



Constitutionality of Appointing an Acting Governor and Mayor of the Region who comes From Active Members of the Indonesian National Army and Indonesian Police Force

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Abstract

Appointment of acting regional heads who come from members of the Indonesian National Army and members of the National Police reaps pros and cons in the community because it is contrary to the provisions of the legislation. following the provisions of the existing laws and regulations and fulfilling the conditions specified in the Regional Head Election Law and the State Civil Apparatus Law. Second, as regulated in the Indonesian National Army Law and Indonesian Police Force Law, which are special laws for members of the Indonesian National Army and Indonesian Police Force members, the acting regional heads who will carry out their duties must resign or retire early from the military service and police service. Third, the appointment of Brigadier General Andi Chandra As'aduddin as the acting Regent of West Seram without resigning from the army service is something that is not right, related to positive law perspective. Specifically, the Indonesian National Army Law, Government Regulations PP No. 15/2001 concerning the transfer of the status of members of the Indonesian National Armed Forces and members of the State Police of the Republic of Indonesia to civil servants to occupy structural positions as amended by PP No. 4 of 2002 and lastly amended by PP No. 21 of 2002; and PP No. 1 of 2003 concerning the Dismissal of Members of the Indonesian National Police.

Keywords: Acting Regional Head, Indonesian Armed Forces Dual Function, the Election

Introduction

The implementation of the people's sovereignty system cannot be separated from the general election, because the General Election (PEMILU) is a logical consequence of the adoption of the principle of people's sovereignty in the life of the nation and state. In addition, the basic principle of a democratic state life is that every citizen has the right to actively participate in the political process.¹

One of the manifestations of a democratic system in a country is by the implementation of direct general elections.² The election is one of several competitions, the victory of candidates is in the hands of the people by using the voting

¹ Putera Astomo, *Putera Astomo* (Yogyakarta: Thafa Media, 2014).

² Sultoni Fikri and others, 'PROBLEMATIKA KONSTITUSIONALITAS PRESIDENTIAL THRESHOLD DI INDONESIA', *Jurnal Hukum Positum*, 7.1 (2022) <<https://doi.org/https://doi.org/10.35706/positum.v7i1.6643>>.



mechanism.³ Based on that, the general election is one of the joints of a democratic country and aims to implement the values of democratization. Elections are something that must be carried out directly, publicly, freely, confidentially, honestly, and fairly every five years, this is explicitly stated in Article 22E of the 1945 Constitution of the Republic of Indonesia. One of the type of elections in Indonesia is to elect Regional Heads and Deputy Regional Heads direct and democratic from the people, which is commonly known as PILKADA to choose Head of Region and Deputy Head of Region for Province, Regent and Deputy Regent for Regency, Mayor and Deputy Mayor for City.⁴ In the 1945 Constitution of the Republic of Indonesia, it is expressly stated in Article 18 paragraph (4) states "The Governors, Regents, and Mayors respectively as Heads of Provincial, Regency and City Regional Governments are democratically elected". The election of regional heads and deputy regional heads is a must that is held by every region.⁵ Regional head elections conducted by the people are the embodiment of the constitutional rights of citizens in terms of the nation and state, and the embodiment of constitutional obligations in terms of the obligation to comply with and carry out the life of the nation and state based on the mutual agreement contained in the constitution.⁶ Therefore, a law was formed that further regulates the regional elections as regulated in Law no. 10 of 2016 concerning Regional Head Election (PILKADA).

Based on Article 201 paragraph (8) of Law Number 10/2016 concerning the Election of Governors, Regents, and Mayors, national simultaneous voting for regional elections in all regions of Indonesia will be held in November 2024. Whereas one of the legal implications is that many definitive regional head seats must be filled by the Acting Officer (PLT). Meanwhile, regional heads from the 2020 elections will only serve until 2024. According to data that the author obtained from several sources, in 2022 there were 101 regional heads resulting from the 2017 elections whose terms of office ended. Then 171 Regional Heads from the 2018 regional elections will end their term of service in 2023. With the abolition of holding simultaneous regional elections in 2022-2023, there will be 272 PLT. Regional heads who will serve until there are regional heads resulting from the 2024 simultaneous regional elections.

