


## The Logic Position of State Emergency Law in the Implementation of Regional Head Elections during the Covid-19 Pandemic



Ahmad Siboy<sup>1</sup>, Sholahuddin Al-Fatih<sup>2</sup>

<sup>1</sup> Universitas Islam Malang, Malang, Indonesia

<sup>2</sup> University of Muhammadiyah Malang, Malang, Indonesia

 [salfatih@umm.ac.id](mailto:salfatih@umm.ac.id)

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## The Logic Position of State Emergency Law in the Implementation of Regional Head Elections during the Covid-19 Pandemic

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**ABSTRACT.** There are two circumstances in state emergency law, namely coercive urgency and danger. The coercive urgency is the basis for issuing a Government Regulation in *Lieu* of Law (Indonesian: *Peraturan Pemerintah Pengganti Undang-Undang* (Perpu) on postponing the regional head election. The postponement of its election regulated through this regulation means that this condition from September 09 to December 09, 2020, has fulfilled the qualification of the state emergency law. The research problems in this study were as follows. (1) Why the Covid-19 pandemic can be used as the basis for issuing a Government Regulation in *Lieu* of Law? (2) Is the practice of the logic of the state emergency law as the basis for issuing a Government Regulation in *Lieu* of Law in line with the essence of the enactment of the state emergency law? The purpose of this study was to describe the position of the state emergency law as the basis for the issuance of the Government Regulation in *Lieu* of Law and to examine the consistency of the position of the state emergency law in the implementation of regional elections during the pandemic. This study used normative juridical research with conceptual, statutory, philosophical, and case-study approaches. Sources of legal materials in this study consisted of primary, secondary, and tertiary legal materials. The results showed that the Covid-19 pandemic is declared a non-natural disaster to be qualified as coercive urgency, which is a requirement for enacting the state emergency law. However, there is a logical inconsistency about the Covid-19 pandemic concerning regional elections. On the one hand, the Covid-19 is used as an argument to declare the state in an emergency so that it is necessary to issue a state emergency law in the form of the Government Regulation in *Lieu* of Law. On the other hand, the regional head election is still be held during the pandemic. If the Covid-19 pandemic is considered a state emergency, the regional head election must be postponed until the pandemic is over.

**KEYWORDS.** State Emergency Law, Regional Head Election, Covid-19 Pandemic

# The Logic Position of State Emergency Law in the Implementation of Regional Head Elections during the Covid-19 Pandemic

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## Introduction

Regional head elections are a legitimate manifestation of the implementation of popular sovereignty.<sup>1</sup> The legitimacy of the Regional Head Elections (*Pilkada*) as the legitimate exercise of popular sovereignty is stated explicitly in Article 1 of Law 10 of 2016 concerning Regional Head Elections. It states that the election of regional heads is the exercise of popular sovereignty to elect the Governor/Deputy Governor, Regent/Deputy Regent, and Mayor/Deputy Mayor. The election of regional heads is the embodiment of popular sovereignty because, since 2005, the regional head elections have been held directly. Namely, every citizen has the same opportunity and right to elect regional heads (Governor, Regent/Mayor). In holding local elections, the principle of one man, one vote applies.<sup>2</sup>

Through regional head elections, every citizen in each region can choose their respective regional heads directly and secretly. As the implementation of popular sovereignty that functions to produce democratic

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<sup>1</sup> Ahmad Siboy, Sholahuddin Al-Fatih, and Abdul Kadir Jaelani, "Design to Resolve Case of Disqualification of Winning Candidates in Local Government Head Elections in Indonesia," *Central Asia and The Caucasus* 23, No. 1 (2022): 632–642.

<sup>2</sup> Sholahuddin Al-Fatih, *Hukum Pemilu dan Threshold (Dinamika & Perkembangannya di Indonesia)* (Malang: UMM Press, 2022).

leaders, the regional head elections are structured and systematic, starting from the model until when it is held. Elections have been designed to be held regularly every five years. Since 2015, the regional head elections have been designed to be held simultaneously. If referring to the schedule that has been set, 2020 will be the fourth period of simultaneous regional head elections. In the 2020 simultaneous regional head elections, it is planned that there will be 9 provinces and 224 regencies, and 37 cities that will hold simultaneous regional elections.<sup>3</sup> The simultaneous regional head elections data as shown on Table 1.

**Table 1.** The 2020 Simultaneous Regional Head Elections

No.	Type of Elections	Regional
1.	Province	9
2.	City	37
3.	Regency	224

Source: KPU, 2020

However, the hope that the simultaneous regional head elections in 2020 would be held on September 9 cannot be realized. Postponed simultaneous regional elections related to Covid-19 in Indonesia and the real-world conditions. The Covid-19 has become a virus that makes the world order must be changed, and all plans that have been carefully planned must adapt to the Covid-19 health protocol. The postponement of the election time is certainly not an easy thing. It is because various legal and political implications must accompany the postponement of the Pilkada. Legally, the schedule for the 2020 Pilkada is regulated in Article 201 paragraph (6) of the Regional Head Election Law, which states that the simultaneous voting of the Governor and Deputy Governor, Regent and Deputy Regent, as well as Mayor and Deputy Mayor of the 2015 election results, would be held in September 2020.<sup>4</sup>

This provision means that if the provisions of Article 201 do not carry out the Regional Head Elections, then it would automatically be declared invalid. It means that September 9, 2020, is the date for voting. The

<sup>3</sup> Singgih Choirul Rizki and Yusuf Adam Hilman, "Menakar Perbedaan Opini Dalam Agenda Pelaksanaan Kontestasi Pilkada Serentak Di Tengah Covid-19," *Jurnal Ilmiah Muqoddimah : Jurnal Ilmu Sosial, Politik dan Humaniora* 4, No. 2 (2020): 143–155, <http://jurnal.um-tapsel.ac.id/index.php/muqoddimah/article/view/1709/996>.

