

Research Article

Pseudo-judicial Review for the Dispute over the Result of the Regional Head Election in Indonesia

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ABSTRACT: In Indonesia, the Constitutional Court has the power to decide the dispute over the result of the national election, including that of the regional head election. In practice, the Constitutional Court exercises power with the so-called pseudo-judicial review for the result of the regional election dispute. This study aims to analyse the rationale of the Constitutional Court to implement a pseudo-judicial review over the regional head election result, given the judicial activism that also is limited to checks and balances. It also links the theoretical basis for rule-breaking and judicial activism by the Constitutional Court, the transition of the Constitutional Court's power in deciding regional election disputes from temporary to permanent, as well as further analysis of why the Constitutional Court needs to file a lawsuit for review. This study used legal research that examined legal principles and regulations with a theoretical approach analysed qualitatively. The results of this study indicate that pseudo-judicial review affirms the legal breakthrough beyond ordinary decisions as this was made on the ground of the public interest. While the Constitutional Court is essential in maintaining and overseeing democracy in Indonesia, the rationale of the Constitutional Court under the public interest is justified as it is constitutionally correct that has led to judicial activism. A pseudo-judicial review is for substantial justice and can influence time efficiency.

KEYWORDS: Constitutional Court, Judicial Review, Local Election Disputes.

I. INTRODUCTION

Since it was firstly held in 2005, direct local elections (then to be local general elections) in Indonesia have experienced unending polemics,¹ as problems

¹ Tareq Muhammad Aziz Elven & Shalahuddin Ahmad Al-Muqorrobin, "Consolidating Indonesia's Fragile Elections Through E-Voting: Lessons Learned from India and the Philippines" (2021) 3:1 *Indones Comp Law Rev* 63–80.

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Submitted: 27 December 2022 | Reviewed: 07 February 2023 | Revised: 09 May 2023 | Accepted: 22 May 2023

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have emerged due to the rampant cases of fraud and violations.² They have been indicated with money politics, vote inflation, and other problems.³ However, the dispute settlement body was far from prepared, resulting in the contentious issue of which institutions were more relevant and competent to adjudicate the electoral results, whether the Supreme Court or the Constitutional Court. Before the Constitutional Court was finally granted the power to resolve disputes over regional head election results,⁴ the Supreme Court took over power over the issue of disputed regional head election results. This was confirmed in Constitutional Court's Decision No. 85/PUU-XX/2022 on the judicial review of Article 157(3) of the Second Amendment Law 10/2016 of Law 1/2015 on the Stipulation of Government Regulations in lieu of Law 1/2014 on the Election of Governors, Regents and Mayors (Local Election Law) in order to the contrary to the 1945 Constitution. This case dealt with the special judicial body for the election of regional heads.⁵

² Ardiansyah & M Rafi, "The Role of Malay Culture in Maintaining the Neutrality of the Civil Servants: A Case Study of Local Election in Riau, Indonesia" (2022) 18:2 J Borneo Adm 111–124.

³ Muhammad Habibi & Achmad Nurmandi, "Electoral Manipulations and Fraud Political Contestation: The Case of Regional Head Election" (2021) 6:3 Polit Indones Indones Polit Sci Rev 360–374.

⁴ Mahyudin Mahyudin, Edy Haryanto & Rahmah Marsinah, "Impact of Structured, Systematic and Massive Violations In the General Election" (2020) 5:2 Law Justice 175–195.

⁵ It was confirmed in Article 106(1) of Regional Government Law 32/2004, emphasising that objections to the determination of the results of regional head and deputy elections could only be submitted by pairs of candidates to the Supreme Court no later than three days after the regional head and deputy regional head election results. The Supreme Court issued Regulation 02/2005 on Procedures for Submitting Objections to Regional Head and Deputy Regional Head Election Results from Provincial Electoral Bodies (Regencies and Cities) to implement this law.⁵ In its progress, this power was transferred to the Constitutional Court based on Article 236C of the Second Amendment to Regional Government Law 12/2008. After this law was passed, on October 28, 2008, the Chief Justice of the Supreme Court and the Chief Justice of the Constitutional Court signed the Minutes of Transfer of Powers at Courts to implement Article 236C of Law 12/2008. Abd Rahmattullah Rorano S Abubakar & Atma Suganda, "Special Courts for the Settlement of Regional Head Election Disputes in the Context of Realising the Principle of Legal Certainty and Orderly Governance" (2022) 1:11 J Res Soc Sci Econ Manag 1952–1962.

