

## ALTERNATIVE BALANCE PRINCIPLE-BASED ALTERNATIVE OF IMPLEMENTATION OF LIMIT THRESHOLD OF VOTE DIFFERENCE IN SETTLEMENT OF DISPUTES ON RESULTS OF SIMULTANEOUS REGIONAL HEAD ELECTIONS

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### ABSTRACT

*The enactment of the limit threshold of vote difference as a requirement to file an application of lawsuit of dispute of the results of the regional head election to the Constitutional Court has positioned the candidate pairs into two different conditions and situations. Candidate pairs who meet the limit threshold of vote difference can file an application of lawsuit of dispute of election result to the Constitutional Court. On the other hand, the candidate pairs of election who do not meet the limit threshold of vote difference cannot file an application. Thus, it needs an option or alternative for the implementation of limit threshold of vote difference. It is an alternative where all the candidate pairs both the candidates who meet the limit threshold of vote difference and who not does meet the limit threshold can file an application of lawsuit of dispute of election result to the Constitutional Court. This is important because it is based on the principle of balance for all candidate pairs considering that each candidate pair must be treated equally. An alternative form of limit threshold of vote difference is used in order to provide equal treatment that is to submit the process of case settlement of dispute of election result to the two courts.*

**Keywords:** *Alternative, Balance Principle, Regional Head Election.*

### INTRODUCTION

The case of dispute of election result of the regional head (PHPkada) is a dispute between the election candidate pair and the election organizer concerning the determination of vote earning of the election result (Law No. 10 of 2016 article 156). Candidate pair of election who feel disadvantaged by the decision may file a lawsuit of result dispute to the Constitutional Court before the Special Court of Justice (BPK) is formed.

However, not all candidate pairs of election can file a lawsuit of dispute of the results of the regional head election to the Constitutional Court. It is because not all lawsuits of disputes of election results can be filed and tried by the Constitutional Court.

A candidate pair of election who can file a lawsuit of dispute of election result is a candidate pair whose voice difference is not more than 0.5% -2% of the candidate pair of election who get the most votes. If the candidate pair of election who want to file a lawsuit of dispute of election result has a voice difference above 0.5% -2% then the concerned cannot file an application to the Constitutional Court. Maximum vote difference of 0.5% -2% is the limit threshold of vote difference determined by Article 158 of Law 10/2016 concerning the Election of Regional Head and Regulation of Constitutional Court Number 1 Year 2016 concerning Procedural Guidelines for the Lawsuit Settlement of Dispute of Election Result of Regional Head. That limit threshold of vote difference becomes a formal requirement in the procedural law and a consideration to determine whether the applicant has a legal standing or not.

If the candidate pairs of election who do not meet the limit threshold of vote difference still file an application of lawsuit of dispute of election result to the Constitutional Court, then the Constitutional Court will decide that the applicant's petition cannot be accepted because the applicant has no legal standing. In the dispute of election result in 2015, there are 147 applications that have been decided by the Constitutional Court, 97 of them are declared unacceptable because they do not meet Article 158. In the 2017 regional election, there are 55 applications of dispute of election result filed to the Constitutional Court and 1 is granted, 6 rejected and 43 cannot be accepted (MK 1/PHP.BUP-XIV/2016-147/PHP.BUP-XIV/2016).

The facts show that there is no judicial process for election candidates whose differences are above the limit threshold of the vote difference. The candidate pair of election shall not have the opportunity or right to obtain legal protection for the loss suffered or the rights that have been violated through the judicial process in the Constitutional Court. That absence of space of legal efforts certainly indicates that there is no legal protection for candidate pair of election (Hadjon, 1987), whereas legal protection for election is a necessity in order to safeguard, protect, and shelter the rights of election during the holding process of regional head election. On the other hand, if the limit threshold of the vote difference is not enforced on the basis of providing an opportunity for all candidate pairs to file a lawsuit of dispute of election result without based on a vote difference of 0.5-2%, it would also be an improper choice in the case settlement process of dispute of election result. Without the enactment of the limit threshold of the vote difference as a requirement of filing a lawsuit of dispute of election result, it will make the number of lawsuit application filed quite a lot and will have implications on the effectiveness of the settlement process by the Constitutional Court considering the number of cases filed coming simultaneously and must be decided in the same time within the limit, maximum time 45 days (Pasal 157 angka 8 UU 10 tahun 2016). Naturally, it is irrational thing. Just imagine, in the simultaneous holding of regional head election, there are 540 regions that hold the elections at the same time.

