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Establishment of Electoral Court in Indonesia: Problems and Future Challenges

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ABSTRACT

The primary aim of this research is to evaluate the imperative need for the establishment of a dedicated judicial body to address electoral disputes in Indonesia, particularly in light of the imminent concurrent elections scheduled for 2024 and the limited jurisdiction of the Constitutional Court in adjudicating such matters. This study employs normative legal research methodologies, incorporating legislative analysis, scrutiny of judicial precedents, and a comparative law framework as its principal approach. Uruguay serves as a pertinent comparative reference within the contextual parameters of this inquiry. The research findings unequivocally indicate the indispensability of instituting a specialized court for regional head elections, as mandated by Constitutional Court Decision Number 97/PUU-XI/2013. This imperative is substantiated by a series of legal arguments, namely: (a) the constrictive nature of the law's mandate,



(b) the Constitutional Court's role as a constitutional enforcement institution rather than a court of justice, (c) the absence of an appellate process, contravening fundamental principles inherent to the electoral law system, (d) the quantitative approach to dispute resolution, impeding the attainment of justice, and (e) the presence of a distinct judicial system, engendering uncertainty and impeding the realization of justice, certainty, and expediency within the election legal framework. The establishment of specialized courts for regional head elections in Indonesia is analogous to the implementation of analogous courts in Uruguay and Costa Rica. In both jurisdictions, specialized election courts function as distinct entities, operating autonomously from the conventional judicial powers vested in the Supreme Court or the Constitutional Court.

Keywords: Special Court, Election Dispute Resolution, Dispute Settlement

INTRODUCTION

The discussion surrounding the concept of conducting general elections prompts an examination of the process of addressing election-related issues as a phenomenon that is perceived to evolve and progress in alignment with the societal and governmental dynamics.¹ Conversely, elections have been compared to a metric for evaluating and safeguarding the proper functioning and sustainability of democratic systems.² Moreover, elections frequently

¹ Zayanti Mandasari, "Politik Hukum Pengaturan Masyarakat Hukum Adat (Studi Putusan Mahkamah Konstitusi)," *Jurnal Hukum Ius Quia Iustum* 21, No. 2 (2014): 227–250.

² Chris Marsden, Trisha Meyer, and Ian Brown, "Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?," *Computer Law and Security Review* 36 (2020): 105373.

give rise to intricate issues that frequently lead to contentious debates.³ This phenomenon is characterized by a procedural framework that extends beyond the mere tabulation of votes, necessitating resolution through judicial means. The electoral process within the judiciary has inadvertently emerged as a significant indicator of the attainment of political objectives. This scenario substantiates the significance of judicial institutions as a crucial component of the electoral process.⁴

The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) has designated the Constitutional Court (hereinafter as MK) as an institution of significant importance within the political process.⁵ The authority to adjudicate disputes regarding election results, commonly referred to as the General Election Results Dispute (hereinafter as PHPU), is the Constitutional Court's most frequently invoked jurisdiction in comparison to its other authorities. Undoubtedly, this scenario presents a formidable task for constitutional adjudicators as they strive to strike a delicate equilibrium between principles of fairness, openness, efficiency, and temporal limitations. Additionally, in the event that the Constitutional Court fails to render a just and unbiased decision in a Public Hearing of Public Importance case, it will result in significant political ramifications.⁶

Moreover, the transfer of jurisdiction in adjudicating disputes related to regional head elections (hereinafter as Pilkada) from the Supreme Court (MA) to the Constitutional Court has expanded the

³ Muhammad Bahrul Ulum and Nilna Aliyan Hamida, "Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia," *Constitutional Review* 4, no. 1 (2018): 111–130.

⁴ Nicholas Tarling and Edmund Terence Gomez, *The State, Development and Identity in Multi-Ethnic Societies: Ethnicity, Equity and the Nation*, *The State, Development and Identity in Multi-Ethnic Societies: Ethnicity, Equity and the Nation*, 2008, <https://doi.org/10.4324/9780203932162>.

⁵ Ahmad Ahmad and Novendri M. Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution," *Jurnal Konstitusi* 16, No. 4 (2020): 785–808.

⁶ Ria Casmi Arrsa, "Pemilu Serentak dan Masa Depan Konsolidasi Demokrasi," *Jurnal Konstitusi* 11, No. 3 (2014): 515–537.

Constitutional Court's role beyond mere exercise of authority.⁷ Consequently, Decision Number 97/PUU-XI/2013 was rendered by the Constitutional Court, wherein it was determined that the jurisdiction of resolving election outcomes no longer rests with the Constitutional Court. The response to the decision was subsequently manifested through the implementation of Law Number 10/2016 on the Election of Governors, Regents, and Mayors (Pilkada Law), which mandated the creation of a Special Judicial Body tasked with resolving disputes arising from Pilkada outcomes.⁸ Contrary to its purported role as a resolution to the issue at hand, it can be argued that the Pilkada Law does not inherently negate the jurisdiction of the Constitutional Court in addressing conflicts arising from Pilkada outcomes. The authority to oversee the Pilkada Law remains with the Constitutional Court until the establishment of a Specialized Judicial Body that can assume this responsibility. Currently, the establishment of the Special Election Judicial Body has not been realized, resulting in the Constitutional Court continuing to bear the responsibility of addressing all matters pertaining to elections.⁹

The impetus to establish a dedicated judiciary for special elections is not solely motivated by the enactment of the Pilkada Law. The current state of affairs demonstrates the presence of numerous institutions engaged in the resolution of election disputes. In relation to a range of issues encountered during electoral processes, a comprehensive examination of the available evidence reveals that there exist three state institutions vested with the jurisdiction to address these concerns. These institutions are identified as the Constitutional Court, the Election Supervisory Body (Bawaslu), and

⁷ Ahmad Siboy, "The Relationship between DKPP and PTUN Decisions Regarding Ethical Violation by General Election Administrators," *Jurnal Konstitusi* 19, No. 2 (2022): 624–642.

⁸ Titon Slamet Kurnia, "Mahkamah Konstitusi Sebagai Election Court: Refleksi Teoretis," *Refleksi Hukum: Jurnal Ilmu Hukum* 3, No. 1 (2019): 33–48.

⁹ Risa J. Toha, Dimitar D. Gueorguiev, and Aim Sinpeng, "The Normalization of Intolerance: The 2019 Presidential Election in Indonesia," *Electoral Studies* 74, No. July (2021): 102391.

the State Administrative Court (PTUN).¹⁰ The proliferation of institutions engaged in the resolution of election disputes has led to a suboptimal efficacy of the dispute resolution process. Rather than effectively addressing the issue, the outcome entails a proliferation of bureaucratic processes in the resolution of election and local election conflicts, accompanied by instances of redundant judicial decisions. Furthermore, it is worth noting that the judicial proceedings for each individual case are often protracted, exacerbated by the judges' competence and the general courts' limited comprehension of electoral matters. Consequently, the efficacy of the electoral dispute resolution process is increasingly subject to scrutiny.¹¹

The presence of a special court for the election of regional heads in Indonesia is a must, recalling the decision of the Constitutional Court (MK) No. 97/PUU-XI/2013 in the case of judicial review of Article 236 C of Law No. 12 of 2008 concerning the Second Amendment to Law No. 34 of 2004 concerning Regional Government, and Article 29 paragraph (1) letter e of Law Number 48 of 2009 concerning Judicial Power, which is considered contrary to Article 1 paragraph (3), Article 22E paragraph (2), Article 24C paragraph (1) the Constitution of 1945. This contradiction is seen from the authority of the Constitutional Court (MK) in resolving disputes over the results of regional head elections according to the Constitution of 1945 different regimes, that are the electoral regime and the regional head election regime as explained in Article 22E paragraph 2, that: "*General Elections are held to elect Members of the People's Representative Council, Regional Representative Council, President and Vice President, and Regional People's Representative Council*". Article 24C paragraph 1: "*The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine the law against the constitution, decide on disputes over the authority of state institutions whose authority is*

¹⁰ Pan Mohamad Faiz, "The Dissolution of Political Parties in Indonesia: Lessons Learned from the European Court of Human Rights," *Journal of Legal, Ethical and Regulatory Issues* 22, No. 4 (2019): 1–10.