This condition then undermines the quality of democracy and creates disharmony in development policies. In fact, one of the prerequisites for a democratic state is that there is a regular exchange of the ruling elite/regional head, which is 1 period for 5 years. The author believes that there are many regional heads who have been hurt

³ Muhadam Labolo and Teguh Ilham, *Partai Politik Dan Sistem Pemilihan Umum Di Indonesia (Teori Konsep Dan Isu Strategi)* (Jakarta: PT RajaGrafindo Persada, 2015).

⁴ Titik Triwulan Tutik, *Pemilihan Kepala Daerah Berdasarkan Undang-Undang Nomor 32 Tahun 2004 Dalam Sistem Pemilu Menurut UUD 1945* (Jakarta: Prestasi Pustaka, 2006).

⁵ Marulak Pardede, 'Legitimasi Pemilihan Kepala/Wakil Kepala Daerah Dalam Sistem Pemerintahan Otonomi Daerah', *Jurnal Penelitian Hukum De Jure*, 8.2 (2018) <<https://doi.org/https://ejournal.balitbangham.go.id/index.php/dejure/article/view/431>>.

⁶ Dio Ekie Ramanda, 'Menata Ulang Kewenangan Mengangkat Penjabat Kepala Daerah', *JISIP (Jurnal Ilmu Sosial Dan Pendidikan)*, 6.3 (2022) <<https://doi.org/10.58258/jisip.v6i3.3353>>.



because their tenure has been reduced just for the sake of the ambition of the simultaneous regional elections. One of the legal implications is that the Provincial and Regency/Municipal RPJMD is a development planning document of a region which is the elaboration of the Vision and Mission of the selected Regional Heads and Candidates for Regional Heads.

Furthermore, the implications of abuse of authority and power in filling Acting Regional Head. Several major parties, especially the ruling party, will benefit if the 2022 and 2023 elections are held in 2024. The party that will benefit is the ruling party. Acting Regional Head will be prepared in advance to become an extension of the regional government, so that the Acting Regional Head will work perpendicular to the source of power and can have an impact on the politicization of civil servants or State Civil Apparatus.

As mentioned before In 2022, at least 101 regional heads have ended their terms of office. These regional heads consist of Regents, Mayors, and Governors. However, there were many polemics in the appointment, the Minister of Home Affairs (Mendagri) appointed the Head of the Central Sulawesi State Intelligence Agency (BIN), Brigadier General Andi Chandra As'aduddin, who is still active as the acting (Pj) Regent of West Seram who is considered to have violated the provisions of the legislation. invitation,⁷ even though by law it prohibits the filling of acting regional heads by members of the Indonesian National Army and members of the Police who are still active. The appointment of active Indonesian National Army officers as acting regional heads is a bad precedent that will revive the Indonesian National Army's dual function, as well as undermine the mandate of reform and democratic principles. As already regulated in Article 47 Paragraph (1) of Law No. 34 of 2004 concerning the Indonesian National Army and Article 28 Paragraph (3) of Law No. 3 of 2002 concerning the National Police of the Republic of Indonesia, which essentially prohibits holding civilian positions while still active as members Indonesian National Army and Indonesian Police Force members. Based on this, the authors are interested in reviewing, "Constitutionality of Appointing an Acting Governor and Mayor of The Region Who Comes from Active Members of The Indonesian National Army and Indonesian Police Force".

Research Methods

⁷ 'Perwira TNI Jadi Penjabat Kepala Daerah: "Mencederai Reformasi Dan Prinsip Demokrasi", Dwi Fungsi TNI/Polri Terulang Kembali?', *Www.Bbc.Com*, 2022 <<https://www.bbc.com/indonesia/indonesia-61576564.amp>> [accessed 4 June 2022].



