

# GUARDING DEMOCRACY: JUDICIAL ACTIVISM IN THE INDONESIAN CONSTITUTIONAL COURT DECISIONS IN REGIONAL HEAD ELECTORAL DISPUTES

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Received: 1 October 2024 | Last Revised: 5 March 2025 | Accepted: 22 April 2025

## Abstract

This paper examines the extent of judicial activism exercised by the Court in resolving regional head election disputes from 2017 to 2020 and its implications for democratic electoral processes in Indonesia. Through a normative juridical approach and case study analysis of selected Constitutional Court decisions, this study highlights how judicial activism has been used to safeguard democracy. The findings reveal that the Court, in several instances, has expanded its jurisdiction beyond legal norms to address systemic electoral violations, including structured, systematic, and massive fraud. The Court's decisions in cases such as Boven Digoel, Yalimo, and Sabu Raijua demonstrate its willingness to intervene in cases involving candidate eligibility, vote-buying, and administrative malpractice, often resulting in re-elections or candidate disqualifications. However, despite its proactive stance, the Court has shown restraint when dealing with pre-election violations such as money politics and civil servant mobilization, thereby raising concerns about the consistency and limitations of its judicial activism. The study underscores the dual nature of judicial activism: while it enhances electoral democracy by addressing unresolved violations, it also risks creating legal uncertainty and overstepping institutional boundaries. The trend observed in the 2017-2020 decisions suggests that the Court's role in election dispute

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resolution is evolving, reflecting both the need for judicial intervention in electoral integrity and the constraints imposed by legal frameworks. Ultimately, judicial activism by the Constitutional Court contributes to the protection of electoral democracy in Indonesia, ensuring that regional head elections adhere to democratic principles and are free from fraudulent practices.

**Keywords:** Electoral Democracy, Judicial Activism, Local Election

## I. INTRODUCTION

Regional head elections serve as a mechanism to uphold people's sovereignty and promote democratic local governance in line with the local democratization agenda.<sup>1</sup> The democratic quality of these elections is reflected in their adherence to the principles outlined in Article 22E paragraph (1) of the 1945 Constitution, which mandates elections to be direct, general, free, secret, honest, and fair.<sup>2</sup> In 2020, there were 270 regional head elections in 9 provinces, 224 regencies, and 37 municipalities.<sup>3</sup> They had not ended by the time of vote counts. Many candidate pairs contested the results at the Constitutional Court (MK). Even though the original intent of designing the regional head election disputes was to contest vote count errors, many plaintiffs questioned the processes before and during the election. For instance, a pair allegedly could not meet the requirements, engaged in money politics, involved state civil apparatus, and abused power. The conduct of regional head elections across various regions in Indonesia was marred by numerous violations, involving election organizers, regional head candidates, and their supporters.<sup>4</sup>

The Constitutional Court is a state organ in the judiciary with limited authority as stipulated by Article 24C of the Constitution 1945, namely adjudicating at

<sup>1</sup> Amiruddin and Rizki Ramadani, "Judicial Activism in Regional Head Election Dispute: The Practice and Consistency of The Indonesian Constitutional Court," *Substantive Justice International Journal of Law* 6, no. 1 (February 2023): 56–70.

<sup>2</sup> Kosandi, M and Wahono, S., "Military Reform in the Post-New Order Indonesia: A Transitional or a New Subtle Role in Indonesian Democracy?" *Asian Politics & Policy* 12, no. 2 (April 2020): 224–41.

<sup>3</sup> Consideration point (b) of Decree of the General Election Commission of the Republic of Indonesia Number 258/Pl.02-KPT/01/General Elections Commission (KPU)/VI/2020 on the Stipulation of the Extended Simultaneous Gubernatorial and Vice Gubernatorial, Regental and Vice Regental, and/or Mayoral and Vice Mayoral Elections in 2020.

<sup>4</sup> E. Kusdarini et al., "Roles of Justice Courts: Settlement of General Election Administrative Disputes in Indonesia," *Heliyon* 8, no. 12 (December 2022).

the first and final instance to review laws against the Constitution, judging on authority disputes of state institutions whose authority is granted by the Constitution, judging on the dissolution of a political party, and judging on disputes regarding the result of a general election. Thus, Constitutional Court should have had no other authority besides what is written in the Constitution. In other words, its authority is limited by constitutional norms.