¹¹ Luthfi Widagdo Eddyono, "Penetapan Anggota Panwaslu oleh Bawaslu: Analisis Putusan Mahkamah Konstitusi Nomor 11/PUU-VIII/2010," *Jurnal Konstitusi* 8, No. 2 (2016): 23-44.

granted by the constitution, decide on the dissolution of political parties, and decide disputes regarding the results of general election". While the rules regarding the election of regional heads regulated in Article 18 Paragraph 4 of the Constitution of 1945 reads: "*Governors, regents and mayors respectively as heads of provincial, district and city governments, are democratically elected*".

The separation of regional head arrangements in the constitution from elections can be seen in a clear sense that the regional head election is not an election. Thus, the authority of the Constitutional Court in Article 236 C of Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Regional Government which reads: "*The handling of disputes over the results of the election of regional heads and deputy regional heads by the Supreme Court (MA) is transferred to the Constitutional Court (MK), no later than eighteen months from the promulgation of this law*", is considered to have a very principle conflict regarding the scope of the MK's duties which is limited only to the electoral regime, so that the authority over dispute resolution results is also only in the election. Therefore, in the petition for judicial review, the constitutional judges granted it in its entirety, assessing that the article was not only contradictory but also had no binding legal force.¹²

This decision was later manifested in Article 157 paragraphs 1, 2 and 3 of Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors to become Laws, as the following below:

- 1) Disputes over election results are examined and tried by a special judicial body
- 2) The special judicial body as referred to in paragraph (1) is established before the implementation of the national simultaneous elections

¹² Mardian Wibowo, I Nyoman Nurjaya, and Muchammad Ali Safaat, "The Criticism on the Meaning of 'Open Legal Policy' in Verdicts of Judicial Review at the Constitutional Court," *Constitutional Review* 3, No. 2 (2018): 262.

- 3) Disputes over the determination of the final stage of the election results are examined and tried by the constitutional court until a special judicial body is formed.

In this decision, the Constitutional Court gives freedom to legislators to determine which judicial institutions are authorized to resolve regional head election disputes. However, in dictum number 2 the decision stipulates that the Constitutional Court is still authorized to adjudicate disputes over the results of regional head elections as long as there is no law governing this matter.¹³ The attitude of the Constitutional Court can be assessed as an alternative to providing a win-win solution if the mandate of the law has not been realized.

Therefore, from the mandate of the Constitutional Court's decision which is manifested in Article 157 paragraphs 1, 2 and 3 of the Regional Head Election Law (UU Number 10 of 2016) related to the establishment of a special court for resolving disputes over election results, it is necessary to ascertain the position and authority of the settlement, so that the regional head election justice system gets certainty. If it is not realized, it will become a problem in the upcoming elections in 2024, because clearly in the decision the Constitutional Court stated that it no longer has the authority to adjudicate election disputes.

Several experts and researchers emphasize the crucial need for establishing a dedicated judicial institution, particularly in light of concurrent regional head elections. Wicaksono asserts that introducing a court exclusively tasked with handling election disputes constitutes a pertinent legal reform, given the evolving legal landscape and the decision to conduct simultaneous elections in the upcoming years.¹⁴ Echoing this sentiment, Mahendra urges prompt action from the House of Representatives and the Government to establish a Special Court dedicated to handling Election Disputes.

¹³ Slamet Suhartono, "Konstitusionalitas Badan Peradilan Khusus dan MK dalam Penyelesaian Sengketa Hasil Pilkada Langsung," *Jurnal Konstitusi* 12, No. 3 (2016): 503.

¹⁴ Dian Agung Wicaksono and Ola Anisa Ayutama, "Initiation of Special Court on the Local Election for Regional Leaders to Face the Simultaneously Election of Governor, Regent, and Mayor in Indonesia," *Jurnal Rechts Vinding* 4, No. 1 (2015): 157–179.

According to him, this specialized judicial institution is essential to mitigate the risk of fraud, thereby elevating the overall quality of regional head elections in the future. Consequently, the central question addressed in this paper revolves around the urgency of implementing a specialized judiciary to effectively address disputes arising from regional head elections in Indonesia.¹⁵

Furthermore, the scholars and researchers posit the indispensability of instituting a dedicated judicial entity, especially within the context of concurrent regional elections. Dian Agung Wicaksono contends that the implementation of a specialized court exclusively tasked with adjudicating election disputes constitutes a salient legal reform, particularly given the legal intricacies surrounding imminent simultaneous elections. Similarly, Yusril Ihza Mahendra advocates for the expeditious establishment of a Special Court by the People's Consultative Assembly (DPR) and the Government to address Election Disputes. From his perspective, this particular judicious establishment bears significance in mitigating fraudulent activities, thereby resulting in an amelioration of the overall quality of regional head elections in subsequent instances.

The academic discourse on the establishment of a dedicated election court in Indonesia has garnered attention in numerous scholarly articles. However, the present research narrows its focus to a specific paper, elucidating the concurrent election of regional leaders as a pivotal argument for the prompt establishment of a specialized court to address election disputes in Indonesia. To distinguish this paper from antecedent studies, the author meticulously outlines several legal issues germane to this topic, which will be expounded upon in subsequent sections.

This paper provides a comprehensive analysis of the challenges encountered within the election judicial system in Indonesia, with a specific focus on the integration of the system through the establishment of the Supreme Election Court. The issues

¹⁵ Surya Darma Kardeli, "Analisis Tentang Parliamentary Threshold Dan Calon Perseorangan Berdasarkan Undang-Undang Nomor 10 Tahun 2016 Dalam Perspektif Demokrasi Dan Prinsip Check and Ballances," *Legality: Jurnal Ilmiah Hukum* 26, No. 1 (2018): 118.

encompassed in this context comprise, among various others, the contentious struggle for jurisdiction over the resolution of conflicts arising from regional head elections, the fragmentation and overlapping of authority in resolving election disputes, the mounting accumulation of election and regional head election disputes within the Constitutional Court, and the challenges associated with the recall mechanism for political party members in the House of Representatives.¹⁶ This research paper titled "The Implementation of Special Courts for the Resolution of Regional Head Election Results in the Context of National Simultaneous Elections" examines the establishment of a special judicial model within the Supreme Court to handle cases related to national simultaneous elections. The model involves the creation of an ad hoc special court operating within the existing judicial framework. The special court responsible for resolving election disputes is situated within the High Court. This court is designed to address conflicts arising from election outcomes within the province. This arrangement mirrors the model of a corruption court located in the provincial capital. By adopting this approach, the aim is to ensure that the financial resources allocated for the establishment and operation of this special court remain within reasonable limits.¹⁷

This paper elucidates the rationale behind the necessity for establishing a dedicated court to address the evolving complexities in the realm of justice within society. Furthermore, it emphasizes the heightened enforcement of election laws as a means to uphold election integrity. The primary objective of this proposed court is to expedite and streamline the resolution of election law cases, thereby contributing to the realization of election integrity.¹⁸ Lastly, This paper

¹⁶ Moch. Marsa Taufiqurrohman, Jayus Jayus, and A'an Efendi, "Integrasi Sistem Peradilan Pemilihan Umum Melalui Pembentukan Mahkamah Pemilihan Umum," *Jurnal Konstitusi* 18, No. 3 (2022): 562.

¹⁷ Mohammad Syaiful Aris, "Pembentukan Peradilan Khusus Penyelesaian Hasil Pemilihan Kepala Daerah dalam Pelaksanaan Pemilu Serentak Nasional," *Media Iuris* 5, No. 3 (2022): 473–506.