This research is legal research.⁸ The approach method used in this study is the statutory approach and the conceptual approach.⁹

Results and Discussion

As a country that adheres to a democratic system, general elections are a consequence that must be carried out by the Indonesian state. State power that came from elections is power that born from below according to the will of the people, by the people, and for the people. The general election aims to uphold the principle of popular sovereignty¹⁰, one of them is to elect the Regional Head and Deputy Regional Head directly and democratically¹¹. Regional Head Election (PILKADA) is the most common terminology in identifying the implementation of political decentralization, namely in the practice of administering regional government.¹²

Article 60 of Law no. 23 of 2014 concerning Regional Government states that the term of office of the regional head is 5 years after the inauguration and can be re-elected for another period if he/she is still eligible to be elected, of course with a mechanism that is following the law. However, the government plans simultaneous general elections to be held in 2024. Before welcoming the simultaneous general elections in 2024, there are a total of 271 regional heads who will step down during the 2022-2023 period, with details of the 271 regional heads consisting of 24 governors, 56 Mayor, and 191 Regents. Regional heads whose term of office expires before 2024 will be replaced by acting regional heads. The rules regarding this issue are contained in Law no. 10 of 2016 article 201 point 9 which reads "To fill the vacant positions of Governor and Deputy Governor, Regent, and Deputy Regent, as well as Mayor and Deputy Mayor whose term of office ends in 2022 as referred to in paragraph (3) and whose term ends in In 2023 as referred to in paragraph (5), the acting governor, acting regent, and mayor will be appointed until the election of the governor and deputy governor, regent and deputy regent, as well as the mayor and deputy mayor through national simultaneous elections in 2024".

To avoid the occurrence of vacancies, a definitive replacement for the regional head is determined. The Indonesian state administration system, it has regulated the

⁸ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenadamedia Group, 2016).

⁹ *Ibid.*, Marzuki.

¹⁰ *Op.Cit.*, Labolo and Ilham.

¹¹ The meaning of being democratically elected is not interpreted as being directly elected by the people. In the process of formulating this meaning, there were dynamics, because it was not interpreted explicitly if democracy had to be interpreted as being directly elected by the people. The debate about this meaning has become polemic because policymakers interpret democracy as not having to be directly elected by the people but can also mean being elected by DPRD whose members are also the result of democratic elections through elections. But the debate about the meaning of democracy was finally formulated as being directly elected by the people. see: Sulardi Sulardi and Tri Sulistyarningsih, 'Konstruksi Regulasi Sistem Pemilihan Kepala Daerah Menuju Sistem Pemilihan Kepala Daerah Yang Demokratis Dan Aspiratif', *Jurnal Media Hukum*, 24.1 (2017) <<https://doi.org/10.18196/jmh.2017.0086.24-34>>.

¹² Wilda Prihatiningtyas, 'KONSTITUSIONALITAS MODEL PENGISIAN JABATAN WAKIL KEPALA DAERAH DALAM PENYELENGGARAAN PEMILIHAN KEPALA DAERAH (PILKADA)', *Media Juris*, 1.2 (2018), 373 <<https://doi.org/10.20473/mi.v1i2.8836>>.



mechanism for appointing a temporary substitute public official who will carry out his duties and obligations if the definitive official or head of a government agency is unable to carry out his duties.¹³ Discussing the replacement of regional heads, there are three types of replacements for regional heads that are known in Indonesian constitutional law, namely Daily Implementer (PLH), Acting Officers (PLT) and Acting (PJ). The daily executive is mandated, where the responsibility is still attached to the regional head, while the acting (PJ) is special and can only be used to replace the regional head if there is a vacancy in the positions of the regional head and deputy regional head at the same time, and the term implementing task (PLT) are general, not limited to replacement officials for regional heads. Although the terms Acting and Implementing Tasks can be used to designate a replacement for regional heads, there are different conditions in the use of the two terms. The use of term Implementing the task of the regional head is attached to the deputy regional head due to the dismissal of the regional head (vacant positions are only in the position of regional heads). The appointment of the regional head (PJ) is also carried out when the regional head and deputy regional head have entered the End of Office Term (AMJ). The acting regional head is assigned to fill the vacant position of the regional head in the transition period until the inauguration of a new regional head as a result of the regional head election.¹⁴