<sup>4</sup> Sholahuddin Al-Fatih, "Urgensi Sosialisasi Pilkada Sehat di Tengah Pandemi Covid-19 di Wilayah Malang Raya," *Jurnal Dedikasi Hukum* 1, No. 1 (2021): 45–57, <https://ejournal.umm.ac.id/index.php/jdh/article/view/16314/9212>.

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regulation of the Regional Head Elections implementation at the statutory level makes the postponement of the elections. It must be regulated by law, or it may not be by the type of legislation under it. There is a principle of legislation that states that laws lower rules cannot conflict with higher rules.<sup>5</sup> Therefore, changes in norms in a statutory regulation must be by an equivalent or equivalent statutory regulation.

If we want to change the time of holding the regional head elections simultaneously from September 9 to another time, there must be a change in the norms governing the date it in the law. Changes to the law certainly require a very long process. One is because the law is a legal product of The House of Representatives and the President. Making changes to the law is certainly not easy. Therefore, if the regional head elections are still postponed, an alternative legal product with an equal position must be found to amend Article 201 of the Pilkada. If the change in the timing of the Pilkada cannot be changed through the law, the only alternative legal product that has the same material content and position as the law is government regulation. It is a legal product that hierarchically has an equal position when it refers to the hierarchical provisions of laws and regulations regulated in Article 7 paragraph (1) of Law 12 of 2011 concerning the Establishment of Legislation.

However, government regulations are not an arbitrary legal product or can be issued under normal circumstances. The issuance of it must be based on constitutionally valid reasons. Article 22 of the 1945 Constitution of the Republic of Indonesia states that the president issues a government regulation in *lieu* of law in the case of “*a compelling urgency*.” One means that the president can issue a Government Regulation in *Lieu* of Law only in situations and conditions of “forced urgency”. If the situation and conditions of urgency are not fulfilled, the president will automatically not issue government regulations. The question then is: is the Covid-19 an urgent and compelling condition and situation that the president must issue government regulations regarding the postponement of the regional head elections?

Determining whether Covid-19 is an emergency or not, assessing the parameters that must be met to enact the state emergency law is needed. Iwa Kusuma Sumantri (1899-1971) stated that five conditions must be met to

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<sup>5</sup> Sholahuddin Al-Fatih, “Electoral Regulation in Indonesia : Is It Modern Law ?,” *Unnes Law Journal: Jurnal Hukum Universitas Negeri Semarang* 6, No. 2 (2020): 205–216, <https://journal.unnes.ac.id/sju/index.php/ulj/article/view/41627>.

enforce a state emergency law.<sup>6</sup> Namely, there are urgent conditions, security that is dangerous and threaten the realization of the state to overcome the conditions and difficulties resulting from the situation. Danger, there is no opportunity to discuss it with parliament, and the law as the basis for enacting state emergency law only applies as long as it is in a state of danger. President Joko Widodo as the person authorized to determine whether Covid-19 has fulfilled the elements of the enactment of the State emergency law has legitimized that Covid-19 has fulfilled the elements of the enactment of the State emergency law so that Government Regulation in *lieu* of Law Number 2 of 2020 has been issued and has been issued concerning the Third Amendment on Law Number 1 of 2015 concerning Stipulation of Government Regulations in *Lieu* of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors to become Laws. Through the Government regulations, the 2020 Pilkada, which should have been held on September 9, 2020, was postponed to December 09, 2020. The postponement of the Pilkada is explicitly stated in three articles:

1. Article 122A paragraph (3) states, "Further provisions regarding the procedure and time for the implementation of further simultaneous elections shall be regulated in a General Elections Commission Regulation".
2. Article 201 A paragraph (1) states, "The simultaneous voting as referred to in Article 201 paragraph (6) is postponed due to a non-natural disaster as referred to in Article 120 paragraph (1)".
3. Article 201A paragraph (2) states, "The postponed simultaneous voting would be held in December 2020."

The president postpones the Regional Head Elections to save the people because of the Covid-19; why has the government postponed the Pilkada from September 09, 2020, to December 09, 2020, even though in December, Covid-19 is still predicted not to end.<sup>7</sup> It means that month (December) is not yet in normal conditions. If conditions are not normal, then the regional head elections automatically cannot be held because they can only be carried out under normal conditions of the state. There is a policy

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<sup>6</sup> Dalinama Telaumbanua, "Urgensi Pembentukan Aturan Terkait Pencegahan Covid-19 Di Indonesia," *QALAMUNA: Jurnal Pendidikan, Sosial dan Agama* 12, No. 1 (2020): 59–70, accessed July 1, 2020, <https://ejournal.insuriponorogo.ac.id/index.php/qalamuna/article/view/290>.

