

The Dignity of Democracy in the Appointment of Acting Regional Heads by the President: Legal Construction After the Constitutional Court Decision Number 15/PUU-XX/2022

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ABSTRACT

Purpose of the study: This study aims to examine the legality of the position and authority of the acting regional head, as well as to explore the dignity of democracy in the appointment of acting regional heads by the president and its construction after the Constitutional Court Decision Number 15/PUU-XX/2022.

Methodology: This study belongs to normative legal research with statutory, conceptual, and case approaches.

Results: This study unveiled that the appointment of acting regional heads operationalized politically appointed presidential power and not election (politically elected) as regional heads. Consequently, it lacked regional legitimacy and relations with the people because it was not the people's choice. It demonstrated the decline of democracy in the regions. Therefore, the government should implement regulations concerning the mechanism for selecting regional heads by not degrading the democratic values as mandated by the Constitutional Court Decision Number 15/PUU-XX/2022.

Applications of this study: This article analyzed how democratic principles should be applied in appointing acting regional heads. It serves as a reference for those studying the appointment of acting regional heads. Thus, it can enrich the scientific treasures and studies regarding the mechanism for appointing acting regional heads.

Novelty/ Originally of this study: Due to the limited research on this topic, examining the dignity of democracy in the mechanism for appointing the acting regional head is considered crucial as a reference in implementing democracy in Indonesia.

Keywords: Acting Regional Head, Dignity of Democracy, Political Appointed

INTRODUCTION

Democracy is essentially from the people, by the people, for the people (Zaelani, Handayani, & Isharyanto, 2019: 76). Hence, the highest sovereignty is in the hands of the people, following the provision of article 1, paragraph 2 of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). The people's participation in making decisions is depicted when selecting leaders to carry out their duties following those mandated by the people based on the applicable laws and regulations (Hamdani, 2020). People's sovereignty in Indonesia can be realized through the general election (Pemilu) held every five years to constitutionally rotate power in a direct, public, free, secret, honest, and fair manner (Marwan, 2016: 233). An election can be defined as selecting the president and vice president, members of the People's Representative Council (DPR), the Regional People's Representative Council (DPRD), and the Regional Representative Council (DPD) to perform their respective functions (Asrun, 2020: 23). Likewise, regional heads, in this case, regents, mayors, and governors, are elected directly by the people. However, as the constitution stipulated, they are democratically elected.

Law of the Republic of Indonesia, Number 7 of 2017 concerning the General Election, defines election as a means of people's sovereignty to elect the president and vice president as well as the members of DPR, DPD, and DPRD carried out directly, publicly, freely, confidentially, honestly, and fairly within the Republic of Indonesia based on Pancasila and the 1945 Constitution (Najati, Azhari, & Enggarani, 2021: 69).

The General Election Commission (KPU) of Indonesia has officially stipulated the 2024 Simultaneous General Election as outlined in its Decree Number 21 of 2022 on Voting

Days and Dates for the General Election of the president and vice president as well as members of DPR, DPD, Provincial and Regency DPRD. This simultaneous election has been scheduled for Wednesday, November 27, 2024. However, it will result in vacancies of the regional heads in several regions due to the official term for the definitive regional heads ending in 2022 and 2023. In 2022, there are 101 regions, of which the definitive governors, regents, and mayors will complete their term of office, and 171 other regions will follow in 2023. Meanwhile, 272 regions will encounter vacant regional head positions until the simultaneous regional head election (pilkada) in 2024 (Makki, 2022).

Thus, in approximately two years leading to 2024, the positions of governor, regent, and mayor will be replaced by temporary acting following the provision of Law Number 10 of 2016, article 201, paragraph 9. Furthermore, the attribution provision to the central government to appoint the acting head of the province from the middle high leadership position and the acting head of the regency or city area, originating from the high Pratama leadership position until the inauguration of governors, regents, and mayors as a result of the 2024 simultaneous regional election is regulated in article 201 verses 10 and 11. Filling regional head positions due to a vacancy is mandated directly by the constitution. The regional head positions should not be left vacant, allowing all government administration to run actively.

Unfortunately, the mechanism for filling the regional heads positions in Indonesia through direct appointment by the president and the Minister of Home Affairs can harm democratic values. Article 18, paragraph 4 of the 1945 Constitution of the Republic of Indonesia mandates that the regional election must be carried out democratically. Democratic necessitates people's involvement in the appointment. Compared to regional heads elected through regional elections, the official appointment to fill the vacant regional heads raises issues regarding the legality of the position and authority of the official, as well as whether the appointment of acting regional heads by the president and the Minister of Home Affairs violates the democratic values.

