police, public prosecutors and courts), while administrative violations should be settled by KPU/KPUD. With regards to the disputes in the election process/stages, they should be settled by Bawaslu/Panwaslu. Unfortunately Bawaslu/Panwaslu's decision, although they are supposed to be final and binding, often are not as strong as the decision of the judiciary (often ignored).

Meanwhile the definition of "election result disputes" is disputes over KPU/KPUD decision with regards to election results. These election result disputes are unfortunately limited to only disputes on counting errors made by KPU/KPUD. In practice, all the legal issues are included in the petition. No wonder most of the petition in MK were decided to be "inadmissible" or "rejected" (especially in the period before the decision of the Pemilukada for East Java Governor).

Should the election petition then be limited to a large deposit (as applied in several countries) or limited to a certain vote difference, to ensure that the Judiciary and the society will not be preoccupied with election disputes? This is indeed one option, but what is important is the awareness of the candidates or political parties to respect and recognize the victory of others, and their comprehension on the definition of election results dispute.

The definition of "Pemilukada dispute" is as stipulated in Article 66 paragraph (4) and Article 106 of Law No.32 Year 2004 on Regional Government. From the articles it can be surmised that there are two types of disputes. *First*, the disputes where the settlement authority is in the

hands of Panwaslu[53] and *second*, the disputes where the settlement authority is in the hands of the judiciary.[54]

Before the regional head and deputy regional head election was under the election regime, the election result disputes had been settled by the Supreme Court. At that time the settlement regional head election disputes was regulated in several legal instruments, namely Law No. 32 Year 2004 on Regional Government, Government Regulation (PP) No. 6 Year 2005 on the Election, Approval, Appointment, and Dismissal of Regional Head and Deputy Regional Head *conjunction to* Government Regulation No. 4 Year 2005 on the Amendment to the Government Regulation No.6 Year 2005. In Article 106 paragraph (1) it was confirmed that objections to the determination of the head and deputy regional head elections could only be filed by candidate pairs to the Supreme Court no later than 3 (three) days after the determination of the head and deputy regional head elections.

More detailed provisions concerning the dispute settlement process were set forth in Supreme Court Regulation (PERMA). Article 2 PERMA No. 2 Year 2005 determined that the Supreme Court was to investigate and adjudicate disputes on Provincial election results, while the High Court was to investigate and adjudicate disputes on District election results. In accordance to the Law and this PERMA, the Supreme Court or the High Court's decision was to be the first and the final.. Article 6 stated that upon other matters not regulated in the PERMA other provisions in the applicable civil procedural law shall apply, as long as not they are not contrary to the PERMA.

Disputes settled by the Supreme Court (or the High Court) as stipulated in Article 106 paragraph (2) Law No. 32 Year 2004 are only those "*with respect to the results of vote counting that affect the election of candidate pairs.*" This provision was reaffirmed in Article 94 paragraph (2) of the Government Regulation No. 6 Year 2005, which states that: "*The objections as referred to in paragraph (1), only with respect to the results of vote counting that affect the election of candidate pairs.* " and Article 3 of PERMA No. 2 Year 2005, namely the Supreme Court *only accepts objection filed against election results of the governors elections, while for the heads of district the hearing and adjudications on objections to the election results shall be done by the High Court through the local District Court*.[55]

If one examine all of the decisions of the High Court and the Supreme Court on election dispute cases, as well as the election result disputes decided by MK , then it will be found that the basis of the vote counting disputes in election/Pemilukada was just due to miscalculation

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[53] Article 66 paragraph (4) Law No. 32 Year2004 reads:
"(4) Election Supervisory Committee have the duty and authority:
a. oversee all election implementation stages of regional head and deputy regional head;
b. receive violation reports on governing regulations of regional head and deputy regional head elections;
c. settle disputes that arise in the election implementation of regional head and deputy regional head;
d. forward the findings and reports that cannot be settled to the competent agency; and
e. regulating the relations of coordination among supervisory committee at all levels."

[54] Article 106 Law No. 32 Year2004 reads:
" (1) Objections to the result determination of the regional head and deputy regional head election can only be filed by candidate pairs to Supreme Court no later than 3 (three) days after the result determination of the regional head and deputy regional head election.
(2) The objections as referred to in paragraph (1)are only with respect to the results of vote counting that affect the election of candidate pairs.
(3) Filing objections to the Supreme Court as referred to in paragraph (1) shall be submitted to the high court for province regional head and deputy regional head elections and to the district court for district/city regional head and deputy regional head elections.
(4) The Supreme Court to decide disputes over vote counting results as referred to in paragraph (1) and paragraph (2) no later than 14 (fourteen) days from the receipt of objections by the District Court/High Court/Supreme Court.
(5) The decision of the Supreme Court as referred to in paragraph (4) shall be final and binding.
(6) The Supreme Court in carrying out its authority as referred to in paragraph (1) may delegate to the High Court to rule on the vote counting result disputes of district/city regional head and deputy regional head elections.
(7) The decision of the High Court as referred to in paragraph (6) shall be final."

[55] Article 2, PERMA No. 2 Year 2005 on the Procedures for Filing Objection Remedies Against Results Determination of Regional Head Elections (Pilkada) and Deputy Regional Head Elections (Pilwakada) From Provincial KPUD and District/City KPUD

(recapitulation) caused by the negligence/wilful misconduct of the vote counters (KPPS, PPS, PPK, District KPU, Provincial KPU, or Central KPU).

The ground forPemilukada disputes is the same with ground for litigation in legislative and presidential election disputes. According to Article 75 of Law No. 24 Year 2003 and MK Regulation No.04/PMK/2004, the basis to file objections against election result is the presence of errors in the decisions regarding election results made by the KPU.

In the various decisions, the object calculated is only the votes that have actually been casted, rather than the assumed or potential votes. Thus the potential votes from people who did not vote due to any reason (not listed, had not received the invitation letter to vote, impeded, intimidated) will not be taken into account. Also not counted are the votes that might have been influenced by bribes (money politics), intimidation, campaign outside the schedule, and so forth.

Pilkada was put under the election regime since the enactment of Law No. 22 Year 2007 on General Election Organizer where it is firmly stated that "elections" include the election of Head of Regions. Thus, in addition to Law No. 32 Year 2004, the implementation of Pemilukada also refers to Law No. 22 Year 2007, KPU Regulations and MK Regulations on Pemilukada dispute settlement in MK.

Consequently, the Regional Head Election dispute settlement shifted from the Supreme Court to MK.[56] There were two notable periods with relation to MK Decisions on election (especially Pemilukada) results, namely: (1) the period when MK more often limited election result disputes to disputes pertaining counting error and (2) the period when MK expanded the definition of "election result disputes" as not only limited to counting error but also the errors in the process which influence the election results. In the case of East Java governor election, as well as the Head of Region's election in South Bengkulu, South Central Timor, North Tapanuli and so forth, MK introduced the concept that elections can be repeated in the event of massive, structured, and systematic violations. These Decisions are landmark decisions, thus nowadays many of the petitions to MK present the argument that massive, systematic, and structured violations have occurred.