<sup>7</sup> Rezky Panji Perdana Martua Hasibuan, "Urgensitas Perppu Pilkada Di Kala Wabah Pandemi Covid-19," *Adalah: Buletin Hukum dan Keadilan* 4, No. 1 (2020): 121–128, <http://www.journal.uinjkt.ac.id/index.php/adalah/article/view/15503/7266>.

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inconsistency here. On the one hand, the government issued Government Regulations to legitimize the postponement of the regional head elections based on the state emergency caused by Covid-19. Still, on the other hand, the government held the regional head elections in December 2020 even though that day (December 9, 2020) was still a month in which the condition of the Indonesian state was still in its infancy in abnormal conditions or still a Covid-19 emergency.

This research was very important because this research will complement several previous related studies and provide a different analysis related to the legal basis for emergency conditions in the implementation of regional head elections during the Covid-19 period. Some previous studies have been highlighted this issue, such as; 1) Urgensi Sosialisasi Pilkada Sehat di Tengah Pandemi Covid-19 di Wilayah Malang Raya, written by Sholahuddin Al-Fatih in *Jurnal Dedikasi Hukum*, Volume 1 Number 1 Year of 2021;<sup>8</sup> 2) Urgensitas Perppu Pilkada di Kala Wabah pandemi Covid-19, written by Rezky Panji Perdana Martua Hasibuan in 'Adalah; Buletin Hukum dan Keadilan, Volume 4 Number 1 Year of 2020;<sup>9</sup> 3) Diskursus Hukum: Alternatif Pola Pengisian Jabatan Kepala Daerah di Masa Pandemi Covid-19, written by Richard Kennedy and Bonaventura Pradana Suhendarto, in *Jurnal Pembangunan Hukum Indonesia*, Volume 2 Number 2 Year of 2020;<sup>10</sup> 4) Legalitas Perppu Pilkada Serentak Di Masa Pandemi Covid-19 (Studi atas Perppu No. 2 Tahun 2020) written by Mohammad Zainor Ridho, Ahmad Zaini, and Riza Pahlefi, in *Al Qisthas: Jurnal Hukum dan Politik Ketatanegaraan*, Volume 12 Number 1 Year of 2020;<sup>11</sup> and 5) Menakar Perbedaan Opini dalam Agenda Pelaksanaan Kontestasi Pilkada Serentak di Tengah Covid-19, written by Singgih Choirul Rizki and Yusuf Adam Hilman, in *Jurnal Ilmiah Muqoddimah: Jurnal Ilmu Sosial, Politik dan Humaniora*, Volume 4 Number 2 Year of 2020.<sup>12</sup> However, none of these studies provide an analysis of the reasons and logical positions in a

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<sup>8</sup> Al-Fatih, "Urgensi Sosialisasi Pilkada Sehat Di Tengah Pandemi Covid-19 Di Wilayah Malang Raya."

<sup>9</sup> Hasibuan, "Urgensitas Perppu Pilkada Di Kala Wabah Pandemi Covid-19."

<sup>10</sup> Richard Kennedy and Bonaventura Pradana Suhendarto, "Diskursus Hukum: Alternatif Pola Pengisian Jabatan Kepala Daerah Di Masa Pandemi Covid-19," *Jurnal Pembangunan Hukum Indonesia* 2, No. 2 (2020): 188–204.

<sup>11</sup> Mohammad Zainor Ridho, Ahmad Zaini, and Riza Pahlefi, "Legalitas Perppu Pilkada Serentak Di Masa Pandemi Covid-19 (Studi Atas PERPPU No. 2 Tahun 2020)," *Al Qisthas: Jurnal Hukum dan Politik Ketatanegaraan* 12, No. 1 (2020): 15–46.

<sup>12</sup> Rizki and Hilman, "Menakar Perbedaan Opini Dalam Agenda Pelaksanaan Kontestasi Pilkada Serentak Di Tengah Covid-19."

comprehensive manner regarding the state emergency law in the implementation of regional head elections during the Covid-19 pandemic.

## Method

This research uses normative juridical research<sup>13</sup> with a conceptual approach, legislation approach, philosophy approach, and case approach. Sources of legal materials consist of primary sources of legal materials, sources of secondary legal materials, and sources of tertiary legal materials.<sup>14</sup> The collection of legal materials is carried out utilizing an inventory, classification, and mapping following the legal issues that have been determined. All legal materials collected are then analyzed systematically and in-depth, both descriptively and prescriptively.<sup>15</sup>

## Construction of State Emergency Law in Postponing Regional Head Elections

Regional head elections must be held on time following the established periodization system.<sup>16</sup> It relates to the term of office of the current regional head. If the regional head election is held not according to a predetermined schedule, it will certainly be related to the term of office served by a regional head. The incumbent regional head will not get a replacement or regional head at the end of his term of office. One is because when the regional head elections are postponed, automatically, the certainty of who the regional head will be elected and inaugurated cannot be determined, causing a power vacuum.<sup>17</sup> However, it does not mean that the holding of the regional head elections that has been determined periodically is absolute or cannot be postponed. As a design for implementing popular sovereignty, the regional head elections are a local democratic party that can

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<sup>13</sup> Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*, ed. Ahsan Yunus (Yogyakarta: Mirra Buana Media, 2020).

<sup>14</sup> Sholahuddin Al-Fatih and Ahmad Siboy, *Menulis Artikel Karya Ilmiah Hukum Di Jurnal Nasional Dan Internasional Bereputasi* (Malang: Inteligencia Media, 2021).