¹⁸ Iwan Rois and Ratna Herawati, "Urgensi Pembentukan Peradilan Khusus Pemilu dalam Rangka Mewujudkan Integritas Pemilu," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 7, No. 2 (2018): 267.

examines the authority of the Constitutional Court in resolving disputes regarding election results subsequent to the issuance of Constitutional Court Decision Number 85/PUU-XX/2022. It argues that this decision has eliminated the distinction between the two regimes, thereby granting the Constitutional Court the permanent jurisdiction to review and adjudicate such cases.¹⁹

Drawing from a range of scholarly articles that examine the establishment of special election courts in Indonesia, this analysis explores the dimensions of urgency and ideality associated with such courts. Nevertheless, the author asserts that this paper presents a unique contribution compared to previous studies by emphasizing the significance of establishing a dedicated election dispute court to address the issue of simultaneous elections in Indonesia. This reconsideration is crucial in order to establish a fair and impartial platform for resolving disputes among the involved parties. Additionally, it is imperative to ensure the objectivity of the judicial institution in fulfilling its judicial function, particularly given that the Constitutional Court is the sole authority responsible for handling election disputes. The potential lack of objectivity may arise if the Constitutional Court becomes inundated with a substantial number of election disputes during the upcoming elections.

EVOLUTION OF DISPUTE RESOLUTION IN INDONESIAN REGIONAL HEAD ELECTIONS

Juridically, the underpinning for the execution of direct regional head elections (Pilkada) is enunciated in Article 18, paragraph (4) of the 1945 Constitution, stipulating that "*Governors, Regents, and Mayors, respectively serving as heads of provincial, district, and city governments,*

¹⁹ Baharuddin Riqiey, "Kewenangan Mahkamah Konstitusi dalam Memutus Perselisihan Hasil Sengketa Pilkada Pasca Putusan Mahkamah Konstitusi Nomor 85/PUU-XX/2022," *Jurnal APHTN-HAN* 2, No. 1 (2023).

are democratically elected."²⁰ Scrutinizing the temporal trajectory from the inaugural Pilkada in 2005 to the current year 2022, it is discerned that four discrete judicial periods have been vested with the authority to adjudicate disputes emanating from these elections, such as:²¹

- a. In the Supreme Court from 2005 to 2008
- b. In the Constitutional Court from 2008 to 2014
- c. In the High Court and can be appealed to the Supreme Court from 2014 to 2015
- d. The transition period in the Constitutional Court was from 2015 until the establishment of the Special Courts Agency.

In contemplating the optimal entities for adjudicating disputes arising from Regional Head Elections, the Supreme Court and the Constitutional Court find themselves in a challenging quandary. Both judicial institutions bear formidable responsibilities and authoritative roles. The predicament arises from the formidable tasks and weighty duties vested in these two entities. Notably, the Supreme Court is grappling with a substantial caseload, which raises concerns regarding its capacity to effectively handle additional responsibilities associated with regional election disputes. This burgeoning workload poses a potential risk to the administration of justice in Indonesia, and concurrently, it jeopardizes the assurance of legal certainty for the involved parties,²² as well as the Constitutional Court although it has not yet reached the overload stage, the number of incoming cases is quite energy-consuming so that it has an effect on the guarantee and quality of decisions for the parties.

In response to the evolving socio-political landscape, the complexity and magnitude of issues have notably intensified. This escalation has correspondingly prompted an increased reliance on the

²⁰ Sholahuddin Al-Fatih, "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi," *Legality: Jurnal Ilmiah Hukum* 25, No. 2 (2018): 247.

²¹ Ansorullah, Iswandi, and Firmansyah Putra, "Efektivitas Penegakan Hukum Pemilu (Peran Bawaslu Kota Sungai Penuh dalam Pemilihan Kepala Daerah Tahun 2020)," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 12, no. 1 (2023): 125–139.

²² Rian Saputra et al., "Reconstruction of Chemical Castration Sanctions Implementation Based on the Medical Ethics Code (Comparison with Russia and South Korea)," *Lex Scientia Law Review* 7, No. 1 (2023): 61–118.

Constitutional Court by citizens, who seek legal remedies while concurrently engaging with other avenues within the Supreme Court. The Chief Justices of both the Constitutional Court and the Supreme Court have articulated concerns regarding the weightiness of their current mandates. Consequently, they advocate for the expeditious establishment of a specialized court tailored to address disputes emanating from these circumstances. This viewpoint is highlighted by Adhani, who underscores the intrinsic link between the authority of the Supreme Court and the efficacy and efficiency of the judicial process, particularly in the domain of regional head elections. The mounting caseload handled by the Supreme Court serves as a compelling rationale to designate it as the executive authority in cases related to regional head elections. Crucially, the preeminent consideration in this discourse is the recognition of the political dimension, emphasizing the Supreme Court's role as a political court—an identity firmly rooted in its overarching function as an institution of justice.²³

Another problem that essentially needs to be observed is related to the relevance of the Constitutional Court's authority in resolving disputes over the results of the Regional Head Elections, even including elections, because the basic thing in every consideration of its decisions is the Constitution of 1945 and Pancasila as the touchstone.²⁴ Therefore, the authority of the Constitutional Court in resolving disputes over the results of the regional elections and general elections has no philosophical relevance, especially since the fundamental paradigm of the focus of the judges of the Constitutional Court is quantitative, only looking at quantitative evidence.²⁵

²³ M. Guntur Hamzah and Wilma Silalahi, "Constitutionality of the Former Ex-Convict as Election Participants of Regional Heads," *Proceedings of the 1st Paris Van Java International Seminar on Health, Economics, Social Science and Humanities (PVJ-ISHESSH 2020)* 535 (2021): 538–544.

²⁴ Lita Tyesta Addy Listya Wardhani, Muhammad Dzikirullah H. Noho, and Aga Natalis, "The Adoption of Various Legal Systems in Indonesia: An Effort to Initiate the Prismatic Mixed Legal Systems," *Cogent Social Sciences* 8, No. 1 (2022).

²⁵ Yance Arizona, "The Return of Pancasila: Political and Legal Rhetoric Against Transnational Islamist Imposition," *Constitutional Review* 5, no. 1 (2019): 164–193.

According to Nurul Ula Ulya, the judge's consideration here is inefficiency, because the dispute over the outcome is a concrete case that is more appropriate in the realm of the Supreme Court or other special courts as the "Court of Justice" and not the Court as the "Court of Law" which requires very philosophical considerations, and disputes over the results of regional head elections or general elections are concrete cases and do not need philosophical considerations.²⁶ The same thing was also conveyed by Saldi Isra, that cases related to regional elections or general elections are essentially real cases, so it is more appropriate if they are handled by the "Court of Justice" which in the building of judicial institutions in Indonesia is the Supreme Court and not the "Court of Law" such as the Constitutional Court.²⁷

Thus, talking about the position and authority of the judiciary for resolving disputes over the results of the regional elections is not only based on considerations of its effectiveness, because the Constitutional Court is considered more established, experienced and can minimize conflicts than other institutions, but deeper than that is a matter of the nature or characteristics between the "Court of Justice" and the "Court of Law".²⁸ So, in the context of the *ius constituendum*, of course, we must try to initiate the position of the judiciary for the settlement of regional election disputes in a position that is more ideal in nature and principle while still looking at the aspect of effectiveness. To arrive at the position and state of an effective institution, of course, it cannot be answered instantly, but it takes a long process to harmonize its systems and organs, especially the issue of human resources.²⁹

²⁶ Nurul Ula Ulya and Fazal Akmal Musyarri, "Evaluasi Yuridis Sistem Penyelesaian Sengketa Pemilihan Umum Dan Ius Constituendum Peradilan Khusus Pemilihan Umum," *Justitia et Pax* 35, No. 2 (2020): 153–175.

²⁷ Saldi Isra, "Titik Singgung Wewenang Mahkamah Agung dengan Mahkamah Konstitusi," *Jurnal Hukum dan Peradilan* 4, No. 1 (2015): 17-30.

²⁸ Frans Van Dijk, "Improved Performance of the Netherlands Judiciary: Assessment of the Gains for Society," *International Journal for Court Administration* 6, No. 1 (2014): 83-99.

²⁹ Rian Saputra, M Zaid, and Silaas Oghenemaro, "The Court Online Content Moderation : A Constitutional Framework," *Journal of Human Rights, Culture and Legal System* 2, no. 3 (2022): 139–48, <https://doi.org/10.53955/jhcls.v2i3.54>.