If 25% of the electoral districts file the case to the Constitutional Court then 9 constitutional judges must decide 405 case of disputes in 45 days simultaneously, in fact adjudicating a dispute case will take relatively a large amount of time ranging from preliminary examination, principal investigation, verification to verdict.

Because of that natural basis, then the limit threshold of the vote difference is applied as a way to minimize or limit the number of cases submitted to the Constitutional Court. On the other hand, the enactment of the limit threshold of the vote difference even implies the neglect of the principles of dispute settlement of the election result of the regional head such as the principle of legal protection and the necessity to settle the dispute of election result of regional head through the judicial process in order to give legal certainty to the candidate pair of election who feel their rights violated.

Therefore, the position of the limit threshold of the vote difference in the dispute settlement of the election result needs to be placed equally between the interests of the candidate pair of election who feel that their rights are violated and the ability and time allocation of the Constitutional Court to adjudicate the case of election result dispute.

Because of that basis of the balance principle, then the alternative of the enactment of the limit threshold of vote difference as a requirement to file a case of dispute of the election result becomes a necessity so that the existence of limit threshold of vote difference in Article 158 of Law 10/2016 on the election of regional head shall not be absolute or extreme.

1. Why does it need an alternative of the enactment of the limit threshold of vote difference in the settlement of disputes of the results of the regional head election?

2. Why should the principle of balance become the foundation for building an alternative to the implementation of PHPkada?
3. How is the alternative form of a balance-based limit threshold of vote difference in the settlement of the case of dispute of election result of the regional head?

## RESEARCH METHOD

This type of research is normative legal research (doctrinal research) which is based on conflict of norm with a legislative approach, conceptual approach, historical approach, and case approach. Types of legal materials in this study consist of primary legal materials, secondary legal materials and tertiary legal materials. Primary legal material consists of laws and regulations sorted according to the provisions of the hierarchy of laws and regulations that apply in Indonesia as stipulated in Article 7 paragraph (1) of Law Number 12 of 2011 concerning Establishment of Legislation. Secondary Legal Materials are obtained from minutes of law, academic texts, minutes of proceedings in the Constitutional Court, text books, papers, articles and journals. Whereas tertiary legal materials include legal materials that provide instructions or explanations of primary and secondary legal materials. For example, both print and electronic dictionaries. Sources of legal material in this study were obtained through literature search / references and legal documents that were supported and supplemented by legal material resulting from in-depth interviews with figures/experts and with constitutional judges.

The analytical technique in this research is Prescriptive analysis by examining whether the application of the threshold of the difference in votes is in accordance with the legal principles in the settlement of cases of disputes over the results of regional head elections simultaneously. By using this analysis, conclusion are drawn on the implications of applying the threshold of vote difference as a formal requirement for submitting PHPkada and is also used as an analysis material for alternative legal construction of the threshold of sound difference offered in this study.

## RESULTS AND DISCUSSION

Essentially, the basic essence of the law is in order to achieve justice. Plato states that justice essentially wants equality or not to discriminate people. This can be realized if it is explained in the norms of a constitutional state and the ruler becomes a slave of law that stands on justice (Raharjo, 2012).

*John Rawl develops the principle of justice in two parts namely, justice related to basic rights and justice related to socio-economic. In the first principle, John Rawl states that everyone has equal rights over a broad fundamental freedom while the second principle, there must be a regulation of the occurrence of social and economic inequality so that it can cause benefits to all people equally (Rowl, 2011).*

Yatimin Abdullah defines justice as an attempt to put things in proportion and equality of rights in accordance with one's capacity and ability to do things (Abdullah, 2006).