Two main arguments over regional head election dispute settlement were subsequently transferred to the Constitutional Court. *First*, it was seen as part of the general election, as one of the powers exercised by the Constitutional Court,⁶ in addition to its final and binding decision.⁷ *Second*, the Supreme Court was considered incapable and failed to resolve this matter due to prolonged conflicts.⁸ The power transfer from the Supreme Court confirms that the Constitutional Court was also the guardian of democracy, as it plays an essential role in improving constitutional democracy.⁹ While such a debate was considered over following such a transfer, the Constitutional Court's power to resolve regional head election disputes was temporary. However, after Decision No. 85/PUU-XX/2022, its power on this matter has become permanent despite the public criticism of making self-judgment, so that the Constitutional Court has assumed expanded power as this did not happen the first time. The Constitutional Court examined the laws governing or relating to its existence and power several times.¹⁰ On the other hand, this attitude led to judicial activism, in which the Constitutional Court adjusts completely new norms to the existing legal culture. The actions of the Constitutional Court, which lead to judicial activism, often found in their decisions which indicated *ultra petita*.

There are several *ultra-petita* decisions made by the Constitutional Court that intervened in the legislative branch,¹¹ and in this paper, it is a so-called

⁶ Micael Josviranto, "Juridical Review of the Authority of the Constitutional Court in Resolution of General Election Disputes for Regional Head" (2020) 9:2 Sosioedukasi J Ilm Ilmu Pendidik dan Sos 39–47.

⁷ Muhammad Rinaldy Bima & Imran Eka Saputra, "Implication of the Constitutional Court Ruling on the Binding Character of the Election Organizer Ethics Council Decision" (2022) 2:6 Daengku J Humanit Soc Sci Innov 769–776.

⁸ Kamal Fahmi Kurnia, Tian Terina & Dinar Mahardika, *The Authority of Constitutional Court in General Election Results: Is It Powerful or Meaningless?* (Malang: Atlantis Press, 2020).

⁹ Selfianus Laritmas et al., "A Constitutional Court Decision Has Final Law And Binding Related to Decision No. 57/PHP.BUP-XIX/2021, North Halmahera Election Results Disputes" (2022) 3:1 Int J Educ Res Soc Sci 238–247.

¹⁰ Luthfi Widagdo Eddyono, "The Constitutional Court and Consolidation of Democracy in Indonesia" (2018) 15:1 J Konstitusi 1–26.

¹¹ Ahmad Wijaya & Nasran Nasran, "Comparison Of Judicial Review: A Critical Approach To The Model in Several Countries" (2021) 14:2 J Leg 85–106.

rule-breaking. As a judicial institution granted powers for protecting the constitution, it is a consensus that the Constitutional Court can carry out rule-breaking with the interest of upholding the constitution. Rule-breaking is an action in legal practice that frees from the prevailing concepts, doctrines, and principles,¹² applied to bring justice to society. A former Constitutional Justice Harjono named the term pseudo-judicial review as a review of a law carried out by the Constitutional Court indirectly in exercising its other powers.¹³ As the rule-breaking measures the Constitutional Court implemented was a pseudo-judicial review to settle regional head election disputes, the Constitutional Court also applied for pseudo-judicial review several times in handling regional head election dispute resolution. For instance, the Constitutional Court Decisions No. 41/PHPU.D-VI/2008 and No. 45/PHPU.D-VIII/2010, as well as several other regional head election disputes handled by the Constitutional Court. There are similarities and differences in the construction of judicial review in testing laws and pseudo-judicial review in regional elections cases. Pseudo-judicial review results from judicial activism that constitutional judges often carry out. Judicial activism is a manifestation and implementation of provisions from Article 24 of the 1945 Constitution, which emphasises that judicial power is independent to uphold law and justice. In addition, the design and character of the Constitutional Court as this Court allow itself to be free in making decisions that often break legal impasses, one of which is conducting a pseudo-judicial review when deciding a regional head election case.¹⁴

In Indonesia, Article 5(1) of Judicial Power Law 48/2009 provides the legal justification for constitutional judges' use of pseudo-judicial review. Judges and constitutional justices are obligated to investigate, uphold, and comprehend societal and legal ideals as well as justice. This provision also

¹² Hery Abduh Sasmito, "Ultra Petita Decision of Constitutional Court on Judicial Review (The Perspective of Progressive Law)" (2016) 1:1 J Indones Leg Stud 47–68.

¹³ Rofi Wahanisa Emy Hajar Abra, "The Constitutional Court Ultra Petita as a Protection Form of Economic Rights in Pancasila Justice" (2020) 5:1 JILS (Journal of Indonesian Legal Studies 187–224).

¹⁴ Irfan Nur Rachman, "Constitutional Court and Dispute the Results of Local Election" (2015) 12:1 J Konstitusi 155–171.

increases the Constitutional Court's legitimacy as the defender of democracy. Throughout the history of the Indonesian Constitutional Court, a transition from an authoritarian to a more democratic style of government was one of the underlying causes. Hence, Article 1(3) of the 1945 Constitution asserts Indonesia as a rule-of-law state, one of the movement's principal demands. One of the major features mentioned is also democracy.¹⁵

Previous research demonstrated that the pseudo-judicial review to resolve regional head election issues was beyond the Constitutional Court's power.¹⁶ By departing through the Judiciary Power Law, the arguments for the election of a single candidate regional head can be resolved by applying a quasi-material test.¹⁷ In contrast, this study delves into the reasons why the Constitutional Court must apply for pseudo-judicial review in handling election disputes in Indonesia, departing from the perspective of violations of rules, as well as several reasons why the Constitutional Court must be involved in judicial activities in exercising its authority as a bodyguard constitution and especially as a guardian of democracy. This paper contributes to the advancement of knowledge and understanding of the use of pseudo-judicial reviews by the Constitutional Court in resolving disputes in local political contests.