There is one thing that makes pro and contra in the community related to the appointment of the acting regional head who is appointed by the Minister of Home Affairs, through his minister Tito Karnavian. The Minister of Home Affairs appointed an active Indonesian National Army officer to become the acting regional head whose term of office expires in 2022. Tito Karnavian's decision to appoint Brigadier General Andi Chandra As'aduddin as acting Regent of West Seram is against the law and democratic principles, and it is feared to be a dual function of the armed forces are reborn. Such matters should be taken into account considering that the mandate of the reform was to abolish the dual function of ABRI and become ABRI only to focus on defense and security matters. The question is what if the acting regional heads are members of the Indonesian National Armed Forces (TNI) and members of the Indonesian National Police (POLRI) Is the arrangement for filling in the acting regional head only subject to the provisions of the Regional Head Election Law and the State Civil Apparatus Law?

Brigadier General Andi Chandra As'aduddin is a member of the Indonesian National Army who is still active, therefore in the process of appointing Indonesian National Army members to be acting regional heads, the provisions of Law no. 34 of 2004 concerning the Indonesian National Armed Forces (hereinafter referred to as the Indonesian National Army Law). Likewise, for members of the National Police, Law

¹³ Fabian Riza Kurnia and Rizari Rizari, 'TINJAUAN YURIDIS KEWENANGAN PENJABAT SEMENTARA (PJS) KEPALA DAERAH', *TRANSFORMASI: Jurnal Manajemen Pemerintahan*, 2019, 79–97 <<https://doi.org/10.33701/jtp.v1i1i2.691>>.

¹⁴ *Ibid.*, Kurnia and Rizari.



no. 3 of 2002 concerning the National Police of the Republic of Indonesia (hereinafter referred to as the Police Law).

Judging from the principle of statutory regulations, the Indonesian National Army Law, in the opinion of the author, is a special law (*lex specialis*) that is applied to members of the Indonesian National Army, including in their appointment as regional heads. Similarly, the Police Law is special (*lex specialis*) for members of the National Police, including in the appointment as acting regional heads. The existing provisions for the appointment of acting regional heads cannot override or eliminate the provisions stipulated in the Indonesian National Army Law and Indonesian Police Force Law for members of the Indonesian National Army and Indonesian Police Force members.

The Indonesian National Army Law has regulated the matter of Indonesian National Army members who will occupy positions outside the civilian or positions outside the Indonesian National Army. Article 47 Paragraph (1) of the Indonesian National Army Law stipulates that "Soldiers can only occupy civilian positions after resigning or retiring from active service in the army". Then Article 47 Paragraph (2) of the Indonesian National Army Law states, "Active soldiers can occupy positions in the office in charge of the coordinator of the field of State Politics and Security, State Defense, Presidential Military Secretary, State Intelligence, State Code, National Defense Institute, National Defense Council, Search and Rescue (SAR), National Narcotics, and the Supreme Court". Elucidation of Article 47 Paragraph (2) of the Indonesian National Army Law states, "Position is a position that can be occupied by active soldiers, not including the position of the Minister of Defense or other political positions". Furthermore, Article 55 Paragraph (1) letters f and g of the Indonesian National Army Law stipulates that soldiers are honorably discharged from the military service because f. change of status to become a civil servant; g. occupy a position that according to the laws and regulations, cannot be occupied by an active soldier.

As for the regulation of Indonesian Police Force members, it is determined based on the provisions of the Indonesian Police Force Law. Article 28 Paragraph (3) of the National Police Law stipulates, "Members of the Indonesian National Police may occupy positions outside the police force after resigning or retiring from the police service". Elucidation of Article 28 Paragraph (3) of the National Police Law states, "What is meant by "positions outside the police" are positions that have nothing to do with the police or are not based on an assignment from the National Police Chief".

Article 1 number 2 of Government Regulation 1/2003 concerning the Dismissal of Members of the Indonesian National Police (hereinafter referred to as PP 1/2003) states, "Dismissal from the Police Service is the dismissal of a member of the Police from the Indonesian National Police service to provide legal certainty that the person concerned is no longer status as a member." Then, Article 1 number 3 PP 1/2003 states, "Police Service is all official activities carried out by members of the Indonesian National Police Agency".



