

THE CONSTITUTIONAL COURT'S ROLE IN CONSOLIDATING DEMOCRACY AND REFORMING LOCAL ELECTION

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Abstract

Within the same group as the USA and India Indonesia is one of the largest democracies in the world. After experiencing authoritarian rule for a few decades since its independence the country finally at the beginning of the twenty first century managed to chart along its new direction along democratic course and values. More than a decade has passed since the democratic transition begun yet the country still faces various constitutional dilemmas and enigmas. One of organs of the government which has been entrusted to transform the country into a democratic nation is the Constitutional Court. The objective of this paper is to provide critical analyses of the role of the Constitutional Court of Indonesia in the process of consolidating local democracy. The scope of analysis is confined to a number of important cases heard by the court on local election disputes from the year 2008 to 2013. The rationale to focus on local election is because local government provides the second layer of government for this unitary country making the governance more democratic and more in touch with local population. The result of the study is the Constitutional Court through its decisions has created conducive political situation and has provided significant contributions in the process of consolidating local democracy. In spite of limited number of judges and short period of settlement to disputes brought before it the Court have settled all disputes regarding local elections without much delay

and complaint. Nevertheless there are some areas that need to be addressed by the court to enhance its efficiency and effectiveness. A few factors have been identified to be the cause of the problems namely problem of design of structure of the Court, extension of the scope of authority, period of settlement, over-dosis of authority and the breach of code of ethics of the judges. Thus it is recommended that in order to perpetuate the excellent achievements of the court the institution need to be strengthened by addressing the problems.

Key words: consolidation of local democracy, Local Election Dispute, Constitutional Court

I. INTRODUCTION

Based on the experiences of countries referred “new emerging democracies”, it transpired that there are so many obstacles in the countries that are hampering efforts to develop an effective “rule of law”. One of the problems is the “*anomia* syndrome.” It refers to the situation in which the integrity, the impartiality, and the independence of the judiciary are seriously influenced. Under the authoritarian regimes, courts are usually politically intervened by the ruling elite.¹ In other words, in authoritarian regimes, courts are more considered as the attributes of the authority rather than as the attributes of justice which has happened in Indonesia during the era of Suharto regime.² Authoritarian regimes also produce legal professionals without integrity which resulted in judicial corruption. Amidst the impossibilities the constitutional court managed to overcome the cumbersome obstacles of corruption and despotism to be the true savior of justice and democracy.

Before the enactment of Election Act 2007, the Constitutional Court has only the authority to settle disputes over the result of election limited to election disputes regarding the result of election of president and vice-president, members of DPR (House of Representative), DPRD (Regional House of Representative)

¹ See Jimly Asshiddiqie, “Access to Justice in Emerging Democracies: The Experiences of Indonesia”, In Fort, Bertrand (Ed), *Proceeding of Workshop on “Comparing Access to Justice in Asian and European Transitional Countries, Democratizing Access to Justice in Transitional Countries*, Indonesia, 27-28 June 2005, p. 10.

² Many political experts and constitutional law experts describe the era of Suharto regime as “bureaucratic-authoritarian regime which controlled every single aspect of the nation, including judicial power.

and DPD (Regional Representative Council). After the enactment of the Election Act 2007, the Constitutional Court also has authority to settle disputes of local election.³ Since the authority of local election disputes settlement was moved from the Supreme Court to the Constitutional Court, 477 cases have been registered with the Constitutional Court.⁴ The huge number of cases is an indicator that the people have belief in the court to deal with local election disputes. The effectiveness and efficiency of the courts, which able within 14 days with only 9 justices to deliver results and judgments, is also a factor that make the court is favored by the people. The facts point to the conclusion that the court does have a role in consolidating local democracy in Indonesia through its decisions regarding local election disputes. Besides resolving the general election disputes⁵, the Constitutional Court has also authority to settle local election disputes.

Settlement of local election disputes is an important aspect of local election. The quality of local election disputes settlement represents the quality of the local election itself. The quality of local election will influence the quality of local democracy. Its commitment to justice and fairness is manifested by the Court's extension of authority from only trying and deciding disputes on mathematical count of the result of local election to more extensive meaning of result of local election including the administrative disputes and criminal violations. The justices of the Constitutional Court strongly believe that they have to uphold justice and democracy in the process of local election, therefore if there are violations against democracy which influence the result of local election, the Constitutional Court can try and decide the cases. Based on the scenario above it is pertinent and timely to evaluate the role of the Indonesian Constitutional Court in consolidating local democracy through its decisions of settlement disputes on local elections from 2008 to 2013.

³ Based on the Election Act 2007, the term "pilkada"(pemilihan kepala daerah or election for head of region) changed into "pemilukada"(pemiliha umum kepala daerah or general election for head of region). Since the term used is "pemilukada", therefore "pemilukada" is part of the general election which the Constitutional Court has the authority to settle the disputes.

⁴ www.mahkamahkonstitusi.go.id, retrieved on 24 November 2012. It may be compared to judicial review cases, from 2008 to 2012, there were only 341 cases. This shows that the number of local election disputes registered to the Constitutional Court is much more than judicial review cases.

⁵ Article 22E (2) of the 1945 Constitution states that "General elections shall be conducted to elect the members of the House of Representatives, the Regional Representative Council, the President and the Vice-President, and the Regional House of Representatives".

II. DISCUSSION

Brief History of the Constitutional Court of Indonesia

The idea to establish the Constitutional Court emerged during the era of reform.⁶ The reasons underpinning the consensus to set up the Constitutional Court could be summarized into two, namely political and legal reasons.⁷ Politically the Constitutional Court is one of the checks and balances mechanisms established to control the state organs. Legally the Constitutional Court have two crucial power, first is the power to examine the constitutionality of acts or legislations and the second power is to settle disputes relating to the authority of state organs.