RESEARCH METHOD

This research utilized a normative legal research method with statutory, conceptual, and case approaches. The statutory approach was intended to examine the appointment of acting regional heads. Moreover, the conceptual approach studied the legal issues within the

framework of a democratic state. Finally, the number of regions that would experience vacancies in regional head positions until the 2024 simultaneous regional head election was examined using the case approach.

RESULTS AND DISCUSSION

The Legality of the Position and Authority of the Acting Regional Head

Acting governor, regent, or mayor are parties assigned by the government when no pair of candidates is elected in the election (Article 54D, paragraph 4 of Law Number 9 of 2015 concerning the Second Amendment to Law Number 23 of 2014 concerning Regional Government (UU Pemda)). Indonesia's constitutional law stipulates three acting replacements for regional heads: Daily Implementers (Plh), Caretakers (Plt), and Acting (Pj). The Plh's authority is derived from the mandate's assignment of affairs between superiors and subordinates. If there is a liability with a third party, the responsibility is still attached to the mandate giver. In this case, if the president appoints the Plh, the president is at fault.

In contrast to acting Pj, which is special, acting can only be employed for definitive regional heads whose positions have been eliminated or vacant. Pj is utilized to replace the regional head due to the simultaneous vacant regional head and deputy regional head positions. Indonesia is creating an excessive number of officials in several regions before the 2024 simultaneous regional election, unlimited to acting as a substitute for regional heads (Maula, 2019: 7). Plt is applied when the definitive regional head is absent. The authority obtained in government organs is vital because it directly relates to legal accountability in using the authority. It follows the law principle of "no authority without accountability" (Fauzani & Wahyuningsih, 2021: 342).

Discussing the appointment of acting regional heads is relevant to the legitimacy of government actions. In accordance with the concept of state administrative law in Indonesia, government actions are lawful if the movement's authority, substance, and procedures are under the laws and regulations and general principles of good governance (AUPB). In addition, Philipus M. Hadjon, in his book, explains that the scope of the legitimacy of government actions and state administrative decisions encompasses authority, substance, and procedure. Authority and substance are the basis for formal legality (Hadjon & Djatmiati, 2008: 1).

To begin with, concerning authority. The appointment of acting regional heads is an operationalization of the concept of politically appointed presidential power and not the election (politically elected) of regional heads. Simply put, political appointees are delegates of presidential power since the holder of government power has the right to delegate the authority of regional head officials to anyone as long as the administrative requirements under Law Number 10 of 2016 are met (Djohan, 2022). Accordingly, it results in weak regional legitimacy and relations with the people for being not the people's choice. Due to the centralized nature of this appointment, it is susceptible to influence by political interests. The authority of the acting regional heads in running the government is, of course, derived from a decree issued by the Minister of Home Affairs; therefore, the acting regional heads belong to an attributive authority (Fauzani & Wahyuningsih, 2021: 342).

Additionally, the substantive and procedural provision of Law Number 10 of 2016 governing the appointment of acting regional heads is only implemented under conditions of campaign leave due to the absence of an election. Hence, the government can fill the vacant position by extending the term of office of the definitive regional head. It can be regulated by issuing a government regulation instead of a law (Perpu) and accomplished through the DPRD election. Moreover, the third option is to appoint an official from the State Civil Apparatus (ASN). Law Number 10 of 2016 concerning the Election of Governors, Regents, and Mayors (UU Pilkada) has regulated the requirements for officials who should fill the temporary positions of governors and mayors until the election of a definitive regional head.

Nonetheless, the Indonesian government has not yet issued a technical regulation from Law Number 10 of 2016, stipulating the mechanism for appointing an acting regional head by direct appointment by the president. It negates the values of democracy in which citizens should be involved in making political decisions, either directly or indirectly (through a representative system). It indicates a decline in democracy to the pre-reform system, where authority is handed over to several people or agencies before being centralized in the central government. The absence of DPRD representing the people is the reason for this decline, as the people are unaware of the requirements for acting regional heads other than middle-high leadership for the governor and middle-high leadership positions for regents or mayors. This practice has demonstrated a shift from democratic principles known as the State of Law (Rechtsstaat) and the Rule of Law (Ni'Matul Huda, 2015: 265).

