

Special Electoral Tribunal as A Solution for Fairness and Fulfillment of Human Rights of The Candidates for Membership of The House of Representatives and Regional People's Representatives Assembly

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Abstract--Issues regarding election (in this case, the election for the House of Representatives and Regional People's Representative Assembly) is divided to violations against the election, disputes over election processes, and disputes over election result. The author's purpose in making this research is to review the immediate need to form a special tribunal so that every dispute connected to the election can be promptly settled. This research used the juridical normative method that reviewed several secondary legal materials, as well as books and journals related to disputes over election result. Based on the result of the research, the forming of special electoral tribunals is needed to settle election-related disputes. The special tribunal should be ad hoc in nature. The electoral disputes, especially, the disputes over election results that require legal standings in their petitioning. The disputes are judged by several parties depending on the kind of dispute being judged. It is required to form a new institution specialized in settling electoral disputed so that the implementation can be more focused and put forward fairness, independency and protection of human rights.

Keywords- *rights; election result; election court.*

I. INTRODUCTION

Indonesia is a democratic state. "The Democratic Celebration" or Election is something awaited by Indonesians who wished to make themselves candidates for state leadership. This democratic festivity held in Indonesia are done directly in which the organizing is by the people, from the people, and for the people. Although the party is held once every five years, the preparation done by the candidates has been done a year or even

more before the execution of the election. Large financial and mental preparation is indeed accounted for by each candidate, especially those who run for membership in the House of Representatives or Regional People's Representative Assembly. From the preparations made, it is no wonder that each candidate desires victory in the election and earn a seat in the legislative or regional leadership that they look forward for the election result. Disputes in an election can happen in the form of violation against the election (regarding ethical and/or administrative codes), election process, and election result. This study will focus on dispute over election result for membership in the House of Representatives or Regional People's Representative Assembly, but will not disregard the discussion on other kinds of electoral dispute.

The first dispute is about the ethical code. Ethical code is a norm and principle accepted by a certain group as a basis of conduct. Dispute regarding ethical code is linked with violation of ethical code of the Electoral Committee, the Province Electoral Committee, the County/City Electoral Committee, the Election Supervising Board, the Province Electoral Supervising Board, and/or the County/City Electoral Supervising Board. There is also the electoral administrative violation which can be in the form of violation against protocols, procedures, or mechanism related to election organizing administration in every step of the election (Chapter 460 Law number & of 2017 regarding Election). There are also violations against other regulating law which are not an

electoral violation, electoral dispute, and electoral crime. Furthermore, the dispute over electoral process is settle through the State Administration Court. The decision of the State Administration Court is final and binding, but there are exceptions such as verification of political party participation in an election, and others. The dispute over election result may be in the form of vote letter do not match with the number of inputted vote, diverted vote letter, and others. Disputes connected to election results is the most difficult due to petitions for settlement of the dispute is submitted to the Constitutional Court which requires legal standing where the petition needs to be signed by the General Leader and Secretary General of the corresponding Political Party as a form of approval. The approval from the General Leader and Secretary General may reflect unfairness if the candidate does not have a closeness or there are certain political considerations. Petitions regarding those disputes are submitted to the Constitutional Court. The Constitutional Court is one of the institutions running the judicial power aside from the Supreme Court and Judicial Commission. The authority of the Constitutional Court is regulated in Chapter 24C article (1) of 1945 Constitution, which is to judge on the first and final level whose decision is final to test laws against the Constitutional, settle a dispute of authority between state institution whose authority is given by the Constitution, decide the dissolution of a political party and to settle dispute regarding election result.

The regulation regarding the due time of petitioning for cancelling the election result to the Constitution Court is 3 times 24 hours since the announcement by the Election Committee as regulated in Chapter 474 article (1) of Law number 7 of 2017 regarding the Election jo. Chapter 6 and chapter 8 of Constitutional Court Regulation number 2 of 2018 regarding Protocols in Disputes over Result of Election for the House of Representatives and Regional People's Representative Assembly. Furthermore, there are other requirements if an individual candidate for the House of Representative and Regional People's Representative Assembly is aiming to submit a petition to cancel an election result as regulated in Chapter 3 Article (1) letter b jo. Chapter 7 article (2) of Constitutional Court Regulation number 2 of 2018 which states that individual candidate for the House of

Representatives and Regional People's Representative Assembly that wish to file a petition to cancel an Election result requires written approval from (petition signed by) General Leader and Secretary General or other equivalent term of the corresponding political party.