<sup>15</sup> Jazim Hamidi, *Hermeneutika Hukum: Sejarah, Filsafat, & Metode Tafsir* (Malang: UB Press, 2011).

<sup>16</sup> Ahmad Siboy, *Konstruksi Hukum Pilkada: Jalan Tengah Keadilan Prosedural Dan Substansial Dalam Penyelesaian Perselisihan Hasil Pilkada Serentak* (Depok: Rajawali Press, 2018).

<sup>17</sup> Kennedy and Suhendarto, "Diskursus Hukum: Alternatif Pola Pengisian Jabatan Kepala Daerah Di Masa Pandemi Covid-19."



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be postponed. The postponement of the election is legal. The regulation regarding postponement of regional head elections is regulated in Article 121 of Law number 1 of 2015 concerning regional head elections, which states:

1. If natural disasters, riots, security disturbances, and other disturbances occur in an election area, all stages of the Election implementation will be disrupted, a follow-up election will be held.
2. The implementation of follow-up elections is carried out for all stages of the implementation of the election.

The provision regarding postponement of the regional head elections as regulated in Article 121 has never been tested nationally since the simultaneous regional elections in 2015. The mechanism for postponing the elections has never been carried out. However, in organizing the regional head elections, very serious things often occur but are still considered not to comply with the elements of Article 121 of the Law. At least there were some serious problems during the regional head elections from the first to the third period. Namely, a single candidate in regional head elections has occurred since the first election period, namely 2015. The emergence of a single candidate in regional head elections is an unpredictable phenomenon in the regional head elections law. As a result, there is confusion whether it in an area where there is only one pair of regional head candidates can still be held or not. If only one pair of candidates appears, the option arises for the regional head elections to be postponed until the next period. It is not necessary to carry out it or directly determine the existing pairs of candidates. Because if there is only one candidate, then one will be meaningless or just a waste of the budget considering that there is only one candidate so that the winner is already known. Is it impossible for an election or a match if there is only one participant? An election or competition can occur if two people or two pairs of candidates want to compete.<sup>18</sup>

Referring to the provisions of Article 121 of the Regional Head Elections Law, the emergence of a single candidate in the Regional Head Elections does not become a reason to postpone it so that several regions continue to hold it even though a single candidate only follows it. The phenomenon of a single candidate who cannot delay the holding of the regional Head Elections has been seen since the first round of simultaneous regional elections, namely in 2015 where three regions consisted of a single

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<sup>18</sup> Sholahuddin Al-Fatih, *Penyederhanaan Tata Kelola Pemilu Melalui Parliamentary Threshold*, Seminar Nasional XXVIII AIPI “Evaluasi Pemilu Serentak 2019 dan Tantangan Demokrasi Indonesia Ke Depan” (Jakarta, AIPI, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3799758](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3799758).

candidate, and this figure increased in 2017 where 9 regions were consisting of a single candidate. In 2020 there will be 25 Regions. In addition to the appearance of a single candidate in the Regional Head Elections that cannot be used to postpone it, other serious problems are also considered to have fulfilled the elements of postponing. The problem is related to the determination and detention of candidates for regional heads. For example, in the 2018 Malang City Election, two of the three pairs of candidates were named suspects and detained by the Corruption Eradication Commission (Indonesian: *Komisi Pemberantasan Korupsi* or KPK). As a result, only one candidate pair can participate in the election contestation process perfectly. Meanwhile, the other two candidates could not participate in the general head elections process because they were detained. When the Corruption Eradication Commission detains prospective participants, the process of holding the elections will continue as under normal circumstances, or the detention of two participants cannot be a justifiable reason for postponing.

However, the postponement of the general head elections finally occurred when the COVID-19 virus from Wuhan China spread massively throughout the world, including in Indonesia. The Covid-19, which is getting worse by the day in Indonesia, has made the government issue Government Regulation No. 2 of 2020 regarding the implementation of the 2020 Regional Head Election, where the core point of it is related to the postponement of the elections from September 09 to December 09, 2020. Normatively, the postponement of the general head elections from September 9 to December 9, 2020, can be analyzed through two approaches. Legal product approach and philosophical argumentation approach.

First, the legal product approach- the legal product to postpone the general head elections- uses the instrument of Government Regulation in *Lieu* of Law (Indonesian: Perpu). The choice to use a legal product in the form of this Government Regulation was officially carried out on March 31, 2020, where President Joko Widodo issued Government Regulation in *Lieu* of Law Number 2 of 2020 concerning the Third Amendment to Law Number 1 of 2015 concerning Stipulation of Government Regulation in *Lieu* of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Law.

Government regulation in *lieu* of law is legislation that has an equal position with the law. Namely, based on serial number three after the People's Consultative Assembly Decree (Indonesian: TAP MPR or TAP MPR). The postponement of the general head elections through the Government

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Regulation certainly makes the elections a valid one when viewed from the hierarchy of laws and regulations in Indonesia. One is because the position of the Government Regulation, which is equivalent to the law, means that the binding power and content of the regulations are equated and equalized with the law. It is different if the postponement of the general head elections uses another legal product. For example, the postponement of the elections is only regulated through a Government Regulation or a General Election Commission Regulation (Indonesian: Peraturan Komisi Pemilihan Umum or PKPU). The postponement of it through Government Regulation and a General Election Commission Regulation will be a delay that is null and void because the two legal products cannot change the provisions in the law, which are hierarchically under the Law/ Government Regulation.

