

Analysis of the Constitutional Court Decision on a Simultaneous Election in Indonesia

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Abstract- The recent plan to organize a simultaneous election has resulted pro and cons arguments in Indonesia. The reason is simply because the constitutional court decision that was issued in the act No. 14 / PUU-XI / 2013 on a simultaneous election has not given satisfied explanation toward how the simultaneous election should be conducted and what the legal basis that should be used to support such simultaneous election. This paper aims at discussing the technical aspects that should be provided to implement a simultaneous election and examines political dynamics at the parliament level in formulating the above constitutional court decision on simultaneous election. Throughout this paper, the data used were collected from interview with resource persons and from the literature as well. The study found that the decision made by the constitution court has been in line with the national constitution. However, the detail explanation of the importance of simultaneous election in the constitution was far from clear. The study suggests that if the simultaneous election will be conducted in the year 2019, there are many things that need to be prepared.

Index Terms— Simultaneous election, the Constitutional court, Court Decision No. 14 / PUU-XI / 2013 and democratic elections.

I. INTRODUCTION

As known that a general election or locally called as PEMILU is very important to be held Indonesia. This is because through a general election the people of Indonesia can manifested their sovereignty. One could argue that if there is no election, the people are not sovereign. Also, through the election, the people of Indonesia can determine who is going to be the representatives and leaders in governing the country and hopefully can be trusted to reach the expectations of the people outlined in the national constitution. However, the election in practice is very dependent on the adoption of the governance system adopted by a country and it also relates to the implementation of the model of electoral activities. The government system here is usually called *regeringsdaad*, that is governance by the executive in relation to the power of legislative.

The election can also be considered as a ritual activity for the people of the country to realize democracy. This activity should follow the regulation that was established through the basic norm (*norm ground*). This basic norm was outlined in Section 22E of the Act of 1945 (1945). However, in terms of the technical implementation it was regulated in the legislation.

It should be noted that the so called democratic general election in Indonesia began in 1998 after the Soeharto era. In this election there are two types of election. The first is the election for the legislative members and the second is the election for selecting the president and the vice president. However, these two different types of election has been questioned as it was considered inefficient financially. Some also questioned whether these two types of election is the

will of the Constitution, or is there something else that makes these elections cannot be held simultaneously.

In the literature it was argued that there are at least three reasons why the election should be undertaken separately. First, it is because the national constitution as outlined in Article 9 paragraph (1) of the 1945 National Constitution stated that the inauguration or oath of President and Vice-President should be conducted in the presence of the Assembly or Parliament. Second, it is because the separate election has been *desuetudo* or habit that was outlined in the constitutional convention. Third, it is because there is a rule that stated the importance of legislative support to the ruling executive government.

The above reasons can be found in the Article no. 22E of the 1945 national constitution. However, it is worth noting that in the Article 22E paragraph (1), there is a statement that mention that the election is conducted every five years. This notion has been interpreted by many experts as the potential legal argument to undertake a simultaneous election. Effendi Ghazali, for instance, argued that this paragraph can be interpreted as the potential argument to conduct a simultaneous election. He also further argued that the election that was done separately would cause transactional politics, a high political cost, money politics, and political corruption. Also, the election that was done separately tends to be ineffective particularly in terms of time as it should be done in different time.

As there is a pro and cons argument toward a simultaneous election, the Constitutional Court as the final Interpretation of the Constitution, then conduct an examination of the articles that are considered contrary to the applicant with the test of Article 3, paragraph (5), Article 9, Article 12 paragraph (1) and (2), Article 14 paragraph (2) and Article 112 of Law 42 of 2008 on the General Election of President and Vice President of Article 4 paragraph (1), Article 6A paragraph (2), Article 22E paragraph (1) and paragraph (2), Article 27 paragraph (1), Article 28D (1), Article 28H (1), and Article 33 paragraph (4) of the 1945 Constitution.