The Court began to resolve the dispute after the enactment of Law Number 12 of 2008 on Local Government, which transferred the authority to it.<sup>5</sup> The law implicitly stated that regional head elections were part of the general election as stipulated by Article 22E of the Constitution 1945. It means that the Constitutional Court has wider authority, from only resolving disputes over the results of general elections, not the regional ones. The extension of authority enables the Court to be the guardian of the Constitution and democracy.<sup>6</sup> It is caused by at least two things. First, an election indicates how a country runs a democratic political system.<sup>7</sup> Second, following Article 18 paragraph (4) of the Constitution 1945, every regional head shall democratically be elected. Hence, the authority of the Constitutional Court to judge the legitimacy of a regional head election directly ensures that the election is democratically conducted.

Nevertheless, after Constitutional Court Decision 97/PUU-XI/2013, which states that Constitutional Court has no authority over regional head election disputes, there is a shift in the its authority. The legal reasoning in the decision implicitly ensures that there is no constitutional disobedience.<sup>8</sup> There are two constitutional reasons why the Constitutional Court revoked its authority. First, its authority is limited by the Constitution 1945. Second, the regional head elections are not a part of the general elections as stipulated in two separate chapters and articles. After this decision, the lawmakers directly enacted Law 1

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<sup>5</sup> Article 236C of Law No. 12 of 2008 on Local Government.

<sup>6</sup> Hamdan Zoelva, "The Problems of Settlement of Disputes on the Results of the Regional Head Election by the Constitutional Court," *Journal of the Constitution* 10, no. 3 (September 2013): 382.

<sup>7</sup> Affan Gafar, *Indonesian Politics: Transition to Democracy*, 2nd ed. (Yogyakarta: Pustaka Belajar, 2000), 7.

<sup>8</sup> Supriyadi and Aminuddin Kasim, "Design of the Special Election Court After the Constitutional Court Decision Number 97/PUU-XI/2013," *Journal of the Constitution* 17, no. 3 (September 2020): 688.

of 2015 on Regional Head Elections. However, the Constitutional Court still has been judging election results until an election court is established.

In its development, the Constitutional Court has quantitatively resolved disputes over regional head election results. It is also deemed to have the authority to assess infringements committed during the process of regional head elections.<sup>9</sup> The infringements are money politics, the involvement of officials or civil servants, alleged election offenses, which are structured, systematic, and massive, affecting the results of general elections or regional head elections, and the infringements of principal and measurable requirements for candidacy (such as having never been convicted and drawing legitimate support for independent candidates).<sup>10</sup> In assessing those infringements, the Constitutional Court rationalized that due to its nature as a constitutional court, it may not let procedural justice restrict and set aside substantive one.<sup>11</sup> Substantive justice generally promotes more fundamental things, such as morals and humanity.<sup>12</sup> The Constitutional Court also reasoned that the Court also has the authority to oversee and safeguard the establishment of democracy as regulated in the Constitution by assessing and providing justice for violations that occur in the implementation of democracy, including that of regional head elections.<sup>13</sup>

### 1.1. Background

The Constitutional Court's decision to adopt judicial activism is an important step in correcting violations in the democratic process. This is to keep elections as part of democracy running well. Democracy and the electoral process cannot be separated. All existing indexes of the quality of democracy agree on a need for good-quality elections. The minimum standard of democracy is the existence of institutions that allow citizens to run their government through elections.<sup>14</sup> Huntington says that the central procedure for democracy is the selection of

<sup>9</sup> Constitutional Court Decision No. 115/PHPU.D-XI/2013, 99.

<sup>10</sup> Constitutional Court Decision No. 115/PHPU.D-XI/2013, 99.

<sup>11</sup> Constitutional Court Decision No. 41/PHPU.D-VI/2008 on the dispute over the East Java gubernatorial election, 128.

<sup>12</sup> David Lewis Schaefer, "Procedural versus Substantive Justice: Rawls and Nozick," *Social Philosophy and Policy* 24, no. 1 (January 2007): 166.

<sup>13</sup> Constitutional Court Decision No. 41/PHPU.D-VI/2008 on the dispute over the East Java gubernatorial election, 128.

<sup>14</sup> Brigitte Geissel, Marianne Kneuer, and Hans-Joachim Lauth, "Measuring the Quality of Democracy: Introduction," *International Political Science Review / Revue Internationale De Science Politique* 37, no. 5 (November 2016): 574.

leaders through competitive elections by the people they govern.<sup>15</sup> The democratic method is an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide through a competitive struggle for the people's vote.<sup>16</sup> One of the functions of democracy in a country is to produce good government policies, but it can play this role only so far as it operates in two distinct dimensions, electoral and contestatory.<sup>17</sup>

Debates among judges on the use of judicial activism occurred. In Constitutional Court Decision 46/PUU-XIV/2016, there are two approaches by judges to giving an opinion on the decision. Some judges used the judicial restraint approach by assuming that the expansion of norms is the exclusive authority of legislators. At the same time, others thought that the Constitutional Court should not take a self-limiting attitude by using the judicial restraint approach in cases related to the order and welfare of human life. Some of the Constitutional Court judges took the judicial activism approach in this case with the argument of moral reading of the Constitution where the Constitutional Court judges are obliged to maintain, straighten, and make law congruent with the dynamics of people's lives.