The issuance of Government Regulation itself is a legal product issued in terms of compelling urgency. The urgency that compels itself is a situation for which the president has the authority to judge. The determination of the status of a state of coercion depends on the subjective considerations of a president. The president can freely issue the regulation related to the material and time. At the same time, the president does not need approval from any institution to issue a regulation government. The Constitutional Court has translated the condition for “forced urgency” through its decision number 138/PUU-VII/2009, which defines “forced urgency” with several conditions:

1. There is an urgent need to resolve legal issues quickly based on the law;
2. The required law does not yet exist so that there is a legal vacuum, or there is a law, but it is not sufficient;
3. The legal vacuum cannot be overcome by making laws in the usual procedure. It will take quite a long time while the urgent situation requires legal certainty to be resolved.

The choice to use a legal product in the form of a Regulation Government in delaying the implementation of the regional head elections is also to “protect” the president and provide legal protection for all Indonesian people. With a legal product in the form of government regulation. It will make the president unable to be prosecuted before the law, both criminally and civilly, because of his policy of issuing a regulation. The Presidential Decree can only be challenged in two ways. Namely, the mechanism for approval or rejection from the House of Representatives and constitutional review by the Constitutional Court.

The mechanism in the House of Representatives for a Government Regulation issued by the president is the mechanism for evaluating it by the

House of Representatives on a Government Regulation. The House of Representatives will assess whether the Government Regulation on regional head elections is per existing needs and is the right choice of legal policy. In terms of evaluation in the House of Representatives, they only have two options; rejecting or approving the government regulation issued by the president. If they approve a government regulation issued by the president, the regulation can automatically become law. On the other hand, if they reject the government regulations, the president must automatically revoke them. However, in this case, they voted to approve the Presidential government regulations so that the Government Regulations Number in *Lieu* of Law Number 2 of 2020 concerning the Third Amendment to Law Number 1 of 2015 concerning Stipulation of Government Regulation in *Lieu* of Law Number 1 of 2014 concerning The Election of Governors, Regents, and Mayors Becomes Law.

Meanwhile, the constitutional review mechanism rejects the Government Regulation through testing to the Constitutional Court. This constitutional review mechanism is a form of legal protection given to people seeking justice who feel that their rights have been harmed by the Government Regulations issued by the president. People who feel that the issuance of the regulations has disadvantaged them can apply for a constitutional review to the Constitutional Court. The petitioner will be confronted by the president, who is the respondent. In this trial before a constitutional judge, the petitioner for canceling the Government Regulations regarding the postponement of the regional head elections will argue with the respondent. In this trial, the applicant's argument may be granted or rejected. If the Constitutional Court accepts the petitioner's argument or application, the regulations issued by the president will not automatically have binding legal force.

Thus, the president's issuance of a Government Regulation to provide a legal basis for postponing the regulations is the right choice. Exactly because the postponement of the elections is something that is very urgent and must be decided immediately through a strong legal basis while issuing a legal product in the form of a law is something that is not possible given the corona conditions that the House of Representatives and the government can't conduct joint discussions and sessions. For the birth of the law on postponing the elections. On the other hand, for parties who feel aggrieved or disagree with the president's issuance of a Government Regulation, the

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people (who feel aggrieved) can take legal proceedings to the Constitutional Court.

The legal construction of postponing the regional head elections through the issuance of a Government Regulation is an option that is in line with the principle that people's safety is the highest law. The postponement of the regional head elections during the COVID-19 pandemic is to prevent the transmission of the Covid-19 to more people. If the elections continue to be held, automatically more citizens will be exposed to the virus, considering that in the process of holding the elections will be many meetings or interactions involving many people. Meeting people on a large scale is certainly something that is strictly prohibited in the process of breaking the chain of spreading Covid-19.

Postponing the election is certainly a very reasonable prevention effort. That is, preventing the people from the Covid-19 has been prioritized over the regional head election process, which only contains a contest for power. Elections can still be held later, while if people are exposed to the Covid-19, the potential for death is very large. When people die of the corona, their death cannot be resurrected. Preventing people from being exposed to the Covid-19 is an option that is in line with the rules of *ushul fiqh 'dar'ul mafasid muqaddamun ala jalbul masol* (preventing evil must take precedence over taking benefits).

### **Misguided Logic (Fallacy) in the Implementation of Regional Head Elections during a Pandemic**

The postponement of the regional head elections from September 09 to December 09, 2020, is a postponement in the perspective of legal logic can be called a fallacy or error of thinking. It is stated in the major premise that the Covid-19 Pandemic is an emergency. Everything about gathering large numbers of people must be prohibited (major premise), and elections gather many people (minor premise). Thus, the regional head elections cannot be held as long as they remain in a Covid-19 pandemic. It can only be held after Covid-19 is declared over. Thus, the postponement of the elections from September 09 to December 09, 2020, contains a deviant thought. *First*, the initial logic of postponing the regional head elections was to prevent people from being exposed to the Covid-19; then actually, the postponement should have come to the point where the pandemic period was declared to end. One

means that the elections will not be forced on December 9, which is still qualified during the pandemic.<sup>19</sup>

*Second*, the holding of the regional head elections on December 9, 2020, is gambling on the safety of the people.<sup>20</sup> It is because of the safety of the people with the threat of the Covid-19. People's safety from the threat of the Covid-19 is not prioritized considering that when the elections are still held during a pandemic. One will automatically ask people to come to the crowd, leave the house, and interact freely, even though these activities are very contrary to the Covid-19 health protocol. Holding the regional head elections during a pandemic is not appropriate to realize people's sovereignty and maintain the people's safety. Here, it is more impressive to mainstream the implementation of people's sovereignty and forget the implications of holding elections in Covid-19. The choice to hold elections during pandemic period is certainly a gamble with the health of the citizens. On the one hand, local elections can be held, but on the other hand, there is no guarantee that citizens will be free from exposure to the Covid-19.