The problem is, the development of dispute settlement regulations in MK, which have somewhat influenced Law No. 32 Year 2004 (as well as Law No. 10 Year 2008 and Law No. 42 Year 2008) has not been responded by the appropriate legal instruments. In their words, the shift in meaning, scope, parameter of election disputes has not been codified in the election Laws mentioned above. Therefore, in order to better ensure legal certainty and equality of the application of law, the shift should be codified. One of the issues that can be regulated for example is the restriction on what can be the ground for petition that can affect election results. Is it just an error or violation in the counting? Or does it include violations in the process? If violations in the process are included, what kind of violations shall be considered as affecting the election results? We can refer to the parameters established by MK namely massive, structured, and systematic violations. But, what is the precise definition of such violations?

The definition of massive, structured, and systematic election violations has already been a topic of extensive discussions, particularly after MK's Decisions on several previous Pemilukada disputes (such as the Pemilukada dispute cases in East Java, South Central Timor, North Tapanuli, and South Bengkulu). The problem is, if the definition is not clarified then **there can be the assumption that all violations are included in the scope of massive, structured and systematic** so all of them can be submitted as the ground for petition against (Pemilukada) results.

[56] Article 24C of the 1945 Constitution states, among others, that MK is authorized to hear and adjudicate over disputes on general election results asthe Court of the first and final instance, which decision is final..

Table 6.

MK Decisions on Several Massive, Structured, and Systematic Violations[57]

No.	MK Decisions	District/City
1.	Vote recounting with a recapitulation based on C1-KWK Form	Sintang District
2.	Ballot recounting	1. Lamongan District 2. Surabaya City 3. Tomohon City
3.	Voting for several voters	Bangka Barat District
4.	Re-voting in several villages/ sub regency/regency TPS	1. Tanjungbalai City 2. Gresik District 3. Surabaya City 4. Bangli District 5. Sumbawa District 6. Sintang District 7. North Minahasa District 8. Tomohon City 9. North Konawe District 10. South Buru District 11. Merauke District
5.	Re-voting throughout TPPS	1. Tebingtinggi City 2. Mandailing Natal District 3. Pandeglang District 4. South Tangerang City 5. Manado City 6. South Konawe District
6.	Re-election but starting from a specific stage	1. Jayapura City 2. Yapen District
7.	Determination of candidate pair votes that affect participation in the second round	1. Supiori District 2. Manokwari District
8.	Determination of elected candidate pair	South Bengkulu District
9.	Disqualification of elected candidate pair	West Kotawaringin District

Another problem which also becomes an issue is that many of the election violations filed to MK are not under the jurisdiction of the Court to settle, therefore **there should be clarification** on what types of Election (Pemilukada) violations, the definition and settlement mechanism that are admissible to the Court.[58]

[57] Endang Sulastri, *Evaluation on Regional Head and Deputy Pemilukada Implementation*, Power Point Presentation delivered at Perludem's Limited Discussion, March 28th 2011.

[58] Structured, systematic, and massive violations are violations that involve so many people, planned carefully, and involving election officials and/or organizers gradually (vide MK Decision in Case Number 41/PHPU.D-VI/2008, December 2, 2008)

a. Massive Violations

There should be limitations, for example massive election violations are violations that occur in a large scale to the extent of which it can influence the election results. But the violations that occur on a wide scale must be proved, not only based on assumptions and estimates. If violations occur in a location, it should not cancel the votes of other voters that have been casted legally. This is because the voters' right to cast vote legally should be protected.

As an illustration, if in one polling stations (TPS) there is someone claiming not having received the **notification letter** to vote, this does not make nullify the entire result form that polling station, because the error is not massive in nature and does not affect the election result. Election results of the entire village or sub district **must be respected** and **cannot be cancelled** by allegations of violations in 1 or 2 polling stations. The point is, only violations which effect can change the result or at least render the election result indefinite can be called massive.

From comparative point of view this definition is also applicable. For example, in dispute cases in Malaysian General Election, only when the violations are committed in widespread manner and the acts can be substantiated, then they can be considered as having influenced the election result.[59]

As another comparison, in election cases in the United States, only when it can be proven that the violation is expansive, powerful, and destructive and able to destroy the fairness and equality of right during the election then it can be surmised that a massive violation has occurred.

In the case of *Jernigen vs. Curtis* (1981), the court of appeals stated that deviations did occur, but the evidence did not show either the number of ballots involved in these deviations or to whom the votes were given. The court concluded that the deviations were not enough to cancel the election results in these constituencies.[60] In this case it is clear that the court could not determine the exact number of fraudulent ballots and therefore could not arrive at the conclusion that the overall election in the constituencies had been tainted by fraud.[61]

This is reinforced in another case, *Nugent vs. Phelps* (2002), where the court of appeals stated that an election can be canceled and a new election be held if: it is impossible to determine the election results or the number of voters eligible to vote, but denied of their right, is enough to change the election results had they been allowed to vote or various combinations of deviations that are sufficient to alter election results.[62]

b. Structured and Systematic Violations

According to Perludem a structured offense must be associated with systematic violations. Structured and systematic Election Violations can be interpreted as violations that did not occur accidentally nor take place independently without any arrangement or planning.

Structured and systematic violations indicate the existence of a systematic planning through meticulous organizing or structure and the acts are conducted with a clear division of tasks. There are components or sub-structure that commits the violations at various levels and in various places according to their respective working division. Perpetrators of violations conduct violations with a clear direction and pattern from a particular structure

[59] See Topo Santoso, *Settlement of Election Offences in Four Southeast Asian Countries: With Special Reference to Indonesian General Elections, PhD Thesis*, Kuala Lumpur: University of Malaya, 2009.
[60] See Barry H. Weinberg, *The Resolution of Election Disputes: Legal Principles That Control Election Challenges*. Jakarta: IFES, 2010, page 77-78.
[61] *Ibid,* page 79-80.
[62] *Ibid,* page 79-81.

(whether formal or informal in nature). They work systematically and do not act independently. All the components committing the violations are working to achieve the same goal.

If the violations are acts committed by each perpetrator individually, without any clear structure nor organization, each working to achieve her or his own goals, then they should not be included in the definition of structural and systematic election violations.

Thus, learning from and to MK Decisions as well as by comparing the election disputes decisions in other countries, then the election violations that are considered to be able to influence or cancel an election's results are only those that are a combination of violations which can be firmly substantiated and are massive, structured, and systematic that by nature it can in someway influence the election result. The violations are not violations that occur separately, individually, and in a small scale, but rather in a broad scale and are committed through an organizing to achieve common goals that affect the election's result.