The idea to review acts as a mechanism of constitutional adjudication actually had been debated among the founding fathers of the nation in the preparation of the independence of Indonesia in 1945. Muhammad Yamin was the first founding father who proposed that the Supreme Court had authority to review acts.⁸ The proposal however was not accepted by the member of Independent Committee.⁹ After President Soeharto's resignation in May 1998, Indonesia began to take comprehensive reform measures by putting sovereignty back to the hands of the people. The peak of such efforts was a series of amendments to the 1945 Constitution, made during four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. The amendments produced a blueprint for a system of state administration which was totally different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution were:

- (1) the principle of constitutional democracy, and
- (2) the principle of democratic rule of law or "*demokratische rechtsstaat*".¹⁰

⁶ Bambang Sutiyoso, Pembentukan Mahkamah Konstitusi sebagai Pelaku Kekuasaan Kehakiman di Indonesia, *Jurnal Konstitusi MK RI*, Volume 7 No 6, 2010, p. 27

⁷ Muchamad Ali Safa'at, "Peran MK Mewujudkan Prinsip Checks and Balances", *Majalah Konstitusi*, 2011, p. 2.

⁸ See Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia*, Jakarta: PT. Bhuna Ilmu Populer, 2007, p. 581-582.

⁹ *Ibid*, 582.

¹⁰ See Jimly Asshiddiqie, "Creating A Constitutional Court for A New Democracy", *Paper presented at Seminar held by Melbourne Law School*, March 11 th, 2009, p. 2.

The democratic system was reinforced by the adoption of various fundamental principles to ensure that sovereignty had its sources in the people and was administered by the people, together with the people, and for the sake of the people. Among those important principles is the establishment of a constitutional court which was adopted in the Third and Fourth Amendments made in 2001-2002.¹¹ Among the considerations in the establishment of the Constitutional Court are as follow:¹²

- a. The state of Indonesia shall be a rule of law state which is based on *Pancasila*¹³ and the 1945 Constitution, aims at achieving a peaceful, order, clean, prosperous and just country;
- b. The Constitutional Court as one of the pillar of the judiciary has an important role in upholding the Constitution, principle of rule of law based on its authority as has been stated in the 1945 Constitution;
- c. Based on article 24C (6) of the 1945 Constitution, it is needed to arrange the appointment and retirement of justices, court procedure and other regulations regarding the Constitutional Court;
- d. Based on the consideration stated in point a, b, c and to conduct article III of Transitional Provision of the 1945 Constitution, it is needed to enact law regarding Constitutional Court.

The role of the Constitutional Court in Indonesia highlights the importance of separation of powers which has been described as “[replacing] the executive-heavy sharing of powers” put in place by the Pre-amendment Constitution. The Constitutional Court’s judicial review power provides a check on the Legislature, its impeachment power provides a check on the Executive; and its decisions on electoral results help ensure the integrity of the democratic process.¹⁴

Undoubtedly Indonesians were influenced by the advance of ‘new Asian constitutionalism’ as in the cases of Taiwan, Thailand and South Korea, which

¹¹ *Ibid.*

¹² See further Constitutional Court Act 2003 and the Amendment of the Constitutional Court Act 2011.

¹³ Pancasila means five pillars. Pancasila is the five pillars of Indonesian state.

¹⁴ Simon Butt, *The Constitutional Courts Decision in the dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?* in McLeod and MacIntyre (ed) *Indonesia: Democracy and the Promise of Governance*, Institute of South East Asian Studies, 2007, p. 178-182.

impelled close consideration of South Korea's Constitutional Court in particular as a model.¹⁵ Intense debates took place about judicial review, disenchantment was expressed with the judiciary in general, and Indonesian society addressed concertedly the problems of how to advance the reform process.¹⁶ In particular there was an intense debate concerning how, following the impeachment of President Abdurrahman Wahid in 2001, to lay down a satisfactory legal as opposed to political process for presidential impeachment. Commentators have indeed stressed the last of these issues as particularly crucial, even though in practice the exercise of constitutional jurisdiction has in the event been directed more towards the enforcement of constitutional rights than towards other, ancillary, powers.¹⁷

Undoubtedly the collapse of Suharto's *Orde Baru* ('New Order') in 1998, together with its oppressive 'integralist state' ideology, had hastened the victory of arguments in favor of judicial control over government that had continued at some level almost since the creation of the Republic in 1945. Butt refers to this factor as 'the fading of barriers to judicial review' – increasingly judicial review proponents found themselves pushing at an opening door. Some voices, as in Thailand, were skeptical about constitutional reform in times of economic hardship, arguing, as popular discourse had it, that 'democracy and the rule of law cannot be eaten'. The prevailing view was, however, as in Thailand, that good governance reforms would provide the basis for stable economic recovery and social justice. These factors did not of course determine what model of court or judicial review should be adopted. Some preferred an independent constitutional court, some preferred a constitutional chamber of the Supreme Court, and others opposed to judicial review preferred review by the MPR (People's Consultative Assembly) itself.¹⁸

¹⁵ Hendrianto, 2009, *Institutional Choice and the New Indonesian Constitutional Court*, in Andrew Harding and Penelope (Pip) Nicholson (eds), *New Court in Asia*, Madison: New York Routledge, 2010, p. 8.

¹⁶ Timothy Lindsey and Mas Achmad Santosa, "The Trajectory of Law Reform in Indonesia: a Short Overview of Legal Systems and Change in Indonesia", 2008, p. 32.

¹⁷ See Timothy Lindsey and Simon Butt, "Economic Reform when the Constitution Matters: Indonesia's Constitutional Court and Article 33", *Bulletin of Indonesian Economic Studies*, 2008, p. 239.

¹⁸ Simon Butt, "Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions", *University of Melbourne PhD thesis*, 2006 (unpublished); Fenwick, S (2008), 'Administrative Law and Judicial Review in Indonesia: the Search for Accountability', in Ginsburg, T and Chen, Albert HY (Ed), *Administrative Law and Governance in Asia*, Routledge, 2008, p. 153.