This study aims to analyse the importance of implementing a pseudo-judicial review by the Constitutional Court in handling disputes over the results of regional head general elections in Indonesia. It also links the theoretical basis for rule-breaking and judicial activism by the Constitutional Court, the transition of the Constitutional Court's power in deciding regional election disputes from temporary to permanent, as well as further analysis of why the Constitutional Court needs to file a lawsuit for review that will be elaborated systematically.

¹⁵ Samuel Issacharoff, "Constitutional Courts and Democratic Hedging" (2011) 99:10 *Georgetown Law J* 961–1012.

¹⁶ Irfan Nur Rachman Op. Cit, 169. See Constitutional Court Decision 97/PUU-XI/2013.

¹⁷ Nurul Badriyah, *Pseudo Judicial Review Dalam Sengketa Pemilihan Umum Pasangan Calon Tuggal Kepala Daerah* UIN Sunan Kalijaga Yogyakarta, (2020).

Throughout the analysis, this paper consists of three parts of the discussions. The first part will discuss the relationship between rule-breaking and judicial activism made by the Indonesian Constitutional Court. The second part will examine the trajectory of the power shift in deciding regional electoral disputes in Indonesia. The third part will analyse the urgency of a pseudo-judicial review regarding local electoral disputes in Indonesia.

II. METHODOLOGY

This study was normative research, using a theoretical approach and legal principles to analyse the rule-breaking practised by the Constitutional Court for pseudo-judicial review in dealing with the regional head election dispute settlement. The data were collected through documentation techniques from various sources, such as government documents, books, and related research journals. To analyse the data obtained, the author used qualitative content analysis to systematically discuss the contents of documents.¹⁸ The research started with data classification, which included grouping and recording data through reading literature. Then, it proceeded with interpreting detailed data according to context to understand the meaning of context in the research substance. In the final stage, the paper descriptively analysed the interpretation of the data to draw conclusions and answer the research questions posed.

III. RULE-BREAKING AND JUDICIAL ACTIVISM BY THE INDONESIAN CONSTITUTIONAL COURT

In several decisions, the Constitutional Court conducted rule-breaking. Legal breakthroughs made by the Constitutional Court are usually made by adding or subtracting words to an article, paragraph, or certain part of a law.¹⁹ In the process, there are three ways to do rule-breaking. *First*, using spiritual

¹⁸ Loraine Busetto, Wolfgang Wick & Christoph Gumbinger, “How to Use and Assess Qualitative Research Methods” (2020) 2:1 *Neurol Res Pract* 1–10.

¹⁹ Zulkifli Suparto, “Position of Circular Letter of the Supreme Court as a Follow-Up From the Decision of the Constitutional Court Number 37/PUU-IX/2011” (2022) 5:1 *Awang Long Law Rev* 225–234.

intelligence to avoid and rise from legal adversity so that it encourages us to make legal breakthroughs and not be bound by old ways that are considered no longer appropriate. Sticking to the law and the old way will significantly hurt justice. *Second*, searching for deeper meaning should become a new criterion in implementing the law and as the rule of law. Every party who plays a role in law enforcement is always encouraged to ask their conscience about the most profound meaning of the law. *Third*, in carrying out the law, do not only use logic alone but feelings, concern for, and involvement with vulnerable groups. Justice seekers may look at the normative aspect and other aspects, namely sociology and the constitutionality of a law.²⁰ In countries around the world, if a Constitutional Court has been formed, then all issues relating to constitutionality will be resolved only through the Constitutional Court. However, in practice, legal breakthroughs often occur when the Constitutional Court handles a case, even if it is slightly out of the scope of its authority.²¹

The attitudes of the Constitutional Court in carrying out legal breakthroughs originate from the intentions of constitutional judges when handling a case. However, there is also a public response to constitutional judges' deciding rule-breaking in handling a case. For instance, once the Court issued Decision No. 46/PUU-XIV/2016, many citizens hoped that this Court would consistently issue a legal breakthrough in expanding the meaning of adultery as contained in the (old) Criminal Code.²² Thus, the public accepts the legal breakthrough by the Constitutional Court.

Furthermore, Lino Graglia defines judicial activism as allowing judges to decide based on personal or political considerations.²³ Brian Galligan defines judicial activism as controlling or influencing political and administrative

²⁰ William B Gartner Angela F Randolph, Danna Greenberg, Jessica K Simon, "Exploring Differences in the Antisocial Behaviors of Adolescent Rule-Breaking That Affect Entrepreneurial Persistence" (2022) 28:2 Int J Entrep Behav Res 471–499.