Aristotle divides justice into two forms namely distributive justice and corrective justice. Distributive justice is a justice which means that a reward and wealth are received or given to a citizen under the same condition and position within a state. That is, distributive justice prioritizes balance not equality while corrective justice is the justice prevailing in the realm of civil law. That is, it does not distinguish one's position within a state. This type of justice prioritizes more on the balance.

That principle of distributive justice which then generates the balance principle. The balance in the dispute of the election result of the regional head is on how all candidate pairs of candidates get equal treatment of all stages in the implementation of the regional head election including the balance of treatment in the stage of dispute resolution of the election result of the regional head. The balance in the settlement of disputes over election results for election candidates is divided into two aspects namely: first, an opportunity to obtain justice through the judicial process or provide an opportunity for candidates to file an application of a dispute case to the judiciary. Second, getting the same treatment in accordance with each position.

The same opportunity to file a dispute case of the result to the judiciary is where each candidate pair who feel their rights are being violated / disadvantaged is given space to file a dispute of the election result without differentiating the candidate pair from each other. Therefore, the legal effort to the court is an effort made by the candidate pair of election as the people who seek justice and the state must provide justice guarantee through the judiciary.

The right to have access to the judicial process should not be prevented by any reasons including restrictions on the rights of eligible candidates to be able to file election disputes to the Special Court (BPK) or the Constitutional Court through the enactment of the limit threshold of the vote difference as a formal requirement as stipulated in Article 158 of Law 10/2016 on the election of regional head.

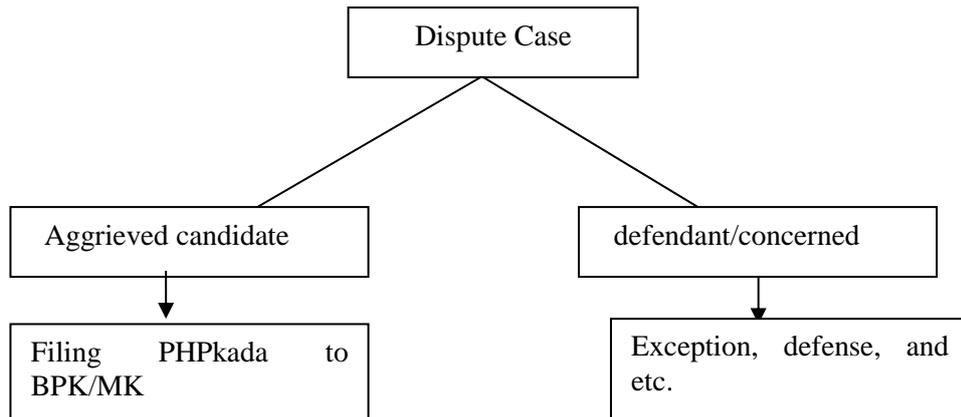
Article 158 can be categorized as an attempt to prevent the right of election candidates that seek justice for the suffering experienced by the candidate pairs of election because with the enactment of the limit threshold of the vote difference, therefore the people who seek justice or the candidate pair of the election do not get an equal treatment between the candidate pair of election with one another. Candidates pair of election that meet the limit threshold of vote difference may file an election dispute to the Special Court / Constitutional Court while the candidates who do not meet may not file a dispute of election results or may not be proceeded legally. In fact, the right of the candidate pair of election to fulfill the limit threshold and not is the same. That is, it equally feels aggrieved or violated his rights over the determination of the election result decided by the Regional General Election Commission.

