

Constitutionality of the Regional Head Elections democratically

A. KaharMaranjaya
UniversitasKrisnadwipayana
Corresponding Author: A. KaharMaranjaya

Abstract: Amendments to the 1945 Constitution of the Republic of Indonesia may be referred to as a revolution in government administration, specifically in electing formal regional leaders. Article 18 paragraph (4) of the 1945 Constitution as one of the revolution accommodations regulates the regional administration. The Article states that the Unitary State of the Republic of Indonesia (*Negara Kesatuan Republik Indonesia, NKRI*) divided into provinces, regencies, and cities have their own regional administration to regulate and manage their own government matters in accordance with the principles of regional autonomy. A regional administration shall have a Regional Head and a DPRD (Regional House of Representatives, *Dewan Perwakilan Rakyat Daerah*) as the leaders of the regional administration. The provisions of Article 18 paragraph (4) of the 1945 Constitution contain editorial and phrase saying that a Governor, Regent, and Mayor shall be elected democratically. The practice of filling the regional heads' positions after the Amendment to the 1945 Constitution was performed directly by the people as an implementation of the provisions of Article 18 paragraph (4) of the 1945 Constitution. The scope of this article also reflects various relevant laws and regulations as stated in Law Number 10 Year 2016 on the Second Amendment to the Law Number 1 Year 2015 on the Stipulation of the Government Regulation in Lieu of Law Number 1 Year 2014 in the Election of Governor, Regent, and Mayor into Law. In terms of rules, no problems occur. However, through the implications of empirical findings, problems occur due to counter-interests.

Keywords: constitution, democracy, autonomy, electoral system, regional head.

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I. BACKGROUND

Changes in the political system and state power after the amendment to the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution) gave a new color to the democratic system in Indonesia. This can be seen and felt by the shift in the Regional Head Elections (*Pemilihan Kepala Daerah, Pemilu*) mechanism which has brought fresh air to the development of democratic ideals and parliamentary supremacy leading to constitutional supremacy. Thus, the sovereignty of the people which were fully in the MPR (People's Consultative Assembly, *Majelis Permusyawaratan Rakyat*) is currently vested in the people. Understanding of the amendments to the 1945 Constitution should be intended as a manifestation of the checks and balances of the state powers. Hamilton in 1931 states that every modern nation today always requires a regulatory system set out in a constitution. Therefore, constitutionalism refers to an institutionalized system of effective, regularized restraints upon governmental action. In other words, to keep a government in order requires treatment in such a way that the power dynamics in the governance process can be limited and controlled.¹ This idea arises because of the need to respond to the development of the relative role of power in human life. In Indonesian vocabulary, the term constitution has two meanings, i.e. all the provisions and rules regarding constitutionality and the Constitution of a country. The constitution according to The Great Dictionary of the Indonesian Language means the Law which forms the basis of all other laws and regulations of a state that regulate the form of government, government system, separation of power, and authority of government bodies.²

Based on the map of democracy in the Asian region from Farahdiba's research results, Indonesia has become a model for countries in the world, especially among developing countries and Asian countries. Indonesia takes the leading role in the existing democratic countries.³ Indonesia's election model has its own

¹ Bedjo, Zainul Akhyar. 2009. *Pendidikan Kewarganegaraan (Civil Education)*. Banjarmasin: Laboratorium Pendidikan Kewarganegaraan Fakultas Keguruan dan Ilmu Pendidikan Universitas Lambung Mangkurat, 2009 hlm 255

² Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, Jakarta, Balai Pustaka, 2002, hal 590

³ Farahdiba Rahma Bachtiar, *Pemilu Indonesia: Kiblat Negara Demokrasi Dari Berbagai Representasi*, Jurnal Politik Profetik Volume 3 Nomor 1 Tahun 2014

characteristics compared to other democratic countries in the Asian and other regions, even the United States. Indonesia has a tiered government structure so that Indonesian elections are held at almost all levels in the power structure at the executive and legislative levels. The elections start from the presidential level as the Head of State to the village head level as the lowest level in the executive structure, as well as the legislative institutions chosen at the regional and central level.

Discussion about the fundamental issues regarding the regional head elections is generally related to the understanding and meaning of the word "democratically" in Article 18 paragraph (4) of the 1945 Constitution,⁴ which is then debated and interpreted narrowly into direct elections called democratically. Another opinion states that indirect elections can also be called democratically. In line with the acceptance of the direct presidential election by the people as an inseparable part of the democratization agenda, the regional head election procedures must also be established to become more democratic as well, especially when compared to the election procedures practiced so far. Therefore, Article 18 paragraph (4) of the Second Amendment to the 1945 Constitution affirms that: "A Governor, Regent, and Mayor, each heading respectively the administration of a province, a regency, and a city shall be elected democratically". With this affirmation, it means that the regional head elections practiced so far can be said to be undemocratic or at least the democratic procedures for the regional head elections have not been guaranteed in the Constitution. Now, the guarantee is expressly stated in Article 18 paragraph (4) of the 1945 Constitution.⁵ The mechanism of regional head elections is called democratically if it meets several parameters to observe the realization of democracy, among others: general elections, power rotation, open recruitment, and public accountability.⁶

The mechanism of democratic regional head elections according to Article 18 paragraph (4) of the 1945 Constitution of the Republic of Indonesia should not be interpreted as the direct regional head elections, but also the regional head elections through a democratic and constitutional representative system. This is due to the fact that the two mechanisms for the regional head elections have their strengths and weaknesses, especially concerning its benefits in terms of financing prioritized for people's welfare.