²¹ Nicoletta Perlo François-Xavier Millet, "The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law?" (2015) 16:6 Ger Law J 1471–1490.

²² Eddyono, *supra* note 10.

²³ Keenan D Kmiec, "The Origin and Current Meanings of 'Judicial Activism'" (2004) 92:5 Calif Law Rev 1441–1477.

institutions.²⁴ In the Black Dictionary of Law, judicial activism is a philosophy of judicial decision-making in which judges allow their personal views on public policy to guide their decisions with the suggestion that adherents of this philosophy are likely to find constitutional violations and are willing to ignore precedent.²⁵

Historically, judicial activism originated from the conception of the English legal tradition, which refers to the notion of equity and natural rights.²⁶ When these two concepts were brought to the United States, they became the basis for conducting a judicial review. This existence can be seen from the critical decision in *Madison v. Marbury* in 1803. This event in historical records was the court's first step in criticising legislative action, which led to judicial activism. However, there are essential values that we can learn from *Madison v. Marbury*, namely the realisation of the separation of powers and the strength and clarity of the position of judicial power in the checks and balances between powers in a country.²⁷ This also aligns with one of the objectives of establishing the Constitutional Court.²⁸

In Indonesia, the doctrine of judicial restraint is better known and often applied than judicial activism. This is because the legal system in Indonesia is civil law, where judges in court prefer to refrain and refuse to take over legislative duties in making laws.²⁹ Bradley C. Canon makes a general concept and structure often used as the primary reference in the six dimensions of judicial activism.³⁰ *First*, Majoritarianism is a dimension that

²⁴ Brian Galligan, "Judicial Activism in Australia" in *Judic Act Comp Perspect* (London: Palgrave Macmillan, 1991).

²⁵ Bryan A Garner Henry Campbell Black, *Black's Law Dictionary* (Minnesota: West Group, 1999).

²⁶ Kmiec, *supra* note 23.

²⁷ Edward S Corwin, "Marbury v. Madison and the Doctrine of Judicial Review" (1914) 12:7 Mich Law Rev 538–572.

²⁸ Adhitya Widya Kartika, "The Existence of Decision Norms of the Constitutional Court as a Source of Legislative and Executive Laws" (2019) 6:2 Lentera Huk 309–320.

²⁹ Radian Salman, *Judicial Activism or Self-Restraint: Some Insight Into the Indonesian Constitutional Court* (The Netherlands: Atlantis Press, 2018).

³⁰ Bradley C Canon, "Defining the Dimensions of Judicial Activism" (1983) 66:6 Judicature 236–280.

describes how the judicial process negates policies taken and adopted based on the democratic process. *Second*, Interpretative Stability, namely the dimension that considers the extent to which doctrinal decisions and previous interpretations of a court are changed again. *Third*, Interpretative Fidelity, namely the dimension that describes the extent to which the articles in the Constitution are interpreted differently from what was intended by the makers of the Constitution or what is legible from the language used. *Fourth*, Substance/Democratic Process Distinction is the dimension that looks at the extent to which court decisions have made substantive policies compared to maintaining the results from a democratic political process. *Fifth*, the specificity of policy is the dimension that analyses the extent to which a court decision forms its policy contrary to the principle of discretion held by other institutions or individuals. *Sixth* is the Availability of an Alternate Policymaker, which considers the extent to which a court decision replaces essential considerations made by other government institutions.³¹

In its application, some justifications or reasons can be accepted when implementing judicial activism, known as virtue jurisprudence which consists of several reasons. *First*, the implications principle that in a constitution, there are several rights of citizens which are technically unwritten. This principle provides a broader view of a constitution that further protects rights and freedoms that were not explicitly intended by the constitution's creators but have been widely predicted by the judges. *Second*, the minoritarian principle emphasises that there is special attention given to minority groups when they receive negative impacts from the democratic process, which is heavily influenced by the majority, especially when there is a violation of the principle of equal protection. This principle is also interpreted as an intervention against the failure of the representative system, which can lead to making laws that are considered discriminatory against minority groups. *Third*, the remedial principle is in contact with the principle of justice in efforts to restore rights, in which the court is given the discretion to restore the rights of individuals or groups considered unfair. *Fourth*, the internationalism principle that emphasises consideration of developments in

³¹ Febriansyah Ramadhan & Ilham Dwi Rafiqi, "Study of Constitutional Court Decisions Cancelling All Norms in the Law" (2021) 29:2 Leg J Ilm Huk 286–308.

the world of international law, judicial activism can produce decisions by adjusting the current global context through the methodology of comparative law and the implementation of principles and provisions in international law.³² Thus, the act of judicial activism by the Constitutional Court can be accepted and has a strong rationale. The Constitutional Court is encouraged to carry out judicial activism in handling certain cases.³³ The practice of judicial activism in Indonesia can also be justified in terms of its legal system because the legal system in Indonesia is not entirely civil law but is multi-faceted, which is a combination of various legal systems whose important parts are taken from and based on Pancasila and the 1945 Constitution.³⁴