Consolidation of Democracy

The working definitions of a consolidated democracy are as follows:¹⁹

1. Behaviorally, a democratic regime in a territory is consolidated when no significant national, social, economic, political, or institutional actors spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence or foreign intervention to secede from the state.
2. Attitudinally, a democratic regime is consolidated when a strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society such as theirs and when the support for anti-system alternatives is quite small or more or less isolated from the pro-democratic forces.
3. Constitutionally, a democratic regime is consolidated when governmental and non-governmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process.²⁰

Morlino defines democratic consolidation as the process of establishing and adapting democratic structures and norms that come to be accepted as legitimate by the civil society, in part or in full. He further adds that it is variegated and composite process which unfolds in various directions and ends by strengthening those institutions and norms so as to ensure their persistence.²¹ Ethier formulates two conditions for the emergence and consolidation of democracy, namely, *first*, there should be compromise between the dominant actors and social groups. This compromise centers on the definition of collective objectives of power and the modalities of participation in the decision-making process. *Second*, there should be development of social consensus.²² Important elements of democratic

¹⁹ Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South Africa and Post-Communist Europe*, Johns Hopkins University Press, 1996, p. 6.

²⁰ *Ibid.*

²¹ Leonardo Morlino, *Democratic Consolidation: Definition and Models*, in Geoffrey Pridham (ed), *Transition to Democracy*, Dartmouth Publishing, 1995, p. 574-575.

²² See Diane Ethier, *Democratic Transition and Consolidation in Southern Europe, Latin America and Southeast Asia*, The Macmillan Press LTD, 1990, at 13. Ethier proposes these conditions based on the experience of Southern Europe and Latin America. He explains in his article that the prospects for consolidation of the new democratic regimes appear rather gloomy due to the fragility and the limits of the social consensus. See further *Ibid.*, p. 17.

consolidation as described by various scholars have been summarized in the table below.

Table 1
Elements of Democratic Transition and
Democratic Consolidation

Steps of Democracy	Elements of Each Step
Democratic Transition Linz and Stepan	A sufficient agreement has been reached about political procedures to produce an elected government
	The government comes to power that is the direct result of a free and popular vote
	The government de facto has the authority to generate new policies,
	The executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies de jure
Democratic Consolidation Linz and Stepan, Schneider and Schmitter	No significant national, social, economic, political, or institutional actors spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence or foreign intervention to secede from the state.
	A strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society
Linz and Stepan, Stephen Hanson, Schneider and Schmitter	The governmental and non-governmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process
Samuel Huntington	It has achieved what is called as “two turnover tests”. In other words, the process of democratic power transition has happened twice transition peacefully and sustainably

Morlino	The process of establishing and adapting democratic structures and norms comes to be accepted as legitimate by the civil society, in part or in full
Schneider and Schmitter	Access to mass media
Schneider and Schmitter	Whether electoral volatility has diminished significantly
Ethier	Compromise between the dominant actors and social groups and development of a social consensus

The Constitutional Court, Local Election and Consolidation of Democracy

The Constitutional Court had been mandated to settle local election disputes. The decision to grant the court with such power was influenced by some landmark of local election disputes which had been settled by the Supreme Court i.e local election dispute in Depok, Sulawesi Selatan dan Maluku Utara. These cases have been prompted by controversies caused by unclear decision of the Supreme Court in settling disputes of local election. Public untrust to the record of the general court under supervision of the Supreme Court also influenced negative response of political parties and intellectual to the quality of decision made by the Supreme Court. By the enactment of Election Act 2007, the authority of local election disputes settlement was moved from the Supreme Court to the Constitutional Court. In article 1 paragraph 4 of Election Act 2007, it is stated that local election for the head of regions is part of direct general election for electing the head of the regions in unitary state of Indonesia which is based on Pancasila and 1945 Constitution. In other words, since the local election had been considered as part of the general election, therefore the authority of disputes settlement becomes the duty of the Constitutional Court.

The Constitutional Court has been perceived as holding the beacon for democracy and has become a new hope of citizens in Indonesia due to its reputable decisions. The court is regarded as one of true reformist state organs

in Indonesia. In a relatively very short period of time the Constitutional Court has started giving full and serious attention to the plight and complaints of the citizen and simultaneously gained public trust at a very high pace. As result, many parties summoned for moving the authority of local election disputes settlement from the Supreme Court to the Constitutional Court.

Selected Landmark Cases on Local Election Dispute by the Constitutional Court

Since 2008, the Constitutional Court has received, tried and decided 452 cases on local election disputes. Among the cases, 46 cases were accepted wholly or partly, 293 rejected, 99 could not be accepted, and 14 cases were withdrawn by the applicant. There are some landmarks of the decision on local election disputes that are important to be noted in this discussion. They are as follows:²³

a. Dispute over the Result of Local Election in East Java Province: Decision No. 41/PHPU.D-VI/2008

It is considered as the first landmark decision as well as the milestone case of local election disputes. The Constitutional Court has shifted the meaning of local election disputes from formal justice approach to substantive justice approach. Through this decision, the Constitutional Court extended a new definition of local election disputes stating that the Constitutional Court does not merely try and decide the disputes based on 'mathematical count' or the result of local election in term of vote recapitulation, but more than that also try and decide whether there is violations of law in the process of local election. Hence, the Constitutional Court formulates a new standard of local disputes that the violation of local election has to be systematic, structured, and massive.²⁴ The Constitutional Court argues that to arrive at conclusion which convinces the justices that there are violations of law in a very extensive scope as well as in a very serious degree, the Court will decide the disputes based on evidence in the trial.