The second, balance principle is on how each candidate pairs get an equal space in the process of settling disputes of the results of regional head elections in court either in the Constitutional Court or the Special Court. The election for the election candidates here is how the election candidates who feel their rights have been violated or positioned as the applicant and the candidate pair with the highest number of votes or the position of the relevant party in the law of the settlement of the dispute case of the result of the election get an equal treatment. Equal treatment here is not necessarily translated that all should be treated the same but how the two sides can be given maximum space in accordance with each position to convey what is rightfully. Candidates pair of election that becomes applicant shall be given the opportunity to file an application of dispute case of election result to the court and submit presumption of fact of violation. As for the candidate pair of election who become concerned parties should be given the opportunity to deliver clarification, defense and evidences. In the enactment of the limit threshold of vote difference, between candidate pairs of election do not get an equal space in the process of settling the dispute case of election results. The enactment of the limit threshold of vote difference has resulted in unequal treatment among candidate pairs. That is, the difference of treatment between candidate pair that meets the limit threshold of vote difference and candidate pair that does not meets the limit threshold of vote difference. For the candidate pair of election who do not meet the limit threshold of vote

difference, so that the concerned cannot prove and reveal the claim of loss suffered due to the fraud done by the candidate pair of election who obtain the most votes. That is, there is a shift of balance principle from before and after the implementation of the limit threshold of vote difference as a formal requirement to file an application of dispute case of election result. The shift of balance principle from before and after the implementation of the limit threshold of vote difference can be illustrated in the following chart:

Chart: The Shift of Balance Principle in Dispute Case of Election Result

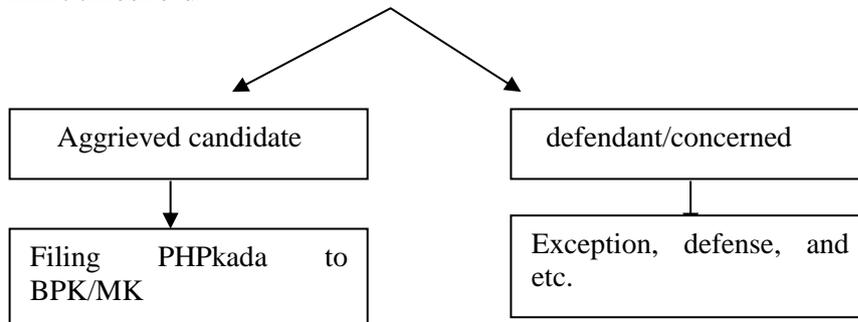
**1. Early meaning or before the implementation of the limit threshold of vote difference**



**Figure 1. The Shift of Balance Principle in Dispute Case of Election Result before the implementation of the limit threshold of vote difference**

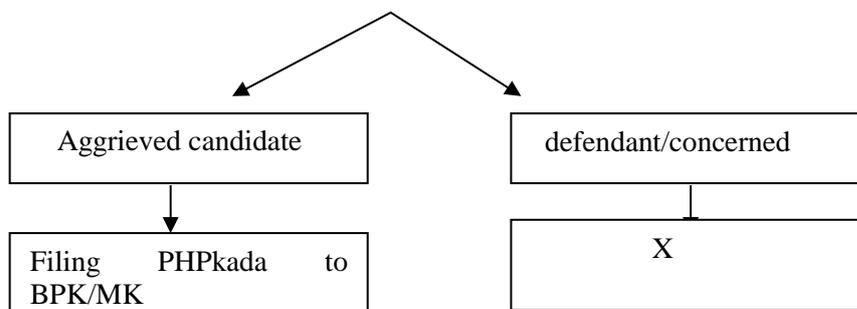
**2. Meaning after the implementation of the limit threshold of vote difference**

a. Meet the limit threshold



**Figure 2. The Shift of Balance Principle in Dispute Case of Election Result after the implementation of the limit threshold of vote difference**

b. Does not meet the limit threshold



**Figure 3. The Shift of Balance Principle in Dispute Case of Election Result after the implementation of the limit threshold of vote difference**