By ensuring there are rigid and detailed stipulations on the ground of petition in each election Law, the plaintiff will be able to clearly determine whether to file a petition or not, depending on whether in the election the problem in question is included in the Grounds for Petition or not. Of the various election lawsuit cases (as compiled and discussed by Barry H. Weinberg, *The Resolution of Election Disputes: Legal Principles That Control Election Challenges*, IFES, 2006) the following lessons can be surmised:

Election results are valid unless there are material violations affecting the election results; there are many deviations or illegal votes to be able to change election results

Perfect compliance in each action in an election is impossible, and the courts avoid cancellation of election only due to minor violations on technical requirements (High Court of South Carolina, George v Charleston City Election Commission, 1999).

Evidence that the deviations have changed the will of voters usually will win the election lawsuit.

General allegations of fraud/manipulation and deviations are not sufficient to state a lawsuit, however, if the court finds evidence of fraud and deviations of a serious nature, which can deprive the voters of the ability to freely express their choice, then entire election may be cancelled, even when the plaintiff cannot prove that he would have been elected if the fraud and deviations did not happen (Valence v Rosiere, 1996);

Obvious negligence from election officials can cancel the election. The question is: does the will of voters can be shown by facts that occurred? If the court finds substantial non-compliance on provisions of election implementation procedures and make a factual determination that there is a reasonable doubt that the election expresses the will of the voters, then the court may cancel the election even though there is no fraud or deliberate error (High Court of Florida in Volusia County v Beckstrom case, 1998). Florida High Court stated that "By unintentional errors, we interpret as non-compliance on provisions of election implementation procedures in a situation where non-compliance is the result of incompetence, lack of attention, or the election officer has misunderstood the requirements of the regulations. The court will declare the election null and void only if it finds substantial non-compliance leading to doubts whether or not the election reflects the will of the voters.

The matters above can be introduced as the parameter for violations that can be filed as Pemilukada result disputes to the MK and can be regulated in the Pemilukada Law.

c. Recommendations

However, along with regulation improvements related to types of Election (Pemilukada) violations, the definition of and the better settlement mechanism by MK, Perludem views that the authority to settle Election result disputes must remain to be under the control of MK.

This is not only because MK is considered to have proven credibility, integrity, and ability to settle various Election result disputes but also due to a technical reason, namely that the ranks of the Supreme Court are burdened by piles of general cases that fall under its jurisdiction. Aside from that, Pemilukada is a part of the Election regime, and the Constitution requires that all result disputes that occur in it fall under the MK's jurisdiction to adjudicate (vide Article 24C of the 1945 Constitution).

G. MONEY POLITICS AND CAMPAIGN FUNDS ARRANGEMENTS

One of what considered to be the advantage of regional head direct election (compared to elections by local representatives) is the reduction of possibility of money politics. Logically, bribing millions of people is considered to be more difficult than a few dozen people, although in practice money politics practices can still be found. In fact what happens is the transformation of money politics, if originally the fund is intended for dozens of people, with direct Pemilukada it is distributed to the whole of society (including to several community figures who are obeyed). Logically, if previously the billions of rupiahs were distributed to several hundred people, in the new mode of money politics the same amount will be spread more widely. Of course, deviations in the form of bribery could not be separated from other deviations that are related to illicit campaign funds.

It seems that money politics problem will continue to paint the political arena, particularly in the direct Pemilukada implementation. If in 2004 Election and 2009 Elections there were many issues of money game, then in the Pemilukadas throughout 2005-2009 and post-2009 the classic problem was also rampant. Worst still, the existing legal framework is not adequate to deal with this. The experience in tackling money politics in 2004 and 2009 elections has proved that it is difficult to manage the problem.

a. Types of Money Politics

Money politics is usually associated with bribery with the objective to secure the victory of a particular candidate in an election. In fact if viewed more broadly, money politics can also be linked with all kinds of violations concerning the funds in political context (including party and election problems). Indeed, the most prominent is fraud by bribery. However there are also other forms that also violate legal norms that should be paid

attention to, especially the attainment of funds from illicit sources without reporting the existence of the illegal funds.

Given the many provisions in Law No. 32 Year 2004 that follow that of Law No. 12 Year 2003, then there are many similar problems between Pemilukada and Legislative Elections, Particularly in the implementation of direct regional head elections there are a number of provisions on funds either in the political party law or in the election Law.

In Law No. 32 Year 2004, particularly in Section Eight of the Regional Head and Deputy Regional Head Election there is regulations on money politics, particularly in Article 116. In this article there are 8 (eight) election crimes related to campaign. Three of the eight crimes during campaign specifically criminalize acts relating to campaign funds, namely to give or receive campaign funds that exceed the predetermined limit, receive or give campaign funds from or to prohibited parties, and deliberately provide incorrect information in the Election campaign fund report.

As stipulated in Article 83 paragraph (3) of Law No. 32 Year 2004, campaign fund contributions from individuals should not exceed 50 million rupiahs, while from private corporation the maximum limit is 350 million rupiahs. Meanwhile, according to Article 85 paragraph (1), Election Participants may not accept donations or other assistance for the campaign from foreign parties, contributors who are not clearly identified, and from government, state-owned enterprises, and local government-owned enterprises. Perpetrators of these offenses are subject to 4 to 24 months imprisonment and/or a fine of 200 million to 1 billion rupiahs.

Aside from Article 116, in Article 117 paragraph (2) there is a ban on intentionally giving or promising money or other materials to someone to prevent the person from using the right to vote or to ensure her or his vote for particular candidate pair, or use his or her right to vote in a certain way (the substance of this article is exactly the same with the substance of Article 139 paragraph 2 of Law No. 12 Year 2003). Perpetrators of this last act are subject to 2 to 12 month's imprisonment and/or a fine of 1 million to 10 million rupiahs. From the sanctions point of view, the above money politics offenses are relatively more severe than other offenses in Law No. 32 Year 2004.

Violations in form of engaging in money politics as elaborated above are not only subject to criminal sanctions but also to cancellation of candidate status as stipulated in Article 82 paragraph (2) which states that the candidate pairs and/or campaign team who are proven to have done these violations based on a court decision with permanent legal force are subject to the penalty in form of the cancelation of their candidate status by DPRD. While Article 85 paragraph (2) determines that the candidate pairs who have received prohibited contributions as stipulated in Article 85 paragraph (1) are subject to penalty in form of the cancellation of their candidate status by KPUD.

The serious problem in this regard is how to supervise and enforce the law on money politics in direct regional head elections, especially the receipt of prohibited campaign contributions as mentioned above? The investigators and prosecutors for money politics cases in the election have admitted that technically they have the ability to investigate and prosecute offenses of this kind. However, it should be noted that from the few references of money politics cases in Pemilukada implementation that were successfully prosecuted and

tried, the modus operandi was not very sophisticated and involved a relatively small amount of material and was not committed by important figures in the parties.