²³ See Data on Research conducted by researchers of the Constitutional Court (Helmi Kasim, Syukri Asy'ari, Meyrinda R. Hilipito dan Rio Tri Juli Putranto) with title "Kompatibilitas Metode Pembuktian dan Penafsiran Hakim Konstitusi dalam Putusan-Putusan tentang Perselisihan Hasil Pemilihan Umum Kepala Daerah dan Wakil Kepala Daerah".

²⁴ Widodo Ekatjahjana, "Telaah Kritik atas Putusan Mahkamah Konstitusi dalam Perkara Perselisihan Hasil Pemilukada Provinsi Jawa Timur", Vol. 8, No.1, Februari 2011, *Jurnal Konstitusi*, p. 54.

Based on the all evidence in the trial, the Constitutional Court believed that there were serious violations of laws which influenced the result of local election for every candidate. However, the Constitutional Court had a constraint that they had limitation of authority in handling local election disputes since the laws give mandate only for the dispute settlement on the result of recapitulation of votes.²⁵ In fact, the settlement of disputes in the process of local election, either administrative or criminal violations, could not work effectively. Therefore, the parties applied the disputes to the Constitutional Court.

In line with that, the Constitutional Court argues they would not tolerate the violations which are against article 18 (4) and article 22E (1) of the 1945 Constitution. Using extensive interpretation method relating to its authority to settle the local election disputes, the Constitutional Court decided that the Court did not merely try and decide the disputes on the basis of mathematical count, but also on the basis of any systematic, structured and massive violations in the process of local elections which influenced the result of the local election.

In East Java local election, the Constitutional Court then nullified the result of local election and asked for re-election in particular regions.²⁶ In this decision, the Constitutional Court used purposive interpretation in analyzing and deciding the case. The Constitutional Court argues that local election was one of the implementation of principle of democracy in accordance with the 1945 Constitution. The violations of law in the process of local election could threaten the values of democracy as well as the principle of rule of law. Therefore, the Constitutional Court asked for re-election in three regions, namely Bangkalan, Sampang and Pamekasan.

In short, through its decision, the Constitutional Court has interpreted its authority while at the same time ignoring procedural law applied in the Constitutional Court. This can be accepted in the light of seeking for the fair election disputes settlement. The procedural law is set out for perceiving

²⁵ Article 106 (2) of Local Government Act 2004, as amended by Law No. 12 of 2008.

²⁶ Article 77 (3) of the Constitutional Court Act 2008, and Article 15 (3) of the Constitutional Court Regulation 2008.

justice, not for defeating justice.²⁷ In other words, the judges argue that the Court may interpret extensively the meaning of violations of local election disputes in the light of securing the working of local democracy in the regions. The Court is the guardian of the Constitution and democracy.

b. Local Election in South Bengkulu District: Decision no 57/PHPU.D-VII/2008

The Constitutional Court decided that winner in the second round of local election, Dirwan Mahmud, did not fulfill the administrative requirements of being candidate of the region since he had been in jail for murder case. Article 58 of Regional Government Act 2004 clearly states that one of the requirements of being a candidate is the candidate for local election has to be a person who was never sentenced by the court for any crimes with minimum punishment 5 years or more.²⁸ Since the candidate Dirwan Mahmud did not fulfill the administrative requirement as a candidate the local election in South Bengkulu was not legally valid. The Constitutional Court further stated that the local election in South Bengkulu had violated the law and the principles of election.

Even though it was administrative dispute, the Constitutional Court, as previous decision in East Java, argued that the violation of law and the principle of election could not be tolerated because it threatened the principles of fair election. Again, the Constitutional Court uses the extensive interpretation of its authority in this case. The Constitutional Court might try and decide any cases which were considered as the violation of law and principle of election in the process as well as the result of local election.

The decision of the Constitutional Court has caused several critical responses since the decision of the Constitutional Court was only based on administrative reason and hypothetical assumption on the result of the local election.²⁹ The decision was considered as the broadening of the authority

²⁷ Y.M. Lady Justice Constance K. Byamugisha, *Justice of the Court of Appeal of Uganda, Administering Justice without Undue Regard to the Technicalities*, Greenwatch, 2003, p. 6.

²⁸ As amended by Local Government Act 2008.

²⁹ Taufiqurrohman Syahuri, "Putusan Mahkamah Konstitusi Tentang Perselisihan Hasil Penghitungan Suara Pemilihan Umum Berdasarkan Undang-Undang No. 24 Tahun 2003", *Jurnal Konstitusi PKK-FH Universitas Bengkulu*, Vol. II No. 1, 2009, p. 17.

of the Constitutional Court in guarding the working of democracy in the local election. Quoting Van Vollenhoven statement," the Constitutional Court chose to fly freely without paying attention to the administrative law". The Constitutional Court had extensively covered all types of violation of local election although the violations of election are categorized into three types which subject to different regime of law. It is generally understood that the criminal violation is the authority of general court³⁰, administrative disputes are the authority of KPU (Election Committee) and Bawaslu (Election Supervisory Board)³¹, and disputes over the result of election is the domain of the Constitutional Court³². In other words, the Constitutional Court has ignored the regulation of the election in the name of preserving democracy.³³ In fact, through its decision, the Court may settle the dispute on local election in Bengkulu Selatan.

c. Intermediate Decision on Local Election of District of Bangli

The impact of the decision on the local election in East Java is that there was a broader interpretation of local election disputes. The disputes are not only the disputes over the result of local election, but also the disputes on administrative issues as well as the criminal violations in the process of local election. The Constitutional Court emphasizes that the violations should be systematic, structured and massive which were considered influence the result of local election.

If compared to the decision of local election in East Java which decided to ask re-voting without any intermediate decision, the Constitutional Court decided the local election dispute in District of Bangli with intermediate decision. Intermediate decision is an interval decision (*tussenvonnis*) which has many functions before the final decision for the main dispute. The intermediate decision can be any actions for preparation of final decision. The decision can be also the judges asking the parties to provide particular evidence, shifting burden of proof, re-voting and re-recapitulation of votes and

³⁰ Article 252 of Law No. 10 of 2008.