After more than a year of the constitutional court examination to this case, the Constitutional Court on January 23, 2014 finally decided that all the articles and the paragraphs including the Article 3 (5), Article 12 paragraph (1) and paragraph (2), Article 14 paragraph (2), and Article 112 of Law No. 42 Year 2008 regarding the General Election of President and Vice President (State Gazette of the Republic of Indonesia Year 2008 Number 176, Supplement to State Gazette of the Republic of Indonesia Number 4924) have been considered "against" the 1945 National Constitution of the Republic of Indonesia. Due to this argument, the constitutional court issued the act No. 14 / PUU-XI / 2013 on a simultaneous election. However, the issuance of this decision raised many

criticisms as the 1945 National Constitution has no detail and explicit statement on a simultaneous election.

This paper aims at discussing reasons why Indonesia needs a simultaneous election and the basis to justify the constitutional court in deciding a simultaneous election. However, before the above two issues are discussed, the section 2 below overviews the meaning of election in Indonesia as the background of the analysis. Section 3 then addressed reasons why Indonesia needs a simultaneous election. Section 4 discussed the basis to justify the constitutional court in deciding a simultaneous election. Finally, concluding remarks are drawn in section 5. Note that throughout this study, all the data and information was collected from interview and secondary sources advanced in the literature.

II. GENERAL OVERVIEW OF ELECTION

General election or locally called Pemilu can be considered as the means in manifesting the sovereignty of the people. This election is supposed to be carried out in the form of direct, general, free, confidential, honest, and fair as stated in Pancasila and the 1945 Constitution of the Republic of Indonesia. In political studies, election system can be defined as a collection of methods or an approach with procedural mechanism for citizens to exercise their right. However, the election system can change from time to time according to the dynamic situation of the global world on one hand, and the local situation on the other hand. Lijphart (1995) further argued when a representative body of the people - whether it is the House of Representatives (DPR) or the Regional Representative Council (DPD) - is selected, then the electoral system to transfer the amount of vote to the number of seats. Meanwhile, presidential elections, governors and regents, which is a single representation in the electoral system, the basis of the number of votes obtained by determining who wins and who loses. Based on this definition, one can convince the importance of the election to reach democracy state.

In addition, elections can also measure the process of democracy in a state. This is simply because an election should be conducted in an honest, fair, direct, general, free, and confidential ways in accordance with universal principle. These principles *directly* imply that the people as voters have the right to vote directly in accordance with the will of his conscience without intermediaries. *General* principle means is that there is a chance that a thorough applicable to all citizens without discrimination. Then the principle of *free* elections is defined as every citizen has the right to choose freely make choices without pressure and coercion from anyone. In the exercise of their rights, every citizen is guaranteed their security and confidentiality by the state, so it can choose according to the will of conscience.

The principle of secrecy is assured voters that their choice will not be known by any party. Voters cast their votes on the ballot with can not be known by others. Honestly principle means that the election committee, government officials, participants in the election, the election watchdog, the oversight election, voters and all interested parties should behave and act honestly in accordance with laws and regulations. While the principle of justice means that every voter and election participants receive equal treatment and free of any party fraud. However, in reality the above principles are difficult to be realized. As Michael Burton, Richard Gunther,

and John Higley as quoted by Bakhtiar Effendi in his *Theology of the New Politics of Islam* (1999: 107) as follows.

"Many regimes that hold elections (general) on a regular basis cannot be called democratic. Some regimes set the citizens' right on the basis of wealth, as it was happened in Western countries in the 19th century. Some regimes deny voting rights of certain ethnic groups, as in South Africa and South America in the late 19th century. Some regime prohibit parties by ideology or work programs that radical, as is the case in the communist parties in a number of countries. Others seek majority support for the ruling party through practices unfair and pressing, as the regime of Mexico for several decades. In fact, there has been number of regimes which strongly limit the procedural democracy in the election.

Huntington as in his book *No Easy Choice: Political Participation in Developing Countries*, argued that "political participation" is a parent concept that is a label attached to a set of variables. Each variable with the definition of the core, but each also causes and consequences are somewhat different and differently related to the socio-economic and political trends.

