

NORMATIVE LEGAL REGULATION

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NORMATIVE-LEGAL REGULATION IN THE SETTLEMENT OF DISPUTES FOR THE ELECTION OF LOCAL HEAD IN INDONESIA

Azis Setyagama

The current direct election for regional heads in Indonesia raises the issue of disputes among the candidates for this post. The settlement of such disputes from 2004 was initially the authority of the Supreme Court, and in 2008, it was transferred to the Constitutional Court, which in 2016 issued a special Law, which mandates a Special Court for the settlement of regional head election disputes. However, until this Court will not be formed, the settlement of such disputes will be the authority of the Constitutional Court. This study is based on a normative approach, namely the Constitutional Court Decree No 97/PUU-XI/2013 and Law No 10 of 2016. In addition, a sociological study regarding the existence of a special judicial body that will be formed to resolve regional head election disputes in Indonesia.

Keywords: authorized institutions, disputes, regional head elections, Indonesia.

НОРМАТИВНО-ПРАВОВОЕ РЕГУЛИРОВАНИЕ ПРИ РАЗРЕШЕНИИ СПОРОВ НА ВЫБОРАХ ГЛАВ РЕГИОНОВ В ИНДОНЕЗИИ

Азис Сетягама

Действующий порядок прямых выборов глав регионов в Индонезии может приводить к спорам между кандидатами. Разрешение таких споров с 2004 г. входило в полномочия Верховного суда, а в 2008 г. перешло в юрисдикцию Конституционного суда, который в 2016 г. утвердил специальный закон, предусматривающий создание специального суда для разрешения споров на выборах глав регионов. Однако до тех пор, пока не будет сформирован такой суд, разрешение выборных споров будет находиться в компетенции Конституционного суда. Данное исследование подготовлено на основе нормативно-правового подхода, а именно – анализа постановления Конституционного суда № 97/PUU-XI/2013 и Закона № 10 от 2016 г. Кроме

того, было проведено социологическое исследование о перспективах деятельности специального судебного органа, который будет сформирован для разрешения споров на выборах глав регионов в Индонезии.

Ключевые слова: уполномоченные органы, споры, выборы глав регионов, Индонезия.

Introduction

After the amendment of the 1945 Constitution of the Republic of Indonesia, there are fundamental changes that affect the legal and the political system of the state. These changes previously did not find articles regulating the Constitutional Court Institution in the in the previous edition of the Constitution, now it is listed in the body of the main law of the country.

The Constitutional Court in the Indonesian Constitution is regulated in article 24C. Paragraph 1 contains the provisions that the Constitutional Court has the authority to judge at the first and last levels whose decisions are final to examine the Law against the Constitution, decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide the dissolution of political parties and decide on disputes over election results. Paragraph 2 contains the provisions that the Constitutional Court is obliged to issue a decision on the opinion of the House of Representatives regarding suspected violations by the President and/or Vice President according to the Constitution.

To implement the provisions contained in article 24 C, the issuance of Law No 24 of 2003 concerning the Constitutional Court, which in this Law is fully regulated regarding the duties and powers of the Constitutional Court. Meanwhile, the authority of the Constitutional Court is regulated in article 10 and article 11 of this Law concerning the Constitutional Court, which in article 10 contains the following provisions.

The Constitutional Court has the authority to judge at the first and last level the decision:

1. Testing the Law against the 1945 Constitution of the Republic of Indonesia.

2. Resolve disputes over the authority of State Institutions whose authority is granted by the Constitution.

3. Deciding to dissolve political parties.

4. Resolving disputes about the results of general elections.

Regarding the authority of the Constitutional Court in deciding disputes over the results of general elections, especially regarding regional head elections, there are those who argue that the Constitutional Court does not have juridical authority over regional head elections, because regional head elections are not part of the Presidential Election, the House of Representatives/Regional People's Representative Council (DPR/DPRD) and Regional Representative Council (DPD).

This is strengthened by Law Number 32 of 2004 concerning Regional Government where the completion of provincial level regional head elections (Pilkada) is the ¹ authority of the Supreme Court and High Court for results district/city head elections.