Thus, the regional head election process in the general election system in Indonesia can be said to be a long and high-cost process. From the financing aspect, for example, at least three groups of costs are allocated. *First*, the costs for the administration of the regional head elections. *Second*, the costs incurred for political parties (in practice are costs incurred to be nominated by political parties). *Third*, the costs incurred for the regional head election campaign.⁷ The inevitable fact in direct regional head elections is the emergence of capitalization in the regional head election stages.⁸ With the emergence of capitalization, the direct regional head elections are far more expensive than the regional head election model through a representative system by the DPRD (Regional House of Representatives, *Dewan Perwakilan Rakyat Daerah*).⁹ One of the challenges in the regional head elections is the rampant money politics occurring at almost all general election stages. Money politics is one of the factors causing high-cost democracy.¹⁰ It becomes an open secret that money politics cases are common in elections after the reform. Although all candidates will always state that they are not involved in money politics, residents will soon be able to point out how the candidates use the money to "buy votes" in their constituencies.¹¹ Money politics is an inseparable link from the political cartel formation. Representative democracy relying on votes is easily converted into a commodity that will be sold when it has been acquired and purchased when it has not been obtained.

The direct regional head elections¹² in the political liberalization era with the power of dominant political parties make it possible those being involved are people with strong economic and political capital.

⁴ The Republic of Indonesia (1), the 1945 Constitution of the Republic of Indonesia. *Article 18 paragraph (4)*, "A Governor, Regent, and Mayor, each heading respectively the administration of a province, a regency, and a city shall be elected democratically".

⁵ Jimly Asshiddiqie., *Pemilihan Kepala Daerah*, Harian Pelita, 14 Februari 2004

⁶ Saukani HR, Affan Gaffar, dan Ryass Rasyid, *Otonomi Daerah dalam Negara Kesatuan*, Pustaka Pelajar, Yogyakarta, 2002 hlm 16

⁷ Iksan Darmawan, *Menata Pengaturan Pemilu pada Depok*, Departemen Politik FISIP Universitas Indonesia, 2009, hlm 2.

⁸ Amirudin dan A. Zaini Bisri, *Pilkada Langsung: Problem dan Prospek*, Pustaka Pelajar, Yogyakarta, 2006, hlm 59

⁹ Amirudin dan A. Zaini Bisri, *Ibid*

¹⁰ Ari Dwipayana. *Demokrasi Biaya Tinggi*. Yogyakarta: Jurnal FISIPOL UGM, 2009

¹¹ Wahyudi Kumorotomo. *Intervensi Parpol, Politik Uang dan Korupsi*. Makalah Ilmiah: UNDIP, 2008, hlm

¹² One form and mechanism of democracy in the region is the implementation of direct regional head elections. Aside from being sovereignty manifestation and confirmation means that voters are the people in the region, the regional head elections also have an important function in the implementation of

Entrepreneurs close to political parties or wealthy incumbents are the ones who have the greatest chance for the nomination in regional elections. Based on this financial and power capability, those who can be nominated in the regional elections are not competent figures with good capability, but only those who belong to the rich people group or have strong financial abilities.¹³

From the research conducted by Kontan Magazine, the government allocated IDR 8.1 trillion in the 2013 State Budget as the 2014 election funding. It was added by IDR 16 trillion in the 2014 State Budget, so in total the government disbursed IDR 24.1 trillion for the 2014 election. The budget reached IDR 7.1 trillion for 269 constituencies in the 2015 regional head election and reached IDR 5.95 trillion for 101 constituencies in the 2017 regional head election.¹⁴ Indonesia as a country with the largest and most expensive General Election budget in the world is a necessity as the government budget allocation for the election. The government allocated IDR 16 trillion for the 2014 election. The government budgeted IDR 6.67 trillion in 2008 as the 2009 election funding, but the realization was only IDR 1.9 trillion. The government budgeted IDR 13 trillion in 2009 for the implementation of general elections, with the realization of around IDR 8.5 trillion. Fund absorption of IDR 16.2 trillion was used to finance all stages of the 2014 legislative and presidential elections. The total election cost was based on the budget requirements of all programs at each stage of the two elections. The budget was allocated from the 2013 State Budget of IDR 8.1 trillion and the 2014 State Budget of IDR 8.1 trillion. The KPU (General Election Commission, *Komisi Pemilihan Umum*) had compiled the details of the budget requirements for the implementation of the 2014 General and Presidential Elections and submitted it to the Bappenas (National Development Planning Agency, *Badan Perencanaan Pembangunan Nasional*). The KPU determined and delivered all the detailed program and budget requirements on June 4, 2012.¹⁵

The high cost of democracy in Indonesia is getting stronger along with the enactment of the Law Number 10 of 2016 on the Second Amendment to the Law Number 1 of 2015 on the Stipulation of the Government Regulation in Lieu of Law Number 1 of 2004 in the Election of Governor, Regent, and Mayor into Law. The law has an impact on the lowest election budget allocation of IDR 24.8 trillion for the 2019 General and Presidential Election. This budget allocation has increased by 3 percent or by IDR 700 billion compared to the 2014 General and Presidential Election of IDR 24.1 trillion. The government had allocated an election budget of IDR 16 trillion in 2018.