This effort is not only able to maintain the authority and image of the judicial power institutions of the Supreme Court and the Constitutional Court, in terms of state administration, it is also to better position and organize the judicial power system and the electoral law system in Indonesia so that there is no position and authority that seems forced, although it is considered effective but actually has other systemic effects.³⁰ Finally, at any time there will also be problems such as debates about election terminology and regional elections in various interpretations which will eventually make the decision change from the Supreme Court to the Constitutional Court, then the Court releases itself again and recommends it to other courts, ultimately makes the electoral justice system uncertain and confusing, this is a fundamental problem in terms of position and authority. Therefore, to anticipate the recurrence of this kind of shift in position and authority, we need to initiate a better judicial system.³¹

Topo Santoso's analysis emphasizes a crucial set of conditions necessary for the effective functioning of the electoral law system. These encompass the establishment of an effective legal mechanism and resolution framework, the formulation of rules outlining penalties for election violations, and the provision of detailed mandates ensuring the protection of voting rights. Additionally, the entitlement of voters, candidates, and political parties to register complaints with either the election management body or the judiciary is considered pivotal. Santoso also underscores the significance of prompt decisions to prevent the deprivation of voting rights, the acknowledgment of the right to appeal, and the expeditious issuance of decisions. Furthermore, the establishment of rules specifying the required time for lawsuit resolutions, clear implications for violations on electoral outcomes, and the incorporation of processes, procedures, and prosecutions adhering to human rights principles are

³⁰ Suwari Akhmaddhian, "Discourse on Creating a Special Environmental Court in Indonesia to Resolve Environmental Disputes," *Bestuur* 8, no. 2 (2020): 129, <https://doi.org/10.20961/bestuur.v8i2.42774>.

³¹ Budi Suhariyanto, "Persinggungan Kewenangan Mengadili Penyalahgunaan Diskresi Antara Pengadilan TUN Dan Pengadilan Tipikor," *Jurnal Hukum Dan Peradilan* 7, no. 2 (2018): 213–36.

deemed integral. Together, these conditions form an essential framework for the efficient operation of the electoral law system.³² Some of the theoretical foundations above can lead us to an ideal understanding to be a reference to see the legal reality sociologically related to how the law is applied. That way, it will be able to see what the problems in implementation are in the form of a picture of the problematic resolution of regional election disputes so far, so as to find the urgency for a solution in the context of seeing the law in the future or what it aspires to (*ius constituendum*).³³

CHALLENGES IN RESOLVING DISPUTES ARISING FROM REGIONAL HEAD ELECTIONS RESULTS

I. Constraints in the Mandate of Election Law

Court decisions within the realm of legal science are imperative to adhere to and hold in high regard, provided that the decision possesses enduring legal validity.³⁴ It is imperative that all court decisions are adhered to and enforced. In order to effectively address conflicts encountered, judges must possess the capacity to impartially resolve them in accordance with relevant legal principles.

³² Irwan Anjalline, Rini R.A. Anggraini, and Rosita Indrayati, "Pengaturan Dana Kampanye Pemilihan Umum Sebagai Tanggung Jawab Calon Anggota Legislatif Berdasarkan Undang-Undang Nomor 8 Tahun 2012 Tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Dan Dewan Perwakilan Rakyat Daerah", *Lentera Hukum* 1, No. 1 (2014): 42–53.

³³ Arif Rachmanto, "Comparing Presidential System Implementation in South Korea, Philippines, and Indonesia," *Wacana Hukum* 29, No. 1 (2023): 37–48.

³⁴ Rian Saputra, Josef Purwadi Setiodjati, and Jaco Barkhuizen, "Under-Legislation in Electronic Trials and Renewing Criminal Law Enforcement in Indonesia (Comparison with United States)," *Journal of Indonesian Legal Studies* 8, No. 1 (2023): 243–288.

Consequently, during the decision-making process, judges are required to maintain independence and refrain from being influenced by any external party, including the executive branch. When rendering decisions, judges are exclusively constrained by the pertinent facts and legal principles that serve as the legal foundation for their rulings. However, the judge is responsible for determining the relevant facts and selecting the legal rules that will be applied to resolve the current case.³⁵

Hence, it is evident that judges or magistrates possess significant authority over the involved parties in a dispute with regard to the specific issue or conflict presented before them. Nonetheless, it is imperative to acknowledge that judges shoulder a significant burden and must be cognizant of their responsibility while executing their duties. This is due to the fact that the decisions made by judges can have profound and extensive ramifications on the individuals impacted by the scope of said decisions. An unjust ruling made by a judge has the potential to deeply impact the individuals involved, leaving a lasting emotional imprint that may endure throughout their lifetimes.³⁶

The Constitutional Court's decision Number 97/PUU-XI/2013 in a judicial review case concluded that the Constitutional Court was no longer authorized to handle disputes over the results of the regional elections. This decision was then manifested in Article 157 paragraphs 1, 2 and 3 of Law Number 10 of 2016 concerning Regional Head Elections as follows:

- 1) Disputes over election results are examined and tried by a special judicial body.
- 2) The special judicial body as referred to in paragraph (1) shall be established prior to the implementation of the national simultaneous elections.

³⁵ Rian Saputra et al., "Reform Regulation of Novum in Criminal Judges in an Effort to Provide Legal Certainty," *Journal of Indonesian Legal Studies* 6, no. 2 (2021): 437–482.

³⁶ Firman Floranta Adonara, "Prinsip Kebebasan Hakim dalam Memutus Perkara Sebagai Amanat Konstitusi," *Jurnal Konstitusi* 12, No. 1 (2015): 1–20.

- 3) Disputes over the determination of the final stage of voting results from the election are examined and tried by the Constitutional Court until a special judicial body is established.

In this decision, the Constitutional Court gives freedom to legislators to determine the form of a judicial institution authorized to resolve regional election disputes. However, in dictum number 2 the decision stipulates that the Constitutional Court is still authorized to adjudicate disputes over the election results as long as there is no law governing this matter. Furthermore, it is also emphasized that the task of the Constitutional Court is only to fill in the intermediary period before the national simultaneous elections (limitative), if it continues without any follow-up, he considers it will experience a legal stalemate.³⁷

Although theoretically there is still room for justification that through practice for a period of time it is still believed and accepted, meaning that the Constitutional Court's decision is changed by the practice that has been carried out since the decision was issued, therefore, this can be changed by practice as well as interpretation. There are at least three reasons for changing the constitution; through formal amendments, constitutional conventions and through constitutional interpretation. However, in state practice, especially in matters of state administration, we need to adhere to the essence of positive law, which is to provide certainty and consistency of the norms, especially those that have been made which contain a limitative mandate, so there must be clarity and follow-up.

II. Disruption of the Constitutional Court's Authority: Implications for a Constitutional Enforcement Agency

Since the Constitutional Court handled disputes over the results of the Regional Head Elections in 2008, it is undeniable that it has

³⁷ Zainal Arifin Mochtar, "Antinomi dalam Peraturan Perundang-Undangan di Indonesia," *Hasanuddin Law Review* 1, No. 3 (2015): 316-336.

disrupted productivity in carrying out its main tasks, time has been occupied by a lot of election dispute cases whose data continues to increase every year which exceeds 50% of regional head candidates, and ultimately participates in interfere with the quality of the decision on the examination, interpretation of the requested law, and this is of course very dangerous if efforts are not considered to minimize it as an enforcement agency for *staatsfundamentalnorm*.

The effect of the Constitutional Court's authority to adjudicate election disputes is the increasing number of cases that are entered, even exceeding judicial review cases which have actually become its main authority as *the guardian of the constitution*. This authority eventually dominated the trials in the Constitutional Court, with the number of cases that came in and the short trial period of 14 days as stated in Article 78 of Law Number 8 of 2011 concerning the Constitutional Court, it was feared that it would affect the quality of the decision. In addition, it also interferes with the role of the Constitutional Court in deciding applications for judicial review, which is actually the main core of the Constitutional Court's authority. The role of the Constitutional Court finally shifted from the constitutional court to become as if it were an election court because it was dominated by regional head elections rather than judicial review.³⁸

Arief Hidayat (former Chief Justice of the Constitutional Court) admitted that the handling of regional election disputes so far has taken a long time, so that the handling of cases of judicial review of the law has been neglected. Moreover, the number of cases that go to the Constitutional Court tends to increase every year. He also hopes that the Constitutional Court should only examine the law so that the integrity and independence of judges are not affected by election dispute cases.³⁹

³⁸ Irfan Amir, "Disqualification of the Candidate Pair for the Elected Regional Head of Sabu Raijua Regency," *Al-Bayyinah* 5, No. 2 (2021): 196–213.