³¹ Article 248-249 of Law No. 10 of 2008.

³² Article 259 (1) of Law No. 10 of 2008.

³³ *Ibid*, p. 18.

any valid evidence which determine the result of election related parties.³⁴ In Bangli District case, it was proven in the trial that in 12 Vote Counters, the voters did not directly vote, but they were represented by others. Therefore, the Constitutional Court had no choice than it has to enforce the law in a democratic event for upholding the principles of state based on rule of law by asking re-voting.

The lesson learnt from the experience of the local election in East Java is that the Constitutional Court does not want to decide directly final decision, but they ask for re-voting through intermediate decision. The Constitutional Court uses interpretation *stare decisis* and doctrinal analysis to argue that they have authority to try and decide any cases related to not only the result of election in term of mathematical count, but also may have authority to settle any cases dealings with the process of local election in Bangli District.

In addition, the nomenclature of intermediate decision is not only meant re-recapitulation, but also can be re-voting.³⁵ In other words, the Constitutional Court has used an extensive interpretation and free interpretation at the same time.

Intermediate decision is explicitly recognized in case of disputes on authority among state organs.³⁶ Therefore there is no regulation on the intermediate decision in local election disputes settlement. However, the Constitutional Court as the interpreter of the Constitution may interpret any issues relating to the Constitution. In addition, the independence and impartiality of the judiciary may lead the judiciary to have authority to interpret based on their own interpretation in responding the existing case.³⁷ Accordingly, based on the previous reasons, the Constitutional Court introduces re-voting through nomenclature of intermediate decision in the light of guaranteeing the principles of democracy as well as fair election.

³⁴ Maruarar Siahaan, "Implementasi Putusan No.27/PHPU.D-VII/2010 Tentang Perselisihan Hasil Pemilihan Umum Kepala Daerah Kabupaten Lamongan Provinsi Jawa Timur Tahun 2010", *Jurnal Konstitusi*, Volume 8 No 1, 2011, at 9.

³⁵ Article 8 ayat (4) PMK 15/2008 states that, "for the need of investigation, the Constitutional Court may decide an intermediate decision with re-voting.

³⁶ Article 63 of the Constitutional Court Act also states that, "the Constitutional Court could issue a decree which commands the parties to stop the practice of the dispute authority temporarily until the Constitutional Court finally decides".

³⁷ Rahayu Prasetyaningstih, "Penafsiran Konstitusi oleh Mahkamah Konstitusi Menuju Keadilan Substantif", *Jurnal Konstitusi PKK Universitas Padjajaran*, Volume III No 1, 2011, p. 8.

d. Decision on Disqualification and Decree on One of the Candidate of the Local Election in District of Kotawaringin Barat

The lesson learnt from the decision of local election in East Java also influenced the local election disputes decision in Kotawaringin Barat where the Constitutional Court has produced a new norm of violations of the local election. In this decision, the Constitutional Court formulated the violations should be systematic, structured and massive.

In this decision, the Constitutional Court disqualified one of the candidates in the local election in Kotawaringin Barat and decided the winner of the local election. The reason of the Constitutional Court was the evidence showed that there were serious violations of election law in the process of local election in Kotawaringin Barat. The Constitutional Court argued that they have authority to disqualify the candidate since the candidate had violated the laws and therefore also threatened the quality of democracy.

However, some experts questioned on decision of the Constitutional Court since the Constitutional Court had extended their own authority in relation to the settlement of the local election. They proposed to revise the local election acts in order to guarantee the certainty of law.³⁸

On the other hand, other experts have different comments that the decision of the Constitutional Court on local election dispute in Kotawaringin Barat is a proper decision since there are serious violations of principles of fair local election. The violation of local election acts will create a negative impact of democracy.³⁹

The Constitutional Court uses a more philosophical approach of law as practiced in the Constitutional Court of Germany as well as the Supreme Court of the United State of America. They state that if there are two options whether we have to choose the rule of positive law or justice, they emphasize:

³⁸ MK Merampas Kewenangan KPU dan PTUN, <<http://www.mediaindonesia.com/2010/08/06/160511/16/1/>> , See also Noorwahidah, "Sengketa PemiluKada Kotawaringin Barat (Analisis Terhadap Putusan MK No. 45/PHPU.D-VII/2010 dari Perspektif Hukum Negara dan Hukum Islam)", Vol. 8 No.1, (2011), *Jurnal Konstitusi* at 27. See MK Buat Tafsir Sepihak Dugaan Pidana PemiluKada, *Media Indonesia*, 19 July 2010, p. 2, kolom1-4.

³⁹ "Saksi Ahli Dukung Putusan MK Kasus Kobar", <<http://www.jpnn.com/index.php?mib=berita.detail&id=68858>>, viewed on 27 July 2010.

“Preference should be given to the rule of positive law, supported as it is by due enactment and state power, even when the rule is unjust and contrary to the general welfare, unless, the violation of justice reaches so intolerable a degree that the rule becomes in effect “lawless law” and must therefore yield to justice.”⁴⁰ Again, through its decision, the Court has secured the quality of local democracy in Kotawaringin.

e. Decision on Re-Voting with Additional Candidate of Local Election in Jayapura

In this decision, the Constitutional Court extended the qualification of the parties who might have legal standing in local election disputes. The Constitutional Court gave opportunity to the candidates who had registered but they were not determined as the candidate by the Election Commission. The extension of legal standing is formulated by the Constitutional Court on the basis of reasons which may violate the norm of the constitution, legal sovereignty (*nomocracy*), people sovereignty (democracy), any violation of preventing someone from being the candidate (right to be candidate), ignorance of the general court and impartiality of persons relating to a particular candidate and there it prevent other right of candidate.