IV. POWER SHIFT IN DECIDING REGIONAL ELECTION DISPUTES: FROM A TEMPORARY TO PERMANENT POWER

The power of regional head election disputes was initially granted to the Supreme Court by referring to Local Government Law 32/2004. Several controversies occurred when the election dispute settlement became the Supreme Court's authority. One of the main factors that have given rise to this controversy is that a decision that the Supreme Court has decided can still be sued again. Such a situation will lead to more complicated problems in the future.³⁵ In its development, the authority to resolve regional head election disputes has become the authority of the Constitutional Court. This began when Constitutional Court Decision No. 97/PUU-II/2004 was issued, one of which stated that regional head elections were part of the general election regime. Thus, based on the *mutatis mutandis* principle, the authority to decide regional head election disputes is the authority of the Constitutional Court.³⁶ Following up on the decision of the Constitutional

³² Kmiec, *supra* note 23.

³³ Rahayu Prasetianingsih, "Judicial Activism in Indonesia: Constitutional Culture by the Constitutional Court" (2020) 5:2 J Kaji Ilmu Huk dan Syariah 160–177.

³⁴ Wijaya & Nasran, *supra* note 11.

³⁵ Camden Kelliher et al., "Unconstitutional Authority of Indonesia's Constitutional Court: The Resolution of Pilkada Result Disputes" (2019) 18:3 Elect Law J Rules, Polit Policy 297–308.

³⁶ Rorano S. Abubakar & Suganda, *supra* note 5.

Court, the framers of the constitution issued The Implementing General Election Law 22/2007 and Law 12/2008 on the Second Amendment to Local Government Law 32/2004. To complement its legal position, the legislators also established Judicial Power Law 48/2009, where Article 29(1) emphasises that the Constitutional Court can hold other powers regulated in the law. This article aims to reinforce and strengthen the legal argument that the authority of the Constitutional Court can be added through law.³⁷ In its development, there have been several criticisms regarding the addition of authority possessed by the Constitutional Court through laws. One of the criticisms relates to Article 24C(1) and (2) of the 1945 Constitution, which regulates the powers the Constitutional Court possesses in an expressive and enumerative manner.³⁸

However, there is a need in practice due to a legal vacuum as this Court seeks to expand its powers. In Decision No. 138/PUU-VII/2009, the Constitutional Court added its power to review Government Regulations in lieu of Law (*Perppu*) against the 1945 Constitution. In this decision, Constitutional Justice Mahfud MD wrote concurring opinions. He argued that the DPR might stall for time not to discuss it for various reasons, even though the contents contained in the *Perppu* are contrary to the Constitution.³⁹ Then, Jimly Asshiddiqie supported this additional power for the Constitutional Court. While *Perppu* is different from Law, they are substantially similar as long as they are still in the form of government regulations in place of laws. This is still the People's Representative Council (DPR) realm.⁴⁰ Contrary to Mahfud MD's opinion, Jimly Asshiddiqie said that the Constitutional Court could not wait up to a year for a *Perppu* to become Law. This will even lead to arbitrariness for the President.⁴¹ From

³⁷ Kelliher et al, *supra* note 35.

³⁸ Prakyekti Muharjanti Simon Butt, "What constitutes compliance? Legislative responses to Constitutional Court decisions in Indonesia" (2022) 20:1 Int J Const Law 428–453.

³⁹ Ramadhan & Dwi Rafiqi, *supra* note 31.

⁴⁰ Hamid A Chalid, "Dualism of Judicial Review in Indonesia: Problems and Solutions" (2017) 7:3 Indones Law Rev 367–394.

⁴¹ Catur Wido Haruni, "Constitutionality of Monitoring and Evaluation of Regional Regulation Drafts and Regional Regulations by Regional Representative Council" (2022) 30:1 Leg J Ilm Huk 103–115.

the viewpoint of these experts, there are indeed differences. However, in practice, the Constitutional Court has increased its authority through its decisions. Then also this action has been strengthened by Article 29(1) of Judicial Power Law 48/2009. It is the same with the authority of the Constitutional Court in deciding regional head election disputes, which is the authority of the Constitutional Court based on Constitutional Court Decision No. 97/PUU-II/2004.

Furthermore, the power of the Constitutional Court in deciding disputes over regional head election results was declared unconstitutional. This was stated by the Constitutional Court itself through Constitutional Court Decision No. 97/PUU-XI/2013. This decision emphasised Constitutional Court's power in deciding disputes over regional head election results was contrary to the 1945 Constitution. After this decision, the Constitutional Court still has the authority to handle regional head election dispute cases until a law is enacted which regulates the institution authorised to resolve regional head election disputes, namely a special judicial body. To follow up on the Constitutional Court's decision, the legislators passed Law 22/2014 concerning the Election of Governors, Regents, and Mayors, which stipulated that disputes over the results of regional head elections were resolved by four High Courts appointed by the Supreme Court. The Constitutional Court has been freed from additional authority to resolve disputes over post-conflict local election results. It may not be re-granted this authority by using law as a legal basis unless granted with attribution authority from the 1945 Constitution.⁴²