Based on the notion of democracy,¹⁶ no group has the right to govern other people unless it is based on the approval of the people. A democratic state system can only be enforced on mental infrastructure or one way of life that adheres to democratic values. Democracy cannot be enforced by a dictatorship with dictatorial means.¹⁷ In terms of the way of channeling the will of the people, democracy can be divided into:

1. Direct democracy which was historically practiced in the polis or city-state in the epoch of Ancient Greece. At that time, all people could express their aspirations and views directly. Thus, the government could know directly the aspirations and problems faced by the people. However, in modern times, direct democracy is difficult to implement because i) it is difficult to find a place that can accommodate all the people at once in discussing state and national affairs; ii) not everyone understands increasingly complicated and complex state problems; iii) deliberation will not be effective, making it difficult to produce good decisions. Direct democracy occurs when people realize their sovereignty directly, meaning that the right of the people to make political decisions is administered directly by all citizens who act based on majority procedures.

2. Indirect democracy or representative democracy. A democratic system that replaces direct democracy which in channeling the will, the people elect their representatives to sit in representative institutions and the people's aspirations are conveyed through their representatives. Type of representative democracy differs according to

regional administration. Janedjri M. Gaffar, Sekertaris Jendral Makamah Konstitusi RI, Koran SINDO, 5 Januari 2012

¹³ Amirudin dan A. Zaini Bisri, *Op.Cit*, hlm.29

¹⁴ <https://nasional.kontan.co.id/news/sejak-2014-biaya-pesta-demokrasi-di-pemilu-habiskan-rp-65-triliun-efeknya>, di Unduh 7 Agustus 2018

¹⁵ <https://www.kaskus.co.id/thread/524b6489108b466f60000002/biaya-pemilu-amp-pilpres-indonesia-termahal-di-dunia-tapi-selamatkan-ri-dari-krisis/>

¹⁶ "Literally, the word democracy means a government system of a country in which all citizens equally have rights, obligations, position, and power in conducting their lives and in running the country or supervising the course of state power either directly, such as through public spaces, or through its representatives who have been chosen fairly and honestly with a government run solely for the interests of the people, so that the government system of the country comes from the people, for the interests of the people". RR.Cahyawati, *Politik Hukum Keterwakilan Perempuan Di Dewan Perwakilan Rakyat Republik Indonesia (Tinjauan Berdasarkan Prinsip Keadilan, Hak Asasi Manusia dan Demokrasi)*, Disertasi Program Doktor Ilmu Hukum Fakultas Hukum Universitas Brawijaya, Malang, 2012. hlm.73-74

¹⁷ M.Natsir. *Demokrasi Di Bawah Hukum*, (Jakarta: Penerbit Media Dakwah, cetakan kedua 1988). Hlm.2

each country's constitution. Indirect democracy occurs when the people are not directly dealt with the executive branch to realize its sovereignty but through representative institutions. In an indirect democracy, parliamentary institutions are required to be sensitive to various matters relating to social life in relation to the government or the state. Indirect democracy is also known as representative democracy.

As stated by Abdul Mukti Fadjar, democracy according to the level seen from the political decision establishment and implementation aspects is divided into four levels which include:

1. Procedural democracy¹⁸ relies on fair competition and citizen participation to determine people's representatives or government leaders through direct, public, free, secret, honest, fair and accountable elections. It is also known as minimalist democracy.
2. Aggregative democracy is a democracy in which citizen participation is not only through direct, public, free, secret, honest, fair and accountable elections, but also the ideas, opinions, preferences, and judgments of citizens determine the contents of laws, policies, and public actions. It is because they believe in the self-government principle that underlies decision making regarding public laws and policies by most citizens.
3. Deliberative democracy states that public laws and policies must be formulated based on reasons and considerations that all citizens can accept rationally because it emphasizes the importance of individual autonomy and equality.
4. Participatory democracy agrees on the importance of democratic values such as self-government, political equality, and reasoned rule, and emphasizes the participation of all citizens entitled to vote to be directly involved in decision making.¹⁹

Democracy is a stage or process that a country must pass to gain welfare. Democracy for a country is a learning process leading to perfect constitutional development. Therefore, the measure of the existence of democracy in a country is not determined by the ultimate goal, but rather on the existing stages. Democracy will run according to the times and will be greatly influenced by a country's cultural factors.²⁰

5. Pancasila democracy²¹

The 1945 Constitution of the Republic of Indonesia is a constitution with the spirit of Pancasila. Pancasila is the soul or spirit, while the 1945 Constitution is the form or body. Therefore, the way to understand the 1945 Constitution should not only be focused on written texts grammatically but also explore the values in the ideas contained therein.²² Democracy officially crystallized in the 1945 Constitution²³ and currently applied in Indonesia is called "Pancasila Democracy."²⁴

¹⁸ The relatively peaceful practice of procedural democracy shows the political freedom at central and regional levels. The next priority is to strive for the presence of a qualified political freedom. Valina Singka Subekti, *Dinamika Konsolidasi Demokrasi: Dari Ide Pembaruan Sistem Politik Hingga ke Praktik Pemerintahan Demokratis*, Jakarta: Yayasan Pustaka Obor Indonesia, 2015. Hlm. 286

¹⁹ Abdul Mukti Fadjar, *Pemilu yang Demokratis dan Berkualitas; Penyelesaian Hukum Pelanggaran Pemilu dan PHPU*, Jurnal Konstitusi, Volume 6 Nomor 1, April 2009, hlm. 3-4.

