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Comprehensive review of the deferral of the final and binding meaning of the decision of the ethics council of the election organizer

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Abstract

The purpose of this study is to know and analyze the basic regulations and ideas regarding the final and binding nature of the Ethics Council of Election Organizers and the existence of the final and binding nature of the decisions of the Ethics Council of Election Organizers after the issuance of the Constitutional Court's decision in order to realize elections with integrity in Indonesia. This article uses normative legal research with statutory, analytical, and conceptual approaches. The findings show that the basic regulations and conceptions regarding the final and binding nature of the Election Organizers Ethics Council are those of a state auxiliary body. The final and binding nature makes the existence of the Board of Ethics of Election Organizers more of an auxiliary body to supervise election officials. The Constitutional Court in its Decision No. 32 / PUU-XIX / 2021 has stated that the Election Organizers Ethics Council is not a judicial body that exercises judicial powers within the meaning of Article 24 paragraph (1) of the Indonesian Constitution of 1945. Therefore, the Board of Ethics of Election Organizers is not suitable to be considered as another body that exercises judicial powers because the General Election Commission and the Election Supervisory Board are election organizers that have an equal position. In order to avoid legal uncertainty with regard to these provisions, the Court must reaffirm that the final and binding decision of the Ethics Council of election organizers cannot be equated with the final and binding decision of the judiciary in general.

Keywords: Final and binding, election organizer ethics council, decision

1. Introduction

The rationale contained in the 1945 Constitution of the Republic of Indonesia (hereinafter Indonesian Constitution), the State of the Republic of Indonesia is a Unitary State based on people's sovereignty as stated in Article 1 paragraph 1 and paragraph 2 of the Indonesian Constitution. "To implement the principle of popular sovereignty led by wisdom in consultation and representation, it is necessary to establish consultative institutions and people's representative institutions whose members are elected through elections that are held democratically and transparently or openly. General elections are a means of democracy to realize a state government system that is sovereign of the people as mandated by the 1945 Indonesian Constitution ^[1]. Democracy places humans as the owners of sovereignty which is then known as the principle of popular sovereignty. The state government formed through these elections is that which comes from the people, is run in accordance with the will of the people and is devoted to the welfare of the people." A government formed through elections will have strong legitimacy from the people.

One of "the main pillars in every democratic system is the mechanism of channeling people's opinions periodically through general elections held periodically. In Indonesia there are three institutions involved in organizing general elections, namely General Elections Commission, Election Supervisory Agency and the Election Organizer Ethics Council. The General Elections Commission functions as an institution that coordinates, organizes, controls and monitors all stages of elections, collects and systematizes election materials and data and leads the stages of election activities." In the meantime, the Electoral Supervisory Authority has the task of monitoring the conduct of elections in order to prevent and punish violations so that democratic elections can be held. The Election Organizers' Ethics Council has the function of an institution that deals with violations of the Election Organizers' Code of Ethics.

Election integrity is still a serious problem in Indonesia which is influenced by two important factors, namely the integrity of election organizers and the integrity of election

participants. This can be seen from the process of conducting elections that are not based on the principles of elections (honest, democratic, and fair). As an effort to organize the integrity of election organizers, the birth of a code of ethics and ethical institutions as election organizers absolutely must exist in maintaining the integrity, independence, and credibility of election organizers.

The Election Organizer Ethics Council officially becomes a state institution in the realm of enforcing election ethics, this is in accordance with the order of Law Number 15 of 2011 concerning Election Organizers which states that Election Organizer Ethics Council is included in the function of organizing elections. Election Organizer Ethics Council as a new institution that complements the institution of election organizers is a quasi-judicial institution, especially in the field of ethics for election organizers. Election Organizer Ethics Council was formed to maintain independence, credibility, integrity, and uphold the code of ethics for election organizers^[2]. This is in accordance with the views of the Institute for Democracy and Electoral Assistance (IDEA) which initiated 7 principles to ensure the legitimacy of election organizers, namely: Independent, impartiality, integrity, transparency. Efficiency, professionalism and service-mindedness^[3].