In Indonesia, general election in 2004 and in 2009, for example, has undertaken the election for both the legislative as well as the president. These elections systems were chosen after the 1945 constitution has been amended for four times. The first amendment was done on 19 October 1999. The second amendment was done on August 18, 2000. The third amendment has been approved on November 10, 2001. Finally, the fourth amendment was on August 10, 2002. In the amendment, the Election of President and Vice President are no longer using a representative system, but it introduced a system of direct elections, meaning that all participants of the election party, have a chance equal to nominate candidates for president to remain grounded in the Presidential election law in force, namely Law No. 23 of 2003.

General elections were held under the umbrella of the 1945 amendments have not been an sich in electing the members of the House of Representatives (DPR) and the Regional Representatives Council (DPD). These elections have also been accompanied by the election of the President and Vice President. This selection involves the political parties and the people of Indonesia as a whole, the full set in Article 6A.

As in Chapter VIIB of the third amendment of 1945 constitution, it was mentioned in Article 6A paragraph, 1, 2, 3, 4, and 5 that "the President and Vice President shall be elected in a single package directly by the people. The candidates for the President and the Vice President were proposed by the political party or coalition of parties participating in the election before the election. The candidates for President and Vice President who received the votes of more than fifty percent of the vote in each province in Indonesia, was sworn in as President and Vice President. In case there are no candidates for President and Vice President, the two candidates who obtain the first and second most votes in the general election are directly elected by the people and couples with the most votes was sworn in as President and Vice President.

Moh. Kusnardi and Harmaily Ibrahim argued that the general election is nothing but a way to elect representatives of the people. In the Article 22E paragraph (2) of the 1945 Constitution, it was mentioned the election aims at electing members of the House of Representatives, Regional Representatives Council, the President and Vice-President and the Regional Representatives Council. However, the election

should be done separately. This provision is contained in Article 3, paragraph 5 of Law No.48/2009 which states that "The election of President and Vice President held after the election of members of DPR, DPD, and Parliament." This norm which later became the foundation held elections into two (2) periods, namely the elections to choose members of the House of Representatives, Regional Representative Council, and the Council of Regional Representatives; (2) the election to elect the president and vice president. Note that the implementation of voting for the legislature will come before the election of president and vice president. The implementation voting presidential and vice presidential elections held no later than 3 (three) months after the announcement of the results of the general election of members of DPR, DPD, provincial and regency / city.

It is argued, however, that democracy depends on the spontaneous development of two different relationships: 1) the representation of the citizens by the elected leader, a relationship marked by dialogue and responsibility; 2) tolerance, bargaining and compromise among political groups competing. The first linking elites and non-elites who have the same political interests which are the vertical dimensions of democracy. The second obtained mainly among the leaders of conflicting interests or so called horizontal dimension of democracy.

The relative importance of each dimension is different during the transition to democracy and the consolidation period. This is because the transition involves the formation of a new constitutional order which must be held by all factions, the transition was characterized by intensive bargaining among competing elites. At this stage a relatively small pressure was based on the quality of the representation.

Thus, the democratic election system requires a rule or mechanism honest and fair in meeting the capacity of democracy itself. Each candidate and/or the pairs candidate, whether it is legislative candidates, the candidates for Regional Head or the President and Vice President certainly should have rules with various conditions made through formal political agreement. This suggests that every candidate competing for leader position is bounded by a rule that must be followed.

The above conditions has changed drastically after the Constitutional Court issued the regulation No. 14 / PUU-XI / 2013. Under this regulation, the general election is proposed to be conducted simultaneously. The question is why Indonesia needs a simultaneous general election for both legislative leaders and the President and vice President of Indonesia?