Article 201, paragraphs 10 and 11 concerning the appointment of acting regional heads to fill vacancies is still within the scope of “democratic” as regulated in article 18, paragraph 4 of the 1945 Constitution, which reads, “governors, regents, and mayors respectively as the heads of provincial, regency and city governments are democratically elected.” This provision does not explain the meaning of democracy. Democratic refers to elected through the general election directly by the people or people’s representative institutions in the region. If, in practice, the Pj is directly elected by the president, it negates democracy.

In addition, the status and position of civil servants appointed as acting regional heads are much different. Civil servants are career officials occupying positions based on career paths. In contrast, they are political officials with political authority due to their position as heads of autonomous regions (Prasojo, 2022). It can impact the regional head election system in Indonesia in the future. For example, within two years, the performance of the acting regional heads elected through the appointment system is much better than the officials elected through the regional head election. Thus, Indonesia’s regional head election can be run through appointment (Prasojo, 2022). It is possible because article 18, paragraph 4 of the 1945 Constitution of the Republic of Indonesia does not explicitly explain the meaning of democracy. However, the appointment of an acting regional head by the central government still negates the values of democracy, placing the highest sovereignty in the hands of the people, not the central government.

It is strengthened by the institution in charge of maintaining the dignity of the constitution, the Constitutional Court, through its Decision Number 15/PUU-XX/2022 concerning the review of Law Number 10 of 2016, mandating the need for the government to issue implementing regulations as a follow-up to article 201 of the Regional Election Law, which regulates the requirements of the acting regional heads. It is intended to provide measurable and clear mechanisms and conditions regarding filling the interim regional heads. Hence, it does not neglect the principles of democracy (*demokratie beginsel*), the hallmark of a democratic state of law (democracy under the rule of law), as explained by Scheltema in his article entitled “De Rechstaat” (Engels, 1989: 15).

The acting regional head carries the same duties and authorities as the definitive regional head following the Regional Government Law. Despite the interim regional head having the same duties and authorities as the definitive official, a limitation exists on the authority of the acting regional head because he is appointed, not through an election. The

boundary of the authority of the interim regional head is regulated in Government Regulation (PP) Number 6 of 2005 concerning the Election, Ratification, Appointment, and Dismissal of Regional Heads and Deputy Regional Heads, covering (a) transferring employees, (b) canceling a permit issued by the previous official and issuing a permit that contradicts the one issued by the previous official, (c) establishing policies on a regional expansion that contradicts the previous policy, and (d) establishing policies contradicting the policies of the administration of the government and the development program of previous officials.

Several issues must be highlighted that the limitation of authority can be excluded after obtaining written approval from the Minister of Home Affairs. Obviously, it offers the possibility for political intervention because an acting regional head is not the result of an election but an appointment. The central government's selection system lacks legitimacy; therefore, it appears foreign in a country adhering to a constitutional democracy such as Indonesia. People become political objects in this system because they lack access to information and participation (Arifin, 2019: 47). The sovereignty should be entirely handed over and utilized by the people to guarantee greater representation and a democratic society.

The Dignity of Democracy in the Appointment of Acting Regional Heads by the President and Its Construction After the Constitutional Court Decision Number 15/PUU-XX/2022

Philosophically, a legal state plays a significant role in protecting people's and the state's sovereignty (Fauzia & Hamdani, 2021a: 133). Then, it is bolstered by popular sovereignty, referring to a supreme power residing in the people as expressed by John Locke, that in the formation of a state, the people play a role in establishing a unified state through practicum unionist and practicum subjection (Fauzia & Hamdani, 2021b: 160). Agreements between citizens and the state, known as *pactum unionis* and *pactum subjectionis*, give birth to maximum protection for the people's interests. The concept of popular sovereignty as the supreme authority is founded on a maxim, "*salus populi suprema lex*," stating that the people's interests are the highest law (Hamdani & Fauzia, 2021: 101).

The Indonesian constitution specifies in greater depth the protection, promotion, enforcement, and fulfillment of human and civil rights as the embodiment of the protection of the people's interests (Fauzia, Hamdani, & Octavia, 2021: 16). Thus, as mandated by the constitution, the implementation of democracy must consider the people's interests as a

whole, one of which involves public participation in determining the acting regional heads. The constitution is based on a general agreement (consensus) among most people regarding the idealized building of the state. The constitution represents the citizens' collective consensus or universal agreement (Hamdani & Fauzia, 2021: 102). Members of the political community require this state organization to protect and advance their common interests by establishing and utilizing a mechanism for determining the acting regional heads that put forward the principles of participatory and transparency to accommodate the human rights of citizens.