Then, the legislators ratified Law 1/2015 on the Stipulation of Government Regulation instead of Law 1/2014 on the Election of Governors, Regents, and Mayors to Become Laws. Then, the legislators passed Law 8/2015 on Amendments to Law 1/2015 on the Stipulation of Government Regulations instead of Law 1/2014 on the Election of Governors, Regents, and Mayors to Become Laws. One critical issue in the law is the affirmation to immediately form a special court to handle regional head election disputes. As long as the Constitutional Court cannot be formed, the constitutional

⁴² Kelliher et al, *supra* note 35.

court will temporarily hold this authority.⁴³ There is strong support for the establishment of such a special judicial body. One reason that has been widely stated is that the presence of a special judicial body for the election of regional heads will ease the workload of the Constitutional Court.⁴⁴ Special courts are also considered more effective in resolving disputes over the election of regional heads. However, a special judicial body has not yet been formed as of this writing.⁴⁵

The power to decide regional head election disputes has become a permanent authority.⁴⁶ The Constitutional Court Decision No. 85/PUU-XX/2022 confirmed that there was no longer any distinction between the general election regime and the regional head election regime. The Constitutional Court's Decision No. 85/PUU-XX/2022 results in a change in interpretation of the authority of the Constitutional Court as stipulated in Article 24C(1) of the 1945 Constitution. Therefore, the constitutionality of the institution authorised to resolve disputes over regional head election results through a special judicial body has been declared irrelevant.⁴⁷ The Constitutional Court has the permanent authority to decide regional head election disputes in Indonesia. Thus, the Constitutional Court can be regarded as inconsistent with its previous decision. It clearly shows the dilemma of regulation and confirmation regarding the competent institution in resolving regional head election disputes in Indonesia.⁴⁸ In fact, for now, the Constitutional Court holds the authority to decide regional head election disputes permanently.

There are several reasons why the authority to decide on election results claims is considered more appropriate within the authority of the Constitutional Court. First, the number of cases processed by the Supreme

⁴³ Atiqah Mumtazah Ameliah Bura Datu, "The Formulation of The Norm On Handling The Violation of Local Election" (2018) 3:32 *Mulawarman Law Rev* 15–29.

⁴⁴ Syaifuddin Nofi Sri Utami, M Dwi Cahyono, "The Establishment of Special Judicature for the Local Government Election Result Dispute" (2020) 4:1 *Leg Standing J Ilmu Huk* 193–199.

⁴⁵ Ahmad Siboy, "The Integration of the Authority of Judicial Institutions in Solving General Election Problems in Indonesia" (2021) 29:2 *Leg J Ilm Huk* 237–255.

⁴⁶ Micael Josviranto, *supra* note 6.

⁴⁷ Bima & Saputra, *supra* note 7.

⁴⁸ Laritmas et al., *supra* note 9.

Court is too large, so the Supreme Court is no longer burdened with the authority to decide on regional election result disputes. Second, contesting the election results is a prerequisite for political content and regional elections, so the Constitutional Court is considered more qualified than the Supreme Court in dealing with this issue. Third, the Constitutional Court is a body authorised to try cases at the first and last levels with definitive decisions. Therefore, the Constitutional Court currently holds the authority to decide regional election disputes permanently.

IV. THE URGENCY OF PSEUDO-JUDICIAL REVIEW ON LOCAL ELECTION DISPUTES

Pseudo-judicial review is a review of laws carried out by the Constitutional Court indirectly in exercising its other powers.⁴⁹ Several things distinguish pseudo-judicial review from judicial review.⁵⁰ *First*, the construction of the pseudo-judicial review application and decision in disputes over regional head election results follows the procedural law in disputes over regional head election results. *Second*, the decision on the dispute over the results of the regional head election, which contains a pseudo-judicial review, does not clearly describe the contents of the articles/paragraphs vis-a-vis the 1945 Constitution as a touchstone. There is no statement of conflict between the contents of the articles/paragraphs/part of the law with the 1945 Constitution. *Third*, in regional head election cases, the Constitutional Court can only conduct a pseudo-judicial review by setting aside and interpreting the content of articles/paragraphs/parts of the law because the rulings must be by the procedural law on the results of regional head election disputes. *Fourth*, in constructing pseudo-judicial review in disputes over the results of regional head elections, the Court interprets law against constitutional norms in the 1945 Constitution and against norms in a law.

Fifth, the Constitutional Court cannot annul and declare that it has no legal force to bind a material content of an article/paragraph/part of law even

⁴⁹ Nur Rachman, *supra* note 12 at 156.

