

Judicial Activism in Regional Head Election Dispute: The Practice and Consistency of The Indonesian Constitutional Court

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ABSTRACT

The Constitutional Court's approach towards regional head election disputes is regarded as quite progressive and illustrates the growing trend of judicial activism. This article attempts to analyze the practice of activism by the Constitutional Court in the context of regional head election disputes and assess its consistency in simultaneous elections. This study uses a conceptual, statutory and case approach in analyzing several regional head election dispute decisions in 2020. The activism of the Constitutional Court in the context of regional head election disputes is at least practiced by judges through three things: first, the determination taken by the Constitutional Court to decide on re-voting and re-counting of votes; second, the willingness of the Court to consider election offenses that are structured, massive, and systematic; and third, the courage of judges to disqualify regional head candidates as well as determine the winner to provide legal certainty. This practice of activism is still being consistently pursued by judges in the 2020 simultaneous regional head elections. Even so, there is a tendency that structured, systematic and massive violations are not the main reason for terminating the election results, and even tend to be complicated by judges who demand more significant evidence. This condition will cause the burden of proving the structured, systematic and massive offenses to be much heavier in the future. This seems to be contradictory to previous decisions of the Constitutional Court which were known to prioritize substantive justice.

Keywords: *Judicial Activism; Constitutional Court; Election Dispute; Election Offense.*

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INTRODUCTION

Regional head elections, in line with the local democratization agenda, are a means of fulfilling people's sovereignty in order to support democratic local governance (Shayo, 2012). The "democratic" indicator in the implementation of regional head elections can be measured by the compatibility of election implementation with the election principles stipulated in Article 22E paragraph (1) of the 1945 Constitution, which includes the principles of direct, general, free, confidential, honest, and fair. (Kosandi & Wahono, 2020; Lele, 2019) On this basis, an electoral



governance system is needed to ensure the implementation of elections is not only in accordance with procedures, but also fair and obedient to the principles (Hartlyn et al., 2008). This includes the establishment of an independent election committee and regulations that guarantee this independence (Nelson, 2023; Ramadani, 2020), ensuring that elections are conducted in compliance with appropriate legal procedures, including the provision of a dispute resolution mechanism that ensures legal certainty and justice (Mozaffar & Schedler, 2002).

Regional head elections should be celebrated as a democratic party for every local community as an essential democratic ritual. However, it is impossible to deny that the regional head election is also a political struggle that brings together prospective regional heads with diverse perspectives and objectives. Regional head elections, which are designed to set ideas against each other, frequently devolve into a contest of financial capacities or a struggle of followers, resulting in horizontal conflict. This is exacerbated by the proliferation of money-politics (Hidayaturrehman et al., 2022), clientelism (Bakker, 2021; Mahsun et al., 2021), and patronage in regional head election (Lewis, 2020). The implementation of regional head elections in various regions in Indonesia was accompanied by various violations, both committed by election organizers, regional head candidate participants and their masses of supporters (Kusdarini et al., 2022).

In its development, various violating practices in the post-conflict local election have resulted in regional head election disputes. Since it was first held on June 1, 2005, the holding of regional head elections has almost always been followed by lawsuits over regional head and deputy regional head election disputes (Firmanto et al., 2021). For example, out of around 270 regional head elections that were held during 2020, there were 132 post-conflict local election results being challenged at the Constitutional Court.

In the construction of Indonesian law, disputes in elections are divided into two categories: process disputes and election result disputes. According to Article 466 of Law Number 7 of 2017 concerning General Elections (Election Law), process disputes are disputes that occur between election participants and disputes between election participants and election organizers as a result of the issuance of decisions by the General Election Commission (KPU), Provincial KPU, and Regency/City KPU. Meanwhile, disputes over general election results are regulated in Article 473; in this context, they are defined as disputes between the regional head election administration and participants regarding the determination of the vote acquisition of post-conflict local election results.

In practice, the mechanism for resolving disputes over post-conflict local election results has experienced a change in the legal regime. In the early stages of democratization, post-conflict local election disputes were handled by the Supreme Court (MA) as the executor of judicial power as mandated in Law Number 32 of 2004 concerning regional government. The authority to decide post-conflict local election disputes (disputes over post-conflict local election results) is only

owned by the Constitutional Court after the third amendment to the Regional Government Law (Law Number 12 of 2008). (Ayuni, 2018; Junaidi, 2010).

Initially, the handling of disputes over regional head election results by the Constitutional Court drew sharp criticism from various groups. This criticism targets the narrow interpretation of the Constitutional Court on the meaning of the phrase "election results" which is only interpreted as "a dispute regarding the determination of election results carried out nationally by the General Election Committee (KPU)". This has resulted in the nickname "calculator court" for the Constitutional Court, which solely assesses the suitability of the process of determining the vote count results of election participants by the organizers. but neglected to examine allegations of violations that occurred during the electoral process. Thus, the Court only relies on quantitative indicators (number of votes) in handling the election disputes, no longer as a judicial power whose duty is to guard the quality of democracy as mandated by the constitution.