What if the money politics are committed in a more systematic and subtle manner, involving a large amount of funds, or involving a party's prominent figures who sit on high political office? The occurrences of this type of money politics were widely reported in 2004 elections but it was very difficult to bring it to court. Numerous fictitious campaign funds from unclear contributors have also been reported by several NGOs to Panwaslu. Further exploration has affirmed the reports. Yet in fact it was difficult to bring such campaign funds deviations to the courts.

b. Handling Money Politics

It is in this context that surveillance and law enforcement to resolve money politics are related to law or governing regulations. The main problem is whether the existing provisions are adequate to monitor and deal with money politics. In the Political Party Law the oversight authority is in the hands of the KPU, which is exercised by requesting for the annual audit report from the political parties as well as the audit report of the financial statement of the general election campaign fund (Article 23 e Law No. 31 Year 2002). The same stipulation can also be found in Article 79 paragraph (3) of Law No. 12 Year 2003 on election which stated that the audit report of the campaign funds must be reported to the KPU. While in Law No. 32 Year 2004 this authority is in the hands of KPUD.

What is the connection between the Pemilukada supervisor's role and the money politics related to campaign funds? The Laws do not directly explain the election supervisor's role in overseeing the campaign fund, but the duties and authority of the Pemilukada supervisor are similar to Panwaslu, namely to oversee all stages of the election, receive reports of violations on Pemilukada related laws and regulations, settle disputes that arise in the Pemilukada implementation, and forward the findings and reports that cannot be settled on its own to the authorized institutions. Thus if the Election supervisor in exercising its proactive duties finds violations related to campaign funds or receive reports of violations on campaign funds then they can take action in the form of forwarding the case to the authorized institutions. If the case has criminal elements in it, thus it should be forwarded to the investigator.

In Law No. 32 Year 2004 there is a prohibition from engaging in "money politics" in the meaning of bribery in the election. This is not only in Indonesia, because in many countries this practice is viewed as being able to affect the election results, is considered to be an election crime, and can usually serve as a ground of election petition.

Article 82 Law No. 32 Year 2004 states that: (1) Candidate pairs and/or campaign teams are prohibited from promising and/or giving money or other materials to influence voters. (2) Candidate pairs and/or campaign teams who are proven to have violated paragraph (1) based on court decisions with permanent legal force are subject to cancellation as candidate pairs.

In the context of elections, then the harm caused by money politics or bribery is not only experienced by the opposite political party or other candidates, but also suffered by the

people who can fail to have better people's representatives or leaders. This act also impairs the democratic process.

If the perpetrator is just an ordinary person who is not a candidate or part of campaign team or a political party official, it is fair to only impose the criminal sanctions. What if the perpetrator is a candidate or part of the campaign team or a political party official? Of course, in addition to criminal sanctions, cancellation of candidate status can become another quite severe sanction. In fact, additional sanctions should also be applied, such as the cancellation of election results, or a ban from participating in the election/Pemilukada process for a long period (eg 10 years). Moreover, the violation should also be one of the grounds for election petition, because of its influence on election results.

Can "money politics" be used as one of the reasons to cancel the election results? It indeed is an old argument, made by referring to the narrowly defined grounds for filing a petition against the election results, which render "money politics" and other election offenses inadmissible as the ground for such petition. However, MK Decisions have provided a broader interpretation. Violations that MK considers (based on its decisions on cases related to Regional Head Elections) as affecting the election result are those that are systematic, structured, massive, serious, and significant. This includes offenses such as inflating votes, manipulating the DPT, broad money politics, the ineligibility of the candidates, and so forth.

CHAPTER IV

ORGANIZING TIME ARRANGEMENT

A. SCATERRED ELECTION AND ITS IMPACT

The constitution states that general election is conducted to elect members of House of Representatives (DPR), DPD, President and Vice President once every five years.[63] Whereas governors, district heads (bupati), and mayors (walikota) as head of province, district and city respectively, are to be elected democratically.[64] The phrase "elected democratically" is interpreted as being directly elected by the people by Law No. 32 Year 2004. Therefore after the 2004 General Election, Indonesia organizes Legislative, Presidential and Pemilukada once every five years.

While it seems that the General Election (Pemilu) is only conducted three times, however in reality it is held at least four times (if there is no second round) and at most seven times: *first,* Legislative General Election; *second*, Presidential – first round; *third,* Presidential – second round; *fourth*, Governor – first round; *fifth*, Governor – second round; *sixth,* District Head)/Mayor – first round; and *seventh*, District Head Mayor – second round.

With General Election being held so many times, it does not only spend state funds, but also create political boredom that leads to ever declining number of voters from one General Election to another. Frequently held general election also impacts negatively to the work performance delivered by political parties and the level of effectiveness of the post-general election government.

The Legislative General Election elects the members of four legislative institutions, (DPR, DPD, provincial DPRD, and district/city DPRD), which creates complexity related to providing ballot papers and counting votes. From the voter's side, it is difficult for them to act rationally when they vote because of the large number of candidates proposed by the political parties. Voters are usually thrown into confusion because the local issues that usually serve as the basis for them to vote for the local parliament are intervened by the national issues or figures. From the political party side, legislative general elections can wear out political party's energy when nominating their candidates, which allows unqualified candidates to enter into the candidacy list. On the other hand, the best candidates might not have much opportunity; once they failed at the General Election, then they had to wait for the next five years to start again. Whereas from the organizer's side, the Legislative General Election has burdened the KPU/Local KPU with the unmanageable tasks (171 million voters, 700 million ballots with 1,700 variations), as a result the organizers are caught up in technical aspects, strategic tasks, and miss out on other issues such as voters education.

[63] Article 22E paragraph (1) and (2) of 1945 Constitution.
[64] Article 18 paragraph (4) of 1945 Constitution.

The relatively short time span between the Presidential and Legislative Election (only two months apart) has caused serious problems for voters, political parties, and organizers. The voters lose their interest in voting because they already used up their energy during the Legislative Election. They are also confused with the coalition patterns engaged by the political parties, moreover if there is a second round of election. During Presidential Election, the political parties do not have sufficient time to form a coalition based on political platform, consequently the coalition itself will be a weak one and may have bad effects towards the government's performance during post Presidential Election period. A quick coalition process may also trigger internal conflict that eventually threatens the political parties' solidarity, whereas the candidate pairs are faced with political transactions among themselves. Being an organizer, it might be a relatively easy task to organize the Presidential Election; however the cost can double if a second round is required.

The Pemilukada are held in different time period from one region to the other and from the other elections, and this makes it difficult to control, so people perceive this as political activity that takes place only to accommodate local elite groups purposes, subsequently a lot of violations occur that shatter democratic Election principles. Pemilukada has made the voters fed up and that is why from previous elections, the number of participating voters keeps dwindling. General Elections have continuously fragmented the society, they fail to build solidarity in order to solve problems together. Pemilukada also keeps the political parties busy resolving their internal conflicts as the result of continuous candidacy. They are also busy negotiating and engaging in political transactions, meanwhile the candidate pairs for Pemilukada have political transactions looming over them. The Pemilukada irregular time line has made it difficult for the organizer to set up schedule and budget since the schedule does not always match with the APBD compilation agenda. On the other hand when performing their duties, they are almost beyond control because Pemilukada is merely considered as a local matter or related to KPU local office matter which made the Pemilukada regulation violations are almost uncontrollable.