⁵⁰ Suwarno Abadi, "Finality of Indonesian Constitutional Court Decision in Regard To Judicial Review" (2016) 28:1 Mimb Huk 174–185.

though it is contrary to the 1945 Constitution. *Sixth*, the pseudo-judicial review conducted by the Constitutional Court is carried out because there are provisions limiting the authority of the Court in adjudicating regional head election dispute cases, even though the Court, with its character as a constitutional court, can adjudicate violations that are systematic, structured and massive as well as those that are serious and significant which are contrary to the 1945 Constitution, such action has to lead to judicial activism. *Seventh*, the pseudo-judicial review conducted by the Court in disputes over regional head election results is limited. This is because a pseudo-judicial review will continue the formulation of legal norms from law and is only casuistic in disputes over certain regional head elections. Furthermore, it is necessary to note that not all regional head election disputes can apply the pseudo-judicial review method. Only a material content of an article or paragraph or part of a law contrary to the 1945 Constitution can be applied. *Eighth*, Pseudo-judicial review is also carried out by the Court when there is material in the content of articles/paragraphs or parts of laws contrary to the 1945 Constitution.

Ninth, pseudo-judicial review in the decision to resolve disputes over regional head election results is contained in the Legal Considerations section, in the sub-section Main Application. *Tenth*, in applying for a pseudo-judicial review, the contents of the articles/paragraphs reviewed by the Court do not have to be explicit or explicit but can also be implied or implicit. *Eleventh*, Pseudo-judicial review will only be found in settlement of regional head election results that are granted, to be precise, in the legal considerations section of the main sub-section of the request or the authority of the Court. *Twelfth*, in rulings on regional head election dispute resolution cases, the Court did not annul the content of articles/paragraphs/sections of laws that have been tested through pseudo-judicial review, even though the Court did interpret the law on the content of articles/paragraphs/parts of laws law and set aside the applicability of the article under review.⁵¹ Thus, there is a difference between a judicial review and a pseudo-judicial review.

⁵¹ Muhammad Siddiq Armia, "Constitutional Courts and Judicial Review: Lesson Learned for Indonesia" (2017) 8:No.1 J Negara Huk Membangun Huk untuk Keadilan dan Kesejaht 107–130.

The application of pseudo-judicial review is one of the legal breakthroughs made by the Constitutional Court in exercising its authority. The underlying thing is the active role of the judge in handling a case. Article 5(1) of Judicial Power Law 48 of 2009 emphasises the obligation of judges and constitutional justices to explore, follow and understand legal values and a sense of justice that lives in society. In this regard, constitutional judges will be more active if the cases handled involve much public interest. Public interest is an interest that includes the interests of many people. It aligns with one of the main tasks of the Constitutional Court, which is to protect citizens' constitutional and fundamental rights. From a theoretical point of view, the application of pseudo-judicial review can be justified based on judicial activism.⁵²

Shannon Ishiyama Smithey and John Ishiyama researched the level of judicial activism carried out by the Constitutional Court in eight former communist countries, namely the Czech Republic, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, and Slovakia. The study results show several things. *First*, there is a division of authority between the central and regional governments. *Second*, there is a constitution or written document. *Third*, the judiciary is independent. *Fourth*, there is fragmentation and effectiveness of political parties. *Fifth*, there is public support and legitimacy for court performance.⁵³ Concerning regional head election disputes, C. Neal Tate and Torbjorn Vallinder believe that political fragmentation due to elections often leads to many political issues that are brought to court and forces courts to work to become decisive actors in political decisions.⁵⁴ The theory of social want is the theory of evolution of judicial activism that supports the application of the Constitutional Court in Indonesia. The theory of social want emphasises that judicial activism is due to social community interests (public interest) being hampered due to legal issues that legislators have not resolved.⁵⁵ As a result, a judicial review conducted by a judicial body, which

⁵² Abadi, *supra* note 50.

⁵³ John Ishiyama Shannon Ishiyama Smithey, "Judicial Activism in Post-Communist Politics" (2002) 36:4 Law Soc Rev 719–742.

⁵⁴ Torbjorn Vallinder C Neal Tate, *The Global Expansion of Judicial Power* (New York: University Press, 1995).

⁵⁵ Prasetyaningsih, *supra* note 33.

in this paper is the Constitutional Court, can resolve the issue. In the case of regional head election disputes, a pseudo-judicial review is a form of legal breakthrough applied to fulfil the public interest contained in a regional head election dispute. In the concept of judicial activism, this can be justified from the perspective of the theory of social want, which emphasises society's public interest. This aligns with the historical and constitutional reasons for establishing the Constitutional Court in Indonesia. In court proceedings, constitutional judges are encouraged to be active in certain circumstances and cases, especially in cases relating to the wider community's interests (public interest).⁵⁶