Differences in the treatment between the candidates who meet the limit threshold of vote difference and the candidate pairs who do not meet the limit threshold of vote difference are the differences that are not based on the balance principle to treat equally on the basis of the rights possessed by each election candidate pair. Differences of treatment on the basis of differences in the difference of the vote is certainly a legal policy of law maker that disadvantage one party namely the party that does not meet limit threshold of vote difference and benefit the other. It is because the difference of the treatment on the basis of the limit threshold of vote difference is based on the difference in the number of votes earned not on the element of violation that affects the vote earning of election results. In fact, the nature of the problem in the case of dispute of the election result of the regional head is the element of violation which is not on how big the difference of the vote, considering the occurrence of voice difference above 40% but that difference of vote is affected by the structured, systematic, massive violation as in general election of regional head in Mandailing Natal District where the candidate pair of election who get the most votes above 50% is disadvantaged and the victory is canceled by the Court. The following is the vote earning and difference of votes in the election of regional head of Mandailing Natal.

**Table 1. Vote Earning in Election of Regional Head of Regency of Mandailing Natal Year 2010**

Number	Name of Election candidate/candidate pair	Vote Earning
01	H. Zulfarmin Lubis, AK dan Ir. Ongku Sutan Nasution	7.309
02	H. Aswin Parinduri dan H. Syarifuddin Lubis	4.530
03	Irwan H. Daulay, S. Pd dan H. Samad Lubis, SE., MM.	16.044
04	Drs. H. Naharuddin Lubis dan Drs. Nuraman Ritonga, M.si	10.319
05	Dr. Drs. Arsyad Lubis, MM dan Drs. H. Azwar Indra Nasution, MM.	28.080
06	H.M. Nur Hidayat Batubara, SE dan Drs. H. Dahlan Hasan Nasution	96.245
07	H. Indra Porkas Lubis, S.Ag., MA dan H. Firdaus Nasution (pemohon)	40.173

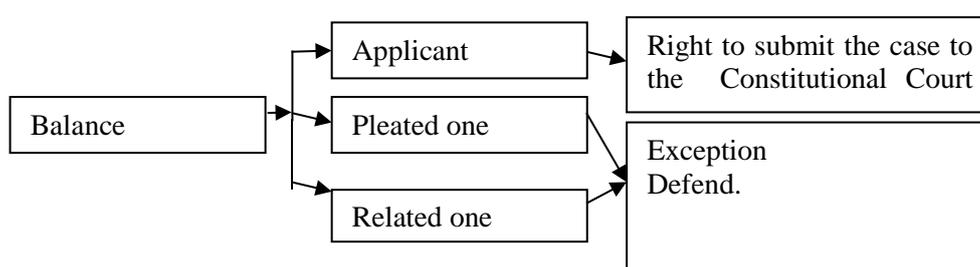
Source: Decision of MK number 41/PHPU.D-VIII/2010 and Decision of MK Number 51/PUU-XIII/2015, (Putusan MK Nomor 51/PUU-XIII/2015, hlm. 38-39)

Because of it, the result of earned votes is assumed that there is an element of infringement done by one of the candidate pairs of election participant. It should be prioritized how the assumption of infringement proven at first. That is not about how big the difference of votes between the candidates who apply by the defendant and the pleaded one. The possible one is, the candidates get the significant votes by cheating, then, and difference of earned votes got by the candidates is in the threshold. The victory by cheating cannot be prosecuted by the Constitutional Court since the difference of votes is beyond the certainty of Article 158 UU 10/2016 about election of regional head. This is a rule to make the position of each candidate is not equivalent in processing the settlement of dispute on election result of regional head.

If the balance principle is applied for all the election candidates, then the candidate who gets significant votes or beyond the threshold can be prosecuted in Constitutional Court. The permanent victory can be sued in a special judicial board or Constitutional Court. In this process, the equality among the candidates can be done. When the candidate pairs get, the significant votes can be sued by Constitutional Court, then it does not mean that treating unfair to the election who get the most votes. The responsibility of vote result of each candidate proposed to the Constitutional Court must be assumed as a part of overcoming process of regional head election. This is also as embodiment of a balanced treatment for

candidate pair who gets the most votes and candidate pair who feels harmed or their rights is violated because of the cheating done by the candidate pair who gets the most votes.