On its journey, this view slowly faded along with the progressiveness of the Constitutional Court's decisions on how regional head election disputes were handled. For example, in the 2008 East Java Regional Head Election Dispute Decision (Decision Number 41/PHPU.DVI/2008, December 2, 2008), the Constitutional Court ordered re-voting in two districts (Bangkalan Regency and Sampang Regency) and a recount of the votes in Pamekasan Regency because it was considered that there had been structured, systematic, and massive violations. This decision is also the first time the Constitutional Court has ordered a re-voting and recount of votes. If we look at the considerations of the decision, the judges seem to eager to counter the previous accusation that the Constitutional Court is not a "calculator court" that can be confined by a narrow interpretation of the law, but that it still has the dignity of being the guardian of the constitution and democratic values, so it is appropriate to question the aspect of electoral justice (Reininda, 2021b).

The progressivity of the Constitutional Court's authority in deciding disputes over election results, especially regional head elections, continues to grow rapidly. Decisions similar to the East Java regional head election have been issued by the Constitutional Court, which is considered to have contributed a lot to the development of democracy in Indonesia. This was done by the Court by correcting the implementation of the election, which was not limited to determining the results of the general election (procedural democracy), but also the process of voting and counting (conversion) of votes by determining the qualifications for a structured, massive, and systematic violation. In other words, there was a legal breakthrough made by the Court to ensure that the vote results as determined by the General Election Commission were in accordance with the will of the people without any manipulation, intimidation, or cajoling that could harm the true meaning of democracy (substantial democracy) (Kartabrata, 2022).

When compared to the 2004 disputes over legislative election results, Constitutional Court judges used a procedural justice approach. Different things can be seen in a number of

disputed decisions on regional head election results in 2009, where the Constitutional Court tended to use a substantial justice approach by questioning electoral process violations (election offenses). This step was not free from controversy and was even considered to have exceeded the limits of the constitutional court's authority (*ultra vires* and *ultra petita*) (Ali et al., 2016). On the other hand, this kind of phenomenon has also given rise to speculation about the existence of a judicial activism movement by the Constitutional Court (Mietzner, 2010).

Based on the background of the issues above, this article attempts to analyze two problems: first, what are the efforts of judge activism carried out by the Constitutional Court in the context of post-conflict local election disputes; and second, what is the consistency of the judge's activism in the context of the 2020 simultaneous local elections? Based on the author's investigation, there have been several studies conducted related to the topic of the activism of Constitutional Court judges, including writings from Pan Mohamad Faiz, which address the dimensions of the judicial activism of the Constitutional Court to protect citizens' constitutional rights through their decisions (Faiz, 2016a). In addition, there is an article from Prabowo, which outlines the importance of judge activism by the Constitutional Court in decisions regarding the presidential threshold (Prabowo, 2022), and Rofiq and Hamidah who discussed the same topic but in the context of the Constitutional Court's decision on children out of wedlock (Rofiq & Hamidah, 2021). In comparison, Dramanda has actually initiated an idea that contrasts with the studies mentioned earlier, namely judicial restraint which should be formalized within the institution of the Constitutional Court (Dramanda, 2016).

In terms of originality, no studies have been found that specifically discuss judicial activism in the context of regional election disputes and, at the same time, evaluate the consistency of the constitutional court's activism in deciding disputes in simultaneous regional elections. In fact, this issue is quite important and relevant to assess how far the authority of the Constitutional Court has developed in deciding regional head election disputes, does it continue to experience progressiveness or even become degressive? Departing from this urgency, this study intends to offer a new perspective on filling the gap.

METHOD

As legal research, this study utilizes secondary data obtained from literature studies on legal material, which includes primary legal material in the form of relevant laws and regulations and judge's decisions, as well as secondary legal material, which includes journal articles and previous research results. Data analysis uses a conceptual approach and a case approach. Conceptually, this study seeks to formulate parameters or criteria based on the theory of judicial activism to analyze and justify the decisions of the Constitutional Court in a number of cases that meet these criteria. Furthermore, the existing parameters will be an indicator of the consistency of the substance of decisions in election dispute cases in the 2020 simultaneous local elections.

In terms of its nature, this research is descriptive-analytical in nature and seeks to describe the form of activism of Constitutional Court judges in post-conflict local election disputes and analyze its consistency in simultaneous regional head election disputes in 2020.