The Constitutional Court considered that there were modus conducted by the Regional Election Commission which prevented particular candidate. Therefore, the Constitutional Court has to create “a break through” to protect the right of someone to be candidate.

The decision of the Constitutional Court might be a warning for commissioners of the KPUD to be more professional and work in line with the regulation.⁴¹ The Constitutional Court also argued that the action taken by the Election Commission which prevents a person to be candidate in the local election is part of violations on the constitutional rights of the candidate. This decision also secures the process of the local election in Jayapura and therefore it saves the practice of local democracy.

⁴⁰ See Maruarar Siahaan, n. 35, p. 1.

⁴¹ Daniel B. Ratu, “Pemilukada Lembata Pasca Putusan PTUN Kupang”, <<http://danyratu.blogspot.com/2011/04/mk-berkan-legal-standing-bagi-bakal.html>>viewed on March, 4th, 2014.

f. Decision on Re-Voting with Order to the Election Commission to Verify the Candidate in District of Pati.

The decision of the Constitutional Court No. 82/PHPU.D-IX/2011 has nullified some decisions of the KPUD Pati such as decision of candidate, proceedings of recapitulation of votes and decision on the second round of local election in District of Pati. The decision, a quo, the Constitutional Court also disqualified the candidate Sunarwi-Tejo Pramono and at the same time asked the KPUD to verify the candidate Imam Suroso-Sujoko to replace the position of Sunarwi-Tejo Pramono and asked the KPUD to re-announce the candidates.

In the decision a quo, the Constitutional Court also asked the KPUD Pati to hold re-voting in the local election of District of Pati in 2011 and asked also the KPU, Bawaslu (Election Supervisory Board), KPU Central Java and Panwaslu (Election Supervisory Committee) of Pati to supervise the re-voting program in accordance with their authority. Through its decision, the Court has protect the right of the candidate in the local election of Pati in 2011. This also improved the quality of the local democracy.

g. Decision on the Administrative and Factual Verification of the Candidate and Re-Voting in District of Buton

On 21 September 2011, the Constitutional Court had decided some decisions on the local election disputes in District of Buton.⁴² Based on these decisions, the Constitutional Court asked the KPUD to hold administrative and factual verification and also re-voting in the local election of District of Buton. This is one of the phenomenal decisions since the decision has given an opportunity for the candidate to join the administrative and factual verification.

The Constitutional Court hold again the trial for the local election disputes settlement in Buton since there was a report that Regent of the District of Buton tries to prevent the re-voting as ordered by the Constitutional Court. The Regent did not want to provide budget for the re-voting of the local election in District of Buton in 2011.

⁴² See Decision No. 91/PHPU.D-IX/2011, Decision No. 92/PHPU.D-IX/2011 and Decision No. 93/PHPU.D-IX/2011.

The decision of the Constitutional Court has protected the right of the candidate in the local election. The decision has also given a significant contribution to the consolidation of local democracy in Buton.

h. Decision on the Local Election of the Mayor and Vice-Mayor in the Municipality of Pekanbaru

The Constitutional Court had decided the local election in Pekanbaru has violated the principle of fair election since in the process of election one of the candidates has conducted violations of laws which were in fact systematic, structured and massive. In the evident session, it was proved that there was mobilization of voters from outside of Pekanbaru, mass mutation of officers in a particular public office which related to the political support in the local election. In addition, there was decision of the mayor which gave advantage for one of the candidate.

According to the Constitutional Court, public officers at particular offices had been involved systematically, structurally and massively in the campaign program of one of the candidate. This was obviously against the principle of election which should be direct, general, honest and fair.

The Constitutional Court argued that the candidate, Firdaus, did not violate the election regulation due to incompleteness of his document regarding his wives. It was because the form of application from the KPUD which provides only for one wife. Therefore, the Constitutional Court further argued that it was not a legal issue.

The Local election in Pekanbaru was one of dramatic local election since there were a long competition among the candidates through re-voting of the election based on the Constitutional Court decision. The Court has finally settled the disputes and secured the practice of the local democracy in Pekanbaru.

From the above landmark of decisions of the Constitutional Court, it is obvious that the violations of laws in the local election related to the violations of law in the process of the local elections, not the result of

the local election. In short, by extending the object of authority of the Constitutional Court in the local election disputes, the Constitutional Court is not only as “the calculator court”, but also try and decide any violations in the process of local elections. However, this extensive authority in the local election dispute settlement has led the Constitutional Court to have very long and heavy trials.

From 2008 to 2013, the Constitutional Court has also settled many local election disputes. Eventhough some petitioners may be dissappointed on the decision, they accept the decisions of the Constitutional Court. By having these achievements, the Constitutional Court has created a more conducive political situation in the process of local election and after the local elections. This is believed to be a part of significant contribution of the Constitutional Court in consolidating democracy at local level. Despite having some significant achievements, the Constitutional Court also faced problems in settling disputes concerning the result of local elections as elaborated below.

Critical Assessment of the Court and Suggestions for Improvement

1. Design/ Structure

The first issue relates to the design or structure. The Constitutional Court of Indonesia is a centralized model based on the Kelsenian model which is mostly applied in European countries. The Constitutional Court is located at Jakarta, the capital city of Indonesia. The Constitutional Court consists of nine justices, three justices are appointed by the President, three justices are appointed by the Supreme Court and three justices are proposed by the DPR. This kind of appointment of justices in the Constitutional Court is a part of the checks and balances mechanism in order to prevent the Constitutional Court from being dominated by one organ in the Indonesian constitutional system.

The effectiveness of the local election disputes settlement also uses two approaches namely first, the position of the Constitutional Court as the judicial organ which has main function as “the guardian of the constitution” through

judicial review mechanism". Second, the effectiveness can also be assessed from the opportunity of the citizen to access the court and also access to justice.⁴³

Centralized model of the Constitutional Court may not be problem with continental European countries which are not huge countries like Austria, Germany, Spain or other Asian countries like South Korea and Thailand.⁴⁴ In those countries, the parties do not need to go far away and spend a lot of money for bringing the cases to the Constitutional Court in the capital city of the countries.