The Election Organizer Ethics Council as an election institution has the duties and authorities as stated in Article 159 of Law No. 7 of 2017 concerning General Elections which states the duty of the Election Organizer Ethics Council to receive complaints of ethical violations and investigate, verify, and examine these complaints. Election Organizer Ethics Council is also authorized to summon the election organizer complained by the complainant, summon complainants, witnesses or other parties to ask for explanations, sanction the complainant if found guilty, and give a verdict on the complaint. As mandated by Article 160 of Indonesian Law Regulation Number 7 of 2017, Election Organizer Ethics Council is given the authority to make regulations, determine their decisions, and has the right to make Election Organizer Ethics Council regulations that can regulate the process of proceedings and regulations related to the election code of ethics. The rationale for the establishment of Election Organizer Ethics Council is to develop new ideas about constitutional ethics in addition to constitutional law, as the latest minds imagine new ideas in the field of law and politics. Election Organizer Ethics Council is one of the embryos of an independent state auxiliary agency, whose presence is an effect of modern democratic practice^[4]. The Election Organizer Ethics Council is independent with the authority to decide, which in its decision is final and binding.

The final and binding "nature of Election Organizer Ethics Council rulings has resulted in the absence of a mechanism for direct correction of decisions that are considered juridically flawed. Ethical court decisions that apply continuously as an implication of the final and binding phrase in Article 458 paragraph (13) of Law Number 7 of 2017 and not legal court decisions. Corrections by the State Administration Court are limited to follow-up decisions on Election Organizer Ethics Council decisions and do not invalidate Election Organizer Ethics Council decisions. The legal position of the Petitioners as General Elections Commission members who have been sanctioned by juridically flawed Election Organizer Ethics Council rulings cannot be restored despite the decision of the judiciary."

The decision of the Constitutional Court is essentially a constitutional interpretation of the Constitutional Court on the powers of the Ethics Council of the Election Organizer in general, in particular on the phrase "final and binding" attached to the Ethics Council of the Election Organizer under Article 458 paragraph (13) of Law No. 7 of 2017. Decision No. 31/PUU-XI/2013 of the Constitutional Court of Pada states that the decisions of the Ethics Council of the Election Organizer, which are final and binding pursuant to Article 112 paragraph (12) of Law No. 15/2011, may give rise to legal uncertainty as to whether the "final and binding" referred to in the law is the same as the final and binding decision of the judicial authority. To avoid legal uncertainty over the existence of these provisions, the Court needs to affirm that the final and binding decision of the Election Organizer Ethics Council cannot be equated with the final and binding decision of the judiciary in general, because the Election Organizer Ethics Council is an internal instrument of the Election Administration authorized by law. The final and binding nature of Election Organizer Ethics Council decisions must be interpreted as final and binding for the President, General Elections Commission, Regional General Elections Commission, and Election Supervisory Agency is a concrete, individual and final decision of State Administration officials, which can be the object of a lawsuit in the TUN court. Therefore in this case it is important to conduct further research related to how the position of the Election Organizer Ethics Council and its function should be in the context of organizing and refreshing elections according to the 1945 Indonesia Constitution."

This research focuses on two problems, first how is the basic regulation and conception related to the final and binding phrase of the Election Organizer Ethics Council in order to realize elections with integrity in Indonesia. Second, how is the existence of the final and binding phrase of the Election Organizer Ethics Council Decision after the issuance of the Constitutional Court Decision? The purpose of this study is to know and analyze the basic arrangements and conceptions related to the final and binding phrase of the Election Organizer Ethics Council and to know and analyze the existence of the final and binding phrase of Election Organizer Ethics Council Decisions after the issuance of the Constitutional Court Decision in order to realize elections with integrity in Indonesia.