ANALYSIS AND DISCUSSION

A. Judicial Activism and Its Practice by the Constitutional Court in the Regional Head Election Disputes

Based on a literature search, the concept of judicial activism was popular in the 20th century but was known long before. According to Kmiec, who specifically researched the origins of judicial activism, the term was first coined by Arthur Schlesinger, an American historian, public intellectual, and social observer, in 1947 in an article in Fortune magazine (Josev, 2017; Kmiec, 2004). From various literature searches, formulating a definite and representative definition of the term judicial activism is not an easy matter. According to Bolick, everyone has their own take on the phenomena of judicial activism. He then gives a reasonably clear description, namely, the situation in which the court invalidates a statute that breaches individual rights or the constitutional restrictions of other branches of government (Bolick, 1994).

Thirlway, for example, proposed a more general definition in his paper titled 'judicial activism and the International Court of Justice', stating that judicial activism refers to the approach used by judges in handling a case by maximizing the function of judges as lawmakers with a logical interpretation and (if necessary) goes beyond an authentic interpretation of the law in favor of something more substantive (Thirlway, 2022). He went on to say that activist judges are those who still believe that the duty of the court is to proclaim laws, not to make them. However, under specific conditions, they will not hesitate to broaden or direct the meaning of the law in order to obtain the desired result. This is done because activist judges are dissatisfied with the current rules and regulations, or if it is determined that there is a legal vacuum, and they are always ready to make the required legal breakthroughs as the foundation for their rulings (Thirlway, 2022).

The judicial activism movement is a prominent school of thought in Anglo-American and Indian countries because of its ability to accomplish substantive justice rather than justice according to the law (procedural justice), which is frequently selective and arbitrary on the side of the populace. societal minorities and marginalized groups (Amarini, 2019). An understanding of judicial activism can also be compared with the idea of judicial restraint as its antithesis. In contrast to the idea of judicial activism, which supports the freedom of judges to make decisions based on their beliefs, judicial restraint emphasizes that judges must refrain from positioning themselves as legislators and only interpret what is necessary according to a doctrinal or formalistic justice approach (King, 2008).

Nonetheless, many people believe that the notion of judicial restraint, as opposed to judicial activism, dominates the arena of justice in Indonesia. This is due in part to the Indonesian legal system, which is typical of civil law and in which judges support the *do loi* concept, therefore judges choose to refrain and refuse to take on legislative obligations in enacting laws. Meanwhile, judicial activism in the civil law legal system is undemocratic and breaches the principle of separation of powers (Rodríguez-garavito, 2011). On the one hand, this kind of attitude is good for avoiding abuse of power by judges who take over legislative authority as positive legislatures (Buana, 2020; Claus & Kay, 2010), but on the other hand, excessive restrictions can result in the judge's decision being dry with progressive considerations and far from true justice.

In the context of Indonesian constitutional courts, judges apply the trend of the two perspectives above in deciding various cases involving disputes over regional head election results. The first inclination is for judges to refrain from interpreting anything other than what is stated in the terms of the laws and regulations, both materially and formally; in this case, the judges emphasize procedural or formalistic justice (restrictive judges). Second, in some situations, judges behave as activists, abandoning formal legal rules in order to achieve far more important aims (active judges). In practice, judicial activism is frequently praised since it frequently breaks the deadlock between a handful of constitutional issues, and activism decisions are frequently become landmark decisions (Faiz, 2016b).

In the context of regional head election dispute resolution at the constitutional court, the practice of judicial activism is reflected in several decisions. One of the phenomenal is Constitutional Court Decision No. 41/PHPU.D-VI/2008 concerning Disputes over the Results of the General Election of Regional Heads of East Java, dated February 2, 2008. In this case of dispute over the results of the regional head elections, the Constitutional Court did not determine the correct vote count results, according to the Court, but instead issued a decision that ordered the counting of votes and re-voting in several designated electoral districts. This is the first time the Constitutional Court has done this in the context of an election dispute.

The activism side of the judges' decision on the dispute over the East Java regional head election can be seen in the judge's considerations when making the decision, which were not based on mere differences in the number of votes as stipulated in the legislation but on the judge's belief that a structured, massive violation had occurred and systematically in the voting process, which has an impact on vote acquisition. Thus, for the first time, judges have stepped out of the corridors of their authority by considering other aspects apart from the problem of the vote count. In fact, the provisions of the legislation at that time, namely Law No. 32 of 2004 concerning Regional Government, Law No. 22 of 2007 concerning General Election Organizers, and Government Regulation No. 6 of 2005 concerning Election, Confirmation of Appointment, and Dismissal of Regional Heads and Deputy Regional Heads,

stipulate that if there is a violation in the general election process, it must be resolved through the district or city supervisory committee. If the violation contains a criminal element, it must be forwarded to the investigator.