In short, if we have to conduct Legislative Election which would elect members of DPR, DPD, Provincial DPRD and District/City DPRD in one period then it would be the most complicated General Election in the whole world because of the high number of participants and candidates, complicated voting system, which makes it an unmanageable task and requires enormous funds. The process of organizing the Presidential and Pemilukada is easy, however the required funds may double, triple or more because this type of Election can take place six times. Whereas in terms of results, it is difficult for voters to control the Legislative Election results (political parties and parliamentary members) because voters cannot effectively give sanction (not to vote again) due to General Election period which is once every five years. And the results of Presidential and head of region Election are being held captive by political parties in the parliament. The second General Election which is held at a different time, also fail in building political block (between the ruling party and opposition party), consequently during post-Election, the government is not effective and all policies are made based on political transactions.

The Legislative Election which has to keep up with the Presidential Election and Pemilukada, has created many problems in terms of the organizing process and results (elected candidates), therefore suggestions are made to rearrange the general election schedule, a simpler one in terms of organizing process (to minimize the burden for voters, political parties, and organizer), as well as ensuring more solid Election results (firm coalition, effective government).

Table 7.

Voters Participation in Indonesian General Elections[65]

Year	Listed Voter	Used Their Voting Rights (%)	Valid Vote (%)	Invalid Vote (%)
1955	43.104.464	91,41	95,90	4,10
1971	58.558.776	96,62	96,59	3,41
1977	69.871.092	96,52	94,90	5,10
1982	82,134.195	96,47	93,71	6,29
1987	93.737.633	96,43	95,00	5,00
1992	107.565.413	95,06	95,67	4,33
1997	125.640.987	93,55	96,13	3,87
1999	118.158.778	92,74	96,61	3,39
2004 Leg Elect	148.000.369	84,07	91,19	8,81
2004 Presd Elect I	155.048.803	78,23	97,83	2,17
2004 Presd Elect II	152.246.188	76,63	97,94	2,06
2009 Leg Elect	171.068.667	70,96	85,59	14,41
2009 Presd Elect	176.367.056	72,56	94,94	5,06

[65] Source: Voters Education Network for People (JPPR), 2010.

B. ELECTION TIME ARRANGEMENT MODEL

In relation with the above problems, three models are suggested for General Election time line: one simultaneous Election, Elections held two times: Legislative and Executive Elections, and Elections held two times: National dan Regional/Local Elections.

First, Simultaneous Election. Here the Legislative, Presidential and Pemilukada are held at one time so that in the time span of five years the General Election occurred only once. If this model is carried out, it does not decrease the complexity of Legislative Election; in fact it will become more complicated by adding the Executive or Presidential Election and Pemilukada into one period of time. Consequently, voters may become more confused with their own political position, the political configuration of Election results may become unclear and thus politically it will be more confusing, and with political blocking may not be established, making political transactions even worse and government performance ineffective.

Second, Legislative and Presidential Elections. Here, Legislative Election is to elect DPR, DPD, provincial DPRD and district/city DPRD members (as currently applies) and the time line is maintained, later followed by an Executive Election to vote for President and Vice President, governor and deputy governor, district head/mayor and deputy district head/mayor. If we apply this model, there will be no solution to the Legislative Election complications that have caused voters confusion political parties working profusely, and organizers overloaded with work,. Instead this model will create new problems, especially for voters and political parties due to unclear political configuration. As a result, General Election cannot establish clear political blocking which may lead to the increasing number of political transactions and ineffective governments.

Third, national and regional Election. Here, the General Election for electing DPR and DPD members are to be held together with the Presidential and Vice Presidential Election. Whereas provincial DPRD and district/city DPRD Election is conducted simultaneously with that of governor and deputy governor, head and deputy district/mayor. If we apply this model, then organizing a General Election would be a lot simpler because in five years there will only be two General Elections, national election which is held in the first year and regional Election which can be organized in the third year. This model may reduce complications in organizing Legislative Election so voters can easily act rationally. Voters can also effectively control political parties' performance because the performance of national Election result can serve as a benchmark for voters when casting their votes during the regional Election. Meaning if the performance of the elected president and his supporting coalition parties is bad, then during the regional Election the voters can punish them by not voting for that coalition and the candidates representing them.

C. NATIONAL ELECTION AND LOCAL ELECTION

Political configuration created by this national election and local election model is also simple, because when the election of DPR and DPD are combined with the presidential election, then there is the tendency that there will only be two major coalitions of political parties that propose their respective presidential and vice presidential candidate pairs. In this case, the experiences in many countries have shown that the elected president and vice president will be followed by the election of legislative member candidates who are proposed by the coalition of parties that supports the president and vice president. In other words, the national election by

itself will create clearer political blocking about which parties are in power with the president, with which parties that become members of the coalition. Governments can be effective because the elected president and vice president will be followed by the acquisition of the majority seats by the coalition of parties supporting them. Government effectiveness is also supported by a longer and more intensive coalition building process, so that each party coalition does not only nominate presidential and vice president candidate pair, but are also capable of making a clear political platform as campaign material.

The process of implementing a simple national election, followed by election results with clear political blocking, by itself shall also occur in local elections to elect members of provincial DPRD, district/city DPRD along with the governors and district heads/mayors. Moreover, the implementation of local elections that will take place two years later may become a real vehicle to assert the people's sovereignty: if the performance of the national election result is good, then voters will choose regional head candidate pairs who are proposed by the same national party coalitions; if the opposite occurs, namely the performance of the those elected by the national election is poor, then voters may punish them by not electing more candidate pairs proposed by the national party coalitions during the regional elections.

Indeed, the party coalitions in national elections will not automatically become the same coalitions in the regional elections. This is solely because of the political parties' practical considerations since the strength of each party is not the same in every region. But for the sake of political simplification and effectiveness of government, then the Law should require that throughout one election period the national party coalitions must continue their coalition in regional elections that take place two years later. However, after the local elections are completed, they are free again to build new coalitions that will compete in the next election period.

Another advantage of this national election and local election model is the simplification of the national political agenda (see Table 7), so that politics become inactivity which can be predicted with certainty. At this point, the implementation of this election model not only has great potential to create political stability, but also will not disrupt other economic, social and cultural activities. Politics become a routine agenda with definite schedule, so that the voters are not confused by the various political maneuvers resulting from the unclear political configuration. It will also be easier for voters to assess the performance of political parties, while the political parties in the end must compete to show good performance through their cadres in the legislative or executive, so they obtain the trust of voters through the election.

Table 8.