Although there have been several previous studies on similar topics; this research can be said to be a can be said original as studies conducted by: (1) Muhammad Nur Ramadhan, published on a journal in 2022 entitled "Eksistensi Gugatan Tata Usaha Negara Terhadap Keputusan Tindak Lanjut Putusan Dewan Kehormatan Penyelenggara Pemilihan Umum" this research focuses on the follow-up of Election Organizer Ethics Council decisions challenged to the state administrative court^[5]. (2) Syafrizal Mughni Mada, Firdaus dan Mirdedi, a published on a journal in 2022 entitled "The Problems of Supervision of Follow-Up on Bawaslu Decisions and DKPP Decisions in the Election Law Enforcement System" This study focuses on legal certainty of the implementation of the follow-up to the Bawaslu decision and the Election Organizer Ethics Council decision in the law enforcement system and the form and scope of Election Supervisory Agency 's supervision of the implementation of the follow-up of the Election Supervisory Agency decision and the

Election Organizer Ethics Council decision in the election law enforcement system according to Law Number 7 of 2017 concerning General Elections ^[6]. Meanwhile, this study focuses on basic arrangements and conceptions related to the final and binding nature of the Election Organizer Ethics Council and the existence of the final and binding nature of Election Organizer Ethics Council Decisions after the issuance of the Constitutional Court Decision in order to realize elections with integrity in Indonesia.

2. Research Methods

The "research method used in this research is normative legal research, where the approaches used are statute as well as analytical and conceptual approach. Normative legal research is research by reviewing documents by collecting data with the literature study method and collecting journal materials with a description method by looking at problems that are happening in society. The decision of the Constitutional Court is essentially a constitutional interpretation of the Constitutional Court on the powers of the Ethics Council of the Electoral Organizer in general, in particular on the phrase "final and binding" attributed to the Ethics Council of the Electoral Organizer under Article 458 paragraph (13) of Law No. 7 of 2017. Decision No. 31/PUU-XI/2013 of the Constitutional Court of Pada states that the decisions of the Ethics Council of the Election Organizer, which are final and binding under Article 112 paragraph (12) of Law No. 15/2011, may give rise to legal uncertainty as to whether the "final and binding" referred to in the law is the same as the final and binding decision of the judicial authority. The data used as material for this research is collected through literature studies, namely collecting various information and legal materials that are included in primary, secondary, and tertiary legal materials and then grouped, recorded, cited, summarized, and reviewed as needed."

3. Result and Discussion

3.1. Basic Arrangements and Conceptions Related to the Final and Binding Phrase of Election Organizer Ethics Council

The Election Organizer Ethics Council was officially established on June 12, 2012, after the revision of Law Number 22 of 2007 to Law No. 15 of 2011. The changes to the law indirectly transformed the organization institution with stronger duties, functions, and authorities. The existence of Election Organizer Ethics Council is inseparable from the spirit of reform, and modern democratic practices that have given birth to many independent state institutions. However, in the Indonesian context, the birth of independent state institutions without a clear blueprint is carried out, so it seems that their formation was carried out carelessly, which often causes overlapping authority or authority disputes between institutions.

The Ethics Council of Election Organizers as an institution of state auxiliary bodies that does not position itself as one of the three institutions of power according to the trias politica in the Indonesian constitutional system in the exercise of its functions is inseparable from the domino effect of modern democratic practices under the rule of law. The institution was born to oversee the democratic process, in particular to create an election process with integrity and to maintain the neutrality of election organizers. Institutionally, it is not a novelty in the Indonesian

constitutional system, but the incarnation of the previous organization whose birth is based on Law No. 22 of 2007 on the Conduct of Elections. The duties and powers of the Election Organizers Ethics Council relate to the individual election officials, both the General Election Commission and the Election Supervisory Board. At the tripartite meeting, the three institutions not only developed common understandings in the form of memoranda of understanding to enforce the Code of Ethics for Election Organizers, but also drafted joint regulations, namely Regulations Nos. 13, 11 and 1 of 2012 on the Code of Ethics for Election Organizers and Regulation No. 2 of 2012 on the Code of Ethics and Code of Conduct for General Election Organizers ^[8].