*Third*, the implementation of the Regional Head Election during the Covid-19 period is an implementation that is not relevant to the Presidential Government Regulation or Law No. 1 of 2020.<sup>21</sup> Many excluded. Therefore, the implementation of the elections certainly requires a significant budget allocation. One is, of course, a very difficult thing for a reason to accept. On the one hand, the budget allocation is prioritized for handling Covid-19 or the safety of citizens from death due to the Covid-19. Still, on the other hand, a significant budget is wasted on the financing of the elections, contrary to the spirit of the Covid-19 health protocol.

If the budget is prioritized for handling Covid-19, the budget for the Regional Head Elections is also diverted for the needs of handling Covid-19. Elections are not something that cannot be postponed, or if it is not held, it will cause the government to paralyze. Supposedly, the budget is allocated for people who are victims of the corona pandemic, such as basic food assistance for people who cannot carry out their economic activities because of the corona. Admittedly or not, the implementation of Large-Scale Restrictions (Indonesian: Pembatasan Berskala Besar or PSBB) carried out by the government has direct implications for the economic demise of the

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<sup>19</sup> Aryojati Ardipandanto, "Permasalahan Penyelenggaraan Pemilu Serentak Tahun 2019," *Info Singkat Kajian Singkat terhadap Isu Aktual dan Strategis* 11, no. 11 (2019): 28.

<sup>20</sup> Kennedy and Suhendarto, "Diskursus Hukum: Alternatif Pola Pengisian Jabatan Kepala Daerah Di Masa Pandemi Covid-19."

<sup>21</sup> Hasibuan, "Urgensitas Perppu Pilkada Di Kala Wabah Pandemi Covid-19."

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community, especially the small community, considering that the government prohibits their economic activities. When the government prohibits people's economic activities in the name of preventing the spread of the Covid-19, the government is automatically obliged to provide compensation to people who cannot carry out their economic activities. People who cannot carry out their normal economic activities will automatically need income or finance from other sources, and the only source is government assistance.

Under conditions such as the above, the government can issue a policy to divert regional election budget allocations into assistance for people affected by Covid-19. Suppose the public is prohibited or forced to stop their economic activities for the sake of preventing the Covid-19. Why are the Regional Head Elections still forced to be held at a high cost? The people certainly agree more with the election budget to be used as assistance rather than organizing the elections. In this context, simple logic can be used. Namely, it is more important to choose a regional head or die of starvation.

*Fourth*, money politics.<sup>22</sup> The regional head elections held during the corona period is certainly an election that encourages more massive and structured money politics. It can certainly be more massive and affect the process of holding the election. One will be more massive because, during the pandemic, the people or voters are in a critical economic condition, especially voters from the lower middle class. Voters from middle to lower economic circles such as street vendors and drivers of public transportation are a group of voters who desperately need money to meet their daily needs. This condition is certainly an opportunity for regional head candidates to gain votes or support by giving them a certain amount of money (the middle group). For candidates for regional heads, giving them (the middle and lower economic group) money is the easiest and most effective way to gain significant votes. As for the voters themselves, the need for money is unavoidable during the corona pandemic, so they don't care who they choose and what the consequences of their choice will be. Under these conditions, the theory of supply and demand applies. Where voters need money, and there are pairs of regional head/deputy regional heads ready to give a certain amount of money if they are chosen at the time of voting.

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<sup>22</sup> Ratnia Solihah, "Peluang Dan Tantangan Pemilu Serentak 2019 dalam Perspektif Politik," *Jurnal Ilmiah Ilmu Pemerintahan* 3, No. 1 (2018): 73.

Fifth, incumbent and social aid (Indonesian: *Bantuan Sosial* or *Bansos*).<sup>23</sup> The holding of regional elections during the Covid-19 pandemic is certainly an election that benefits the incumbent. The incumbent is certainly a party that can take advantage of the status as regional heads to take advantage of their position for campaigning or imaging. As regional heads, they take advantage of their status to meet the people directly for various reasons, such as the ceremony of providing social assistance for Covid-19 and others. Even a regional head can politicize budget allocations and social assistance distribution maps to benefit his victory. Facts like this are commonplace for a regional head running for re-election in a regional head election.

On the other hand, pairs of candidates for regional heads and deputy regional heads who are not incumbent have limited space to campaign and image as incumbents considering the campaign space and imagery that a candidate can do for regional head/deputy regional head during a pandemic will be very limited—considering the implementation of social distancing. *Sixth*, the Regional Head Election is a formality. The holding of regional head elections is not an activity of popular sovereignty that is only oriented to fulfill elements of democratic procedures. It has a substance that is more than just a mere voting procedure. One as the implementation of popular sovereignty means that the people will channel their political aspirations. People's aspirations are manifested in exercising the right to be elected and vote based on moral considerations. Suppose the regional head election is held during a pandemic. In that case, it is ensured that the people cannot exercise their right to be elected and vote based on conscience because it is very unlikely that the people can normally exercise their right to vote in a pandemic condition. How can people exercise their right to vote based on conscience if their mental and physical conditions are still focused on matters related to Covid-19?