In further developments after there was a judicial review of Law No 32 related to the election of the regional head of the Governor of West Java. So that the Constitutional Court Decision No 72-73/ PUU-11/2004 has implicitly transferred the ¹ authority of the Supreme Court to the Constitutional Court. In its consideration, the Constitutional Court is ³ of the opinion. Although Article 18 paragraph 4 of the 1945 Constitution mandates direct Regional Head elections, the implementation of elections is part of the elections regulated by Constitution Article 22 E, so that they become part of the Election Regime.

³ Then was born Law No 12 of 2008 as the second amendment to the regional government law, which gives the authority to resolve disputes over ¹ regional head elections to the Constitutional Court. So that there is no longer any clash of norms related to regional head election issues. In line with the development of the time the issue of regional head election disputes there is a tug-of-war in accordance with political developments in Indonesia and the latest is the issuance of a ³ Constitutional Court Decision No 97/PUU-XI/2013, which ¹ decide on regional head election disputes is not the authority of the Constitutional Court. The follow-up to the decision of the

Constitutional Court was issued Law No 8 of 2015 in conjunction with Law No 10 of 2016, which mandates the Special Courts for regional head election disputes, and before the Special Courts were formed, the ¹ **dispute over the election of regional heads** became **the** authority of the **Constitutional Court**. Starting from this problem, the author would like to further examine the legal analysis of the authority between the Constitutional Court and the Supreme Court in resolving regional head election disputes in Indonesia.

Methodology

The research method in making this article is to use the normative method based on juridical analysis contained in Law No 8 of 2015, Law No 10 of 2016 and Decree No 97/PUU-XI/2013, which decide on regional head election disputes is not the authority of the Constitutional Court. In the Decree of the Constitutional Court, regional head election disputes are not the authority of the Constitutional Court, in Law No 10 of 2016 a Special Court will be established for regional head election disputes and before a special judicial body is formed, regional head election disputes fall under the authority of the Constitutional Court.

In this study also studied sociological analysis where the existence of Law No 10 of 2016, which gives authority to special judicial bodies for election disputes, and the responses of community leaders to the existence of a special judicial body from positive and negative reviews of the special judicial bodies for election disputes to be formed.

Results and discussion

¹ *The **authority of the Constitutional Court** in settlement of regional head election disputes*

A democratic country prioritizes the public interest rather than the private one, meaning that democracy is a form of government in which the formulation of policy, directly or not determined by the votes of the majority of citizens who have voting rights through the general election forum. Democracy talks about the will of the people, democracy can also be common good, so democratic governance is to create a common good, which is determined through a political contract, talking about

democracy means dealing with general elections. In a democratic country, general election is one of the main pillars of an accumulation of the will of the people. General election is also a democratic procedure for selecting leaders. It is believed in most civilized societies on this earth, General Election is the safest mechanism for changing power, when compared to other methods.

Therefore, the general election is the main pillar of a democracy. Through the General election, the people elect their representatives, and then these people's representatives are entrusted with the mandate of the people's sovereignty to take care of the country. Over the general election, the people show their sovereignty in electing leaders such as the President and Vice President, DPR members, DPD members and DPRD members. Through local general elections called regional head elections (Pilkada), the people also demonstrate their sovereignty to elect the Governor and Deputy Governor, the Regent and Deputy Regent or the Mayor and Deputy Mayor.

The most basic function of elections is so that the people can replace or change leaders who are felt no longer worthy of leading the country, so that someone else will immediately replace them. If there is a change of President, there will also be a change in other political elites who are still connected with him, for example a change of ministers or ambassadors. This condition will also affect the running of government that is different from the previous leaders. Election is a means of people's sovereignty to elect members of the People's Representative Council, members of the Regional Representative Council, the President and Vice President, and to elect members of the Regional People's Representative Council. The will of the people is carried out directly, public, free, secret, honest and fair ¹ in the Unitary State of the Republic of Indonesia, based on Pancasila and the Constitution. Election is the election of people to fill certain positions. For this reason, general elections are very important because in these elections there is the implementation of people's sovereignty [6, p. 32].

In the system of people's sovereignty, the highest power is in the hands of the people. This power essentially comes from the people, is reserved for the people, and

is managed by the people. Democracy cannot be used as mere lip decoration and material for mere rhetoric. Democracy is also not only about the institutionalization of lofty ideas about the ideal state life, but also a matter of tradition and egalitarian political culture in the reality of diversity in social life and respect for differences [5, p. 58].