²⁰ Jean Jacques Rousseau, *Du Contract Social (Perjanjian Sosial)*, Jakarta; Visimedia, 2007 hlm 113

²¹ Pancasila is an ideology as well as the life philosophy of the Indonesian people, which therefore serves as the basis of the state. Pancasila is not a referred law or regulation source to justify or blame legislation, but Pancasila is a source of value which consequently and consistently inspires how Indonesia must exist as a nation and country. For example, referring to the first principle of Pancasila, i.e. "the belief in the One and Only God," Indonesia may never regulate "recognized" and "unrecognized" religions and beliefs that its citizens may adhere to. Regarding democracy as a system, we should understand that the "representative" concept exists because democracy does not allow policy making and decision making by involving all the people. Therefore, since the epoch of Ancient Greece, indirect democracy exists. This concept refers to the policy making and decision making process that does not involve all people. It is not because democracy does not respect people's aspirations, but because the implementation is impossible. In the pre-Christian era, tens of thousands of people could not be present in a courtroom to join the meeting together with the political elites. Janedjri M. Gaffar, Sekretaris Jenderal Mahkamah Konstitusi RI, Koran SINDO, 5 Januari 2012.

²² Jimly Asshiddiqie, *Gagasan Konstitusi Sosial, Institusionalisasi dan Konstitusionalisasi Kehidupan Sosial Masyarakat Madani*, (Jakarta: Pustaka LP3ES (Lembaga Penelitian, Pendidikan dan Penerangan Ekonomi dan Sosial), 2015). Hlm. 85

²³ When examined, the 1945 Constitution regulates the sovereignty of the people twice. First, on the fourth paragraph of the Preamble: "... Indonesia's National Independence shall be laid down in a Constitution of the State of Indonesia, which is to be established as the State of the Republic of Indonesia with sovereignty of the people..." Second, in Article 1 paragraph (2) of the 1945 Constitution of the amended

Agustam concludes some basic understanding of Pancasila democracy; (1) Pancasila Democracy is a democracy based on kinship and mutual cooperation aimed at people's welfare containing the elements of religious awareness, based on truth, love and noble character, Indonesian personality, and sustainability. (2) In Pancasila democracy, the state administration system is implemented by the people or with the approval of the people. (3) In Pancasila democracy, individual freedom is not absolute but must be harmonized with social responsibility. (4) In Pancasila democracy, the universality of democracy is synthesized with the ideals of the Indonesian's life imbued by the spirit of brotherhood, so there is no majority or minority domination.²⁵

Although the constitutional foundations for democracy in Indonesia as applicable today existed and were in effect long before 1965, the term "Pancasila Democracy" was popular after the New Order in 1966²⁶ with anti-imperialist and anti-feudal characters aiming to form a socialist society. The foundation of democracy is justice, in the sense of providing equal opportunity to everyone, as well as giving autonomy or independence of people to regulate their life according to what they want. Justice is important in the sense that everyone has the right to determine their own way of life, but that right must be respected and given opportunities and help to achieve that. With the provision of Article 1 paragraph (2) of the 1945 Constitution, it is necessary to examine the implementation of the sovereignty of the people according to the Constitution because the 1945 Constitution is positive law and the highest law containing the norms of State regulation.²⁷

The draft of Decree of the People's Consultative Assembly of the Republic of Indonesia concerning Pancasila Democracy states that Pancasila Democracy is the norm that regulates the implementation of the sovereignty of the people and the administration of state governance in political, economic, social, cultural, and defense and security for every citizen of the Republic of Indonesia, social and political organizations, mass organizations, and other community institutions as well as central and regional state institutions.²⁸ From the above explanation, we can conclude that Pancasila democracy is a democracy based on the personality and life philosophy of the Indonesian people as manifested in the provisions of the Preamble of the 1945 Constitution. For this reason, the notion of the Pancasila democracy is not only political democracy but also economic and social democracy (See amendments to the 1945 Constitution and their resolution in the articles of 27, 28, 29, 30, 31, 32, 33, and 34). "The 1945 Constitution of the Republic of Indonesia is a constitution with the spirit of Pancasila. Pancasila is the soul or spirit, while the 1945 Constitution is the form or body. Therefore, the way to understand the 1945 Constitution should not only be focused on written texts grammatically but also explore the values in the ideas contained therein."²⁹

In summary, Pancasila democracy has several meanings as follows: (a) Pancasila Democracy is a democracy based on kinship and mutual cooperation aimed at people's welfare containing the elements of religious awareness, based on truth, love and noble character, Indonesian personality, and sustainability. (b) In Pancasila democracy, the state administration system is implemented by the people or with the approval of the people. (c) In Pancasila democracy, individual freedom is not absolute but must be harmonized with social

result which states, "Sovereignty is vested in the people and implemented pursuant to the Constitution." Thus, the 1945 Constitution expressly acts as a basis for a democratic government based on the sovereignty of the people. *Ibid.*

²⁴ Pancasila democracy as referred to in the 1945 Constitution means to reaffirm the principles of a law-based state where legal certainty is felt by all citizens, human rights in the collective and individual aspects are guaranteed, and abuse of power can be avoided institutionally. Seminar Angkatan Darat II, Garis-Garis Besar Kebijakan dan Rencana Pelaksanaan Stabilitas Politik, Seskoad, Bandung, 1966, dalam Miriam Budiardjo., *Dasar-Dasar Ilmu Politik*, (Jakarta :PT.Gramedia, cetakan VIII, 1982). Hlm.74

²⁵ Agustam, *Konsepsi Dan Implementasi Demokrasi Pancasila Dalam Sistem Perpolitikan Di Indonesia*, Jurnal TAPIS Vol.7 No.12 Januari-Juli 2011 hlm 82

²⁶ Moh.Mahfud. MD., *Demokrasi dan Konstitusi di Indonesia*, (Jakarta: PT.Rineka Cipta, cetakan Kedua Oktober 2003).Hlm.41-42