*Seventh*, the implementation of the Regional Head Elections is the implementation of people's sovereignty.<sup>24</sup> One is directly related to the participation of the people as the holder of sovereignty. People's participation in the elections can be measured by the activeness of the people in following each stage in the implementation. One of the most valid benchmarks in assessing people's participation in the regional head elections is the level of

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<sup>23</sup> Ombudsman RI, *Potensi Maladministrasi Dan Korupsi Bansos Covid-19* (Jakarta: Ombudsman RI, 2020).

<sup>24</sup> Cora Elly Noviati, "Demokrasi Dan Sistem Pemerintahan," *Jurnal Konstitusi* 10, No. 2 (2013): 333–354, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/107/106>.



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participation of the people who exercise their right to vote. The use of the right to vote becomes a valid benchmark because when people exercise their right to vote, it automatically shows that the people have used their rights actively and responsibly.

The holding of regional elections during the pandemic is certainly directly related to the level of participation or the use of people's voting rights. The use of people's voting in elections during the pandemic will certainly not be maximized. People who are included in the permanent voter list are in a dilemma whether to use their right to vote by coming to the polls or not. The pandemic condition certainly greatly affects the mindset and attitude patterns of voters. Voters will certainly consider whether to come to polling stations to keep voting or stay at home (not going to polling stations) to prevent the transmission of the Covid-19. Thus, it is certain that the level of voter participation in the Regional Head Elections during the pandemic will decrease significantly. Although the declining number of participants will not affect the election results, it will have implications for the moral legitimacy of the elected heads and deputy regional heads. Morally, an elected regional head with a low level of voter participation certainly makes his legitimacy as a regional head feel very low, so he lacks confidence in leading a region.

The low voter participation in the Regional Head Elections also eliminates the substance of the direct election. The holding provides opportunities for all people in an area to exercise their right to vote directly without being represented by anyone. Therefore, the higher the participation of voters who exercise their right to vote, the more the spirit or background of holding direct elections will be realized. Suppose the level of voter participation is very low. In that case, it can automatically be stated that direct elections are not effective or desired by the community. If people want direct elections to implement sovereignty, they will use them to the fullest and not ignore them. This condition can certainly make the Regional Head Elections go backward. It will be returned to the Regional People's Representative Council (DPRD) as before 2004.

Eighth, the term of office of the regional head, which is used as the basis for the Regional Head Elections to be held during the pandemic on December 9, 2020, is an argument that can be put aside.<sup>25</sup> The regional head whose validity period has expired does not have to be replaced by a definitive

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<sup>25</sup> Kennedy and Suhendarto, "Diskursus Hukum: Alternatif Pola Pengisian Jabatan Kepala Daerah Di Masa Pandemi Covid-19."

official who is the result of the elections. The term of office of the regional head whose term has expired can be overcome by using two options. The extension of the term of office of the regional head in office or a temporary/implementing official appointment. In this case, the choice lies with the central government, especially the Ministry of Home Affairs (Indonesian: Kementerian Dalam Negeri Republik Indonesia or Kemendagri) through the directorate general of regional autonomy. They may issue a decision on extending the term of office of regional heads in an area because they have not been able to inaugurate new regional heads due to the inability to hold elections according to the planned schedule. The choice of the Ministry of Home Affairs to extend the term of office of regional heads to overcome a vacuum of power is a discretionary act by state officials which is justified in a state of law based on the provisions of law number 30 of 2014 concerning Government Administration, where the central government is allowed to take legal action. In the form of discretion in the event of a legal vacuum and government stagnation.

Meanwhile, another option that can be taken to overcome the potential vacancy of the regional head position because the current regional head position has ended is by appointing a temporary official or implementing a task. The appointment of a temporary official means the appointment of a person to become a regional head in an area within a brief term of office or until a definitive official is sworn in. The executor of this task will then carry out the duties and functions of the regional head until the definitive regional head is sworn in. However, appointing an executor is an option that will not have the maximum effect in overcoming the power vacuum in an area. One is because the position of a regional head who only has the status of the executor of duties is a position whose authority is limited or cannot carry out several authorities, which are the authority of a definitive regional head.

The government commonly uses the mechanism for appointing regional heads to overcome a power vacuum in the regions under normal circumstances. Regional heads of duties such as the Commissioner-General of Police Iriawan as the technical implementer of Governor of West Java. The principle of the unitary state adopted by Indonesia explicitly states that all parts of Indonesia's territory (both Provinces and Regencies/Cities) constitute one territorial and administrative unit. As stated in Article 1 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, its system shows that the State of Indonesia is under one central government command. However, there is a regional government in each province and

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district/city (regional head and Regional People's Representative Assembly). The government at the regional level is not the leader or president for the states considering that the division of the territory of the Unitary State of Indonesia into provinces and within the province is divided into districts/cities is not a division into states (Article 18 of the 1945 Constitution of the Republic of Indonesia). Provincial and district/city governments remain within the policy line of the central government. The president has authority as head of state and head of government of the Republic of Indonesia.