The regulation for regional head elections in the 1945 Constitution of the Republic of Indonesia has a vague meaning because Article 18 paragraph 4 contains the following provisions: Governors, Regents and Mayors as heads of provincial, regency and city governments are elected democratically.

In Law No 32 of 2004 concerning Regional Government, the people directly elect regional head elections. Nevertheless, regarding disputes over election ¹disputes is the authority of the Supreme Court, which in its subsequent development there is a material review of Law Number 32 of 2004, related to articles deemed incompatible with the election regional heads directly. So that the Constitutional Court Decision No 072-073/PUU-11/2004, which has implicitly transferred the authority of the ¹Supreme Court to the Constitutional Court, in its consideration ¹the Constitutional Court is ³of the opinion. Although, direct regional head elections are mandated by ³Article 18 paragraph 4 of the Constitution, materially, ³the implementation of regional head elections is basically a part of the elections regulated by Article 22E of the Constitution, so that become part of the electoral regime.

³Then Law No 12 of 2008 concerning second amendment to Law No 32 of 2004 concerning Regional Government was born which gives the authority to resolve disputes over regional head elections to the Constitutional Court as stated in the provisions of Article 236 C as follows:

¹*The handling of disputes over the vote count results of regional head and deputy regional head elections by the Supreme Court is transferred to the Constitutional Court no later than 18 months after this law was enacted.*

Moreover, which later issued Law No 8 of 2015 concerning regional head election, which mandates to form a special judiciary body to handle regional head election disputes while the Agency has not been formed, the ³Constitutional Court is

still the one to handle disputes over regional head election. And finally Law No 10 of 2016, which gives the ³ authority to the Constitutional Court to decide regional head election disputes before forming a special judicial body for regional head election disputes

The definition of democratically ¹ in Article 18 paragraph 4 of the Indonesian Constitution has a flexible meaning, which is to provide opportunities for legislators to be able to determine a regional head election system in accordance with certain regional conditions, whether directly or indirectly, even by means of another. This is also intended as a form of respect for the constitution for the diversity of customs and cultures of the people between different regions. Likewise, for other considerations of the Constitutional Court decision No 072-073/PUU-II/2004 said. It is the authority of the legislators to determine whether regional head elections are conducted directly or not, even according to the background of the discussion of the provisions for regional head election (Pilkada) in the Constitution. Lawmakers can actually determine different regional head election systems – different according to each region [4, p. 62].

The authority of the Supreme Court in settlement of regional head election disputes

In order to implement democracy so that it can run well, it is necessary to establish an independent institution to conduct and carry out elections, which are a means for channelling the aspirations of the people. The Indonesian Constitution has been fulfilled, namely the general election held by the general election commission, which is national, permanent and independent. In accordance with the facts that occur in the field, the election of Regional Heads and Deputy Regional Heads will directly result in the impact of disputes between regional head candidates, in which the losing regional head candidates will take legal action. So that the regional head elections are repeated or cancelled even anarchic actions, occur for the losers and its supporters. By this Law, namely Law No 32 Year 2004 provides an opportunity for Regional Head Candidates who are dissatisfied or feel there is vote count fraud to take legal ¹ action to the Supreme Court, for the election of Head of Level I regions, and the High

Court for elections for Head of Level Regions II, in accordance with the provisions of Article 106 paragraph 6 as follows:

¹
The Supreme Court in exercising its authority as referred to in paragraph (1) may delegate to the High Court to decide disputes over the results of the vote count results for the elections for regional heads and deputy heads of regencies and cities.

In subsequent developments there was a judicial review of Law No 32 of 2004, related to articles deemed incompatible with direct ¹ regional head elections. So that the Constitutional Court Decision No 072-073/PUU-11/2004, which has implicitly transferred the authority of the ¹ Supreme Court to the Constitutional Court. In its consideration the Constitutional Court is of the opinion. Although direct regional head elections are mandated by ³ Article 18 paragraph 4 of the Constitution, materially the implementation of regional head elections is basically part of the elections ¹ regulated by Article 22E of the 1945 Constitution, so that become part of the electoral regime.