In addition, members of the Indonesian National Army and members of the Police who switch status as Civil Servants (PNS) to occupy structural positions are regulated through Government Regulation no. 15 of 2001 concerning the Transfer of Status of Members of the Indonesian National Army and Members of the Indonesian National Police to Civil Servants to Occupy Structural Positions (hereinafter: PP 15/2001) *juncto* Government Regulation No. 4 of 2002 concerning Amendments to Government Regulation no. 15 of 2001 concerning the Transfer of Status of Members of the Indonesian National Armed Forces and Members of the Indonesian National Police to Civil Servants to Occupy Structural Positions (hereinafter referred to as PP 4/2002 concerning Amendments to PP 15/2001) *juncto* Government Regulation No. 21 of 2002 concerning Amendments to Government Regulation no. 15 of 2001 concerning the Transfer of Status of Members of the Indonesian National Armed Forces and Members of the Indonesian National Police to Civil Servants to Occupy Structural Positions as Amended by Government Regulation no. 4 of 2002 (hereinafter referred to as PP 21/2002 concerning the Second Amendment to PP 15/2001).

Article 1 number 1 PP 15/2001 *juncto* PP 4/2002 concerning Amendments to PP 15/2001 jo. PP 21/2002 on the Second Amendment of PP 15/2001 states, "Civil institutions are government organizations outside the Indonesian National Armed Forces and the Indonesian National Police".

Article 1 point 4 of PP 15/2001 states, "Structural positions are structural positions of Echelon I and Echelon II as referred to in Government Regulation Number 100 of 2000 concerning Appointment of Civil Servants in Structural Positions".

Acting regional heads who come from members of the Indonesian National Army and members of the Police, in addition to having to meet the requirements that have been determined by the Regional Head Election Law and the ASN Law. That is, the acting governor comes from the middle high leadership position and the acting regent/mayor comes from the pratama high leadership position. Must also meet the requirements specified as members of the Indonesian National Army and members of the Police, as described above. Why is that? As has been stated, members of the Indonesian National Army and members of the Police as long as they are still members of the Indonesian National Army and members of the Police, then *mutatis mutandis* are subject to and bound by the Indonesian National Army Law and the Indonesian Police Force Law. The Indonesian National Army Law and the Indonesian Police Force Law for members of the Indonesian National Army and Indonesian Police Force members are special laws (*lex specialis*) from the provisions of other laws and regulations related to acting regional heads, in this case, the Election Law and the ASN Law. The Regional Head Election Law and the ASN Law, thus mean general law (*lex generalis*) for members of the Indonesian National Army and members of the Police.

So, reading and understanding how to regulate the acting regional heads from Indonesian National Army and Indonesian Police Force members must use a systematic interpretation method, it is not enough just to use authentic interpretation



methods and language (grammatical) interpretation.¹⁵ Except reading and understanding the meaning intended by legislators (authentic interpretation method) and reading and understanding the terms contained in the Regional Head Election Law and ASN Law (language or grammatical interpretation method), must also relate it to reading and understanding the special provisions for members Indonesian National Army and Indonesian Police Force members, especially the Indonesian National Army Law, Indonesian Police Force Law, PP No. 15/2001 concerning the Transfer of Status of Members of the Indonesian Armed Forces and Members of the Indonesian National Police to Civil Servants to Occupy Structural Positions as amended by PP 4/2002 and lastly amended by PP 21/2002; and PP 1/2003 concerning the Dismissal of Members of the Indonesian National Police.

Acting regional heads are civilian positions and positions outside the Indonesian National Army and Indonesian Police Force. The acting regional head is also a political position, whose filling is determined by the leader of the state who is elected by the people through the results of the general election. However, the acting regional head is not a structural position of civil servants whose duties and functions are under the duties and functions of the Indonesian National Army and Indonesian Police Force. If a member of the Indonesian National Army wants to occupy a civilian position, then the person concerned must first resign or retire from active service in the army. Military backgrounds that are opposite to civilian bureaucrats have the potential to create confusion in the formation and implementation of policies.¹⁶ Likewise, if a member of the National Police is to occupy a position outside the police force, he must first resign or retire from the police service. This is because the presence of the police in the local government can lead to the potential use of the police as a coercive instrument for the realization of local government political policies.¹⁷ Therefore, the appointment of the Acting Regional Head should not choose active members, this is to maintain the neutrality of the Indonesian National Army and Pori in politics and to maintain the dignity of the Indonesian National Army and Indonesian Police Force institutions.¹⁸