²⁷ By observing the provisions contained in the 1945 Constitution, the principle of the sovereignty of the people is implemented in two stages. First stage is the direct implementation by the people and the second stage is an indirect stage implemented by representative institutions. Harjono., *Op.Cit.* Hlm.5

²⁸ Agustam, *Konsepsi Dan Implementasi Demokrasi Pancasila Dalam Sistem Perpolitikan Di Indonesia*, Jurnal TAPIS Vol.7 No.12 Januari-Juni 2011 hlm 83

²⁹ Jimly Asshiddiqie, *Gagasan Konstitusi Sosial, Institutionalisasi dan Konstitusionalisasi Kehidupan Sosial Masyarakat Madani*, (Jakarta: Pustaka LP3ES (Lembaga Penelitian, Pendidikan dan Penerangan Ekonomi dan Sosial), 2015). Hlm.85

responsibility. (d) In Pancasila democracy, the universality of democracy is synthesized with the ideals of the Indonesian's life imbued by the spirit of brotherhood, so there is no majority or minority domination.³⁰

Based on the description above, the researchers formulate the main research problem regarding "Democratic Regional Head Election Mechanism: Between Direct Election and Indirect Election" as follows:

1. How does the meaning of "elected democratically" concerning the Implementation of Regional Head Elections after the Amendment to the 1945 Constitution of the Republic of Indonesia?

2. How should the Ideal Regional Head Election be for the Unitary State of the Republic of Indonesia in Realizing Pancasila Democracy after the Amendment to the 1945 Constitution?

Based on the research problems, this research aims to describe the meaning of "elected democratically" concerning the Implementation of Regional Head Elections after the Amendment to the 1945 Constitution of the Republic of Indonesia and offer a concept or mechanism of the Ideal Regional Head Election for the Unitary State of the Republic of Indonesia in Realizing Pancasila Democracy after the Amendment to the 1945 Constitution.

II. RESEARCH METHODS

The research methodology aims to explain the data collection, data analysis, and analysis results processes.³¹ This research uses comparative law method, juridical-normative approach, empirical analysis, and qualitative method.³² *First*, the juridical-normative approach is used to analyze data by referring to legal norms set forth in legislation governing the function of legislation. The normative approach is intended as an attempt to bring the problem under study to the normative nature of law. The normative approach includes the principle of law, systematic of law, synchronization (adjustment) of law, comparative law, and history of law. Seen from the legal issues, if the issues are related to environmental law material, the normative approach is to read, examine, and describe the norms, articles of legislation, and views and opinions of environmental law experts. *Second*, the research also uses the comparative law method with regard to Laws or Regulations concerning general elections, specifically the regional head elections. It aims to know whether there are overlapping laws and regulations which may lead to different interpretations, causing an opportunity for certain parties to take advantage from the democratic process through the aspects of the regional head elections. *Third*, this research uses the qualitative method, meaning the analysis results do not depend on data quantity (quantitative), but in-depth data analysis from multiple angles (holistic).³³ It is important because changes in the law do not depend on the number of events. Data sources in this research include (1) Primary Data. Primary data obtained directly from sources include data from the Central and Regional General Election Commissions and those who have competence and credibility; (2) Secondary data. Secondary data is obtained from official documents, related books, the research results reports, and legislation consisting of (a) research on the principles of constitutional and administrative law; b) research on systematic of law regarding the harmony between the 1945 Constitution and the related laws and regulations, specifically those governing the Implementation of Regional Administration and the Filling of the Regional Heads' Positions; c) research on the synchronization of law level, i.e. synchronization and harmonization between the 1945 Constitution, General Election Law, Regional Head Election Law, and other execution regulations in the administration of the regional head elections; d) research in the form of positive law inventory specifically laws regulating the substance on the regional administration, the regional head elections, and the general elections; and e) research in the form of the discovery of law in concreto, the ideal law in the implementation of the regional head elections according to the Pancasila and the 1945 Constitution.

III. RESULTS AND DISCUSSION.

Amendments to the 1945 Constitution of the Republic of Indonesia may be referred to as a revolution in government administration, specifically in electing formal regional leaders. Article 18 paragraph (4) of the 1945 Constitution as one of the accommodations of the revolution regulates the regional administration.³⁴ The Article states that the Unitary State of the Republic of Indonesia (*Negara Kesatuan Republik Indonesia*, NKRI) divided into provinces, regencies, and cities have their own regional administration to regulate and manage their own government matters in accordance with the principles of regional autonomy. A regional administration shall have a Regional Head and a DPRD (Regional House of Representatives, *Dewan Perwakilan Rakyat Daerah*) as the leaders of the regional administration. The provisions of Article 18 paragraph (4) of the 1945

³⁰ Agustam, *Konsepsi Dan Implementasi Demokrasi Pancasila Dalam Sistem Perpolitikan Di Indonesia*, Jurnal TAPi Vol.7 No.12 Januari-Juli 2011, hlm 82

³¹ Sri Gambari Melati Hatta, *Beli Sewa Sebagai Perjanjian Tak Bernama, Pandangan Masyarakat dan Sikap Mahkamah Agung Indonesia*, Bandung: Alumni, 2000 hlm. 26