³⁹ Ulya and Musyarri, "Evaluasi Yuridis Sistem Penyelesaian Sengketa Pemilihan Umum dan Ius Constituendum Peradilan Khusus Pemilihan Umum." Furthermore, independent general elections encounter a myriad of problems and challenges that span the entire electoral process. Voter suppression, a critical issue, involves deliberate efforts

A former Chief Justice of the Supreme Court, Hatta Ali, firmly refused to return the election dispute to his institution. Because, according to him, the Supreme Court itself is not a special judicial body to resolve regional election disputes. The special court's decision is final and binding, if in the Supreme Court there is still a cassation process, then it is better for a special judiciary body. Hatta believes that the special judicial body for regional election disputes can reduce the burden on the existing judicial institutions (MA-MK). He agreed with the view of the chairman of the Constitutional Court that he said that the dispute resolution of the Regional Head Elections in the Constitutional Court would interfere with the judicial review case.⁴⁰

to restrict certain groups from voting, diminishing the inclusivity and fairness of elections. Electoral fraud poses a significant threat, encompassing activities such as vote-buying and result manipulation, eroding the integrity of the electoral system. Media bias can distort public perception through unequal or prejudiced coverage, influencing democratic outcomes. Inadequate access to information, whether due to misinformation or limited resources, hampers voters' ability to make informed decisions. Political interference, from coercion to misinformation campaigns, undermines the independence of the election process. Insufficient electoral infrastructure, such as outdated technology and poor logistical planning, can result in inefficiencies and errors. Violence and intimidation tactics, whether physical or verbal, can suppress voter turnout and impede the democratic process. Disenfranchisement, caused by barriers to registration or discriminatory voting laws, leads to unequal representation. Political polarization exacerbates challenges by hindering constructive dialogue and cooperation. Election security concerns, particularly cybersecurity threats, pose risks to the credibility of elections. Post-election disputes, often centered around allegations of fraud, can lead to prolonged legal battles and political instability. Addressing these challenges requires a commitment to transparency, protection of voter rights, and the fortification of independent electoral bodies to ensure the integrity and fairness of the electoral process. See also Fikri Ahsan, Wahyu Andrianto, Djarot Dimas Achmad Andaru, Mohamad Mohamad Hanapi, "The Postponed Regional Head Elections in Emergency Situations: A Constitutional Democracy Perspective in Indonesia", *Yustisia* 12 No. 2 (2023): 202-218; Saiful Risky, Sholahuddin Al-Fatih, and Mabarroh Azizah, "Political Configuration of Electoral System Law in Indonesia from State Administration Perspective". *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 6, No. 1 (2023): 119-130; Awwal Muhammad Shafiu, Abdullahi Umar, Halimah Abdul Manaf, "Leadership Challenges in Democratization: An Analysis of Independent National Electoral Commission of Nigeria", *Yustisia* 12, No. 1 (2023): 13-28.

⁴⁰ Wicaksono and Ayutama, "Initiation of Special Court on the Local Election for Regional Leaders to Face the Simultaneously Election of Governor, Regent, and Mayor in Indonesia."

III. Nature of the Final and Binding Decisions of the Constitutional Court

The character of decisions rendered by the Constitutional Court finds its initial codification in the post-amendment Constitution of 1945, notably within Article 24C, paragraph (1), which stated that, "*The Constitutional Court has the authority to adjudicate the first and last instances whose decisions are final...*". This constitutional norm, reiterated through subsequent legal frameworks such as Law Number 24 of 2003 concerning the Constitutional Court and Law Number 48 of 2009 concerning Judicial Power, solidifies the irrevocable and conclusive nature of the Constitutional Court's decisions. Fajar Laksono, however, elucidates that the binding significance is implicitly embedded in the finality of the decision. Legislative provisions underscore that the Constitutional Court's decision stands as both the initial and terminal determination, leaving no recourse for further legal remedies.⁴¹ Consequently, such decisions carry permanent and binding legal force, compelling immediate implementation.⁴² The paramount significance of the Constitutional Court's decisiveness lies in its pivotal role in upholding the sanctity of the constitution and safeguarding the constitutional rights of citizens through interpretative processes.

In addressing the character of Constitutional Court decisions, it is imperative to refrain from asserting any inherent inadequacy in the Court itself. Rather, scrutiny is directed towards the specific context of regional election trials, wherein entrusting such matters to an institution with final and binding authority, like the Constitutional Court, raises concerns of potential authority misuse without recourse for appeal. This absence of a corrective mechanism leaves decisions susceptible to manipulation, particularly given the political nature of

⁴¹ Fajar Laksono et al., "Implikasi dan Implementasi Putusan Mahkamah Konstitusi Tentang SBI Atau RSBI," *Jurnal Konstitusi* 10, No. 4 (2013): 731–760.

⁴² Viktoris Dahoklory, "Dinamika Pengelolaan Keuangan Bumn Perihal 'Dilema' Antara Kerugian Negara Ataupun Kerugian Bisnis," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 9, No. 3 (2020): 349-365.

these cases, as exemplified by the 2008 regional elections incident where a constitutional judge, Akil Moechtar, faced arrest by the Corruption Eradication Commission (KPK).

Moreover, adjudicating political cases intertwines with emotions and perceptions, posing a challenge to the integrity of judges at the Constitutional Court level. The ethical values that guide all elements within the state become pivotal in these instances. A crisis of confidence not only jeopardizes the integrity of the judges but also diminishes the stature of the Constitutional Court as an institution entrusted with upholding the purity of the constitution. Therefore, careful consideration must be given to the potential ramifications of designating the Constitutional Court as the sole authority in handling regional election trials, particularly in light of the intricate dynamics involved in political cases.

IV. Separate Judicial System

Within the Indonesian electoral legal framework, designed as a mechanism facilitating redress for issues arising during elections, be they violations or disputes over outcomes, regulatory provisions comprehensively address these facets. Six distinct institutions wield authority to adjudicate such matters: the election supervisory body, the Supreme Court, the District Court, the Election Organizing Honorary Council (DKPP), the State Administrative High Court (PTTUN), and the Constitutional Court. These entities collectively form a multifaceted apparatus entrusted with the responsibility of ensuring the integrity and fair resolution of electoral issues at various levels.

The proliferation of judicial institutions endowed with the authority to adjudicate disputes and election violations poses a potential inefficiency, exacerbated by the absence of temporal definitiveness in the governing legal norms. The fragmentation of responsibilities across multiple judicial entities introduces an element of uncertainty into dispute resolution processes. This ambiguity is

exemplified by the divergent outcomes in legal proceedings, as evidenced by the Mataram Administrative Court's Decision Number 31/G/2010/PTUN/MTR, which nullified the General Election Commission's determination of regional head candidates. In stark contrast, Constitutional Court Decision Number 186/PHPU.D - VIII/2010 opines that the election process adhered to stipulated provisions, leading to the non-cancellation of the determination of the regional head candidate. This disjunction underscores the potential challenges arising from the decentralized nature of electoral dispute resolution, compounded by the lack of temporal clarity within the pertinent legal frameworks.

Instances of purported overlapping judicial processes transpired during the 2020 Regional Head Election in Bandar Lampung, specifically involving the candidacy of Eva Dwiana and Dedy Amarullah. Following their initial declaration as winners by the General Election Commission of Bandar Lampung, their victory faced subsequent annulment by the Election Supervisory Body of Bandar Lampung. Notably, this revocation was accompanied by a legal determination of culpability, attributing to them structured, systematic, and massive actions.⁴³ Topo Santoso asserts the imperative of a robust legal framework in the resolution of regional election disputes. Santoso contends that the efficacy of the electoral law system rests upon several pivotal prerequisites, including the existence of a proficient legal framework, an effective mechanism for resolution, expeditious decision-making, and unequivocal rules specifying the requisite time for lawsuit resolution. This underscores the compelling need for a streamlined and uncomplicated mechanism, ensuring both legal certainty and prompt adjudication, in strict adherence to fundamental principles.⁴⁴

⁴³ Bisariyadi Bisariyadi et al., "Komparasi Mekanisme Penyelesaian Sengketa Pemilu Di Beberapa Negara Penganut Paham Demokrasi Konstitusional," *Jurnal Konstitusi* 9, no. 3 (2016): 531, <https://doi.org/10.31078/jk936>.