The written approval acts the petitioner's legal standing (Chapter 9 article (1) letter b item 2 of Constitutional Court Regulation Number 2 of 2018). What made it difficult and lessen the sense of fairness is when the candidate who wished to submit a petition did not earn approvals from the General Leader or the Secretary General. The factor of closeness between the candidate and the General Leader and the Secretary General heavily influenced whether or not the petitioning to the Constitutional Court to dispute the election result will be approved. Such case is not in accordance to Chapter 28D article (3) of 1945 Constitution which states "every citizen has the right for equal chance in government." Not granting said approval can be included into an internal party dispute (political party dispute) and the settlement is through the Political Party Court or other equal terms created by the political party. If settlement is not reached in the political party court, the next dispute settling can be done through district court and further issuing cassation to the Supreme Court. Based on the elaboration above, the party which can be involved in the settlement of a dispute over election result is the Election Committee, political party, individual candidate for membership in the House of Representatives, and Regional People's Representative Assembly in a political party, the Constitutional Court, the Political Party Court, District Court, and the Supreme Court.

The author suggested the immediate need for special tribunal so that all disputes regarding the election can be settled, whether it is a dispute regarding electoral violation, election process, and election result can be judged in the tribunal. The idea of forming this special tribunal is not new. Several articles have discussed regarding the urgency or need of a special electoral tribunal, however, as far as the author knows, the researches discuss special tribunals for disputes regarding election result for regional leaderships. Settlement of disputes regarding election result is expected to be an independent procedure and centralised in one specialized tribunal, which is the special electoral tribunal. Fairness, beneficially, and legal assurance

is difficult to realize simultaneously, however, it does not mean one element can be eliminated. The legal assurance element has been fulfilled with the existence of rules that regulates electoral issues, such as the Law of Election, however, the fairness element has not been entirely fulfilled. The author hoped that with the special electoral tribunal, the rights of candidates for membership in the House of Representatives and/or Regional People's Representative Assembly can be fulfilled in the case of having the same chance in government by settling electoral disputes fairly and more independently. The elements that come from the political party can be omitted in the dispute settling since the political party is saturated with alignments and interests between on side and the other. A true justice should be free from elements that could potentially diminish the sense of fairness and eventually the unfulfilled of someone's rights.

II. PROBLEM

According to the aforementioned background, the problem this research is trying to put forward is how fairness and the fulfilment of human rights in the government can be achieved in the case of electoral disputes?

III. RESEARCH METHOD

The research done by the author is a juridical normative legal research. The approach used in this research is the statute approach and the conceptual approach. The legal law used by the author are the 1945 Constitution of the Republic of Indonesia, Law number 7 of 2017 regarding the Election and the Constitutional Court Regulation Number 2 of 2018 regarding Protocols in Disputes over Result of Election for the House of Representatives and Regional People's Representative Assembly. This research used secondary data, which comprised of: First, primary legal material, which are legal laws the author used in the statute approach that includes the 1945 Constitution of the Republic of Indonesia, Law number 7 of 2017 regarding the Election and the Constitutional Court Regulation Number 2 of 2018 regarding Protocols in Disputes over Result of Election for the House of Representatives and Regional People's Representative Assembly, Law number 2 of 2011 regarding amendments over Law

number 2 of 2008 regarding Political Parties. Second, secondary legal material, which are journals, books, and documents linked to issued studied by the author. Third, tertiary legal material, which is the online Indonesian Great Dictionary (KBBI).

IV. DISCUSSION

Institution in an Election

The Election does not solely comprise of the General Election Committee. There is other institution involved which are:

1. Political Party
2. The General Election Committee according to Chapter 1 item 8 of Law of Election is an election running institution that is national, permanent and independent in nature in terms of executing the election.
3. Election Supervision Institution according to Chapter 1 item 17 of Law of Election is an election running institution that supervise the execution of the election across the territory of the Republic of Indonesia.
4. Honorary Election Boards according to Chapter 2 item 24 of Law of Election is an institution with the duty of handling violations of ethical code of election execution.
5. State Administration High Court
6. The Supreme Court
7. The Constitutional Court

Settlement of Electoral Disputes

Periods close to an election is a sensitive time for many people because a lot of people take sides in supporting the candidates of their choice. Using dishonest and covert means to succeed in getting a chair in the government isn't rare. With many things have been sacrificed such as time, energy, and especially a large amount of funds, some candidates even decided to bring down other candidates. Not only the candidates must compete with those from other political parties, they also must compete against candidates from the same political party.