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

Constitution contain editorial and phrase saying that a Governor, Regent, and Mayor shall be elected democratically. The Constitution does not oblige direct election. Thus, it becomes the authority of the legislators, i.e. the DPR (House of Representatives, *Dewan Perwakilan Rakyat*) and the President, to enact related laws. According to John Markoff, Indonesia is currently experiencing a hybrid democracy. A hybrid democracy is the mechanism of democracy taking place together with undemocratic practices. The general elections as one of the pillars of political democracy go hand in hand with money politics which actually destroys the democracy. Thus, voter rationality becomes worth questioning. Voters do not choose candidates based on the offered programs and visions but only based on the amount of money received before the election. In this case, according to John Markoff's theory, voting behavior in Indonesia is strongly influenced by undemocratic factors.³⁵

Article 18 paragraph (4) of the 1945 Constitution expressly states that regional heads shall be elected democratically. From this context, it can be interpreted that the Constitution expressly does not oblige Governors, Regents, and Mayors to be directly elected by the people, but only elected democratically. The interpretation of "elected democratically" may lead to two connotations i.e. first, to be elected directly by the people and *second*, to be elected by the DPRD as a people's representative institution. Thus, the law governing the Regional Administration and the Regional Head Elections should accommodate both methods because both are constitutional. The implementation is handed over to each region to choose the most appropriate method in filling the regional heads' position by comprehensively noticing and considering the regional social conditions, especially regional culture. If we earnestly implement Pancasila for the democracy development in all aspects of the life of the community, the nation, and the state, the election mechanism with a representative system in accordance with the principle of deliberation and representation as the basis of Pancasila democracy is the most appropriate election mechanism in Indonesia. The implementation of democracy based on Pancasila provides us a solid foundation to minimize and negate the negative implications on the implementation of the regional head elections.

The direct regional head elections have also been common in the community. Moreover, in the practice of regional head elections by the DPRD at the provincial, regency, and city levels during the last five years of the reform, various problems closely related to money politics practices and unhealthy practices often arise because of imbalance and disharmonious relationship between the government and the regional people's representative institution. It happens because the current atmosphere of reform has led to the increasing bargaining position of the DPRD's throughout Indonesia, even though the figures sitting there cannot fully be expected to work professionally. As a result, many regional heads are threatened with dismissal for only trivial reasons, and therefore, they cannot work freely without committing irrational affairs to get the support from the members of the people's representative institution in their respective regions. This situation is expected to continue at least during the transition period. Therefore, many people have concluded that to overcome various imbalance and disharmonious relationship between the government and regional parliament (the regional people's representative institution), the heads of the regional administration must be elected directly by the people. Thus, the regional heads cannot be overthrown by the DPRD solely for preference reasons or other political reasons. The heads of the regional administration can only be dismissed from their position for legal reasons legally decided by the court.³⁶

In implementing regional administration, the principles of democracy are applied in accordance with Article 18 paragraph (4) of the 1945 Constitution stating that "A Governor, Regent, and Mayor, each heading respectively the administration of a province, a regency, and a city shall be elected democratically."³⁷ This provision was included in the Second Amendment of 2000 before the provisions concerning the President and Vice-President election were included in the Third and Fourth Amendments of 2001 and 2002. Consequently, it was impossible to be enacted more advanced than the presidential election system unanimously accepted in

³⁵ John Markoff. *Gelombang Demokrasi Dunia, Gerakan Sosial dan Perubahan Politik*. (Yogyakarta: CCSS, 2002), hlm 10

³⁶ Jimly Asshiddiqie. *Pemilihan Kepala Daerah*, Harian Pelita, 14 Februari 2004.

³⁷ The 1945 Constitution Chapter VI on Regional Administration Article 18 (4) states that "A Governor, Regent, and Mayor, each heading respectively the administration of a province, a regency, and a city shall be elected democratically". There are no words of direct election as in the article governing the presidential election and there are no words of the regional head elections indirectly or through the DPRD. In a representative democracy or indirect democracy, it meets democratic rules if the regional heads are elected by the DPRD. Likewise, in direct democracy, the direct regional head elections fulfil democratic principles as a form of the implementation of the sovereignty of the people. Syafran Sofyan., *Permasalahan Dan Solusi Pemilukada*, Makalah Tenaga Profesional Bidang Politik Lemhannas RI.

2001 and 2002. Thus, it can be said that principally the provision of Article 18 paragraph (4) of the 1945 Constitution can be interpreted as accommodating the possibility of a direct regional election system as well as the presidential election system.³⁸

Law Number 32 Year 2004 concerning Regional Administration regulates the regional head and deputy regional head elections elected by the people directly proposed by a political party or by a coalition of political parties. In line with the spirit of decentralization, the Regional Head Elections have been implemented directly since 2005. The spirit of the regional head elections is a correction of the indirect (representative) democratic system in the previous era, in which regional heads and deputy regional heads were elected by the DPRD, to become a direct democracy based on the people's choice (voters). Through the regional head elections, the people as voters have the right to vote directly in accordance with their conscience, without intermediaries, in electing regional heads.³⁹ However, it must be noted that not everyone agrees with the idea of direct regional head elections. The voters with various educational and economic backgrounds tend to calculate momentary economic benefits when the meeting is held as a form of attendance motivation in each socialization invitation and meeting. Additionally, the pair of candidates (hopefully not like that) seem to agree on that. The momentary economic benefits include social charity labeled pious charity to help an organization or physical development in a place taken place every democratic party.⁴⁰ Some regions also show the fact that the Governors, Regents or Mayors are actually considered to be inadequate leaders. After all, if we rely on the direct election system, in some regions where political culture is still very paternalistic, the direct election system has the potential to produce leaders who should not be the Governors, Regents or Mayors. Once the concerned person is elected, it is no longer easy to overthrow him/her, except for legal reasons as mentioned above. For this reason, some experts also express an objection or caution to approve this direct regional election system.⁴¹ The regional head elections are very important not only as the selection of regional head but more importantly how the emerging leaders or elected leaders understand the regional conditions they lead comprehensively.⁴²