¹⁵ - Tohadi, 'PENGANGKATAN PENJABAT KEPALA DAERAH YANG BERASAL DARI ANGGOTA TENTARA NASIONAL INDONESIA DAN ANGGOTA KEPOLISIAN NEGARA REPUBLIK INDONESIA DALAM SISTEM HUKUM INDONESIA (Studi Kasus Pengangkatan Komjen Pol Mochammad Iriawan Sebagai Penjabat Gubernur Jawa Ba', *Jurnal Hukum Replik*, 6.1 (2018), 68 <<https://doi.org/10.31000/jhr.v6i1.1178>>.

¹⁶ Aulia Fitri, 'POLEMIK PENEMPATAN TNI AKTIF SEBAGAI PENJABAT KEPALA DAERAH', *Pusat Penelitian Badan Keahlian DPR RI*, 19.11 (2022) <https://berkas.dpr.go.id/puslit/files/info_singkat/Info_Singkat-XIV-11-I-P3DI-Juni-2022-1947.pdf>.

¹⁷ Fransica Adelina, 'LEGALITAS PENUNJUKAN PEJABAT POLRI MENJADI PELAKSANA TUGAS GUBERNUR PADA MASA KAMPANYE PEMILIHAN KEPALA DAERAH', *Jurnal Legislasi Indonesia*, 15.1 (2018) <<https://e-jurnal.peraturan.go.id/index.php/jli/article/viewFile/16/pdf>>.

¹⁸ Moh Khalilullah A. Razaq, 'Legalitas Pencalonan Kepala Daerah Dari Unsur Tentara Nasional Indonesia Dan Polisi Republik Indonesia Dalam Pemilihan Kepala Daerah 2018', *Jurnal Lex Renaissance*, 5.2 (2020) <<https://doi.org/10.20885/JLR.vol5.iss2.art1>>.



If a member of the Indonesian National Army occupies a position that, according to the legislation, cannot be occupied by an active soldier, then he must be honorably discharged from the army service. For example, being a civil servant (PNS). Even if a member of the police becomes a civil servant, then he is honorably discharged as a member of the police. Based on the things that have been described in detail above, it can be concluded that if a member of the Indonesian National Army and a member of the Police occupies the position of acting regional head, they must first resign or retire from the military service and police service. The appointment of the Acting Regional Head to active members of the Indonesian National Army and Indonesian Police Force cannot be justified because the definitions, duties, functions, and authorities of the police and the State Civil Apparatus are very different.¹⁹ This is because the acting regional heads, as stated above, are civilian positions and positions outside the Indonesian National Army and Indonesian Police Force, as well as political positions, whose filling is determined by state leaders who are elected by the people through the results of general elections, which are determined by political policies and decisions.

Conclusion

The arrangement for the appointment of acting regional heads who come from members of the Indonesian National Army and members of the National Police, in addition to meeting the requirements determined by the Regional Election Law and the ASN Law, must also meet the requirements specified as members of the Indonesian National Army and Indonesian Police Force members, as regulated in the Indonesian National Army Law and the Indonesian Police Force Law which are special law (*lex specialis*) for members of the Indonesian National Army and members of the Police. The appointment of acting regional heads who come from members of the Indonesian National Army and members of the National Police without first resigning or retiring from the military service and police service cannot be justified according to statutory regulations. Thus, the appointment of members of the Indonesian National Army and members of the National Police as acting Regional Heads has violated the laws and regulations. In addition, there are concerns that the appointment will evoke the dual function of ABRI as well as damage the spirit of democracy and reform that has been carried out so far.

¹⁹ Nur Rohim Yunus, 'Pangkatan Perwira Aktif Polisi Sebagai Penjabat Kepala Daerah', *'ADALAH*, 2.6 (2018) <<https://doi.org/10.15408/adalah.v2i6.8229>>.



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