Democracy and human rights are conceptions of humanity and social relations born from the global history of human civilization (Raihan, 2019). Human rights and democracy can also be interpreted as the result of the human effort to maintain and achieve human dignity because, until now, only these two conceptions have been proven to recognize and guarantee human satisfaction (Rosana, 2016: 49). Therefore, the realization of the concept of human rights and democracy concerning the guarantee of human dignity should be reflected through the mechanism for determining the acting regional heads that continue to prioritize the principles of democracy.

In its Decision Number 55/PUU-XVIII/2019, the Constitutional Court has confirmed that the simultaneous election of the president and vice president and members of DPR and DPD is inseparable. The Constitutional Court no longer distinguishes between elections, especially the general and regional head elections. This decision suggests that the divisions between the general and regional head elections are considered irrelevant. Suppose there is no longer a separation of the regional head election and available election regimes, the greater the gap for the central government to appoint acting regional heads in a power vacuum. The meaning of "democratically elected" in article 18, paragraph 4 has shifted due to this decision. It begins with the purpose of being directly elected by the people through a general election or elected through a representative system through DPR. Accordingly, the regional election regime must remain separated from the general election because it provides a new space for the growth of democracy in the regions in selecting leaders. Due to the benefit of the direct regional head election, the regions possess strong legitimacy to govern.

Furthermore, referring to the Constitutional Court Decision Number 18/PUU-XX/2022, stating that concerning the policy of formulating the administration of governors, regents, and mayors, including cutting or reducing the term of office of regional heads as stipulated in

article 201 of Law Number 10 of 2016, it is transitional. Moreover, it only occurred once, referred to as *einmalig* in legal terminology, for the 2024 simultaneous general election.

Regarding the election timing for governors, regents, and mayors, the Constitutional Court holds that the voting and the inauguration time must be regulated and synchronized simultaneously. It is the initial step for governors and deputy governors, regents and deputy regents, and mayors and deputy mayors to synergize regional government policies with the central government. Synchronizing the timing of both voting and the inauguration of the elected candidate pairs would lead to the effectiveness and efficiency of development policies between the regions and the center.

To realize the simultaneous election, the government should regulate the appointment of Pj so as not to degrade the democratic values of the regional head election as regulated in article 18, paragraph 4 of the 1945 Constitution of the Republic of Indonesia. In Constitutional Court Decision Number 15/PUU-XX/2022, the government issues implementing regulations as a follow-up to article 201 of the Regional Election Law, stipulating the requirements for acting regional heads. If the government stipulates that the acting regional heads are determined by the president and the Minister of Home Affairs, it is questionable whether the dignity of democracy remains in the appointment of the acting heads. Article 18, paragraph 4 of the 1945 Constitution of the Republic of Indonesia defines democracy as the active involvement of the community or at least their representatives (DPR) through an indirect election mechanism in the appointment of the acting regional heads, carried out transparently (UUD NRI 1945 guarantees the rights to vote and be elected).

Article 18, paragraph 4 of the 1945 Constitution specifies that regional heads are elected democratically, notwithstanding the fact that the public continues to view the appointment of the acting regional heads through indirect election as a less democratic system. The phrase “democratic” is often interpreted narrowly as the direct election by the people, even though the 1945 Constitution does not require regional heads to be directly elected by the people (Kennedy & Suhendarto, 2020: 194). However, this system is at least a better choice for maintaining the dignity of democracy at the regional level than the appointment of the acting regional heads by the president and the Minister of Home Affairs, who, incidentally, interfere in regional affairs by determining the interim regional heads.

In its legal considerations, the Constitutional Court asserted the following.

“..... In appointing acting regional heads, as referred to in article 201, paragraphs 10 and 11 of Law Number 10 of 2016, the government must first map out the real conditions of each region and the need for an acting regional head to meet the requirements of acting regional heads, pay attention to regional interests, and can be evaluated periodically by the authorized official. Thus, it will produce qualified regional officials to lead their respective regions temporarily until the results of the 2024 simultaneous regional election produces a definitive regional head and deputy regional head.”

In Constitutional Court Decision Number 67/PUU-XIX/2021, the court has considered the following.