The embodiment of balanced principle in overcoming the case of election result is by giving the chance to all the candidate pairs to propose the case of election disputes without looking at the significant difference of election votes. The candidate pair who feels that their right is violated can provide many arguments and evidences that their defeat is caused by the violation done by the winner. While for those who gets the most vote will have the opportunity to show the defense and prove that the victory does not get by cheating and if the decree of Constitutional Court based on the decree of the general election commissions or there is no cheating mentioned then the victory of the candidate pair who gets the most vote will be much more noble. The decree of Constitutional Court also gives the law certainty on the speculation whether the victory obtained contains fraud or not. The balanced principle in overcoming the case disputes election results fraud can be drawn in the chart below:



**Figure 4. Chart of Principle of Fundamentals as a Basic Alternative to the Implementation of the Limit Threshold of Vote Difference**

However, to build the balanced principle in overcoming the dispute case of vote result especially for the candidate pair who get the vote below the standard is a dilemma. If all the candidate pairs are given the opportunity to apply the application of dispute case of vote result to Constitutional Court without threshold of difference, then it will affect to the number of case that should be prosecuted. The number of case applied to the Constitutional Court can be predicted 90% from all the election of head region. This is caused by the culture of ready to lose has not yet built in Indonesia. This means that loser will try to foil the winner to be in a judicial process.

The number of cases is a consideration to bear in mind that the overcoming process of dispute case of vote result is limited by the time and the number of judges is relatively a few or not balanced between the relative number of judges with case filed (Pasal 157 angka 8 UU 10 Tahun 2016). From this point, the dilemma of enactment of vote difference threshold as a condition to file a dispute over proceedings to the Constitutional Court was born. It means that if the threshold of vote difference is still applied then automatically it will decrease the case filed in Constitutional Court so the number of them will be the same as the number of the judges. Unfortunately, that action is not based on the balance principle for the candidate pairs because the candidate pairs of election do not get the significant vote and do not get the access to obtain the justice through judicial process while for those who gets the victory with the significant votes, then the vote result does not need to be accounted for the victory despite obtaining it by cheating.

The condition above is a dilemma in the process of overcoming the result dispute of regional head election, so it needs an alternative. The alternative way is the option of overcoming case (Safa'at, 2016). The way in overcoming the case of result dispute result of election is how to enforcement the threshold of vote difference to give the space to get the right in affording the justice. This is in line with the justice principle by John Rawl about how the justice should:

- a) Each person must have the same right of the widest basic freedom, as wide as the freedom for all people. This is the basic thing owned by all people. By only providing the same freedom guarantee for all people, then the justice will come true.
- b) Social inequality and economy must be managed as well so it needs to be concerned its principle *the different principle* and *principle of fair equality of opportunity* (Fauzan, et. al. 2011).

Through the principle by John Rawls, the process of overcoming the dispute over election results of regional head, each participant of election has the same right and freedom towards the procedure of overcoming the result dispute. This right and freedom should be fulfilled because by fulfilling towards the right freedom, the justice will come true.

This leads to the question “How is the alternative form of overcoming the result dispute of regional head election to give the balance to the candidate pairs who fill the threshold of vote difference?”. In the case of creating the balance principle, then the overcoming form of result dispute of regional head election can be submitted to both judiciaries which are not over the threshold of vote difference. By concerning to both judiciaries, then all candidates can get their right on getting the access towards the justice through the Court for both the candidates who get over the threshold of vote difference and the one who does not. Submitting to both the judiciaries is an alternative way to prioritize the right granting for all the citizens who seek for the justice.

If the option is giving the process of overcoming the case of result dispute of regional head election to both different judiciaries, then for dispute case over election result that meets the threshold of permanent votes are prosecuted by the Constitutional Court and for the case which is not over the threshold of vote difference, it should be built the judiciary or is submitted to the existed judiciary. The most important thing is the institution which will judge the case of result dispute of election which under the threshold should be based on; first, the judiciary which will be built should have the equal standing with Constitutional Court. This is for the sake of ensuring the existed power from the decree. If the institution which will judge the case of result dispute of election which is not fulfilled the threshold of below the Constitutional Court, then it will create weirdness concerning that the holding of regional head election is handled by one institution so that it will give the impact to the process of justice which runs the same institution or the difference institution but having the same level.