⁴⁴ Anjalline, R.A. Anggraini, and Indrayati, "Pengaturan Dana Kampanye Pemilihan Umum Sebagai Tanggung Jawab Calon Anggota Legislatif Berdasarkan Undang-Undang Nomor 8 Tahun 2012 Tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah."

V. Paradigmatic Approach to Judicial Calculation

In relation to the paradigm of the judicial calculation in resolving disputes over the results of the regional elections, regarding the practice of the application threshold which is used as a formal requirement in submitting which is more concerned with aspects of the influence and significance of the difference in votes, this has in fact ignored a substantive justice. According to the results of research conducted by Lailam and Anggia, it proved that the application of the threshold for requesting dispute over results (0.5-2%) in the 2015 2017 and 2018 elections was applied rigidly by prioritizing article 158 of the election law. When examined closely, this application clearly injures Article 24 paragraph (1), Article 18 paragraph (4), and Article 28D paragraph (1) of the Constitution of 1945 which affirms that the Constitutional Court's ruling is not merely applying legal certainty, but upholding the constitution, not a law.⁴⁵

This means that if the norms of the law are not in line with the constitution, they must be put aside. Feri Amsari also expressed the same thing, he considered that the Constitutional Court only prioritized vote counts in adjudicating cases of disputed results, not reading and understanding in substance whether there had been an election violation that made the difference very far, he only referred to Article 158 of the Law Number 10 of 2016 concerning elections, this provision regulates the maximum limit for applications.⁴⁶ Moreover, the Constitutional Court is considered not optimal and careful in examining, this will certainly be a problem to the quality of justice, by simply focusing on the procedures and numbers in dispute. Coupled with the increasing percentage of cases in the Constitutional Court in each election in relation to the short time aspect as stated in Article

⁴⁵ Tanto Lailam and Putri Anggia, "Pengenyaningan Keadilan Substantif Dalam Penerapan Ambang Batas Sengketa Hasil Pilkada di Mahkamah Konstitusi," *Jurnal Legislasi Indonesia* 17, No. 2 (2020): 209-222.

⁴⁶ Azka Hussein, "Dampak Putusan Mahkamah Konstitusi Tentang Pemungutan Suara Ulang Terhadap Partisipasi Masyarakat Dalam Pemilihan Umum Kepala Daerah Kabupaten Pati," *Pandecta: Research Law Journal* 8, No. 2 (2013): 224-38.

157 paragraph (8) of Law Number 10 of 2016, only 45 days after the application was received, of course there is a correlation with the quality of justice.

SPECIALIZED COURTS FOR INDONESIAN ELECTION DISPUTES: INSIGHTS FROM URUGUAY FOR ENHANCED ELECTORAL JUSTICE

Measuring the urgency of the presence of a special court for the settlement of regional election disputes needs to be seen comprehensively, at least it must meet philosophical, juridical, and sociological reasons. Philosophically based on considerations on the aspect of justice, juridically based on considerations of legal certainty aspects, and sociologically based on considerations of expediency aspects. Some of the problematic notes presented by the author in the previous sub-chapter have at least described these three aspects. Philosophically, the extent to which the capacity of the Constitutional Court with all its competences of authority can create a sense of justice.⁴⁷ The increasing number of applications for judicial review of laws that come in, the number of regional election dispute cases which continues to increase each period to reach 50%, including the resolution of the General Election Results Dispute (PHPU) which is so complex, this clearly interferes with the main authority of the Constitutional Court as a constitutional enforcement agency, as well as have an impact on the decline in the quality of the resulting decisions. In this way, it is clear that most of the time the Constitutional Court is busy with resolving disputes over the results of the Regional Head Elections and disputes over PHPU which on an

⁴⁷ Wicaksono and Ayutama, "Initiation of Special Court on the Local Election for Regional Leaders to Face the Simultaneously Election of Governor, Regent, and Mayor in Indonesia."

ongoing basis, as an institution holding judicial power, safeguarding the constitution, rights and justice of citizens are actually expected to focus more on their main tasks.⁴⁸

Seeing the increasing trend in the workload faced by the Constitutional Court regarding the handling of disputes over election results, settlement of election results disputes (PHPU) as well as requests for judicial review, the Constitutional Court has become a kind of function changer, draining its energy in resolving protracted political cases between the regional elections and general elections. From 2015 to 2020, there were 684 cases of law review data, 260 legislative election disputes and 409 regional election disputes.⁴⁹ Then, from a juridical point of view the urgency of the presence of a special court related to the decision of the Constitutional Court No. 97/PUU-XI/2013 and the mandate of the Election Law article 157 paragraphs (1, 2 and 3) which are limited. This legal norm must contain certainty, after being in a transitional period for a long time without being addressed clearly and firmly by lawmakers in initiating the formation of special courts, even many parties have questioned why since the 2013 Constitutional Court's decision until the 2020 simultaneous regional elections, the special court has not yet materialized, what is the problem.⁵⁰

The author sees that the problem of the position of the judiciary for resolving disputes over the results of this election from being in the Supreme Court until moving to the Constitutional Court, then the Constitutional Court released itself and declared that it was no longer authorized, then submitted to a special judicial body that must be formed by lawmakers.⁵¹ The author considers that the position and authority of the settlement seem completely forced by the

⁴⁸ Rois and Herawati, "Urgensi Pembentukan Peradilan Khusus Pemilu dalam Rangka Mewujudkan Integritas Pemilu."

⁴⁹ Bisariyadi et al., "Komparasi Mekanisme Penyelesaian Sengketa Pemilu di Beberapa Negara Penganut Paham Demokrasi Konstitusional."

⁵⁰ Lailam and Anggia, "Pengenyampingan Keadilan Substantif dalam Penerapan Ambang Batas Sengketa Hasil Pilkada Di Mahkamah Konstitusi."

⁵¹ Siboy, "The Relationship between DKPP and PTUN Decisions Regarding Ethical Violation by General Election Administrators."

circumstances, especially by the results of the judicial review on the issue of the difference between the electoral regime and the regional election which is actually only a space of interpretation, so that it has an impact on the choice of position and authority between the two institutions (Supreme Court-Constitutional Court), and the choice of this is also a dilemma for both of them with all the main competencies that already exist.⁵²

The ambivalent stance on this matter became apparent in the critique put forth by Bagir Manan, the former chairman of the Supreme Court. While he expressed agreement with the transfer, he concurrently underscored the imperative for robust justifications and meticulous consideration when transferring positions and authorities for dispute resolution from the Supreme Court to the Constitutional Court. Manan emphasized that such transitions should not occur abruptly, as it contradicts the foundational principles of justice. In a legal state, he contended, the law should remain stable to ensure legal certainty, lamenting the frequent changes occurring year after year.⁵³

Similar points were expressed by Mahfud MD, who highlighted the absence of clear regulations governing the transfer of responsibilities from the Supreme Court to the Constitutional Court. According to him, there is a need for a definitive article explicitly declaring the nullification of Article 106 or introducing a replacement rule in Law Number 32 of 2004, a provision that remains unaddressed in the existing legal framework. Mahfud suggested collaborative deliberations among the Constitutional Court, the Supreme Court, the House of Representatives, and the Government to rectify this gap. He postulated that this transition would inevitably lead to a reduction in the Supreme Court's workload, while simultaneously imposing greater challenges on the Constitutional Court. Mahfud underscored the magnitude of the task at hand, particularly given the substantial number of regencies, cities, and provinces in Indonesia—349

⁵² Marsden, Meyer, and Brown, "Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?"