However, the centralized model of the Constitutional Court can create problems with countries with huge territory and moreover Icelandic countries like Indonesia. In term of the access to justice, the furthest island and provinces in Indonesia will face a problem of time and cost needed to apply local election disputes in the Constitutional Court in Jakarta. Aceh and North Sumatera in the western Indonesia and Papua and Papua Barat in the eastern Indonesia can be some examples. Of course, it will spend a lot of money to cover the expenses needed in the Constitutional Court. Furthermore, the parties have to bring many witnesses to testify for the case before the Constitutional Court.⁴⁵

2. Scope of Authority

Second issue is regarding the scope of authority of the Court. As a new state organ, the Constitutional Court has strived to the extent possible to implement the authorities and obligation mandated by the 1945 Constitution and stipulated in the Law Number 24 of the Year 2003 regarding the Constitutional Court (amended by the Law Number 8 of 2011). The Constitutional Court has four authorities and one obligation in accordance with those mandated by article 24C paragraphs (1) and (2) of the 1945 Constitution. Four authorities of the Constitutional Court are examining at the first and the final level whose decision is final materially review the law against the Constitution, decide disputes over

⁴³ See further Jimly Asshiddiqie, *The Constitutional Law of Indonesia*, Sweet and Maxwell Asia, 2009, at 610. In this book, Jimly explains that there are four goals of the general election, namely; first, to facilitate the possibility of regular, peaceful rotation of leader in the country. Second, to elect representatives of the people who represent the interest of people in the House of Representatives. Third, to implement the principle of people's sovereignty, and fourth, to guarantee the protection of human rights.

⁴⁴ As comparison, it can be seen that the width of Austria 83,871 km² with 8,4 million of population and with continent geography. Germany: width 357.021 km², population 82 million, and characteristic of geography: continent. Spain: width 504.782 km², population 45 and characteristic of geography: continent. South Korea: width 99.274 km², population 49 and characteristic of geography: continent. Thailand: width 514,000 km², population 65 million and characteristic of geography: continent. Indonesia: width 5.193.250 km², population 230 million and characteristic of geography: archipelago.

⁴⁵ Based on data at the Constitutional Court, the applicant, on average, proposed many witnesses.

the authority of state institution whose authority is granted by the Constitution, decide the dissolution of political party, and decide dispute over the result of general election. Whereas the obligation of the Constitutional Court is providing decision over the opinion of the House of People's Representative regarding the assumption of violation by the President and/or the Vice President according the Constitution. The extension of scope of authority of the Constitutional Court may also create problems because the justices have faced heavier processes of trial and longer duration of trial.⁴⁶ Moreover, there was no integrated schedule of local election with other election institutions.⁴⁷

Based on the historical background of the establishment of the Constitutional Court, handling the local election disputes is not a part of the authority of the Constitutional Court. In Article 22E of the 1945 Constitution states that general election shall be conducted to elect the members of DPR, the Regional Representative Council, the President and the Vice-President, and the Regional House of Representatives. The article states clearly that the local election in term of electing the Governor, Mayor and Regent are not the part of the authority of the Constitutional Court. In other words, the historical background shows that the Constitutional Court was designed to be the guardian of the Constitution which focuses on four authorities and one obligation as discussed in the previous chapter.

However lack of public trust on one hand to the Supreme Court and having strong public trust to the new Constitutional Court has encouraged the House of Representatives to enact law which gives mandate to the Constitutional Court to handle the local election disputes by extending the meaning of the local election as a part of the general election regime.⁴⁸ Adding the authority with the local election disputes has made the Constitutional Court become an organ with too much too exaggerated.

⁴⁶ Refly Harun argues that the root of problems of ineffectiveness of the Constitutional Court in settling disputes over the result of local election started from the extension of authority of the Constitutional Court on the objects of the disputes. If the Constitutional Court did not extend the objects of disputes, the Constitutional Court would be able to settle the disputes over the result of local election fast and effectively since it focuses on whether the recapitulation of votes is right or not and the applicant has to prove their claims.

⁴⁷ See further Achmad Sodiki, "Demokrasi Lokal: Evaluasi Pemilu di Indonesia", at 44. In this article, Achmad Sodiki argues that the problem of local election has to be analyzed with holistic dan integrated approaches.

⁴⁸ See General Election Act 2007. In Article 1 (4), it is stated that "General election for Head of Local Government is general election for electing directly the Head of the local government in the unitary system of Indonesia based on Pancasila and the 1945 Constitution".

On contrary, I Gede Dewa Palguna, a constitutional law expert from Udayana University, Bali, argues that the Constitutional Court is better free from the authority to handle local election disputes. He adds that the Constitutional Court is better focuses on its main function in constitutional review. The Constitutional Court is better to have the authority to handle constitutional complaint as the closest and direct derivation of constitutional review.⁴⁹ On the other hand, Ni'matul Huda, a constitutional law expert from Indonesian Islamic University, Yogyakarta and Aidul Fitriadi, a constitutional law expert from Universitas Muhammadiyah Surakarta argue that it will be better if the local election disputes are part of the authority of the Supreme Court through the High Court because it will be more effective, efficient and cheap⁵⁰.

3. Procedures

The third is procedural matters. Trial of the local election disputes is a speedy trial because the Constitutional Court has to decide the disputes within 14 days from registration. This is one of the fastest trials of local election disputes compared to other countries such as Nigeria, Mexico, Brazil and Thailand.⁵¹ This is one of the main problems that create high tension of working at the Constitutional Court. A centralized model of the Constitutional Court with only 9 justices is not appropriate for settling huge number of local election disputes in Indonesia.