The existence of the Election Organizer Ethics Council is a supporting organ to supervise the election organizing apparatus. However, its institutional design is problematic because it is "in between", whether as an organ of judicial power that carries out judicial functions or as an independent state institution to support the work of conducting elections. The Election Organizer Ethics Council institution which is in "between" is a historical error in the institutional design of the Indonesian constitution. Therefore that the impact on the duties, functions, and authorities it carries out is at a crossroads "between" carrying out the quasi-governmental functions of the executive, or the quasi-judicial power of the judiciary. Election Organizer Ethics Council as an institution authorized to adjudicate ethical violations committed by election organizers through judicial mechanisms so that it is often referred to as a quasi-court institution, but actually this is not the case if from its authority where Election Organizer Ethics Council only adjudicates the code of ethics for election organizers. Unlike the General Elections Commission and Election Supervisory Agency, which have an active function in supervising the Election Organizer Ethics Council, in this case it plays a passive role and only carries out its function if there are complaints of alleged violations of the code of ethics complained by election organizers ^[9].

The Election Organizer Ethics Council applies the law, everything that has been written in the laws and regulations (formal and material legality principles), especially the Election Organizer Ethics Council Regulations, to the facts submitted to the Election Organizer institution, including the meaning that the Election Organizer Ethics Council applies administrative policy or a product of a formulative policy on the facts presented to it. The purpose of the framer of the Law is to make the Election Organizer Ethics Council an independent institution, which is free from the influence, will, or control of the executive branch of power and is not responsible to that branch of power, therefore the Election Organizer Ethics Council Decision has a final and binding nature, therefore that it does not allow further efforts to file objections or appeals. This is based on Article 112 of Law Number 15 of 2011 concerning Election Administration. The provisions of Article 112 paragraph (12) have been strengthened in Article 34 of the Regulation of the Honorary Board of Election Organizers Number 2 of 2012 concerning Guidelines for Organizing Elections Code of Ethics, however the regulation has been revoked on December 31, 2013 with the existence of Election Organizer Ethics Council Regulation Number 1 of 2013 concerning Guidelines for Organizing Elections Code of Ethics. The phrase Final and Binding in the Election Organizer Ethics

Council decision is no later than 7 (seven) days after the decision is read while the *bawaslu* has the duty to supervise the implementation of the Election Organizer Ethics Council Decision.

The last sentence in this case is that there is no further appeal after the Ethics board of the election organizer has determined and announced its decision in a plenary session open to the public. Binding character is understood as the emergence of a compulsory character, so that all institutions administering state power, including judicial bodies, are bound and obliged to implement the decision of the Ethics Council of the election organizer. The decision of the institution of the Council of Ethics has a final and binding character and should be implemented in order to preserve the dignity and prestige of any noble profession (*officium nobile*). The definitive and binding character makes the existence of the Board of Ethics of Electoral Organizers more of a supportive body to supervise the electoral organization apparatus, which is classified in the category of quasi-judicial courts or so-called quasi-judicial functions, where it can also be interpreted as the Board of Ethics of Electoral Organizers applying an administrative policy or a product of a formulaic policy to the facts presented to it. The presence of the Board of Election Organizers Ethics and the nature of its decision, which is “final and binding,” means that there is no further appeal after the Board of Election Organizers Ethics has determined and announced its decision in a plenary session open to the public. The meaning of ‘binding’ is the emergence of coercive character, so that all institutions that administer state power, including judicial bodies, are bound and obliged to implement the decisions of the Ethics Council of Election Organizers. This is in line with the principles of the IDEA, namely independence, impartiality, integrity, transparency, efficiency, professionalism and service orientation. Because the seven principles conveyed by IDEA can realize electoral justice and a democratic culture of integrity and credibility in organizing elections in Indonesia. A final and binding decision will provide certainty and comfort for the implementation of elections that should be clean from fraudulent practices.

3.2. The Existence of Final and Binding Election Organizer Ethics Council Decisions After the Constitutional Court Decision

The decision of the Constitutional Court is final and binding. Article 24 paragraph (2) of the 1945 Indonesian Constitution states: “The judicial power shall be exercised by a Supreme Court and the subordinate judicial bodies of the General Court, the Religious Court, the Military Court, the Administrative Court and a Constitutional Court.” This provision is a form of recognition and legitimization of the existence of the Constitutional Court. The Constitutional Court is defined as independent, separate and outside the Supreme Court. Both are executive bodies of judicial power with different functions and powers.