“It is vital for the court to emphasize that the process of filling the vacant regional head positions is also still within the scope of the term “democratic” as regulated in article 18, paragraph 4 of the 1945 Constitution. Therefore, it is necessary to consider and pay attention to the government to issue implementing regulations as a follow-up to article 201 of Law Number 10 of 2016. Thus, measurable and clear mechanisms and requirements are available to prevent disregarding democratic principles in filling these officials while also assuring the public that the mechanism filling in the office takes place in an open, transparent, and accountable manner to produce competent leaders, with integrity, who follow regional aspirations and work sincerely for the people and regional progress. In addition, given the central role of regional heads and deputy regional heads, and the length of time acting regional heads have led the regions, it is necessary to consider granting the authority of the acting regional heads during the transition period to the simultaneous national election for the same as the definitive regional heads. Because, with the full authority of the appointed regional head, the acceleration of regional development can still be realized without any differences between regions led by acting regional heads and those led by definitive ones.”

The mandate of the Constitutional Court, as referred to in Decision Numbers 67/PUU-XIX/2021 and 15/PUU-XX/2022, is not observed in the field. For instance, the appointment of five acting regional heads was officially inaugurated by the Minister of Home Affairs, Tito Karnavian. The five acting governors were from West Papua, Banten, West Sulawesi, Bangka Belitung, and Gorontalo Provinces (Nugraheny, 2022).

The mechanism for appointing the acting regional head is dubious and tainted with strong political tendencies because some candidates lack experience in civil administration. For example, the Acting Governor of West Papua came from a recently retired police general. The Acting Governor of Bangka Belitung was the Director General of Mineral and Coal of the Ministry of Human Resources. The Acting Governor of Banten came from the Expert Staff for Sportivity Culture of the Ministry of Youth and Sports, even though the stock of ASN of the Ministry of Home Affairs with JPT Madya status is highly conditional on being appointed

as acting regional heads without having to take ASN with the status of Indonesian national army (TNI) and police (Polri).

In addition to superseding the Constitutional Court Decision Number 15/PUU-XX/2022, the mechanism for appointing acting regional heads also overrides the provisions of Law Number 5 of 2014 concerning ASN, outlining structural ASN positions that members of the TNI and Polri can only fill. It applies to ten ministries or agencies, excluding local governments. The Constitutional Court's decision is a basic guideline for the government in formulating technical rules for filling out acting regional heads. Among the requirements, a minimum of five-year experience in civil administration and mastery of the designated administrative area must be mentioned. Moreover, the acting regional heads will carry out their duties for two to three years, requiring a coordination and consultation relationship with the local DPRD. It relates primarily to the deliberation and stipulation of regional regulations on APBD, RKPD, and several Draft Regional Regulations that have become priorities for regional legislation programs (Prolegda).

Polemic also occurred in the appointment of the Acting Regents of West Muna and South Buton Regencies, where the Governor of Southeast Sulawesi, Ali Mazi, refused to inaugurate the three acting regional heads in his region because the Ministry of Home Affairs ignored the names he proposed. The refusal is, of course, reasonable because in running the wheels of government, the acting regents must also perform the governor's work program included in the Provincial Government Work Plan. Hence, the governor certainly expected that his proposed regional heads could be approved and inaugurated to help realize the provincial government's vision, mission, and work program, both contained in the regional mid-term development plan (RPJMD) and the annual government work plan (RKP).

Therefore, the uproar about the appointment of the acting regional heads must be resolved through a solutive regulation. The government should consider issuing a Government Regulation on Guidelines for the Appointment of Acting Regional Heads, considering the Constitutional Court Decision Numbers 15/PUU-XX/2022 and 67/PUU-XIX/2021, Law Number 5 of 2014 concerning ASN, and course improving the old rules for the appointment of acting regional heads, no longer in line with the development of the situation and the regime of the simultaneous national election.

Regarding the alternative solution for filling vacant regional head positions by regional head officials from incumbents, the mechanism is still not optimal. Although the regional

head official will not run again, it is still unconstitutional for his position to be counted beyond the legal period of office. In addition, even while officials from incumbents properly fill vacancies for regional heads, his influence will be greater because he has undergone the democratic process of being elected by the people. However, to avoid polemics and create uniformity in all regions, the ideal solution is to implement regulations based on the decisions of the Constitutional Court and the ASN Law.

CONCLUSION

The appointment of an acting regional head portrayed the region's deteriorating democracy. It can be interpreted as a desire to realize a more effective implementation of democratic principles. As mandated by the Constitutional Court Decision Numbers 15/PUU-XX/2022 and 67/PUU-XIX/2021, the government should therefore prepare by adopting regulations on the system for appointing regional heads without eroding democratic values. Furthermore, it is an attitude that adheres to the constitution and demonstrates legal certainty to generate competent leaders with integrity who follow the aspirations of the local people.

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