In addition, the short period of settlement of local election disputes is a weakness in the procedure. Fourteen days are not enough for the Constitutional Court in settling disputes of local elections since the Constitutional Court also tries and decides disputes on administrative disputes and criminal violations of election. Furthermore, data of local election shows that almost 85 percent of the local election brought to the Constitutional Court.

Data at the Constitutional Court shows that on August 2010, in particular days, the Justices had to finish the sessions from morning until evening (09.00 am-23 pm). This data is the sessions at the Constitutional Court without local

⁴⁹ From Interview with Dr. I Dewa Gede Palguna on 18 November 2012.

⁵⁰ From interview with Dr. Ni'matul Huda and Dr. Aidul Fitriadi on 12 November 2012.

⁵¹ In Nigeria and Mexico, the Election Tribunal has 180 days for local election disputes settlement at region level and 90 day for appeal. In Brazil, the Election Commission has 90 days for local election disputes settlement at region level and 90 days for appeal. Thailand allocates 30 days for local election disputes settlement.

elections which are conducted at the same time. It is predicted that if the sessions were conducted from morning until evening, it will influence the quality of the session since the justices might be tired already. As the result, it will also influence the quality of decisions of the Justices.⁵²

It is worthy to note that duration of 14 days for finishing a local election dispute is actually design of duration for the general election whereby the local election is not a part of the general election regime. Obviously, the drafter of Act and Regulation do not adapt this duration of time even after the local elections inserted as the part of the general election.⁵³

4. Code of Ethics.

With the spirit as the guardian of the Constitution and vision of upholding Constitution in order to realize the rule of law state and democracy in the light of creating a civilized national life, the Constitutional Court has emerged as a new hope in the practice of constitutional system. This vision is becoming a guideline for the Constitutional Court in performing its duty as judiciary organ which is independent and responsible in accordance with the 1945 Constitution.⁵⁴

Many comments have appreciated the Constitutional Court as a new state organ which inspires the milieu of the practice of the state into a new tradition of checks and balances. As it has been recorded in the previous chapter, the Constitutional Court has been considered as the rising star in the life of the country since it has shown its reputable achievements in keeping the balance of powers between state and the citizens. One of the strengths of the Constitutional Court lies in its strong management and leadership and the integrity of the justices and the staffs who should be hand in hand in building the Constitutional Court to become a modern and trustable court. This very good achievement and reputable institution could be maintained smoothly by the Constitutional Court until October 2013.

⁵² Interview with Dr. I Dewa Gede Palguna from Udayana University, Bali on 12 November 2012.

⁵³ Compare to some countries such as Nigeria and Mexico, the Election Tribunal has 180 days for local election disputes settlement at region level and 90 day for appeal. In Brazil, the Election Commission has 90 days for local election disputes settlement at region level and 90 days for appeal. Thailand allocates 30 days for local election disputes settlement. Those countries have more time to finish their local election disputes. In the case of Indonesia with huge number of population as well as the character of geography which long and consists of many islands, the duration of time for local election disputes settlement should be longer.

⁵⁴ Prakata dalam *homepage* Mahkamah Konstitusi Republik Indonesia, <http://www.mahkamahkonstitusi.go.id/> viewed on March, 4th, 2014

On 2 October 2013, it was surprisingly news made by media when the chairman of the Constitutional Court, Akil Mochtar, was caught red-handed in his official house in his involvement in a bribery case. This is really a disaster for the Indonesian legal system at all since the Constitutional Court is expected as the agent of change in the very dark image of the court and the legal apparatus in Indonesia. The authority of the Constitutional Court is suddenly deteriorating and public trust started disappearing.

One of the loopholes that lead the Constitutional Court to a dangerous situation since the system as well as public placed too much reliance on integrity of the justices in the Constitutional Court. Even though, the Constitutional Court has set out a code of ethics in 2004, however this internal supervision is nothing when the justices or the chairman of the Constitutional Court are a part of the problem. Human beings are sometimes weak to supervise themselves. Therefore, in many areas, it is developed two kinds of supervision; internal and external supervision.

In 2006, the Judicial Commission was the external supervision which had authority to supervise the justices of the Constitutional Court. However, the Constitutional Court nullified the authority of the Judicial Commission in supervising the justices of the Constitutional Court through its decision in 2006. Hence, as a new state organs, the Constitutional Court tends to be a super body institution without strong supervision either internally or externally. Without having strong supervision, the code of ethics of the judges may not be enforced well. Internal supervision becomes weak when the problems lies in the hands of judges of the Constitutional Court. One of the result of this situation was in 2014, Akil Mochtar, the chairman of the Constitutional Court was arrested by the Anti-Corruption Commission on bribery case relating to local election in Borneo.

In short, the individual piety is not enough without having strong supervision and broader contribution of social control. Code of ethics is nothing without having strong supervision of both internal and external supervision. In addition, in relating to the Constitutional Court, social control is also needed.

III. CONCLUSION

The Constitutional Court, through its decisions, has created a more conducive political situation and has given significant contributions in the process of consolidating local democracy in Indonesia. The Court managed to settle all disputes regarding local elections disputes assigned to them so far although it has limited number of judges and short period of settlement of the disputes. However, from managerial aspect and litigant interest, the local election disputes settlement worked ineffectively. Ineffectiveness of the settlement are caused by factors such as problem of design of structure of the Court, extension of the scope of authority, short period of settlement of disputes, and the breach of code of ethics of the judges. The assignment of jurisdiction to the constitutional court to deal with local election disputes unfortunately has negative impact on the function of the Court as the guardian of the Constitutional Court through judicial review mechanism due to logistic and lack of manpower. Therefore, re-design of structure as well as the authority of the Constitutional Court are necessarily needed. In addition, the Constitutional Court needs to have a more effective supervisory organ which may enforce the code of ethics of judges.

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