Referring to the provisions of the existing laws and regulations, the court actually has no authority to try the case based on the fact that there was a violation in the election process. Nevertheless, the judges are of the view that the prohibition to deal with cases of violations and criminal acts in regional head elections must mean that the Constitutional Court may not carry out the functions of criminal justice or administrative justice but may still examine and adjudicate any violations in the administration of elections, which includes the process of collecting and counting votes, which affect the vote count result. Furthermore, the judge attempted to legitimize his considerations by quoting Radbruch's view that, as guardian of the constitution, the court must not allow formal-procedural provisions (procedural justice) to hinder the achievement of greater justice (substantive justice).

The aforementioned situation demonstrates that judges have dared to leave conventional interpretations of the legal constraints on their jurisdiction in favor of interpretations that, in their opinion, can achieve larger purposes. Nonetheless, many parties claimed that the ruling exceeded the Constitutional Court's authority and went beyond the scope of the claims filed (*ultra petita*) (Harijanti, 2010). Even the Constitutional Court's decision can be said to have castrated the authority of the Oversight Committee and investigators who have the authority to handle election administrative and criminal offenses.

This phenomenon at the same time confirms one of the characteristics of judicial activism as stated by Canon, namely the existence of dimensions *Specificity of Policy* (Cohn & Kremnitzer, 2016), whereby the Constitutional Court judges, in their decisions, formed their own paradigm to decide based on violations in the process of administering elections that broke through the principle of discretion or authority possessed by other institutions, in this case the Election Supervisory Committee and Investigators. In several subsequent decisions, the MK judges attempted to clarify this matter as stated in the considerations of Decision Number 190/PHPU.D-VIII/2010 concerning the regional head election of Pandeglang Regency. In this decision, the judge stated that the cancellation of the election results or regional head election due to structured, systematic, and massive violations had absolutely no intention of taking over the authority of another judicial body. The judge argued on the argument that the court only took those violations that were proven to have an impact on the results of the regional head election but still limited itself from imposing criminal or administrative sanctions on the perpetrators (Kasim et al., 2021).

The same thing is also reflected in the case of the regional head election dispute in Kota Waringin Regency. In Decision Number 45/PHPU.D-VIII/2010, the Constitutional Court again reaped pros and cons because it disqualified one of the candidate pairs for Regent and

Deputy Regent and ordered the election organizers, in this case the General Election Commission of West Kotawaringin Regency, to issue a decree stipulating the other candidate pairs as elected Regent and Deputy Regent. Usually, the Constitutional Court's decision only disqualifies candidates who are suspected of committing violations and orders a re-vote, but in this case, the Court went even further by designating one of the parties as the winner of the regional head elections. The main rationalization of the trial judges was that there had been structured, systematic, and massive violations in almost the entire area of West Kotawaringin Regency committed by the disqualified candidate pairs. The violation was so serious that it had a systemic and massive impact on democracy and undermined the principles of direct, general, free, confidential, honest, and fair elections.

Referring to the provisions of Article 24C of the 1945 Constitution and Article 10 paragraph (1) letter d of Law No. 24 of 2003 concerning the Constitutional Court, it is clear that the Constitutional Court does not have the authority to determine the winner of regional head elections but only determines the results of the correct vote count according to the Constitutional Court. This was solely done by the judge with the consideration of avoiding a legal vacuum while guaranteeing legal certainty for the community regarding the winner of the regional head election in West Kotawaringin. Based on the results of Noorwahidah's analysis, the Constitutional Court's decision was the result of the judges' effort to produce greater benefit for society (Noorwahidah, 2010).

Another noteworthy aspect of the two activism decisions above is the emergence of the terms structured, systematic, and massive in the consideration of the decisions. This is important because such violations become a stepping stone for judges to decide disputes over regional head election results with nuances of activism. The parameters regarding these structured, systematic, and massive violations have not yet appeared in the East Java regional head election decisions but have begun to be defined along with the increasing intensity of similar decisions. The definition of these terms can be found, among others, in Decision Number 45/PHPU.D-VIII/20103232 concerning Disputes over the Results of the General Election for the Head of the West Kotawaringin Region. The "structured" nature is defined as violations that have been carefully planned and involve officials and election organizers in stages. "Systematic" refers to violations committed with careful planning and using a good strategy. While "massive" is recognized as a violation committed in a comprehensive manner with wide area coverage (Rudy & Purba, 2014).

B. Consistency of Constitutional Court Activism in Deciding Simultaneous Regional Head Election Disputes

The intense competition between political parties to secure seats in office is described as one of the triggers for judge activism in the context of election disputes in the by Tate and

Valinder study as cited by Faiz (Faiz, 2016a). This spurred a number of lawmakers to file a lawsuit, which compelled the judiciary to engage in the election controversy and resulted in significant improvements thanks to a judge's decision.