Disputes linked to the election aren't restricted to just about the election result. Election running parties connected to the existence of a dispute or settlement of a dispute are the Election Committee (divided to Election Committee, Province Election Committee, County/City Election

Committee), Election Supervising Board (divided to Election Supervising Board, Province Election Supervising Board, and County/City Election Supervising Board), Election Supervising Committee (divided to Sub-District Election Supervising Committee, Village District Election Supervising Committee, and Overseas Election Supervising Committee). In general, the following are the disputes connected to an election:

1. Dispute over electoral violation

Disputes over electoral violation are divided to two kinds of dispute which are:

a. Disputes regarding violation of electoral ethical code.

A violation of electoral ethical code is a violation against the ethics of election executor based on the oath taken before given the duty as an election executor (Chapter 456 Law of Election). The regulation regarding violation of electoral ethical code is written in Chapter 454—459 Law of Election, the violation may come from Election Supervising Board's discovery or a direct report to the Election Supervising Board or the Election Supervising Committee by the people who own the right to vote, participants of the election, and election watchers. The suspecting of a violation of ethical code done by the Election Committee or the Election Supervising Board is then passed on to the Honorary Election Boards. The Board's decision is final and binding in nature.

b. Disputes regarding administrative violations.

Administrative violations in an election encompasses violation towards protocols, procedures, or mechanisms related to the administration in the execution of an election in every sequence of the election's implementation (chapter 460 Law of Election). The regulation regarding administrative violations is written in Chapter 460-465 Law of Election. The dispute regarding administrative violations is settled by the Election Supervising Board and the decision will be passed on to the Election Committee. The Election Committee is

obligated to follow-up the decision by issuing an Election Committee Decree which may be in the form of sanction. For candidates aiming for membership in the House of Representatives, Regional House of Representatives and the Regional People's Representative Assembly in Province and County/City level, as well as paired candidate, a legal effort against the Election Committee's decision can be submitted to the Supreme Court. The Supreme Court's decision is final and binding. If the Election Committee does not respond to the Election Supervising Board's decision by making it a decree, the Election Supervising Board may report the Election Committee to the Honorary Election Boards.

c. The violation against other regulating laws outside electoral violation, electoral disputes and not an electoral crime. The violations in this category is processed by the Election Supervising Board and Election Supervising Committee and then passed on to the corresponding institution or party (Chapter 455 article (3) letter c)

2. Disputes regarding election process

Disputes regarding election process encompasses disputes that occurs among election participants and disputes that occurs between a participant and the election executor due to the issue of Election Committee decree (Chapter 466 Law of Election). The regulation of disputes regarding election process is written in Chapter 466-472 Law of Election. The dispute regarding election process started from the Election Supervision Board who receive petition for settlement of electoral dispute from a candidate and/or election participant due to an issue of Election Committee decree. The Election Supervising Board may settle the dispute through mediation or deliberative consensus and if an agreement cannot be achieved from the mediation or consensus, the Election Supervising Board will settle it through adjudication the Election Supervising Board is the one investigating and decide the settlement of the dispute and its decision is final and binding. However, a decision by the

Election Supervising Board may not be final and binding in the case of:

- a. Verification of Political Party participating in an election;
- b. The establishment of list of fixed candidates for the House of Representatives, Regional House of Representatives, Province level Regional People's Representative Assembly, County/City level Regional People's Representative Assembly; and
- c. The establishing of a paired candidate.

For the three aforementioned cases, a legal effort can be made against the Election Supervising Board's decision by submitting a petition to the State Administration Court. Parties involved may come from the House of Representatives, Regional House of Representatives, Province Regional People's Representative Assembly, County/City Regional People's Representative Assembly, The Political Party of the candidate or proposed candidate against the Election Committee. The State Administration Court's verdict is final and binding. The Election Committee must follow up on said verdict.