Five Yearly Political Agenda

ACTOR	YEAR 1	YEAR 2	YEAR 3	YEAR 4	YEAR 5
	National Election		**Regional Election**		
Political Parties	Registration of participants, nomination, campaign, voting, vote counting, determination of selected candidates.	Evaluation of national election results. Preparation of regional elections: inventory of legislative and executive candidates.	Registration of participants, nomination, campaign, voting, vote counting, determination of selected candidates.	Evaluation of the regional election results. Internal consolidation: Congress, change of management, selection of cadres, etc.	Preparation of national elections. Inventory of legislative candidates. Assessment/ development of coalition for the presidential and vice president candidacy.
KPU/KPUD	Implementation of national election stages. Settlement of election result disputes. Inauguration.	Evaluation of the implementation stage. Planning and preparation for regional elections.	Implementation of regional election stages. Settlement of election result disputes. Inauguration.	Evaluation of the implementation stage. **Changes in the applicable laws and regulations**. KPU/KPUD recruitment.	Planning and preparation for National Election.
Voters	Registration of voters. Identification of candidates. Voting and election monitoring process.	Announcement of potential voters list. Monitoring the performance of the selected candidates and political parties.	Registration of voters. Identification of candidates. Voting and election monitoring process.	Participation in political party activities. Monitoring of KPU/KPUD	Announcement of potential voters list. Monitoring the performance of the selected candidates and political parties.

Given the national election and local election model has significant positive impact on the development of democratic politics in the future, then attempts to direct the application of the model need to be immediately implemented. The required ideal step is to amend the formulation in the 1945 Constitution, especially Article 22E which regulates the implementation of elections. The formulation of this new article should affirm that the elections are to be held twice in five years, namely the national election to elect the members of DPR and DPD as well as the president

and vice president, and regional elections to elect members of provincial DPRD and district/city DPRD as well as the governors and deputy governors, district heads and deputy district heads/mayors and deputy mayors.

However, the constitutional amendment is not urgent, because changing the current election schedule, namely the legislative elections are held in sequence with the presidential elections while the elections of head of regions are held in irregular periods, into two elections, namely the national and local, actually can be done through Laws. In this case two Laws can be formulated , namely the National Election Law or Election Law for DPR and DPD Members as well as the President and Vice President, and Regional Election Law or Election Law for DPRD Members and Regional Heads. However, if the formulation of both Laws is still not possible at this time, Pemilukada Law must begin to adopt arrangements to re-organize the election schedule, particularly with regards to Pemilukada which are presently implemented in scattered schedule.

D. SCHEDULING ELECTION SCENARIO

If 2014 election is to be used as a starting point to rearrange the election schedule, the scenarios offered are as follows:

First, the 2014 election is determined to be the 2014 National Election, namely a General Election to simultaneously elect members of the DPR and DPD as well as the president and vice president,. Afterwards, two years later, the 2016 Regional Election will be held, namely the General Election to elect members of provincial DPRD and district/city DPRD as well as governors and deputy governors, district heads and deputy district heads/mayors and deputy mayors.

Second, the 2014 National Election is held in June 2014, then the elected members of DPR and DPD as well as the president and vice president can be inaugurated on August 15 and 16, so that on August 17, 2014 Indonesia will have new DPR and DPD members as well as president and vice president. If a second round of the presidential election is required, there will be time available for that purpose in July. Meanwhile, the 2016 Local Elections are to be held in June 2016, then the elected members of provincial DPRD and district/city DPRD as well as governors and deputy governors, district heads and deputy district heads/mayors and deputy mayors shall be inaugurated on August 15 and 16, so that on August 17, 2016, the regions shall have new leaders.

Third, the office tenure of provincial DPRD and district/city DPRD members from the 2009 election, which should end in 2014, is extended until August 15, 2016. In June 2016, the 2016 Local Elections will be held to elect members of provincial DPRD and district/city DPRD as well as governors and deputy governors, district heads and deputy district heads/mayors and deputy mayors. Members of provincial DPRD and district/city DPRD are inaugurated on August 15, 2016, while governors and deputy governors, district heads and deputy district heads/mayors and deputy mayors are inaugurated on August 16, 2016.

Fourth, the office tenure of regional heads who were elected in Pemilukada 2009, Pemilukada 2010 and Pemilukada 2011 shall end, and before August 16, 2016, their positions shall be taken over by temporary officials. The temporary officials shall be elected by DPRD and approved by the Ministry of Home Affairs or the President. In the meantime, the Pemilukada Law (with the assumption that it will be enacted before August 2011), has to confirm that with regards

to the heads of regions elected through Pemilukada organized after August 2011, their tenure is limited until August 15, 2016.

In relation with these scenarios, then the Pemilukada Regulation Law, particularly in the transitional stipulation, must regulate two issues: *first*, the replacement of head of regions whose terms of office will end in 2015 and 2016 with temporary officials; *second*, limit the office tenure of heads of regions elected in 2011 and 2012, that instead of having five years office term, their tenure shall end in August 16, 2016. Thus, through such provisions in the Pemilukada Law, scheduling the elections into National and Local Elections can be done, especially by combining the schedule for all Pemilukadas in the 2016 Local Elections. Meanwhile, with regards to the office tenure extension for the provincial DPRD and district/city DPRD members, this can be regulated by other regulations, namely Election Law and or Parliament Law.

CHAPTER V

CLOSING

The election of heads of regions and their deputies is not simply an "artificial event" in realizing the people's sovereignty. Election of local leaders at the provincial, district, and city level is a very important part of the political transformation towards the consolidation of local democracy, which shall determine whether a representative, effective, and pro-public regional government can be formed or not.

Therefore, the quality of Pemilukada is very much dependent on what kind of legal frameworks to be established. Many issues and problems of election implementation in Indonesia are rooted on the fact that the legal frameworks for elections are made of no more than transactional politics products created only in order to secure the interests of each party.

In fact, the main indicator of the International Standard Democratic Elections requires the preparation of a legal framework that is constructed in such way to avoid double meanings, and it should be easily understood as well as able to highlight all the necessary elements of the election system to ensure a democratic election.[66]

The momentum to formulate a special legal framework for the implementation of regional head and deputy regional head elections shall be utilized as well as possible to restructure the Pemilukada arrangement in Indonesia so that it shall fulfill the requirements for the implementation of democratic elections. Therefore Perludem expects the recommendations compiled in this book can be used as a reference or material for discourse towards setting a better and quality Pemilukada.

There are several recommendations that could be applied gradually, for example about the time management for the implementation of election and the application of *e-voting* methods in voting, but there are also urgent recommendations for immediate implementation, for example those that are related to the nomination system, the improvement of the stages of election implementation, as well as election law enforcement and the resolution of Pemilukada violations.

The table below shall illustrate the summary of the main problems in the current Election arrangement and the related recommendations offered by Perludem.

Hopefully the results of studies and recommendations prepared by Perludem can be useful and utilized by the law drafters and makers in the Government and the Parliament, as well as found to be beneficial for civil society groups, academics, media, and the public at large in promoting Indonesia's Election quality improvement through a legal framework that can ensure democratic elections.

[66] International IDEA, *Ibid.*

Table 9.