³
Then Law No 12 Year 2008 concerning second amendment to Law No 32 of 2004 Concerning Regional Government was born which gives the authority to resolve disputes over regional head elections to the Constitutional Court as stated in the provisions of Article 236 C as follows:

¹
The handling of disputes over the vote count results of regional head and deputy regional head elections by the Supreme Court is transferred to the Constitutional Court no later than 18 (eighteen) months after this law was enacted.

After about 13 years of direct regional head elections among our politicians, especially in the House of Representatives of the Republic of Indonesia, there was developed an idea about the ¹ existence of direct regional head elections and wanting to replace the regional head elections in a representative manner by being elected by members of the Regional People's Representative Council. The debate between regional head elections direct election with the regional head representative ended with the issuance of Law No 22/2014 concerning regional head elections, in which the regional head is elected in a representative manner. In Article 3 of Law No 22/2014 on regional head elections, contains the following provisions:

1. Governors are elected by members of provincial DPRD in a democratic manner based on the principles of free openness, honesty and fairness.

2. Regents and Mayors are democratically elected by members of Regency / Municipal DPRD based on the principles of freedom, openness, honesty and fairness.

This law gives a greater role to the Regional People's Representative Council in determining the implementation of regional head elections as stipulated in Article 7 to Article 11 where the implementation of regional head elections is carried out by DPRD by forming a regional head election committee. In this Law, there is not a single provision that provides an opportunity for the loser in the regional head election to take legal action through the Supreme Court or the Constitutional Court because the scope is very limited, namely, the voters are only members of the local DPRD so there is very little chance of miscalculating the number. Losing votes and winning votes so there is no such thing as a dispute over a regional head election dispute because it is carried out with a representative system.

Then followed the passing of Law No 23 of 2014 concerning Regional Government, where in the Law there is no one provision that discusses regional head elections if a dispute occurs and also does not mention the role of the General Election Commission/Regional General Election Commission (KPU/KPUD) in organizing regional head elections. It has regulated in Law No 22/2014 concerning regional head elections where the regional head is elected by the Regional People's Representative Council and its implementation is submitted to the Regional Head Election Committee which is formed by the DPRD.

After the two Laws were passed in the People's Representative Council, there was resistance to the re-enactment of representative regional head elections by the DPRD, which deprived the people of their rights to participate in determining the choice of their leader, in addition to regional head elections. Through representation is considered incompatible with the current democracy and castrates the development of democracy in Indonesia.

As a result of the rejection of most Indonesians towards the regional head election system in a representative manner, the President issued a PERPU

(Government Regulation in Lieu of Law). Namely PERPU No 1 of 2014 concerning direct regional head elections, which annul Law No 22 of 2014 concerning representative elections for regional heads, which was subsequently ratified by Law No 2 of 2015. This Law stipules Government Regulation in Lieu of Law Number 1 of 2014 concerning Amendments to Law Number 23 of 2014 concerning Regional Government into Law, which was later amended by Law No 9 of 2015 concerning the second amendment to Law No. 23 of 2014 concerning Regional Government.

With this direct regional head election, the role of DPRD in regional head elections is no longer authorized and has shifted to the KPUD as the organizer of general elections where regional head elections are included in the election regime. And if there is a dispute regarding the results of the regional head election which has the authority is the Constitutional Court accordingly with the provisions contained in Law No 9 of 2015 concerning the second amendment to Law No 23 of 2014 concerning Regional Government.

In connection with the ¹ Constitutional Court Decree No 97/PUU-XI/2013, which makes it clear that the ¹ Constitutional Court is not authorized to handle cases of regional head election disputes, passed a Law No 8 of 2015, which mandates the establishment of a special judicial body to handle regional head election disputes. So before the agency was formed, regional head election disputes became ¹ the authority of the Constitutional Court to handle them.

Subsequently issued Law No 10 of 2016 concerning the authority of the Constitutional Court in resolving ¹ regional head election disputes. In accordance with the provisions of Article 157 paragraph 8, which contains the provisions that the Constitutional Court shall decide cases of dispute over election results no later than 45 working days from receipt of the application.

Regional head election dispute Resolution by the Supreme Court

Regarding the issue of democracy, by Robert A. Dahl, apart from avoiding the emergence of tyranny, democracy also aims to achieve other goals [9, p. 45]. Among them are the realization of individual essential rights, the existence of political equality, the emergence of moral autonomy, the opportunity to determine the position

of the individual, and the existence of welfare. In such a context, the emergence of democratization in the regions through direct regional elections is expected not only to have the estuary of the freedom of the people in the regions to determine their own leaders. It is hoped that this process can create prosperity and welfare for the people in the regions.