III. WHY INDONESIA NEEDS A SIMULTANEOUS ELECTION ?

As it has been mentioned that the 1945 Constitution has stated that general election is a way to organize democracy in Indonesia. The election should be held not only directly and general, but it should also be free, confidential, honest, and fair in every five years. This statement is further supported by the paragraph (2) in that it was mentioned that the general election is held to elect members of the House of Representatives, Regional Representatives Council, the President and the Vice President and the House of Representatives". This election should be conducted separately. But, why Indonesia needs to conduct a simultaneous election? To answer the question above, it is important to consider the following brief historical records.

As the Soeharto era fell down in 1998, the political condition in the country changed significantly since that time. The number of political parties increased from three parties to more than ten parties. However, at that time there was no views suggested a simultaneous general election. As Yusuf from Golkar political party said that the general election is held to elect members of the House of Representatives, Regional Representatives Council, the President and the Vice President and the House of Representatives. This indicates that it is difficult to held a simultaneously election throughout the Republic of Indonesia. Yusuf further queried the word simultaneously will be interpreted as what? For Yusuf, a simultaneous election will be impossible to be undertaken as there are differences in the nature of election.

A similar view was also argued by Hamdan Zoelva from the Bulan Bintang Party. He argued that the simultaneous election was not yet regulated in the Law. This opinion was shared by other parties' members such as Effendy Yusuf and Tjetje Hidayat. Tjetje Hidayat infact questioned the inclusion of the presidential elections as part of the election. He argued that the election of President and Vice President included in the general election was wrong. For Tjetje, there is no connection between the general election and the presidential election. Hence the election should be separated.

The view given by Tjetje was also supported by LT Sutanto and FX. Sumitro. They said that that the Presidential election and the general election need to be separated in terms of time and/or pattern. This is because each type of election has different target. The president election aims to choose the President, while for the legislative election aims to select the party members who will become the member of parliament. FX. Sumitro, however, tends to question the reason why the election of president and vice president were accommodated in the chapter of general elections. He further argued that the election should be separated as the purpose of election is different. Similarly, Rodjil Ghuftron from Kebangkitan Bangsa party questioned the clarity of the meaning of general election. If the meaning of general election is for both the election of the President and the member of parliament, then the election can be done simultaneously. This view was also supported by LT Soetanto and he said the election should be separated. However, the presidential election can be held after the election of Governor, the Regent, and Mayor have been done.

However, the different views have been argued by Ali Masykur Musa from the party of Kebangkitan Bangsa (PKB). He proposed an alternative that the election of President and Vice President should be done after the general election to elect the Parliament, Council, and Parliament was completed. While Sutjipto of the Golkar party add the point made by Al Masykur Musa in that he said that the general election for the parliament should be expanded to the election of regional representative members or so called Dewan Perwakilan daerah..

Similarly, Arif Mudatsir Mandan of the United Development Party (PPP) did not want to enter the debate about the difference between the election and the presidential election. For the party of United Development, there is no problem with the simultaneous election as long as there is rules that support this election. Also for Patrialis Akbar of the Reform Party (PAN) who agreed with the simultaneous election as there has been no restriction to held a simultaneous election in the national constitution. Therefore, a simultaneous election has been no problems with these two parties. These

arguments were also supported by Soewarno of Indonesia Democratic Party (PDIP). He in fact proposed that for legislative and presidential elections held simultaneously.

Although there are still debates regarding a simultaneous election, the decision made by Constitutional court agreed toward a simultaneous election. This decision was in the Constitution Court Decision No. 14 / PUU-XI / 2013 on a simultaneous election. Jimly Asshiddiqie, a former chairman of Constitutional court suggest three level of general election, namely (i) the election to elect the President / Vice President, Member of Parliament, and the DPD; (ii) the provincial elections to elect the Governor and members of the Provincial Parliament; and (iii) the district/cities general election to choose the Regent and members of the District Council and the Mayor and City Council members.