Whereas in the amendment to Law Number 32 Year 2004 concerning Regional Administration, i.e. Law Number 12 Year 2008, Article 59 paragraph (1) letter b, regional head candidates may also be from individual candidates supported by a number of people. Ideally, the purpose of the regional head elections is to accelerate the consolidation of democracy in this Republic. In addition, it is also to accelerate the occurrence of good governance because people can be directly involved in the policy-making process. This is one proof of the ongoing decentralization program. The region has autonomy to regulate itself, even this autonomy has reached the level of individual autonomy. In addition to this enthusiasm, a number of arguments and assumptions strengthening the importance of the regional head elections are: *First*, with the regional head elections, it is possible to get quality and accountable regional heads. *Second*, the regional head elections need to be implemented to create political stability and regional administration effectiveness. *Third*, with open regional head elections, it is possible to improve the national leadership quality because more opportunities exist for the emergence of national leaders from regions. In this connection, Janedjri M. Gaffar⁴³ explains the negative impacts of direct regional head elections include *first*, regional head elections are always accompanied by social conflicts, starting from the nomination stage and even continuing after the regional head elections. Conflict is indeed part of democracy, but prolonged conflicts leading to violence and cessation of government certainly harm and injure democracy. Social conflict is undeniably very easy to happen with the direct regional head election process because people are directly confronted with their chosen interests and tend to have excessive fanaticism. *Second*, money politics always happens in every implementation of the regional head elections. Money politics which is actually a bribery process has shifted into reasonable occurrence for the candidates and the community. As a result of the money politics, the people's votes become pawned. The elected candidates are not necessarily ideal and quality candidates. On the contrary, the elected candidates pay more attention to the interests of themselves and their closest people because they feel they already "buy" the people's votes and no longer have responsibility for the people because the "buying and selling" process is completed.⁴⁴ On the other

³⁸ Jimly Asshiddiqie., *Pemilihan Kepala Daerah*, Harian Pelita, 14 Februari 2004

³⁹ Syafran Sofyan., *Permasalahan Dan Solusi Pemilu* *kada*, Makalah Tenaga Profesional Bidang Politik Lemhannas RI.

⁴⁰ *Ibid.*

⁴¹ Jimly Asshiddiqie., *Pemilihan Kepala Daerah*, Harian Pelita, 14 Februari 2004.

⁴² Syafran Sofyan., *Permasalahan Dan Solusi Pemilu* *kada*, Makalah Tenaga Profesional Bidang Politik Lemhannas RI.

⁴³ Janedjri M. Gaffar, 2012: 132-133), *Pemilihan Kepala Daerah Secara Langsung*.

⁴⁴ Indeed, what is needed is leaders who understand the aspirations of the people, not the boss. Leaders who deserve to be chosen and deserve the sincere respect and smile from the people. Leaders who truly respect the people, not value the people by money. Leaders who deserve sincere trust, respect, and

hand, if the regional heads are elected by the DPRD, it does not necessarily result in lost money politics in the implementation of the regional head elections. At least, the effect can be minimized with fewer money politics easily monitored among the DPRD members. *Third*, the direct regional head elections are not directly proportional to the increase in regional welfare and progress. Only a few regions have experienced significant welfare and progress improvements. Some regions have experienced phenomenal progress under the leadership of their regional heads, but more still stuck. In fact, some regions with considerable economic potential have not progressed. It is due to the unqualified candidates win the regional head elections with money political factors that have become reasonable and are considered reasonable by the community. *Fourth*, the facts show that in the regional autonomy era, more corruption cases have occurred. Directly elected regional heads do not have an impact on corruption eradication efforts. Instead of supporting corruption eradication, many regional heads are involved in corruption cases. This is due to the very expensive political costs of direct regional head elections, starting from the recommendation process to the promoting political parties to money politics practice to the community. With such expensive costs, the regional heads tend to think about returning capital and even look for "profits" from the costs incurred during the regional head elections. After examining the implementation of the regional head elections so far and considering the negative impacts, we might want to try alternative election systems not prohibited by the Constitution. The regional head elections conducted by the DPRD do not guarantee a clean and healthy democracy realization. However, we attempt to minimize and facilitate monitoring of negative effects caused by direct elections. The point is how the regional head elections can be implemented democratically and the DPRD as the people's representative body is able to portray the general will of the people in choosing their leaders. Thus, regional heads resulting from elections conducted by the DPRD will produce a qualified and capable leader to improve the public welfare.⁴⁵

According to Ahmad Sanusi, the principles of Pancasila Democracy in Indonesia contain 10 democratic principles based on Pancasila and the 1945 Constitution. The principles are:

1. **Democracy based on the belief in the One and Only God.** Democracy based on the belief in the One and Only God means state administration system must be obedient, consistent, and in accordance with the values and the principles of the belief in the One and Only God.
2. **Democracy with intelligence.** It means the rules and implementation of democracy are based on the 1945 Constitution. It shall not be based on instinct, muscle strength, or mass power. The implementation shall be based on spiritual intelligence, mindset, rationality, and emotional intelligence.
3. **Democratic with the sovereignty of the people.** In Pancasila democracy, sovereignty is vested in the people. The sovereignty of the people is limited and entrusted to the people's representatives, i.e. the MPR (DPR/DPD) and the DPRD.
4. **Democracy with the rule of law.** It has four important meanings:
 - First, the power of the Republic of Indonesia must contain, protect, and develop legal truth, not inconsequential democracy, slapstick democracy, or manipulative democracy.
 - Second, the state power provides legal justice, not democracy limited to formal and fake justice.
 - Third, the state power guarantees legal security, not democracy allowing chaos or anarchy.
 - Fourth, the state power develops legal interests such as peace and development, not democracy supporting slander and blasphemy or creating division, hostility, and destruction.
5. **Democracy with the separation of state power.** Pancasila democracy based on the 1945 Constitution experience the division and separation of power with a check and balance system.
6. **Democracy with human rights.** This sixth principle means that democracy based on the 1945 Constitution recognizes human rights with the aim of respecting human rights and enhancing the dignity and degree of the whole person.
7. **Democracy with an independent court.** Pancasila democracy means the need for an independent court system to be implemented by providing broad opportunities to interested parties to seek and find the fairest law. All parties also have the same rights to file considerations, arguments, facts, witnesses, evidence, and claim.
8. **Democracy with regional autonomy.** This eighth principle means that Pancasila democracy is implemented with the autonomy principle in which the government forms autonomous regions in provinces and regencies/cities. The aim is to enable the regions to regulate and manage their own government matters provided by the Central Government.
9. **Democracy with prosperity.** The principle is to build a prosperous country by and for the people of Indonesia covering all aspects such as rights and obligations, the sovereignty of the people, separation of power, regional autonomy, and legal justice.

compliance from the people. Leaders who encourage, not force. Syafran Sofyan., *Permasalahan Dan Solusi Pemilukada*, Makalah Tenaga Profesional Bidang Politik Lemhannas RI.

⁴⁵ Janedjri M. Gaffar, *Pemilihan Kepala Daerah Secara Langsung*. 2012 Hlm 132-133.

10. **Social justice.** This principle means that Pancasila democracy outlines social justice among various groups and communities.⁴⁶

Pancasila for the Republic of Indonesia is final because Pancasila is an ideology as well as the life philosophy of the Indonesian people, which therefore serves as the basis of the state. Pancasila is not a referred law or regulation source to justify or blame legislation, but Pancasila is a source of value which consequently and consistently inspires how Indonesia must exist as a nation and country. Regarding democracy as a system, we should understand that the "representative" concept exists because democracy does not allow policy making and decision making by involving all the people. This concept refers to the policy making and decision making process that does not involve all people. It is not because democracy does not respect people's aspirations, but because the implementation is impossible. The democratic principles based on Pancasila and the 1945 Constitution are: i) Democracy based on the belief in the One and Only God; ii) Democracy based on just and civilized humanity; iii) Democracy based on the unity of Indonesia; iv) Democracy based on the sovereignty of the people with the deliberation/representation principle; and v) Democracy based on social justice for all the people of Indonesia.

Based on these considerations, it would be wise to rethink the most appropriate and efficient election system for the regional head election to support the regional autonomy implementation which realizes people's welfare and a healthy democratic process. From one aspect, the direct election involves the people directly. However, the Constitution allows the implementation of the regional head elections by the DPRD. Article 18 paragraph (4) of the 1945 Constitution only requires that the regional head elections shall be "implemented democratically". This means that regional head elections can be conducted with a direct election system by the people or with the representative system by the DPRD with all the strengths and weaknesses of each system.⁴⁷

IV. CLOSING

The enactment of laws must be consistent with the contents of the constitution as a legal basis and basic law. Laws not consistent with the contents of the constitution can be stated as laws not enacted based on the constitution. The constitution determines that the implementation of regional administration is based on the principle of regional autonomy. The principle of Regional Autonomy produces legal norms and legal norms produces legal rules. Regional autonomy as a principle of law is the foundation for the enactment of the whole legal rules for the implementation of regional administration. The rules include provisions for the filling of the regional heads' positions as mandated by Article 18 paragraph (4) of the 1945 Constitution which does not provide policy choices to the legislators (the DPR and the President) to decide the way in filling the regional heads' positions, whether the regional heads are indirectly elected or directly elected by the people. Therefore, the enactment of laws must contain two mechanisms for the filling of the regional heads' positions in the laws relating to the Regional Heads Election mechanism.

The legislators can determine the regional head elections system in accordance with the regional social conditions, whether directly or through representatives in the DPRD. This is intended as a constitutional solution to the diversity of customs and cultures of different regions, as well as in accordance with the provisions of Article 18 B of the 1945 Constitution which recognizes entities of regional administration that possess a specificity or a distinctiveness. In accordance with the background of the provision, the phrase "democratically" in Article 18 paragraph (4) of the 1945 Constitution, elections can be implemented directly by the people or indirectly by the DPRD. In enacting regulations, the legislators should continue to incorporate culture and value elements that grow and develop within Indonesian society, given the regional autonomy policy is born from the diversity of regional government matters. This diversity also includes the diversity of government matters between regions. Therefore, the regulation regarding regional administration must consider the characteristics of each region and the constitutionality of the law as the main value of the enactment of laws. At present, Law Number 10 of 2016 on the Second Amendment to the Law Number 1 of 2015 on the Stipulation of the Government Regulation in Lieu of Law Number 1 of 2014 does not include the provisions of Article 18 paragraph (2) of the 1945 Constitution as a basis for legal consideration of laws. Therefore, legislators should include Article 18 paragraph (2) as a basis for legal consideration for filling the regional heads' positions.

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