This also explains the proclivity for requests for disputes over the results of regional head elections, in which participants frequently include administrative infractions, criminal offenses and conflicts during the election phases as grounds for litigation. In fact, all those issues are beyond the Constitutional Court's jurisdiction and should be resolved through the criminal justice system's mechanisms by police, public prosecutors, and criminal courts. Meanwhile, administrative violations can be resolved through the Regional General Election Commission. While disputes in the election process or stages are resolved through the Election Supervisory Body or the Election Supervisory Committee, However, due to the structured, systematic, and massive nature of the violations, in order to uphold democratic values, the Constitutional Court considered it necessary to grant such a request and annul the results of the regional head election.

Despite the uproar, the Constitutional Court judges' action has garnered a lot of acclaim and respect. Especially in its endeavors to promote substantive justice rather than being limited to procedural law. The Constitutional Court's progressive judgements in protecting electoral law and democracy have resulted in numerous legal breakthroughs. On that basis, it's worth looking into the consistency of the Constitutional Court's judgements during the 2020 simultaneous regional head elections. This consistency is critical in order to keep democracy moving forward, to ensure legal certainty, and, of course, to maintain the integrity and dignity of the Constitutional Court itself.

On December 9, 2020, regional head elections were held concurrently. In principle, the stages of simultaneous regional head elections are identical to the conventional regional head election model. It's merely that in 2020, simultaneous regional head elections will be held in the midst of the COVID-19 pandemic, with the necessity to follow the health protocol. On that premise, the conduct of the 2020 simultaneous regional head elections has yielded several benefits and drawbacks, as well as numerous infractions, both in the election context and in violation of health protocols (Ramadani & Rezah, 2021). A total of 270 regions held regional head election contests, with details of 9 provinces, 224 regencies and 37 cities.

According to KoDe Inisiatif study, 136 cases of regional head election disputes were brought to the Constitutional Court. Of the 136 cases presented to the Court, the court granted 18 (eighteen) requests, the majority of which included the judge's order to conduct a re-vote, while one ruling ordered a vote recount (Reininda, 2021a). This finding suggests that the Court does not hesitate to overturn the General Election Commission's regional head election results, and that it remains consistent in deciding on a re-vote if an error is suspected in the regional head election process.

In addition to re-voting, in its decision, the Constitutional Court again disqualified one pair of candidates, as occurred in the regional head election dispute case in Boven Digoel Regency, Papua Province. However, the reason for the disqualification is not based on any violations committed by those concerned, but because administratively they do not meet the requirements for candidacy, namely the waiting period for ex-corruption convicts. In the *quo* case, the pair of candidates who were disqualified were ex-convicts in a corruption case who in fact had not passed the 5-year gap when registering as candidates for Boven Digoel Regent in 2020, where the 5-year gap should have ended after January 26, 2022. Thus, violations were actually committed by election organizers, in this case the General Elections Commission. This is as stated in the decision 132/PHP.BUPXIX/2021, where in its conclusion, the judge stated that there had been a violation in the decision letter and decision letter of the Boven Digoel General Election Commission regarding the determination of the pair of candidates in question as contestants for the election of the Regent and Deputy Regent of Boven Regency Digoel of 2020.

Coincidentally, in the Boven Digoel case, the applicant was the pair of candidates whose votes were second in number (9,156 votes) below the disqualified candidate pair (16,319 votes). However, the judge did not immediately determine the applicant as the winner of the local election, as in the case of the dispute over the results of the regional head election in West Kotawaringin Regency. In his decision, the judge only ordered the General Election Commission of Papua Province and the General Election Commission of Boven Digoel Regency to conduct a re-vote for the Regent and Deputy Regent of Boven Digoel without involving the disqualified candidate pairs. This is most likely due to the fact that after the disqualification of one candidate pair, three other candidate pairs remain, so voting can still be carried out again. It is different from the case in Kotawaringin, which only had two pairs of candidates, where if one of them is disqualified, then only a single candidate will be left.

Furthermore, there is a substantial difference between the decision to annul the results of the 2020 simultaneous regional head election and the decisions of the Constitutional Court in the previous regional head election. Even though they consistently decided on re-voting, the arguments relating to structured, systematic, and massive offenses involving money politics, mobilization of the state civil apparatus, pork barrels, or the partiality of regional head election organizers were not the main factors in the judge's considerations. This is exemplified by the dispute over the results of regional head elections in Banjarmasin Regency. The judge ordered a re-vote in his decision Number 21/PHP.KOTXIX/2021 on the Banjarmasin regional head election. It's only that it appears the judges are still doubting a variety of reasons surrounding the applicant's allegations for a structural, systematic, and massive offense.

In the case of the simultaneous regional head election dispute case in Banjarmasin, the applicant in principle argued that there had been a structured, systematic, and massive violation, which included: 1) misuse of social assistance and direct cash assistance committed by related parties; 2) There was misuse of the Banjarmasin Municipal Government's videotron for the sake of imaging incumbents (related parties) during the campaign period; 3) There has been a deployment of civil apparatus and cleaning staff with the aim of winning over the related parties. 4) There was fraud in the voting and vote counting process, including voter mobilization, which was known from the high number of additional voters and the large number of voters who did not meet the requirements, which was detrimental to the petitioner's vote acquisition..