3. Dispute over election result

Dispute over election result includes disputes between the Election Committee and the election participant over the confirmation of electoral vote result on a national scale that can influence the granting of seats to the participants (for the House of Representative, the Regional House of Representatives, and Regional People's Representative Assembly) or influence the confirmation of election result (for choosing the President and Vice President) (Chapter 473 Law of Election). The handling of dispute over election result is regulated in Chapter 473-475 Law of Election jo. Constitutional Court Regulation number 2 of 2018. The petitioners in this kind of dispute are the members of the House of Representative, the Regional House of Representatives, and Regional People's Representative Assembly in a national level, participants of an election for membership in the House of Representative, the Regional House of Representatives, and Regional People's Representative Assembly, whether it is the political party of the

participants for membership in the House of Representative and Regional People's Representative Assembly, individual candidates for membership in the House of Representative and Regional People's Representative Assembly who come from the same political party, local political party participating in an election and individual candidate for the House of Representatives of Aceh and the House of Representatives of Aceh County.

Petition regarding dispute over election result is submitted to the Constitutional Court at the latest 3x24 after the confirmation of vote accumulation is announced by the Election Committee (the Election Committee as the petitioned). If the documents are insufficient, the petitioner may fix and complete the petition within 3x24 hours since the petition is received by the Constitutional Court. The most important document to be issued to the Constitutional Court is the petitioner's legal standing that contains explanation as the participating political party and candidate for membership of the House of Representative and Regional People's Representative Assembly who participate in the election as a written approval from the General Leader and Secretary General or other equivalent title in the Political Party (Chapter 3 article (1) letter b jo. Chapter 9 article (1) letter b Number 2 Constitutional Court Regulation number 2 of 2018).

The requirement for this legal standing is seen by the author to be the most difficult due to its political nature. If a general leader and secretary general do not grant an approval, the petitioner cannot issue a dispute over election result to the Constitutional Court. The factor of close relation between the candidate and the general leader as well as the secretary general highly influence whether a petition is approved for submission to the Constitutional Court for dispute over election result. The denial of approval is considered an internal issue of the party (political party dispute) and the settlement is through the political party court or other terms formed by the political party. The settlement through the political party court should be done 60 (sixty) days at the latest (Chapter 32 Law number 2 of 2011 regarding

Amendment over Law number 2 of 2008 regarding Political Party, hereafter shortened as Law number 2 of 2011). If a settlement cannot be achieved in a political party court, the settlement can be done through the district court and further submission of cassation to the Supreme Court (Chapter 33 Law number 2 of 2011). Time factor becomes the issue due to the settling in the political party court, not to mention if it is continued to the District Court and Supreme Court, will not be done in the total time of 6x24 hours.

The aforementioned political factor that is the closeness with the general leader and secretary general as well as the time limit explained above may diminish the sense of fairness and does not conform to Chapter 28D article (3) of 1945 Constitution because the

unfulfilled right to have equal chance in government by denial of approval by the general leader and secretary general of the political party, even though in terms of protecting the citizens' political rights, a political party is to honour the owner of rights as written in the instrument of human rights.[1] The author gave opinion that in the case of settling disputes within a political party related to an election, a special electoral ad hoc tribunal is needed to be form specifically during election periods.

From the elaboration above, a chart of dispute that can occur during election along with the involved institutions during the settlement can be made as shown below:

Figure 1 Dispute During the Election

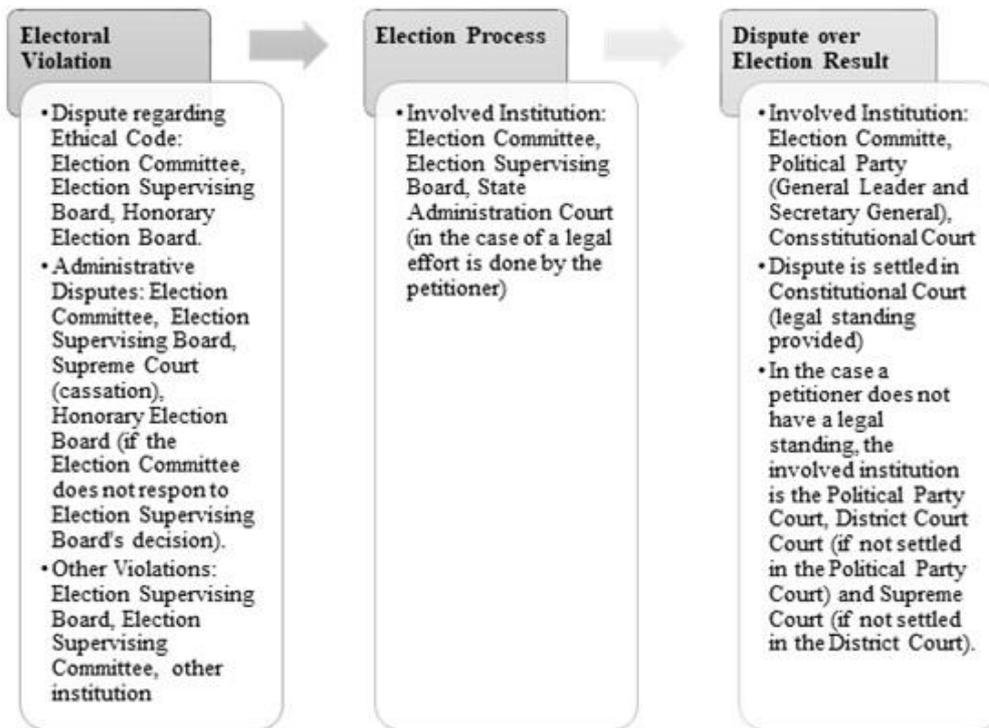


Figure 2 Settling Dispute over Election Result



Special Electoral Tribunal

The implementation of constitutionalism should bring about a government with the following traits:

1. Public power can only be legitimized according to the constitution;
2. Democracy (through representatives) should be used based on the principle of “universal and equal suffrage” together with appointing executive official through democratic election;
3. Separation or division of power followed by limits of authority of each holder of power;
4. Independent judicial power which can enforce law and justice to both the people and the ruler;
5. There exists a control system over military and police forces to enforce the law and respect the people’s rights; and
6. There exists a guarantee of protection over human rights. [1]

Every person has the right to have equal chance in government. That statement is regulated in Chapter 28D Article (3) of 1945 Constitution. From that chapter and the aforementioned constitutionalism traits, especially point 1, 2, 4, and 6, the author opined that fairness and the fulfilment of right to have equal chance in government in terms of the disputes over electoral results should be assisted with forming a special electoral tribunal. The idea of forming special electoral tribunal has been conceived for a while, but not yet realized. The settlement of violation against election and election process does not have difficult requirements as seen in the requirements to settle dispute over election result. The existence of a special tribunal can make the settlement of electoral violations, disputes over election process and disputes over election result more focused. In the matter of settlement process, the judging parties, requirements, and other things, there is nothing that needs to be changed for settling violations and disputes over election process, only the settling of electoral dispute is diverted to the

special electoral tribunal. In other words, the function of handling violations and dispute settling is given to the special electoral tribunal institution to settle problems related to election. [3]

The author argued that this special electoral tribunal is to diminish political dominations in terms of submitting petition to settle dispute over election result by not making the legal standing as one of the requirements. The requirements to submit a petition to settle dispute over election result is regulated in Chapter 9 Constitutional Court Regulation number 2 of 2018. The author agrees with said requirements, but also argued that the requirements written in Chapter 9 article (1) letter b number 2 which states about legal standing needs to be reconsidered as an additional requirement. With no intention of disrespecting the Constitutional Court, the existence of this special electoral tribunal would also make the settlement of disputes over election result possible without going through the Constitutional Court and the author argued that cases related to election needs to be settle by a special tribunal institution formed ad hoc.

Parties that can be involved in a settlement of a dispute over election result is the Election Committee, political party, individual candidate for membership in the House of Representatives and the Regional People’s Representative Assembly from a political party, the Constitutional Court, The Political Party Court, District Court, and the Supreme Court. Elements that came from the political party can be omitted in the settlement since the political party is full of alignments and interests between one side and the other. The tribunal should truly free from elements that could potentially diminish the sense of fairness and leads to the denial of human right. Procedural law and evidence tool in the settlement of dispute over election result may be adjusted with the procedural law written in Constitutional Court Regulation Number 2 of 2018.

The author argued that the special tribunal should be judged by 3 (three) parties, two from the

Election Supervising Board, and the other one from a judge chosen specifically from the district court. The author agreed with the tendency to make the Election Supervising Board the institution capable of making a decision over a case and become a quasi-judicial institution as well as transform in to an electoral tribunal. Parties from the Election Supervising Board is to be specifically prepared and overlapped with the duty of prevention and supervision. [4]

The Election Committee is not included in the judging parties since from the disputes as regulated in the Law of Election, the Election Committee is the party who is being reported, or petitioned or the one making the decision such as the decision made by the Election Supervising Board or State Administrative court, and the Election Supervising Board as the judging party (for dispute over administrative violations and election process). The author likened the Election Committee and the Election Supervising Board to a limited corporation. The organs of a limited corporation are the stockholders, the board of directors, and the commissioners.

any influence or independency) in executing the election. [6]

3. The Stockholders is the people of Indonesia. The board of directors and the commissioners must be responsible over their work in front of the stock holder, and it is the same in the case of election. The Election Committee and Election Supervising Board must be responsible over their duty and authority in front of the People of Indonesia. If a violation or error is done by the Election Committee and/or Election Supervising Board, said violation must be accounted for, unless the violation and error can be proven not done by those parties.