The Constitutional Court has the power to decide in the first and last instance, and its decision is final and binding. As one of the executors of the judicial power as provided for in the Constitution, the Constitutional Court therefore has the power to decide in the first and last instance, whose decisions are final, to measure the law against the Basic Law, to decide disputes about the powers of state institutions whose powers are conferred by the Basic Law,

to decide on the dissolution of political parties and to decide disputes about the results of elections.

Based on the constitutional mandate in Article 24C paragraphs (1) and (2) of the 1945 Constitution, the Constitutional Court has the following powers.

1. “The Constitutional Court has the authority to adjudicate at the first and last instance whose decisions are final to test laws against the Basic Law, decide disputes over the authority of State institutions whose authority is granted by the Basic Law, decide the dissolution of political parties, and decide disputes about election results.
2. The Constitutional Court shall render a ruling on the opinion of the House of Representatives regarding alleged violations of the President and/or Vice President according to the Constitution.”

Furthermore, the power of the Constitutional Court in Article 10 of Act No. 24 of 2003, as amended by Act No. 8 of 2011 on the Constitutional Court, with paragraph (1) of the decision of the Constitutional Court is final, i.e. the decision of the Constitutional Court immediately acquires permanent legal force, as it is promulgated and cannot be appealed. The finality of the decision of the Constitutional Court in this Act also includes the force of binding law (final and binding).

The Constitutional Court does not adhere to the principle of graduated justice, not only because of the function of the Constitutional Court as the sole interpreter of the Constitution, but also because the decision of the Constitutional Court represents the value of justice. Therefore, it is worthy of being a judge of first and last instance whose decision is final. The final and binding decision prescribed by the Constitution means that the Constitutional Court is the only judicial institution in Indonesia that does not have a tiered judicial process. The final decision of the Constitutional Court means that there are no other appeals that can be made by the judiciary. Therefore, the decision has a generally binding force that all parties must submit to and obey in order to implement the decision.

The nature of the Ethics Council of Election Organizers in the decision of the Constitutional Court no. 31 / PUU-XI / 2013 shows that the Ethics Council of Election Organizers is a body that is part and a unit of the function of organizing elections under Article 22E paragraph (5) of the 1945 Indonesian Constitution, as it supervises the conduct of election organizers, The Ethics Council of Election Organizers is not part of a special court that belongs to the courts subordinate to the Supreme Court, as provided in Article 24 paragraph (2) of the 1945 Indonesian Constitution and Article 27 paragraph (1) of Law No. 48 of 2009, and also not among the actors of judicial power as mentioned in Article 24 paragraph (2) of the 1945 Indonesian Constitution. The legal outcome of the authority of the Election Organizer Ethics Board is a decision on violations of the Code of Ethics, which is made on the basis of complaints and/or reports, investigations and/or reviews, hearing defense lawyers and testimonies, examining evidence, and drawing conclusions. The decisions of the Election Organizer's Ethics Board related to violations of the Code of Ethics create legal confusion because the nature of the decision is “final and binding”^[10].

This was also reiterated in one of the recitals in the Court's decision regarding challenges to election results. The Ethics

Council of Election Organizers is a state administrative body that is not a judicial institution within the meaning of Article 24 of the 1945 Constitution, which has independent powers to uphold law and justice. In contrast to the Constitutional Court's Decision No. 32 / PUU-XIX / 2020, which examines the review of Law No. 7 of 2017 on General Elections in comparison with the Indonesian Constitution of 1945, the Constitutional Court in its Decision No. 31 / PUU / XI / 2013 stated that the Ethics Council of Election Organizers is not a judicial body that exercises judicial power within the meaning of Article 24 paragraph (1) of the 1945 Constitution, which explicitly states that the judicial power is the power to administer justice to uphold law and justice. The Ethics Council of Election Organizers is also inappropriate when it is referred to as another body that exercises the functions of judicial power because other bodies whose functions are related to judicial power are regulated by law.