Under a simultaneous election, it is argued that there will be many benefits that can be obtained in strengthening governance systems. Some of the strategic benefits are (i) government system is strengthened through the 'political separation' (decoupled) between the legislative and executive functions that are supposed to draw mutually offset. Officials in both branches of power is established independently at the same time, so there is no conflict of interest or potential hostage that fosters transactional politics; (ii) there is potential for the occurrence of symptoms to divide government'. (iii) Impeachment can only be applied under strict requirements. (iv) able to maintain the climate and the dynamics of "public policy debate" in parliament.

However, as a simultaneous election will be undertaken in 2019, serious preparation toward a simultaneous election should be done. This preparation should also be put as the main agenda of the President Jokowi and the vice President Jusuf Kalla. Without any serious preparation toward the next coming simultaneous election, it is no doubt there will be problems associated with the simultaneous election. But, why the institution that made decision toward a simultaneous election is the constitutional court?

IV. CAN THE DECISION MADE BY THE CONSTITUTIONAL COURT JUSTIFIED?

The decision made by Constitutional Court on a simultaneous election should be classified as a 'consolidated democracy' and the role of law in reaching democracy. This decision can also be considered as an effort to strengthen the presidential system of government in the perspective of the *Trias Politica* leading to strong state and strong society. Also, through the simultaneous election, Indonesia will be able to negate the working mechanism of the election regime accountable, and remind us of the importance of the process of political recruitment and distribution of the measured power constitutionally.

The decision made by the Constitutional Court on a simultaneous election can be justified as this institution has the authority to "*judicial review*" or more accurately as a "*constitutional review*". This implies that the decision No. 14 / PUU-XI / 2013 on a simultaneous elections is an indication to the arrangement of the modern system of democratic government based on the rule of law and the Constitution. The decision also implies to protect the constitutional rights of citizens in the context of using political preferences in an election that is a substantial part of human rights (the

protection of fundamental rights). The decision made by the Constitutional Court on a simultaneous elections is not only address the legal uncertainty regarding the electoral system or the constitutionalization of democratic politics alone, but at the same time transforming the theory of convergence in the process of structuring our constitutional legal system today.

The decision made by the Constitutional Court may automatically traditionalized an understanding of the transformation of our constitutional values of justice which this institution has transformed itself as an institution within the meaning of the court of law as well as the court of justice. The notion of the court of justice here implies as a court of justice in a progressive and substantive sense, i.e. not only uphold the constitution in the sense of formalistic and procedural (legal or constitutional rules) alone, but justice based on the principles of constitutional right. The Constitutional Court's decision is also at least provide new insights to all stakeholders about the existence of this institution that cannot only be understood as 'the sole interpreter of the constitution' in the narrow sense but more importantly as 'the final interpreter of the constitution.

To sum up: the decision made by the Constitutional Court on a simultaneous election has confirmed a constitutional moral values (*moral goodness*) and gives a new awareness and understanding the philosophical importance of developing and practicing the rule of law and constitutional norms in the life of the state in Indonesia. Therefore, understanding the Court Decision No. 14 / PUU-XI / 2013 concerning the simultaneous election can be interpreted in the sense of strengthening the practice of political life, especially in elections and constitutional rights of citizens in terms of *the source of law* and the constitution.

V. CONCLUDING REMARKS

The general election in Indonesia can be considered as a constitutional method in order to perform the circulation of leadership at all levels of formal procedural. Elections are also part of the prerequisite democracies. This is because the majority of countries in the world use elections as a benchmark system of democratic government. Elections are also a manifestation of the implementation of the sovereignty of the people in order to produce a democratic government.

The Constitutional Court Decision No. 14 / PUU-XI / 2013 on a simultaneous election is the part of the legal and constitutional decision. This decision sociologically provides new understanding and awareness to put the values of the constitution as the supreme source of law in our constitutional practice, especially in strengthening the governance system our presidential. Therefore, the decision of the constitutional court on a simultaneous election can be justified not only for achieving a better democracy in Indonesia, but also to generate a high caliber leaders in Indonesia. However, much remain to be done in preparing detail well plan action and implementation of the next coming simultaneous election.

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