According to Philip Mawhood [7, p. 3] and J.A. Chandler [2, p. 78] states, that local government has the potential to realize democratization because the decentralization process requires a greater level of responsiveness, representation and accountability. In relation to elections at the local level, the realization of a democratic regional government is the dream of all nations, including Indonesia. However, these efforts will encounter an unclear problem regarding universal benchmarks for assessing whether a regional government can be categorized as a democratic government or not. The existence of regional government is a consequence of the adoption of the concept of democracy (populist) so that the government formed is a government that is sovereign of the people.

Bagir Manan [1, p. 64], states that the presence of democracy is not only measured by the existence of democratic institutions, such as the existence of representative bodies, general elections are not a guarantee of the presence of democracy. Democracy is not just an institution or institution. Democracy is also a mechanism, even if it is not an exaggeration to say, a democratic mechanism is a determinant for measuring the presence of real democracy, both in the life of the state or government and in the life of society in general. Culturally, democracy will be fertile if it is supported by democratic behaviour such as readiness to dissent, readiness to lose, readiness to compete honestly, peaceful attitude and so on.

After running for about 13 years, many direct regional head elections have been questioned by many groups, although from a democratic side, the direct regional elections reflect the aspirations of the people more than representative democracy. However, the direct elections also caused problems including the following:

1. The tendency is to cost a lot of money and the values contained in society, as if democracy is everything without paying attention and considering the benefits and

consequences. Individualism and materialism seem to colonize and erode the Pancasila values in the souls of some nations. The implementation of the election of candidates for Regional Head must campaign directly against the voters, either physically (door-to-door) or through the mass media. Only candidates who have large reserves of funds or are supported by sponsors are likely to participate in the Pilkada.

2. Prioritizing public figures or acceptability aspects, but not paying attention to their capabilities to lead organizations and society.

3. The possibility of horizontal conflict between supporters if the political maturity of the people in an area is not yet matures enough. In the past, the people were accustomed to winning and losing in various elections. However, during the New Order era, the regional head elections were full of engineering, so that until now the people still did not believe (distrust) the existing system [10, p. 122]

Likewise the opinion of other legal experts, that direct regional head elections in Indonesia cause many problems that are very detrimental to the development of democracy, including the opinion of Djohan Djohermansyah and Made Suwandi which states that direct regional head elections have negative impacts including:

1. The possibility of conflicts of interest between the central and provincial regions and between provinces and districts / cities, and between regions related to the utilization of natural resources, such as water resources, forests, oceans, the environment and so on, especially in terms of determining obligatory and optional affairs.

2. In holding direct regional head elections (Pilkada), the possibility of collusion and money politics or similar forms between the Regional People's Representative Council, the Regional General Election Commission and Political Parties, either as supporters of party candidates or coalition of political parties, or as political vehicles used by individual candidates.

3. If the direct Pilkada is carried out incorrectly, dishonestly and fraudulently, the people will not believe in the existing system, so that mutual suspicion, distrust and even conflict between supporters will be formed. To restore a harmonious

community life will require considerable time, effort and cost. This is a social cost, that must be borne by all parties if the elections are held incorrectly.

4. Conflict at the bureaucratic level will directly or indirectly have an impact on society, among others, services are not egalitarian. The community will also easily be ignited by simple problems. If in society there is continuous conflict, do not expect that progress will be obtained both economically, politically and socio-culture [3, p. 56].

Because direct regional head elections are considered to cause problems as mentioned above, in the discussion of regional head elections in the People's Representative Council there is a tug-of-war between members of the House of Representatives, some of which are of the opinion that direct regional head elections continue to be applied considering the election. The regional head directly reflects a sense of democracy and reflects the people's sovereignty in accordance with the spirit of sovereignty in the hands of the people. However, among the members of the DPR, who want to be representative, have the opinion that the direct regional head elections that are currently in effect have many negative effects, so what is suitable is representative regional head elections.