⁵³ Jazim Hamidi, "Paradigma Baru Pembentukan Dan Analisis Peraturan Daerah (Studi Atas Perda Pelayanan Publik Dan Perda Keterbukaan Informasi Publik)," *Jurnal Hukum Ius Quia Iustum* 18, no. 3 (2011): 336–62, <https://doi.org/10.20885/iustum.vol18.iss3.art3>.

regencies, 91 cities, and 33 provinces. He emphasized that even if only ten percent of these jurisdictions were to experience disputes, the Constitutional Court would face a considerable burden. Despite recognizing the potential challenges, Mahfud affirmed his readiness for the proposed transition.⁵⁴

Two forms of dilemmatic attitude as well as the burden of the two judicial power institutions, then the impression of coercion from the situation by the results of the article review process on the difference between the election regime and the regional head election so that it has an impact on the question of the position and authority of the judiciary. For the author, this attitude is enough to be a concrete conclusion that currently requires the presence of a special court so that the two institutions that hold judicial power do not become a burden in carrying out the duties and authorities that have been given by law, so that the focus on the main task can realize the quality of justice effectively and efficiently.⁵⁵

Along with the times and needs, of course legal issues related to the burden of these two institutions continue to increase from previous times, especially the Constitutional Court. In the early days of the Constitutional Court's birth, the number of petitions for testing that came in was perhaps not so many, even the work of the Constitutional Court was relatively quiet, so that the spirit of wanting to take the authority to settle disputes over the results of the Regional Head Elections was at a time when legal norms were ambiguous which explained the term election in the Constitution of 1945. However, the current conditions are certainly much different from before, the burden on the Constitutional Court continues to increase with the number of applications coming in as listed in the table above,

⁵⁴ Sri Puspitasari, "Urgensi Independensi Dan Restrukturisasi Kekuasaan Kehakiman Di Indonesia," *Ius Quia Iustum Law Journal* 14, No. 1 (2007): 41–57.

⁵⁵ Kardeli, "Analisis Tentang Parliamentary Threshold dan Calon Perseorangan Berdasarkan Undang-Undang Nomor 10 Tahun 2016 dalam Perspektif Demokrasi dan Prinsip Check and Ballances."

so naturally the Constitutional Court also under various circumstances must be an excuse to immediately release.⁵⁶

This seemingly compelling situation is also the reason why the format or design of the dispute resolution court or special court has not yet seen a mature concept, so that until now we continue to enjoy a transitional period, because the transfer of position and authority and the release do not have a clear rationale. However, it is dominantly driven by political reasons with all the handling problems that have ever existed in the Supreme Court, as well as the Constitutional Court with its historical burden. Therefore, in the author's opinion, this situation does require the existence of a special court in a more comprehensive design so that it can properly answer the problems and needs.

Another vulnerability lies in the absence of appeal options, rendering the judicial system susceptible to potential misuse. Topo Santoso emphasizes that a robust application of electoral law necessitates the provision of the right to appeal as a legal remedy. He contends that instances of discrimination arise during the finalization of decisions, attributing this discrimination to the inadequacy of detailed legal provisions governing the resolution mechanism for election result disputes. Furthermore, the existence of a fragmented judicial system contributes to overlapping authorities, undermining the realization of a well-applied electoral law, as outlined by Santoso. The current scenario, characterized by numerous avenues for settlement, each operating under distinct systems and procedural laws, hampers the achievement of an effective legal mechanism and resolution, according to Santoso. Consequently, amidst the convolution of processes and mechanisms, discerning a sense of justice becomes a challenging endeavor.⁵⁷

Including the problem of the calculator court paradigm which is considered difficult to realize a sense of justice, although it has been

⁵⁶ Amir, "Disqualification of the Candidate Pair for the Elected Regional Head of Sabu Raijua Regency."

⁵⁷ Topo Santoso, et.al. *Penegakan Hukum Pemilu, Praktik Pemilu 2004, Kajian Pemilu 2009-2014*, (Jakarta: Perkumpulan untuk Pemilu dan Demokrasi, 2006), p. 97.

underlined that the focus of the settlement is only the result of the dispute which is the cause of defeat, but substantially the Constitutional Court also needs to look at the reasons why the figures may differ. Therefore, of course, there are facts that must be seen comprehensively so that the legal objectives that are realized are not only a matter of certainty but also must look at the aspect of sociological benefit.

Finally, in this discussion, the author wants to convey that talking about the urgency of the presence of a special court in resolving disputes over the results of the Regional Head Elections has become a dynamic and political administration related to the pluses and minuses of its position and authority. This means that whether or not the existence of a special court is urgency for each party, the pros and cons have arguments. However, if it is allowed to drag on without an attitude, it will also continue to be a problem, because the dynamics have been a problem so far, even in the practice setting there are also problems, then an academic study of the existence of this special judiciary will be an important part for structuring a better system. This is where academic dialogue is needed to explore the ideal system.

Ius Constituendum: A Comparative Examination of Specialized Trial Models for Local Elections in Indonesia and Uruguay

Due to its prescriptive nature that is oriented towards synthesis results that contribute to the conception of *ius constituendum*, comparative law is often viewed as a contentious concept. The comparative approach is not supported by all jurists because it is believed to simplify the problem by utilizing references from other

countries to solve domestic legal issues.⁵⁸ On the other hand, comparative analyses of the legal structures of other nations are believed to provide additional perspectives and insights. The aforementioned paradigmatic dispute constitutes a focal point within the field of comparative law.⁵⁹ The theory of legal transplanting, a pioneering approach in the field of comparative law, has identified an anticipated epistemic vacuum within the study of comparative law. Watson presents two distinct issues that arise in the context of legal transplanting, specifically referred to as reception in law and reception in society. The initial concern pertains to the means of enhancing and adjusting within the confines of the established legal framework, so guaranteeing the absence of any legal inconsistencies during the execution of the transplant procedure. The second aspect pertains to the efficacy of integrating the transplanted "foreign legal organ" within the societal framework of the host country. The exterior elements of comparative law encompass both legal and social aspects, and are commonly referred to as receptions.⁶⁰

Notwithstanding the aforementioned philosophical discourse, comparative law has attained scholarly acknowledgment as a methodology for legal inquiry. Zweigert and Kotz have proposed the utilization of a function and problem-based thesis within the realm of comparative law. Both authors contend that comparative law is subject to certain limitations. Specifically, they argue that for a meaningful comparison to be made, the objects being compared must possess identical constitutional functions and roles.⁶¹ Furthermore, the objects under study must address similar problems in order for a

⁵⁸ Rian Saputra et al., "Artificial Intelligence and Intellectual Property Protection in Indonesia and Japan," *Journal of Human Rights, Culture and Legal System* 3, no. 2 (2023): 210–35, <https://doi.org/10.53955/jhcls.v3i2.69>.

⁵⁹ G H Addink and J B J M Ten Berge, "Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands," *Electronic Journal of Comparative Law* 11, No. 1 (2007): 1–34.

⁶⁰ M Zaid et al., "The Sanctions on Environmental Performances: An Assessment of Indonesia and Brazil Practice," *Journal of Human Rights, Culture and Legal System* 3, No. 2 (2023): 236–264.

⁶¹ Jan Halberda, "The Principle of Good Faith and Fair Dealing in English Contract Law," *Pravovedenie* 64, No. 3 (2020): 312–325.

valid comparison to be achieved. In other words, the authors assert that legal systems can only be compared if they effectively resolve the same factual problems and serve the same purposes. According to Tushnet, it is imperative for each nation's constitution to encompass a distinct array of functions.⁶² The role of the comparative law researcher entails the identification of both minor and large similarities, while acknowledging the presence of differences, in the activities of the legal bodies under examination. Furthermore, the researcher is tasked with analyzing how these functions are anticipated to address the problem at hand, or rather, how they are expected to provide a solution to the problem.

Within the global landscape of electoral dispute resolution, a minimum of four distinct designs is observable. Firstly, some nations exclusively rely on a judicial procedure where general judges, overseen by the highest court, are tasked with resolution. Originating in the United Kingdom in 1868 and revised in 1879, this model represents an early iteration. The United States, on the other hand, continues to employ political resolutions. Notably, the House of Congress handles issues related to legislative elections, while the United States Electoral College addresses concerns arising in presidential elections. This approach is intriguing due to its predominantly political nature rather than being grounded in legal principles.