Of the three arguments of the applicant above, only argument number four was accepted by the judge, while for the other three violations, the judge stated that the evidence and facts presented before the trial were insufficient. For example, in relation to the misuse of social assistance and direct cash assistance, the court stated that even though the incident had actually occurred, there was no evidence to justify the existence of a directive from the related party as the incumbent mayor to instruct the State Civil Apparatus (ASN) to campaign for himself or influence voters as the recipient of the assistance. In the context of the argument for videotron abuse, the Court stated more or less the same thing:

“Not finding evidence that the incumbent ordered his staff to abuse the videotron with the aim of campaigning for himself through city government facilities..”.

Regardless of the judge's belief in the truth of those arguments, the considerations of the Constitutional Court tend to complicate efforts to prove the arguments for violations that are structured, systematic, and massive in nature. In fact, proving structured, systematic, and massive violations is considered quite difficult because it must link evidence with all the facts that emerged during the trial and must be cumulative (Carolina & Maryanah, 2022; Kasim et al., 2021). As a comparison, Article 15 of the General Election Supervisory Agency Regulation Number 9 of 2020 states that structured, systematic, and massive elements must be interpreted cumulatively by the existence of evidence showing violations in at least 50% (fifty percent) of districts or cities for provincial regional head elections and 50% (fifty percent) of the sub-districts within 1 (one) regency or city for the election of the regency or city regional head. In short, the complainant must be able to prove that the TSM elements actually occur in full in at least 50 percent of the districts or electoral districts. With such provisions, it is hard to present quality evidence in a very limited time.

This contrasts with the Constitutional Court's decision no. 41/PHPU.D-VI/2008 on the dispute over the results of regional head elections in East Java. In considering his decision, the judge acknowledged that during the evidentiary process, the petitioner was unable to provide evidence to support the results of his calculations. So that the argument for violations

was not formally proven, however, the judge still believed that materially there had been a structured, systematic, and massive offense.

To this point, it is appropriate to state that in the simultaneous regional head elections, the Constitutional Court is still attempting to be consistent with its activism efforts to correct the results of less democratic regional head elections and does not hesitate to order a re-vote. However, from a considering standpoint, it demonstrates that the judge was cautious in recognizing the justifications for structural, systematic, and massive offense. This can be regarded as a court's attempt to raise the burden of evidence in cases involving election offense. It is believed that this approach will set a precedent and make proving the case for an structural, systematic, and massive election offense a lot harder in the future.

CONCLUSION

Judges engaged in constitutional activism in the context of regional head election disputes in at least the following manners: first, the Constitutional Court's determination to rule on voting and recounting of votes in regional head elections; second, the Constitutional Court's willingness to examine and include violations that are structured, massive, and systematic as a basis for decisions; and third, the judge's courage to disqualify regional head candidates as well as determine the winner to avoid confusion while providing legal certainty to society. The Constitutional Court has continued to pursue this activist practice in the 2020 simultaneous regional elections, allowing 18 requests for regional head election disputes and requiring a re-vote on 17 of its decisions. There are indications, however, that the structural, systematic, and massive election offenses, were not the primary basis for dismissing the regional head election results, but rather received more objections from judges who sought adequate proof. This condition shall render it much more difficult to prove a structured, systematic, and massive offense in the future. This appears to be at odds with earlier Constitutional Court decisions, which were believed to be progressive and emphasize substantive justice.

REFERENCE

- Ali, M. M., Rachman, I. N., Wijayanti, W., Putranto, R. T. J., Anindyajati, T., & Asih, P. G. (2016). Tafsir Konstitusional Pelanggaran Pemilu yang Bersifat Sistematis, Terstruktur dan Masif. *Jurnal Konstitusi*, 9(1), 189. <https://doi.org/10.31078/jk918>
- Amarini, I. (2019). Implementation of Judicial Activism in Judge'S Decision. *Jurnal Hukum Dan Peradilan*, 8(1), 21. <https://doi.org/10.25216/jhp.8.1.2019.21-38>
- Ayuni, Q. (2018). Gagasan Pengadilan Khusus Untuk Sengketa Hasil Pemilihan Kepala Daerah. *Jurnal Hukum & Pembangunan*, 48(1), 199–221. <https://doi.org/10.21143/.vol48.no1.1602>
- Bakker, L. (2021). Electoral Dynamics in Indonesia: Money Politics, Patronage, and Clientelism at the Grassroots, by Edward Aspinall and Mada Sukmajati (eds). *Bijdragen Tot de Taal-*