Based on this, a judicial review was carried out on this matter which was reinvigorated in legal considerations, the Court affirmed its stance that the Election Organizer Ethics Council is not a judicial institution and as the General Elections Commission and Election Supervisory Agency, are election organizers who have equal standing. The court also affirmed that the three election organizing institutions have an equal position and none of them has a superior position. Thus, through a quo decision the Court affirms and reminds all stakeholders. Election Organizer Ethics Council, is an institution tasked with handling violations of the Election Organizer's code of ethics and is a unified function of administering elections. This institution was decided to be a State Administrative Institution or government institution based on Law Number 30 of 2014. The issuance of Law Number 7 of 2017 which repealed Law Number 15 of 2011, again regulates the concept of "final and binding" which is a product of Election Organizer Ethics Council decisions. Therefore that final and binding is then perceived to apply to election organizers and also to the judiciary.

In Constitutional Court Decision No. 32/PUU-XIX/2021 on legal considerations, the court reiterated its position that the Ethics Council of Election Organizers is not a judicial institution, just as the General Elections Commission and the Electoral Supervisory Authority are election organizers with equal rights. The court also affirmed that the three election organizing institutions are equal and none of them has a superior position. The decisions of the Ethics Council of Election Organizers, which are final and binding under Article 112 paragraph (12) of Law No. 15 of 2011, may create legal uncertainty as to whether the "final and binding" referred to in the law is the same as the final and binding decision of the judicial authority. In order to avoid legal uncertainty about the existence of these provisions, the court must affirm that the final and binding decision of the Ethics Board of the election organizer cannot be equated with the final and binding decision of the judiciary in general, since the Ethics Board of the election organizer is an internal instrument of election administration authorized by the law. The final and binding nature of the decisions of the Board of Ethics of Election Organizers must be interpreted as final and binding on the President, the General Board of Elections, the Regional General Board of Elections, and the Supervisor of Election, since it is a concrete, individual, and final decision of state administration officials that may be the subject of an action before the State Administrative Tribunal.

With regard to the phrase "final and binding" in Article 458 paragraph (13) of Law No. 7 of 2017, which is to be binding on the President, the General Election Commission, the Regional General Election Commission and the Election Supervisory Authority, it means a concrete, individual and final decision of the officials of the state administration, while the final character in a decision indicates that the decision does not require further approval and can be directly executed, while the decision of the Ethics Council of the Election Organizer cannot be directly executed without the General Election Commission and the Election Supervisory Authority is a concrete, individual and final decision of officials of the state administration. It is affirmed by the statement that the Board of Ethics of Election Organizers is not a judicial institution and the Board of Ethics of Election Organizers, like the General Election Commission and the Election Supervisory Authority, is a concrete, equal election organizer.

4. Conclusion

Fundamental regulations and ideas with regard to the final and binding formulation of the Electoral Organizer Ethics Council, namely as a state auxiliary body. The Election Organizers' Ethics Council only judges the Election Organizers' Code of Conduct. The conclusive and binding character makes the existence of the institution more of an auxiliary body for monitoring election officials. The existence of the Board of Ethics of Election Organizers and the nature of its decision, which is "final and binding", means that there is no further appeal after the Board of Ethics of Election Organizers has made and announced its decision in a plenary session open to the public. Regarding the final and binding nature of the decisions of the Ethics Council of Election Organizers, the Constitutional Court has stated in its decision No. 32 / PUU-XIX / 2021 that it is not a judicial body exercising judicial power within the meaning of Article 24 paragraph (1) of the 1945 Constitution, so it is not appropriate for the Ethics Council of Election Organizers to be referred to as another body exercising the function of judicial power, since the General Election Commission and the Electoral Supervisory Authority are election organizers that have the same position. In order to avoid legal uncertainty with regard to these provisions, the court must confirm that the final and binding decision of the Ethics Council of Election Organizers cannot be equated with the final and binding decision of the judiciary in general. The final and binding nature of the decisions of the Board of Ethics of Election Organizers must be interpreted as final and binding on the President, the General Board of Elections, the Regional General Board of Elections, and the Supervisor of Election, since it is a concrete, individual, and final decision of state administration officials that may be the subject of an action before the State Administrative Tribunal.

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