Summary of Fundamental Problems in Pemilukada Arrangements and Recommendations

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
1.	**VOTERS LIST**	DPS and DPT composed by KPUD based on DP4 prepared by Local Government.	Poor quality DP4 , KPUD did not maximally improve it so many voters are not listed in DPS or DPT.	As long as Ministry of Home Affairs (MoHA)and Local Government have not managed to establish a population data based on the Single Identity Number (SIN) system, the preparation of voter list must entirely be the responsibility KPUD.	Article 70 paragraph (1) Law No. 32 Year 2004 stated that DPS is prepared based on the last election.
2.	**VOTING SYSTEM**				
	Direct Election	Governor and Deputy Governor, District Head and Deputy District Head, Mayor and Deputy Mayor directly elected by people.	Ministry of Home Affairs (MoHA) considers this as a high cost practice, both financially and politically (corruption and money politics as well as encouraging horizontal conflicts in the society). So governor's election needs to be returned to Provincial	No data, facts and concrete arguments which prove that the direct governor elections are counterproductive, because MOHA also has not made a comprehensive evaluation on Pemilukada implementation during 2005-2010 period. Thus, the election of Governor	No need to do amendment on the existing provisions.

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
			DPRD (or done indirectly).	and Deputy Governor, District Head and Deputy District Head, Mayor and Deputy Mayor should remain to be held directly.	
	Constituency	The Constituency for Governor and Deputy Governor Elections is the Province, The Constituency for District Head and Deputy District Head is the District, and the Constituency for Mayor and Deputy Mayor is the City.	Governor elections that are run in different time with the election for district heads and mayors, aside from being cost ineffective, also lead to voters' boredom and continuous social friction.	Because the Constituency for District Head/Mayor is in the Constituency for Governor, then the Governor election should be timed simultaneously with the District Head/Mayors elections.	See Issue No. 3 on Implementation Time
	Nomination Methods	Regional heads candidate pairs are submitted by: first, the party or coalition of parties in DPRD; second, the coalition of election participant parties that do not obtain seats in DPRD, or; Third, support from a number of voters to	Candidate pairs proposed by the parties gaining seats, the numbers are often too many. Political parties that do not obtain seats in DPRD often withdraw support from the candidate pair, which disrupts the nomination process. Support requirements for	Minimum threshold of obtaining seats for party or coalition of parties increased to 20%. The party obtaining no seat cannot propose candidate pairs. Support requirements for individual candidate pairs is derived and calculated based on the percentage of	The idea to propose a candidate alone (without a deputy regional head), is unacceptable: first, concerning the representation of the plural society; second, associated with availing more opportunities for women candidates.

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
		individual candidate pairs.	individual candidate pairs are too hard to achieve.	voters. Candidate pairs to pay some deposit, and if not obtaining at least 5% votes, the deposit will be submitted to the state treasury.	
	Deputy Governor Elections	Deputy Governor is elected directly in a single package together with Governor (as a candidate pair).	Risk of government inefficiency as deputy governor considers him or herself as having made equal contribution to the governor during the election process, thus creating a prolonged conflict which leads to disharmony in governance and public services.	Governor and Deputy Governor to remain directly elected as one candidate pair. This is based on the consideration of maintaining national integration at local level or as a method for conflict resolution in the region. Local Government Law needs to reinforce and clarify the position of deputy governor as an assistant to the governor.	No need to ammend the existing provisions.
	Voting Methods	Voting is done by puncturing the image of candidate pairs.	The casting of vote method is different with that of legislative elections and presidential elections,	Voting is done by ticking the image of candidate pairs.	A uniform method of casting vote is important so voters are not confused.

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
			which prescribes vote casting by ticking.		
	Elected Candidate Formula	The candidate pair with most votes are determined to be the winner, except if there is no candidate pair who obtain more than 30% votes; in this case, a second round Pemilukada is conducted by involving candidate pairs who obtain the most votes and second most votes.	Pemilukada second round does not only expend state funds, but also extend and increase political tensions in the regions.	The reason that second round is necessary is to ensure the legitimacy of the elected candidate pair, but this is not very relevant in the practice. Many elected candidate pairs obtained votes of less than 10% (because many voters did not exercise their right), yet their leadership was accepted by the community.	If the formula for determining the elected candidate pairs is kept simple and disseminated widely, then the voters will be more rational in determining their choice.
3.	**IMPLEMENTATION TIME**	The implementation time of Direct Pemilukada began in June 2005 and was not implemented at the same time in all regions, which extended the existing election schedule and the end result is the Pemilukada implementation for each province and district are	Different schedule of Pemilukada implementation causes many problems: first, the high budget; second, voters are suffering from exhaustion and the society is continually fragmented; third, the party leadership's time is spent largely to take care of internal conflicts due to continuous	Pemilukada implementation time should be combined, not just in one province, but nationally by determining one period of time for all local elections, namely the elections to elect DPRD members and regional heads. Therefore provision for a transitional period is needed to prepare	Arrangements for transitional period can be regulated in the Transitional Provision Chapter.

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
		different.	Pemilukada candidacy.	election schedule in each province or nationally.	
4.	**STAGES OF IMPLEMENTATION**				
	Voters Registration	DPS announcement is too short. The campaign teams do not receive the DPS and DPT.	Many citizens who have the right to vote are not listed in DPS. Those who report themselves, their names are also not listed in DPT.	DPS announcement to be extended to three weeks. The campaign team should receive the DPS and DPT in the form of electronic files from KPU. Officers, who do not enter citizens' names into the DPT when the citizens and/or campaign team have reported the discrepancies, are subject to administrative and criminal sanctions.	The campaign team who does not question the DPS retains no right to question the DPT after the determination of the result.
	Candidate Registration	Candidate pairs are not required to announce their wealth.	Candidate pairs using funds for unclear sources to finance the campaign, so that when elected they tend to behave corruptively.	Candidate pairs must announce their wealth during registration so that voters know their wealth, and the assets can be compared to the campaign funds report.	Elected candidate pair proven of having made fictitious wealth reports shall be disqualified.