Article 5(1) of Judicial Power Law 48/2009 is the legal pretext that can justify constitutional judges using pseudo-judicial review. Judges and constitutional justices must explore, follow and understand society's legal values and sense of justice. This article also strengthens the legitimacy of the Constitutional Court as the protector of democracy in Indonesia. In the history of its formation, one of the reasons that became the background for the formation of the Constitutional Court in Indonesia resulted from an authoritarian transition of power to a more democratic direction. One of the main demands in the movement is constitutional supremacy, emphasised in Article 1(3) of the 1945 Constitution, which affirms that Indonesia is a state of law. One of the critical aspects referred to in this article is that a democracy, described in Article 1(2) of the 1945 Constitution, emphasises sovereignty in the hands of the people and is exercised based on law. Even though the people are the holders and sources of the sovereignty of a country, they must be limited and regulated by law.⁵⁷ It also aligns with Ralf Dahrendorf, who said there are three stages to be passed in building a constitutional democracy—*first*, drafting and forming a new constitution that regulates and affirms basic state values, fundamental rights, the central paradigm of a rule of law state, independent administration of courts, and separation of powers. *Second*, the creation of an orderly economic situation such as anti-monopoly, economic competition, and free competition with the existence of protection from the state for its people. *Third*, the

⁵⁶ *Ibid.*

⁵⁷ Armia, *supra* note 51.

establishment of civil society. The formation of a substantial source of power outside the state and, more often than not, against the state. It is a network of autonomous institutions and organisations with not one centre but hundreds or even thousands of them that monopolistic state or party authorities cannot liquidate or eliminate.⁵⁸

Historically, Indonesia has successfully switched to a constitutional democracy from the previous authoritarian government. Nevertheless, again, it is necessary to emphasise that democracy is limited by law.⁵⁹ Therefore, in practice, the authorities often misuse this situation because there is a limit to the people's sovereignty with an alibi that must be appropriate or based on law. It is the location and strategic role of the Constitutional Court. Among various powers possessed by the Constitutional Court, at least two authorities affirm the Constitutional Court is a guardian of democracy, namely the authority to decide disputes over general election results and the results of regional head elections.⁶⁰ This is the strategic role of the Constitutional Court to protect democracy.

Nevertheless, Indonesia will conduct elections in 2024 with a new model in the form of two elections that will be held simultaneously. Some points are essential to highlight. First, simultaneous elections to elect the President and members of the legislature, namely the candidates for the Regional Representative Council (DPD), the People's Representative Council (DPR), and the provincial/district/city Regional People's Representative Council (DPRD). Second, simultaneous elections to elect regional heads. So, even though they are separate, the two are still one series. In this regard, the Constitutional Court is given the authority to adjudicate disputes over the presidential election and election of legislature members. This task can be seen in the existence of the Constitutional Court in the 2004 election by examining the presidential election dispute filed by the pair Wiranto and

⁵⁸ Ralf Dahrendorf, *On Constitutional Democracy and Constitutions* (Estonia: Juridica International, 2007).

⁵⁹ Suparto Suparto & Ellydar Chaidir, *The Constitutional Court Decision Regarding Disputes of Legislative Election; from a Progressive Law Enforcement to the Recognition of Customary Law Communities in Democracy* (2019).

⁶⁰ Kurnia, Terina & Mahardika, *supra* note 8.

Salahuddin Wahid (Presidential Candidate and Vice Presidential Candidate in 2004). The implementation of the power of the Constitutional Court has its own trajectory. It spans from the issuance of Law 22/2007 on General Election Organisers, which broadened the scope of the meaning of elections as outlined in Article 22E of the 1945 Constitution. Regional elections are declared as part of the election regime. Then in 2022, the Constitutional Court decided to abolish the idea of forming a special judicial body because elections were in sight. However, the legislators have not designed a special judicial body according to the law. Consequently, disputes over the results of the 2024 local election later and in subsequent years will become the power of the Constitutional Court to resolve them. Hence, the Constitutional Court plays a vital role as an instrument of democracy needed by all citizens to protect their constitutional rights.

V. CONCLUSION

Pseudo-judicial review is the legal breakthrough made by the Constitutional Court in exercising its power, as this paper focuses explicitly on its power to resolve disputes over local election results. In this case, the Constitutional Court's decision appears different from other decisions of the Constitutional Court, which in their considerations, proved that there were systematic, structured, and massive violations. However, the Constitutional Court did not vote and recount the votes but instead disqualified the candidate pairs.

In the pseudo-judicial review, a decision disqualifying a pair of candidates is new in the procedural law for examining disputes over the results of the General Elections Regional Head. For instance, if the Constitutional Court declares that the vote count by the KPU was wrong, the Court will determine the correct vote acquisition. In this case, the Constitutional Court interpreted the *argumentum a contrario* by determining the winner based on Article 77 (3) of Law 24/2003 and Article 13 (3) letter b PMK 15/2008. In essence, a pseudo-judicial review results from judicial activism often carried out by constitutional judges. In contrast, judicial activism is about manifesting and implementing provisions from Article 24 of the 1945 Constitution that judicial power is independent to uphold law and justice.

ACKNOWLEDGMENTS

None.

CONFLICT OF INTEREST

The authors declare no competing interests.

ETHICS APPROVAL

The author states that no human participants or animals are involved in this research.

INFORMED CONSENT

The author states that no human participants are involved in this research, therefore, informed consent is not required by them.

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