- Land- En Volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia*, 177(1), 128–130. <https://doi.org/10.1163/22134379-17701002>
- Bolick, C. (1994). The Proper Role of “Judicial Activism.” *Harvard Journal of Law & Public Policy*, 42(1), 1–15.
- Buana, M. S. (2020). *Legal-Political Paradigm of Indonesian Constitutional Court : Defending a Principled Instrumentalist*. 6(1).
- Carolina, M., & Maryanah, T. (2022). Fenomena money politics dan pembuktian terstruktur sistematis masif (tsm) pada pemilihan walikota dan wakil walikota bandar lampung 2020. *Jurnal Ilmu Pemerintahan Widya Praja*, 48(2), 141–158. <https://doi.org/10.33701/jipwp.v48i2.1461>
- Claus, L., & Kay, R. (2010). Constitutional Courts as “Positive Legislators” in the United States. *American Journal of Comparative Law*, 58(1), 479–504. <https://doi.org/10.5131/ajcl.2009.0018>
- Cohn, M., & Kremnitzer, M. (2016). *Judicial Activism : A Multidimensional Model*. 2(2), 333–356.
- Dramanda, W. (2016). Menggagas Penerapan Judicial Restraint Di Mahkamah Konstitusi. *Jurnal Konstitusi*, 11(4), 617. <https://doi.org/10.31078/jk1141>
- Faiz, P. M. (2016a). Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi. *Jurnal Konstitusi*, 13(2), 406–430. <https://doi.org/10.31078/jk1328>
- Faiz, P. M. (2016b). The Protection Of Civil And Political Rights By The Constitutional Court Of Indonesia. *Indonesia Law Review*, 6(2), 158–179. <https://doi.org/10.15742/ilrev.v6n2.230>
- Firmanto, T., Fadli, M., Safaat, M. A., & Istislam, I. (2021). The Dynamics of Organizing Institutions for the Resolution of Election Conflicts in Indonesia During 2005-2020 Period. *Proceedings of the 2nd Annual Conference on Education and Social Science (ACCESS 2020)*, 556(Access 2020), 339–344. <https://doi.org/10.2991/assehr.k.210525.103>
- Harijanti, S. D. (2010). Perkara Perselisihan Hasil Pemilihan Umum Kepala dan Wakil Kepala Daerah Provinsi Jawa Timur: Perspektif Hukum Acara Mahkamah Konstitusi. *Jurnal Konstitusi*, 2(1).
- Hartlyn, J., McCoy, J., & Mustillo, T. M. (2008). Electoral Governance matters: Explaining the quality of elections in contemporary Latin America. *Comparative Political Studies*, 41(1), 73–98. <https://doi.org/10.1177/0010414007301701>
- Hidayaturrehman, M., Ngarawula, B., & Sadhana, K. (2022). Political investors: Political elite oligarchy and mastery of regional resources in Indonesia. *Asian Journal of Comparative Politics*, 7(2), 269–281. <https://doi.org/10.1177/2057891120917213>
- Josev, T. (2017). The nursery years of “judicial activism”: From a historian’s shorthand to media catchphrase 1947-1962. *Studies in Law Politics and Society*, 72, 53–80. <https://doi.org/10.1108/S1059-433720170000072003>
- Junaidi, V. (2010). Pelanggaran Sistematis, Terstruktur dan Masif : Suatu Sebab Pembatalan