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
	Campaign	Only two-week campaign period. Campaign finance report is only a formality. The limitation for civil servants involvement is not yet maximized.	Uncontrolled campaign, voters do not get information about candidate pairs adequately. Reports of campaign funds are not a device to detect the use of 'illicit funds for the campaign. Candidate pairs or campaign teams involving and forcing civil servants to be involved in the campaign or influence voters.	The campaign period starts since candidate pair establishment; restriction is applied only on campaigns that involve mass. Campaign finance reports have to be detailed and clear so that people can clarify if there are indications of the usage of illicit funds. Sanctions on violations of campaign finance rules should be clarified. Candidate pairs and campaign teams proven to have been involving civil servants to be involved campaigns and/or influence voters may be subject to administrative sanction (dismissal) and criminal sanction (jail).	Concerns that Pemilukada is only creating corrupt local leaders should be anticipated by campaign funds regulation. Similarly, the use of civil servants for campaign or influencing voters should be severely punished.
	Voting	Voting is only done	Simple ballot opens space	Need open space to implement e-voting	MK opens space for implementation of e-voting

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
		manually	for manipulation.	methods.	methods through MK Decision No. 147/PUU-VII/2009.
	Vote Counting	Vote counting is only done manually	Long and gradual counting procedures facilitate manipulation of vote counting results.	Need to create a space for the implementation of e-counting methods.	MK has opened the space for the implementation of e-counting
	Elected Candidate Determination				
	Inauguration	Involving DPRD in the inauguration administrative process.	DPRD leaders inhibit inauguration process.	DPRD should no longer be involved in inauguration administrative process of elected regional head candidates.	If the inauguration is only done by the head of the court, does this interfere with the central-local government relations?
	Others	KPU can take over the implementation of local elections from the provincial KPU; the provincial KPU can take over implementation of the local elections from the regency/city KPU.	Basic conditions which allow the takeover of Pemilukada implementation are not clear, so that KPU or provincial KPU tend to act arbitrarily.	There should be specific and clear rules that determine the conditions wherein the taking over of a Pemilukada implementation is allowed.	Regulations with regards to this issue need to be strengthened by the election organizers regulations.

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
5.	**LAW ENFORCEMENT**				
	Criminal Violations	Criminal sanctions are lighter compared to similar violations in the KUHAP. The time limitation for the proceedings (procedural law) is very short.	Light sanctions do not give deterrent effects. Time limitation becomes the reason for law enforcement officials to not settle the case completely.	Criminal sanctions should be intensified and also associated with the imposition of administrative sanctions. Time limitation (expiry time) of reporting be extended between 1-6 years from the events or even adjusted to the provisions of Article 78 of KUHAP.	The existence of alternative between prison sentences and fines make the judges gives light sentences.
	Administrative Violations	There is no clear definition, subject, and qualification as well as penalty on administrative violations.	Many administrative violations have important implications, but not processed and sanctioned.	Definition, subject, qualification. and types of sanctions need to be clarified.	Imposition of administrative sanctions on candidate pairs and campaign teams is more effective.
	Administrative Disputes	There is no clear provision whether or how KPUD decision can be questioned by the parties (especially the voters, parties, candidate pairs and	Unclear administrative dispute arrangements cause prolonged resolution process which disrupts the operations of Pemilukada	Types of KPUD decisions and subjects that can be petitioned against should be clarified. There should be clarification also on which institution has	Election administrative dispute settlement should not establish a new judicial institution. Election special judge in the

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
		campaign team) harmed by the decision.	stages.	jurisdiction over which case, whether it is judicial institutions: (PTUN/PTTUN/MA), or simply to the KPU (such as method of "administrative appeals"). Objections against District KPUD decision/determination should be able to be submitted to Provincial KPUD thereon. Objections against the Provincial KPUD decision/determination, , should be able to be submitted to the High Court to The last legal measure against the decision of the High Court is the submission of the case to the election special judge in the Supreme Court.	High Court and Supreme Court should consist of career judges and election law experts.
	Election Result	MK does not only adjudicate election result	The absence of a clear understanding of massive,	MK should focus on disputes that may affect	The extent of MK authority to adjudicate cases in

NO.	ISSUE	REGULATIONS	PROBLEMS	RECOMMENDATIONS	NOTES
	Disputes	disputes (in the sense of wrong in counting), but also massive, structured, and systematic violations.	structured, and systematic violations causes many of the defeated candidate pairs to file petitions to MK.	election results, while criminal and administrative violations, as well as administrative disputes, should be handled by other institutions. The jurisdiction over Pemilukada result disputes must remain under MK's control. Not only to maintain the quality of the disputes resolution but also as a consequence of regional head elections as part of the Election regime.	Pemilukada can potentially create new problems if not clearly defined.
6.	**PEMILU (GENERAL ELECTION) ORGANIZERS**	Not many provisions governing sanctions against Pemilu organizers who violate election rules and code of ethics.	Many election organizers, who abuse their authorities, particularly related to votes counting and results determination.	Strict sanctions for providers who violate the rules and code of ethics.	More regulations in the election organizer Law.

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APPENDIX

Background

Democracy is not one of perfect arrangement to organize human living. But history that happened everywhere has proved that democracy as a model of state living has very small chance to humiliate the humanity. Therefore, though there is not much of democracy word in this country documentation, since movement era, the founding fathers of this country tried hard to apply democratic country principles for Indonesia.

There is no democratic country without election because election is one of main instrument to apply democratic principles. Actually, election is not just as a field to express the people freedom to choose their leader, but also a field to appraise and judge leaders whom appear in front of the people. But experience in many places and country indicate that election implementation often only political procedural activities, and that made election process and result diverge from the objective of election and also deceive democracy values.

Those realities require restless effort to develop and improve fair election system, which is election that capable to accommodate people freedom and guard people independency. Election organizers required to understand election philosophy, having knowledge and technical skills of organizing election also consistent to perform election regulation to make election process appropriate with the objective. Then, election result, which are the elected leaders, need to be push and use continually to maximize their function; they need to be control so they won't abuse people sovereignty given to them.

Realizing those conditions need the participation of every citizen, former members of 2004 General Election Supervisory Committee get together in an organization named **Perkumpulan untuk Pemilu dan Demokrasi (Perludem)** so they can effectively involve in development process of democratic country and implement the fair election. The moral values of election observer that has been planted during perform duty as election observer, also the skills and knowledge on the election implementation and observation became investment for **Perludem** to maximize their participations.

Vision

The realization of democratic country and the implementation of election that can accommodate people freedom and guard the independency.

Missions

1. Building the systems of legislative election, presidential election and direct elections of regional heads which appropriate with democratic principles.
2. Improving the capacity of election/direct elections of regional heads organizer so they would understand the objectives of election/direct elections of regional heads philosophy and also have enough technical skills and knowledge to organize election/direct elections of regional heads.
3. Observing the election/direct elections of regional heads implementation hopefully aligned with election regulations.
4. Improving the capacity of elected legislative members so they can maximize their role as the people representative.

Activities

1. Research/Studies: studying the election/direct elections of regional heads regulations, mechanism and procedure; studying election/direct elections of regional heads implementation; remapping the strength and weakness of election/direct elections of regional heads regulation; describing the strength and weakness of election/direct elections of regional heads implementation; submitting the recommendation to improve the election/direct elections of regional heads system and regulation; etc.
2. Training: improving the stakeholder understanding on election/direct elections of regional heads philosophy; improving the communities figure understanding on the importance of public participation in election/direct elections of regional heads; improving the skills and knowledge of election/direct elections of regional heads officer; improving the skills and knowledge of election/direct elections of regional heads observers; etc.
3. Monitoring: monitoring the election/direct elections of regional heads implementation; controlling and reminding the election/direct elections of regional heads organizer to work aligned with regulations; recording and documenting the violation cases and election/direct elections of regional heads disputes; reporting the violator of election regulation to the proficient officer; etc.

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3. Prof. Ir. Qazuini, MSc
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