The Board of Directors and the Commissioner must run the limited corporation without having a clash of interest with other parties that can harm the company. Likewise, in the execution of election where the Election Committee and the Election Supervising Board must be free of clash of interest and thus must be an independent party. The party that can represent the people of Indonesia in settling a dispute over election result is the judge from District Court chosen by the Supreme

Figure 3 Settlement of Electoral Dispute



1. The commissioner in an election is the Election Supervising Board. It has plenty of task which comprised of supervising the preparation for executing the election, supervising the steps of executing the election, prevent the occurrence of an neutral civil state officer, prevents money politics, supervise the implementation of verdicts, and supervise the implementation of Election Committee's regulation. [5]
2. The Board of Directors is the Election Committee. The Election Committee reflects the nature of national (its work territory encompasses the entirety of Indonesia), permanent (the institution that continuously undertake its duty), and independent (free from

Fairness, beneficially, and legal assurance is difficult to realize simultaneously, however, it does

Court. The District court also take part in settling internal dispute within political parties when a settlement is not achieved in the Political Party Court, thus the party from the District Court may be involved in making decisions regarding disputes over election result by choosing a career judge as the party who also make verdicts in the special electoral tribunal. The judicial institution has a role not only to correct the Election Committee's mistakes in deciding but also to rehabilitate the loss suffered by the citizen. [7]

not mean one element can be eliminated. Among the three elements, there is a need for priority. The

settling of electoral dispute, whether it is from the organizing of the election, the process of election, and the election result has been regulation in the Law of Election jo. Constitutional Court number 2 of 2018 jo. Law Number 2 of 2011. The element of legal assurance has been fulfilled by the three regulation regarding the dispute settling, however the element of fairness has not been completely fulfilled. The tribunal which specifically handles electoral disputes is needed so that fairness can be realized by lessening the factor which can influence the fulfilment of rights or factors which can affect independency.

The well-established election can also be a form of good public service which is the execution of state's authority in giving service that is the best, with quality and clear procedure as well as rapidly executed to the society. The public service is inseparable from the general principles of a good government which comprised of legal assurance, benefit, neutrality, precision, no abuse of authority, transparency, general interest, and good service. [8] The general principle of good government is the legal (written) and/or ethical (unwritten) norm that specifically applied in the state administration environment. [9] The general principle of good government functions as a medium for preventive legal protection, one of which is the right to be heard.[10] The right to be heard is one of the implementations of putting forward justice, independency, and protection of human rights if an electoral dispute occurs.

V. CONCLUSION

Disputes in an election is divided into 3 (three) categories, which are the electoral violation, disputes over election process, and disputes over election result. For the three electoral disputes, a special electoral tribunal is needed with the function to handle violations and settling disputes to solve problems related to elections. For the petitioning for settlement of a dispute over election result, a legal standing is needed as one of the requirements to submit a petition for settling electoral dispute to the Constitutional court. This legal standing can diminish the sense of fairness and cause the unfulfilled of the petitioner's (candidate for membership in The House of Representatives or Regional People's Representative Assembly) basic rights since the petitioning requires approval from the General Leader and Secretary General of the

Political party. The approval from the General Leader and Secretary General is too political in nature and may cause the candidate not capable of defending his/her right of having votes during election due to the unsatisfied requirement in petitioning to the Constitutional Court. The forming of a special electoral tribunal is also a solution to settle disputes over election result and does not require legal standing in submitting a petition for settling dispute over election result. The purpose to be achieved in forming this special electoral tribunal is justice, the fulfilment of human rights within the government, and independency.

ACKNOWLEDGEMENT

The author would like to thank all parties involved in the process and completion of this research: God, Family, Civitas Academia of Maranatha Christian University Faculty of Law, and other parties that the author is incapable of mentioning in detail.

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