- Kehendak Rakyat dalam Pemilihan Kepala Daerah Tahun 2010. *Wacana Hukum Dan Konstitusi*, 7(5), 41–72. <https://doi.org/10.31078/jk753>
- Kartabrata, A. (2022). Optimalisasi Kewenangan Badan Pengawas Pemilu (Bawaslu) \ Dalam Penegakan Pelanggaran Administrasi Secara Terstruktur, Sistematis Dan Massif Dalam Pemilihan Kepala Daerah (Pilkada). *Jurnal Keadilan Pemilu*, 1(3), 1–18. <https://doi.org/10.55108/jkp.v1i3.158>
- Kasim, A., Supriyadi, & Purnamasari, A. I. (2021). Dekonstruksi Penanganan Pelanggaran Administrasi Yang Terstruktur, Sistematis Dan Masif Dalam Pilkada. *Mimbar Hukum*, 33(2), 494–520.
- King, J. A. (2008). Institutional Approaches to Judicial Restraint. *Oxford Journal of Legal Studies*, 28(3), 409–441. <https://doi.org/10.1093/ojls/gqn020>
- Kmiec, K. D. (2004). The origin and current meanings of “Judicial activism.” *California Law Review*, 92(5), 1441–1477. <https://doi.org/10.2307/3481421>
- Kosandi, M., & Wahono, S. (2020). Military Reform in the Post-New Order Indonesia: A Transitional or a New Subtle Role in Indonesian Democracy? *Asian Politics & Policy*, 12(2), 224–241. <https://doi.org/https://doi.org/10.1111/aspp.12534>
- Kusdarini, E., Priyanto, A., Hartini, S., & Suripno, S. (2022). Roles of justice courts: settlement of general election administrative disputes in Indonesia. *Heliyon*, 8(12), e11932. <https://doi.org/10.1016/j.heliyon.2022.e11932>
- Lele, G. (2019). Asymmetric decentralization and the problem of governance: the case of Indonesia. *Asian Politics & Policy*, 11(4), 544–565.
- Lewis, B. D. (2020). How do mayors get elected? The causal effects of pre-electoral coalitions on mayoral election outcomes in Indonesia. *Local Government Studies*, 46(3), 394–413. <https://doi.org/10.1080/03003930.2019.1627334>
- Mahsun, M., Elizabeth, M. Z., & Mufrikhah, S. (2021). Female Candidates, Islamic Women’s Organisations, and Clientelism in the 2019 Indonesian Elections. *Journal of Current Southeast Asian Affairs*, 40(1), 73–92. <https://doi.org/10.1177/1868103420988729>
- Mietzner, M. (2010). Political conflict resolution and democratic consolidation in Indonesia: The role of the constitutional court. *Journal of East Asian Studies*, 10(3), 397–424. <https://doi.org/10.1017/S1598240800003672>
- Mozaffar, S., & Schedler, A. (2002). The Comparative Study of Electoral Governance— Introduction. *International Political Science Review*, 23(1), 5–27. <https://doi.org/10.1177/0192512102023001001>
- Nelson, M. (2023). Independent Redistricting Commissions Are Associated with More Competitive Elections. *PS - Political Science and Politics*, 56(2), 207–212. <https://doi.org/10.1017/S104909652200124X>
- Noorwahidah. (2010). Sengketa Pemilukada Kotawaringin Barat (Analisis Terhadap Putusan MK

- No . 45 / PHPU . D-VIII / 2010 dari Perspektif Hukum Negara dan Hukum Islam). *Jurnal Konstitusi*, 8(1).
- Prabowo, B. S. (2022). Menggagas Judicial Activism dalam Putusan Presidential Threshold di Mahkamah Konstitusi. *Jurnal Konstitusi*, 19(1), 073. <https://doi.org/10.31078/jk1914>
- Ramadani, R. (2020). Lembaga Negara Independen Di Indonesia Dalam Perspektif Konsep Independent Regulatory Agencies. *Jurnal Hukum Ius Quia Iustum*, 27(1). <https://doi.org/10.20885/iustum.vol27.iss1.art9>
- Ramadani, R., & Rezah, F. S. (2021). Regional Head Election During COVID-19 Pandemic: the Antinomy in the Government Policies. *Yuridika*, 36(1), 213. <https://doi.org/10.20473/ydk.v36i1.23528>
- Reininda, V. (2021a). Evaluasi Penanganan Sengketa Hasil Pilkada Serentak Tahun 2020 di Mahkamah Konstitusi. *Jurnal Bawaslu Provinsi Kepulauan Riau*, 3(1), 24–47. <https://doi.org/10.55108/jbk.v3i1.247>
- Reininda, V. (2021b). Menakar Relevansi Pembentukan Badan Peradilan Khusus Penyelesaian Sengketa Hasil Pemilihan Kepala Daerah Tahun 2024. In *Jurnal Bawaslu Provinsi Kepulauan Riau* (Vol. 3, Issue 2, pp. 1–21). <https://doi.org/10.55108/jbk.v3i2.254>
- Rodríguez-garavito, C. (2011). *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America* (Vol. 1081). Taylor and Francis. <https://doi.org/10.4324/9780203797655-14>
- Rofiq, M. A., & Hamidah, T. (2021). Status Anak Luar Nikah (Judicial Activism Mahkamah Konstitusi dalam Putusan Nomor 46/PUU- VII/2010 Perspektif Mashlahah Izzuddin Bin Abdissalam). *Islamitsch Familierecht Journal*, 2(2), 126–163.
- Rudy, R., & Purba, C. (2014). Karakteristik Sengketa Pemilukada Di Indonesia Evaluasi 5 Tahun Kewenangan MK Memutus Sengketa Pemilukada. *Jurnal Konstitusi*, 11(1). <https://doi.org/10.31078/jk11110>
- Shayo, D. P. (2012). Digitalising Local Democracy: Citizen Participation in Monitoring Local Government Elections through Crowdsourcing Methods in Tanzania. *Journal of African Politics*, 2(1&2), 66–99. <https://doi.org/10.58548/2022jap212.6699>
- Thirlway, H. (2022). Judicial activism and the International Court of Justice. In *Liber Amicorum Judge Shigeru Oda* (Vol. 1, Issue 1, pp. 75–105). https://doi.org/10.1163/9789004531161_013