The holding of the Regional Head Elections on December 9, 2020, which is a pandemic, is certainly an election that ignores the principle of a unitary state. The elections were forced to be carried out on the pretext of a power vacuum and government stagnation. For example, the position of Regent can be carried out by the Governor, while the Minister of Home Affairs can carry out the position of Governor. Suppose there is a power vacuum in an area. In that case, the regional leader at the top level can take over, considering that the power structure in the unitary state is top-down or from the highest position hierarchy to the lower one. In the context of the Covid-19 pandemic, the highest position in the unitary state of the Republic of Indonesia is still definitive. President Joko Widodo is the Head of State and head of government. His term of office will still end in 2024 and for regional heads at the provincial level where most governors still have long terms of office, such as the Governors of West Java, Central Java, and East Java.

Thus, the postponement of the Regional Head Elections from September 09, 2020, to December 09, 2020, on the pretext of the Covid-19 virus, is an argument for postponing and holding the election, which shows inconsistencies in the use of state emergency law logic. On the one hand, the logic used to postpone the Regional Head Elections through the issuance of a Government Regulation (a product of state emergency law) is that the election cannot be held on September 9, 2020, considering the COVID-19 pandemic and the potential exposure of voters if the election is still held. On the other hand, the Regional Head Elections were postponed and forced to be held on December 09, 2020 during the Covid-19 pandemic. Therefore, the government's argument that uses the state emergency law mechanism by issuing Government Regulation number 2 of 2020. It can be canceled considering that the argument for the pandemic period is not enforced by the government. One continues to force the holding of the Regional Head

Elections on December 9, 2020, instead of postponing it until the end of the pandemic period.

The government's inconsistency in using the pandemic period as an argument for implementing state emergency law will make the nature of state emergency law, extraordinary or urgent forcing the best. The parameters for determining a legal emergency are only based on the interests and logic of the power possessed by the authorities, not on the demands of conditions and situations. One will certainly be a bad phenomenon in the future, considering that the state emergency law can be issued at any time to legitimize the wishes and interests of the government in power and to deviate from the applicable laws. The meaning of the urgency of coercion which is a condition for the issuance of the Government Regulation, will be interpreted as very political, not juridical.

## **Conclusion**

Covid-19 has been declared an emergency by Indonesia, so the government enforces a state emergency law to issue a Government Regulation. The determination of the Covid-19 pandemic as a state emergency is a determination that is not excessive considering the systemic implications caused by the Covid-19, where all community activities must be stopped to prevent the transmission of Covid-19, including the holding of regional elections that cannot be held according to a predetermined schedule. However, the Regional Head Elections were only postponed from September 09 to December 09, 2020, where that date (December 09, 2020) was still the Covid-19 pandemic. There is an inconsistency or misguidance in placing the state emergency law as the basis for postponing the elections. On the one hand, Covid-19 is a reason to issue a State Emergency Law, but on the other hand, the Regional Head Election is still carried out during a pandemic. If it is an emergency, it cannot be held during the pandemic, or the elections must be postponed until the pandemic ends.

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#### About the Author(s)

**Dr. H. Ahmad Siboy., S.H., M.H** was born in Sumenep on May 04, 1991. His last education was completed at the Doctoral Program in Law, Faculty of Law, Universitas Brawijaya Malang On July 5, 2018 with cumlaude predicate. On March 30, 2019 he was appointed as Deputy Dean III of the Faculty of Law Unisma, On January 2, 2020 he was appointed as Secretary of the Senate of the Faculty of Law Unisma. Became an Extraordinary Lecturer at the Faculty of Law (FH) Universitas Brawijaya, FH Universitas Muhammadiyah Malang, State Polytechnic of Malang. Managed the Jurispruden journal and An Nahdhoh journal as chief editor, became a reviewer for national journals from various universities. Authors often receive research grants from both the government and other institutions. The types of research that have been achieved are the Beginner Lecturer Research Program (PDP), Doctoral Dissertation Research Program (PDD), Basic Higher Education Research (PDUPT) and institutional research.

**Sholahuddin Al-Fatih, S.H., M.H** was completed his undergraduate studies in Law at the Faculty of Law, Universitas Brawijaya (2011-2015), Masters in Legal Studies at the Faculty of Law, Universitas Airlangga (2015-2016) and Doctoral Degrees in Law in Faculty of Law Universitas Brawijaya (2020-present). The author is currently listed as a lecturer at the Faculty of Law, University of Muhammadiyah Malang, since 2017-present, teaching State Science, State Administrative Law, Constitutional Law, Legislation, Comparative Constitutional Law, Constitutional Law, Comparative Parliamentary Systems and Law and human rights. The author has a history of writing in Reputable International Journals, such as the International Journal of Human Rights (Q2) and Accredited National Journals such as Legality: Legal Scientific Journal, Judicial Journal, Jurisdictie: Law and Sharia Journal, Brawijaya Law Journal, Lentera Hukum Journal, Yustisia, Bestuur, Journal of Legal Reform, JILS, Diponegoro Law Review, De Lega Lata, Legal Discourse, Unnes Law Journal, Law Supremacy: Journal of Legal Research, Ahkam: Journal of Islamic Law, Audio Comparative Law Journal, Journal of Legal Dedication, Indonesia Law Reform Journal, Expose : Journal of Legal Research and Education, Replik Legal Journal, IJLPS, IJALS, JPHI and many more. The author has also succeeded in publishing scientific works in the form of books or book chapters.