Germany adopts a hybrid system that integrates both political and legal means to resolve disputes. Election participants can raise objections to the parliament, the Bundestag, but the final recourse rests with the German Constitutional Court, overseeing the appeal process. In Austria, a distinctive approach is evident as it became the first nation to explicitly designate, in its 1920 constitution, the Austrian Constitutional Court with exclusive jurisdiction over the adjudication of conflicts and transgressions arising from federal-level presidential and legislative elections. The Austrian Constitution

⁶² Sandra Wachter, Brent Mittelstadt, and Chris Russell, "Why Fairness Cannot Be Automated: Bridging the Gap between EU Non-Discrimination Law and AI," *Computer Law and Security Review* 41 (2021): 105567, <https://doi.org/10.1016/j.clsr.2021.105567>.

subsequently extended this jurisdiction to empower the Austrian Constitutional Court to adjudicate electoral disputes at the regional level, specifically concerning the Landers.

Moreover, certain countries have instituted Specialized Electoral Tribunals, categorized into two distinct types: (1) an electoral justice system subservient to the Judicial Power, and (2) an autonomous electoral justice system devoid of any overarching authority. Uruguay paved the way in 1924 by establishing an Electoral Court Institution, subsequently setting a precedent for other nations. Following suit, Chile implemented its specialized election court in 1925, and Mexico followed suit to address electoral disputes. The continual fortification of these institutions resulted from not only domestic pro-democracy factions but also international soft power, which offered substantial backing. In the political landscape of Latin American nations, the rapid progression of democracy finds support from regional inter-state entities, notably the Inter-American Commission on Human Rights (IACHR), playing a pivotal role in fostering the realization of democratic electoral processes and upholding integrity within the Latin American region.⁶³

In the realm of Mexico's electoral democracy, an important electoral reform unfolded in 1996, marking the dissolution of electoral political resolution institutions, including the Electoral College. In its place, the nation established the Specialized Electoral Tribunal, operating under the jurisdiction of the Mexican Supreme Court. This judicial entity assumes responsibility for adjudicating conflicts and transgressions, both administrative and criminal, arising throughout the electoral process, extending its purview beyond the federal level to encompass the state level as well.⁶⁴ The Specialized Electoral Tribunal, functioning under the auspices of the Supreme Court of Mexico, is structured into a singular Superior Court located in Mexico City and five District Courts situated across various states. Despite serving as career justices within the Mexican Supreme Court, it is

⁶³ Pilar Domingo, "Judicial Independence: The Politics of the Supreme Court in Mexico," *Journal of Latin American Studies* 32, No. 3 (2000): 705–735.

⁶⁴ Leigh Anenson, "For Whom the Bell Tolls: Judicial Selection by Election in Latin America," *Southwestern Journal of Law and Trade in the Americas* 4, No. 2 (1997): 261–300.

imperative for Electoral Court judges to maintain independence from political parties. According to data provided by the Inter-American Commission on Human Rights (IACHR), Mexico's electoral courts have issued numerous seminal rulings pivotal in propelling the nation towards democratic consolidation within the broader Latin American context.⁶⁵

These landmark decisions span diverse facets, including the imposition of fines on political parties found culpable of engaging in illicit financial practices, the annulment and subsequent organization of new elections in multiple regions, and the issuance of affirmative action measures directed at empowering indigenous communities in the highlands of Mexico.

The establishment of a Specialized Election Tribunal within the framework of the Mexican Supreme Court merits recognition for its notable significance.⁶⁶ However, a discerning acknowledgment must be made that this model is not seamlessly transposable to the legal system of Indonesia. The organizational character of the Indonesian Supreme Court, while exhibiting advancements in certain sectors, retains undemocratic traits. In the Indonesian context, reliance on career judges for the adjudication of intricately particular and vested-interest cases concerning electoral violations and disputes is not advisable. Consequently, a meticulous examination of Uruguay's approach in siting Specialized Electoral Tribunals outside the traditional Judicial Power hierarchy becomes imperative.⁶⁷

The inception of the Specialized Electoral Tribunal in Uruguay can be traced back to 1924, originating from the Electoral Act. Subsequently, constitutional provisions within the Uruguayan Constitution of 1934 have not only ensured its continued existence but also delineated its operational framework. Positioned prominently within the state's institutional hierarchy, the Specialized Electoral Tribunal, colloquially known as the "Corte Electoral," occupies a

⁶⁵ Julio Ríos-Figueroa, *Institutions for Constitutional Justice in Latin America, Courts in Latin America* (New York: Cambridge University Press, 2011).

⁶⁶ Todd A. Eisenstadt, "Measuring Electoral Court Failure in Democratizing Mexico," *International Political Science Review* 23, No. 1 (2002): 47–68.

⁶⁷ Anenson, "For Whom the Bell Tolls: Judicial Selection by Election in Latin America."

status parallel to that of the President, Parliament, and the traditional Judiciary. Widely regarded as a "Fourth Branch of Government," the Corte Electoral operates as a centralized entity exclusively based in the national capital.⁶⁸ Despite this centralization, the tribunal oversees 19 permanent electoral committees known as *Juntas Electorales*,⁶⁹ each bearing comparable responsibilities and authorities to Indonesia's KPU and Bawaslu. Distinctively, these committees are vested with the authority to conduct investigations and initiate legal proceedings in cases of electoral fraud.

Noteworthy is the composition of both the Corte Electoral judges and *Juntas Electorales* commissioners, characterized by a distinctive amalgamation of political party representatives and independent academics. The Corte Electoral comprises a panel of nine judges possessing legal and political expertise. Five of these judges are selected from a pool of independent legal scholars, while the remaining four are elected through a majority vote procedure, inclusive of representatives from political parties. In parallel, the 19 *Juntas Electorales* consist of five commissioners appointed through a transparent and inclusive selection process.

Furthermore, Uruguay's experience holds particular relevance for Indonesia, given the shared historical background of both nations adopting presidential political systems alongside multiparty structures. The noteworthy separation of the Corte Electoral from conventional Judicial Power institutions in both contexts underscores a common lack of confidence in traditional institutions' efficacy in handling electoral cases.⁷⁰ Costa Rica, similarly with Uruguay, adopts a presidential form of governance characterized by a multi-party structure. Notably, it houses a specialized electoral tribunal known as the Tribunal Supremo de Elecciones, acknowledged as a preeminent

⁶⁸ Samuel Issacharoff, "Constitutional Courts and Democratic Hedging," *Georgetown Law Journal* 99, No. 4 (2011): 961–1012.

⁶⁹ Salvador Romero Ballivián, "Medio Siglo de Historia Del Organismo Electoral de Bolivia," *América Latina Hoy* 51 (2009): 77–94.

⁷⁰ David Altman, "Collegiate Executives and Direct Democracy in Switzerland and Uruguay: Similar Institutions, Opposite Political Goals, Distinct Results," *Swiss Political Science Review* 14, No. 3 (2008): 483–520.

state institution. Mirroring the Corte Electoral in Uruguay, this institution maintains institutional independence from the traditional Judicial Power. However, it is essential to highlight that the Costa Rican Supreme Court possesses the authority to appoint six substitute justices from its pool of nine primary judges. In contrast to Uruguay, Costa Rica involves the Supreme Court in certain judicial technicalities while preserving the impartiality and autonomy of the primary judges.

CONCLUSION

This research concluded that the establishment of a specialized regional head election court, as mandated by Constitutional Court Decision Number 97/PUU-XI/2013, is deemed necessary based on several legal arguments. Firstly, the law itself imposes limitations, thus necessitating the creation of a specific court to handle regional head elections. Secondly, the Constitutional Court's role as a constitutional enforcement institution, rather than a court of justice, supports the need for a separate court to handle these cases. Thirdly, the absence of an appeal process in the decision contradicts the fundamental principles of the electoral law system. Fourthly, the current quantitative approach to dispute resolution poses challenges in achieving a sense of justice. Lastly, the existence of a separate judicial system for election law creates uncertainty and hinders the realization of justice, certainty, and expediency. The establishment of specialized courts for regional head elections in Indonesia mirrors the approach taken in Uruguay and Costa Rica. In both of these countries, special election courts are established as separate entities, operating independently from the traditional judicial branches such as the Supreme Court or the Constitutional Court.

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