The debate regarding the pros and cons regarding direct regional head elections ended with a vote which was won by members of the DPR, who wanted to be representative by the passing of Law No 22 of 2014 concerning regional head elections. The substance of these elections is that members of the DPRD not long ago there was rejection by most members of the community elect the regional head. So the President issued PERPU No 1 of 2014, which cancelled the regional head elections in a representative manner and the implementation of direct regional head elections until now and the latest development will be a special judiciary regarding the settlement of regional head election disputes. And before the agency is formed, ¹ the Constitutional Court has the authority to resolve regional head election disputes even though the ³ Constitutional Court has issued Decree No 97/PUU-XI/2013 in which the substance of regional head election disputes is ¹ not the authority of the Constitutional Court. Referring to the decision of the Constitutional Court, actually

before the special judicial body for regional head election disputes that has the authority to resolve election disputes is the Supreme Court, because the Constitutional Court has implicitly stated that election disputes are not under its authority.

Regional head election dispute Resolution by the Constitutional Court

Election dispute resolution experts agree that a good electoral dispute resolution system must meet the following elements:

1. There is a right to obtain election dispute resolution.
2. There is a clearly defined set of electoral standards and procedures.
3. There is a case decision-making body (arbitrator) who is knowledgeable and impartial.
4. The existence of a judicial system that facilitates the achievement of decisions.
5. There are clear arrangements regarding the burden of proof and standards for filing evidence that are clearly defined.
6. The existence of a solution system that is effective and meaningful and there is effective stakeholder education [q.v.: 8].

In the constitution in the Indonesian state, the settlement of elections, especially regional head elections, can directly be in the Supreme Court and also in the Constitutional Court or form a special body to finalize elections, especially regarding regional head elections. Since Indonesia carried out reforms in the field of government, general elections, especially head elections, were carried out by independent institutions, where people's voices could be channelled properly through free and honest elections.

The authority of the Constitutional Court in resolving disputes over direct regional head elections was questioned by the passing of Law No 22 of 2014 concerning Regional Government where regional head elections are held with a representative system. And this means that there are no disputes over regional head election disputes because the committee is a committee formed by the Regional People's Representative Council and the voting participants are DPRD members, so

there is no need for disputes regarding regional head elections. Regional head election disputes occur when regional head elections are carried out directly by the people. Institutions, that have the authority to directly resolve local election disputes can be the Supreme Court, the Constitutional Court and can also be a special judicial institution.

After the President issued PERPU No 1 of 2014 concerning direct regional head elections, which was followed by the passing of Law No 1 of 2015 and amended by Law No 9 of 2015, the authority to dispute the results of regional head elections is the authority of the Constitutional Court. Subsequent developments with the Decree of the Constitutional Court No 97/PUU-XI/2013 decided that regional head election disputes were not the authority of the Constitutional Court. So that Law No 8 of 2015, which mandates the establishment of a special judicial body to resolve regional head election disputes, before the special judicial body is formed, disputes regarding regional head election disputes are the authority of the Constitutional Court. Then the last one was issued Law No 10 of 2016 concerning the second amendment to Law Number 1 of Year 2015 concerning the stipulation of Government Regulations in Lieu of Law No 1 of 2014 concerning the Election of Governors, Regents and Mayors into Law. Article 157 paragraph 8 contains the following provisions: *the Constitutional Court shall decide cases of dispute over election result disputes within 45 working days from the receipt of the petition.*

Thus, the authority of the Constitutional Court in dealing with regional head election disputes directly according to the provisions of this law is temporary while awaiting the formation of a special judicial body authorized to resolve regional head election disputes in Indonesia.

Conclusion

The legal basis and considerations that serve as guidelines for the authority of the Constitutional Court in matters of disputes in the settlement of regional head elections are the legal provisions stipulated in Law No 12 of 2008, PERPU No 1 of 2014, Law No 1 of 2015, Law No 8 of 2015 and Law No 10 of 2016. The consideration of the thoughts on the authority of the Constitutional Court is based on

the consideration, that regional head elections are included in the category of elections. So that they are included in the election regime and election disputes are the authority of the Constitutional Court besides that the personal judges of the Constitutional Court are considered still independent compared to the Supreme Court and public trust against the Constitutional Court is still high compared to other institutions.

Prior to the formation of a special institution that handled regional head election disputes in accordance with the provisions of Law No 10 of 2016, the Constitutional Court has the authority to resolve regional head election disputes in Indonesia.

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