Second, the characteristic of decree from the institution which will judge the case of election result dispute which does not meet the threshold of vote difference should be final and binding since the characteristic of decree from Constitutional Court is also the same. Besides, those characteristics are needed since the decree must be fast and the term of finishing the case is limited by the time. It is also dealing with the period when the candidates are inaugurated and their length of service.

On the basis of those two things, the institution which will judge can be done by forming a new institution given an authority to run the judicial power in line with Article 24 The Basic Constitution of Republic of Indonesia Year 1945. But, another option can be given to the existed judiciary so-called the Constitutional Court. The Supreme Court is a judiciary which has an equal standing with Constitutional Court in Indonesia government system.

But, if the authority to judge the case of dispute election does not meet the threshold of vote difference, it will submit to the Supreme Court. The finishing process should be final and

binding or be the first and last justice. This case can directly be judged by the Supreme Court/the judiciary in the area of Supreme Court like the state administrative high court. The decree of it should be final and binding as well.

The submission of obligation to the Supreme Court towards this case is not easy since it also concerns to the validity period of the Constitution number 32 Year 2004 on Regional government. The Supreme Court is a judiciary given an authority to judge the result dispute of regional head election but in the process of implementing the authority, the Supreme Court submits to the high Court (*PT*) for the case of result dispute in the level of city or regency. The province level will be judged directly by the Supreme Court. Besides, the decrees of Supreme Court tend to get the positive responses from the society so that there is a change of authority to judge the result dispute of regional head election to the Constitutional Court.

Another case is when it is submitted to the Supreme Court related to the composition of panel of judges in the Supreme Court. The composition in that area is different from in the area of Constitutional Court. In Constitutional Court, the number of judge panels only consists of nine people while in the Supreme Court there are many Supreme Court judges. The judge panels in Constitutional Court does not know about the room system while in the Supreme Court knows about it such as state administration room, civil room, and criminal room. The room system in Supreme Court has its difficulty in the process of overcoming the election dispute, namely, “in which room, the process of overcoming election dispute of regional head election which does not meet the threshold?”. It is not easy since the case dimension in this case can consist of administration and criminal element, however, in this case, it can be obtained the policy by internal side of Supreme Court to form the composition of judge panels especially to judge the case based on Article 158 the Constitution 10 Year 2016 on regional head election.

The other difficulty is, when the system of overcoming the dispute is divided to the both institutions, there will be a problem related to implementation of regional head election in 2027 or in the period of special judicial board (*BPK*) which has an authority to judge the case based on Article 157 UU 10 Year 2016 on regional head election (Pasal 157 ayat (2) UU 10/2016).

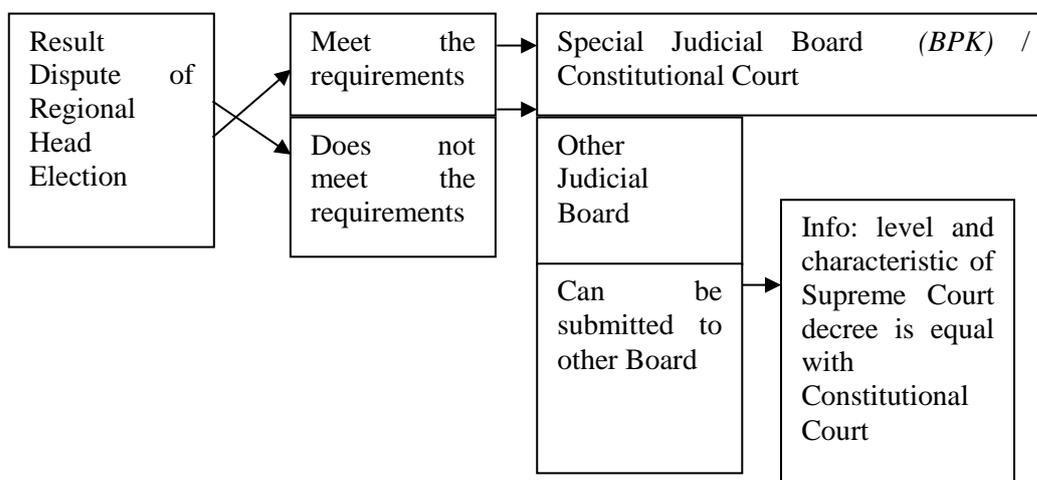
*BPK* as an institution which will judge the case of dispute has not been elaborated in detail in the Constitution about the level and procedural law in overcoming the dispute. This cause the difficulty to meet the threshold of vote difference since the special judicial board (*BPK*) is not clearly placed. It is still whether in the area of Supreme Court or the judiciary. Both chances have a space to choose.

If *BPK* which will be formed placed under the umbrella of Supreme Court, then the overcoming action can be given to the Supreme Court or the judiciary in the area of Supreme Court but the characteristics should be final and binding.

When *BPK* is standing outside the area of Supreme Court, then the difficulty to determine the institution will judge the dispute. The first difficulty is related to the institution which will judge the case of dispute of regional head election. If *BPK* is outside the area of Supreme Court, then whether the level of *BPK* is equal with the Supreme Court or Constitutional Court as a judiciary. If it is equal, then the process of overcoming the dispute can be judged by Supreme Court. Otherwise, if the level is not equal, it cannot be judged by Supreme Court since it is not possible that the case is judged by the different level of institution.

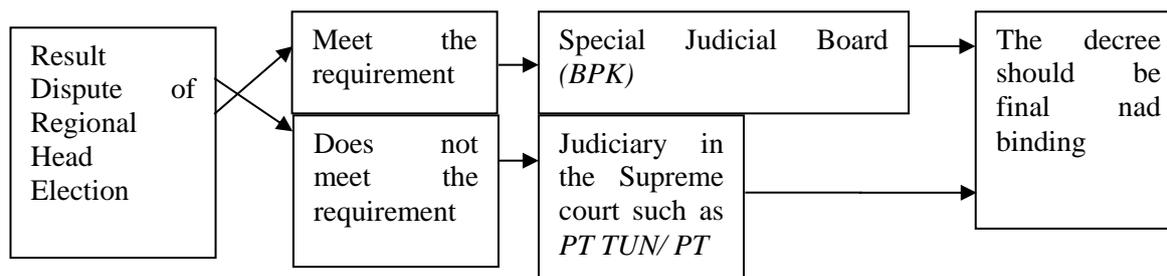
**Chart: The Complete Settlement of Election Dispute submitted to two judicial institutions before and after the Establishment of the Special Judicial Board**

**a. Before forming The Special Judicial Board**



**Figure 5. The Complete Settlement of Election Dispute submitted to two judicial institutions before the Establishment of the Special Judicial Board**

**b. After forming the Special Judicial Board**



**Figure 6. The Complete Settlement of Election Dispute submitted to two judicial institutions after the Establishment of the Special Judicial Board**

**CONCLUSION**

The implementation of threshold of vote difference as the requirement to apply a dispute case of regional head election has treated the candidate pairs unbalanced in term of judicial access. For those who meet the threshold of vote difference can apply a dispute case of election to the Constitutional Court. Otherwise, for those who do not meet the threshold of vote difference does not a right to apply a dispute case of election. Therefore, an alternative is needed towards the implementation of threshold of vote difference so that the candidate pairs who meet and does not meet the threshold have the same right to access the justice in the judiciary. This case is as an embodiment to provide a balance action for all candidates by concerning that they must get the same treatment. The alternative way that can be done is giving the authority to judge the dispute case of election result to both different institutions, namely, Constitutional Court for the dispute case of election result applied by the applicants who meet the threshold of vote difference. The new institution formed has the authority to judge the application of dispute case of election result proposed by the candidates who do not meet the threshold of vote difference.

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