Especially in regional head election disputes, Simon Butt, in his article "Indonesian Constitutional Court decisions in regional head electoral disputes," criticizes that the application of judicial activism in resolving regional head election disputes, particularly in determining qualitative errors, has tended to be inconsistent and arbitrary. This is not in line with the reasons given by the Constitutional Court in settling the East Java regional head election dispute when extending its jurisdiction beyond vote counting, intently to maintain democracy and the legitimacy of elections.<sup>18</sup>

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<sup>15</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), 6.

<sup>16</sup> Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 2nd ed. (New York: Harper, 1947), 269.

<sup>17</sup> Philip Pettit, "Democracy, Electoral and Contestatory," in *Designing Democratic Institutions*, eds. Ian Shapiro and Stephen Macedo (New York: New York University Press, 2000), 105.

<sup>18</sup> Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Canberra: Center for Democratic Institutions, Australian National University, 2013).

Although it can be considered a legal breakthrough, the discussion of judicial activism cannot eventually be separated from how the Constitutional Court has realized democratic elections. Without its role, violations not properly processed before the election would not be handled. Those violations can threaten democratic values in regional elections. This worry matches the theory that the symptoms of the problems facing democracy include declining voter turnout, disinterest in politics among youth, cross-national data showing declining confidence in political systems and leadership, and decreasing participation in civic affairs.<sup>19</sup> Nevertheless, the practice of judicial activism by the Constitutional Court in election disputes must also be investigated to reveal whether it can realize electoral democracy. This can be seen from examining its legal considerations using the limitations of judicial activism.

For example, in the 2000 simultaneous elections, it ordered 17 re-elections due to infringements in the pre-election processes, such as election rigging and irregularities of the Final Voters List, administrative violations, and criminal offenses.<sup>20</sup> At that time, two candidates were also disqualified for their citizenship and conviction for corruption. It shows the Constitutional Court's vital role in handling infringements and disputes over elections, which cannot be resolved by authorized institutions in the electoral process. Additionally, in practice, the Constitutional Court can examine the infringements handled by other institutions: the General Elections Commission (KPU), Elections Supervisory Agency (Bawaslu), and Election Organization Ethics Council (DKPP), provided the handling is contrary to laws and regulations so that the elections follow the principle of democracy as stipulated by Article 18 paragraph (4) of the Constitution 1945.

The study of judicial activism in Indonesia in general and analyses of cases are essential to see its development. Moreover, the Constitutional Court has not standardly and consistently determined when and under what condition judicial activism can be applied to decide a constitutional case. Judicial activism can be

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<sup>19</sup> W. Johnston, H. Krahn, and T. Harrison, "Political Institutions, and Trust: The Limits of Current Electoral Reform Proposals," *The Canadian Journal of Sociology / Cahiers Canadiens De Sociologie* 31, no. 2 (2006): 166.

<sup>20</sup> Author, compilation from various Constitutional Court Decisions on disputes over regional head election results in 2020.

a “double-edged sword”. On the one side, it can enforce substantive justice and strengthen the democratic electoral process. However, on the other side, it can create legal uncertainty in the decisions of the Constitutional Court.

### 1.2. Research Questions

This study maps the trend of judicial activism at the Constitutional Court in judging on regional head election disputes in 2017, 2018, and 2020. Then, its contribution to democracy, in both positive and negative senses, will be analyzed. From the previous decisions, it is hoped that the Constitutional Court judges can take lessons in settling regional head election disputes in the future. Suppose a court that specifically handles disputes over election results is formed in the future. In that case, this study can also be used to reveal to what extent judicial activism impacts the democratic electoral process in Indonesia. Even if, according to the plan, the 2024 regional head elections will be held simultaneously throughout Indonesia, it will certainly be extremely difficult for the regional election dispute court. Besides the existing laws, studies that discuss the limits of judicial activism and judicial restraint can help judges.

### 1.3. Method

This research used the case study approach. The researcher’s main concern was the ratio decidendi, namely the judges’ legal reasons to arrive at their decision. This research was conducted to find legal rules, principles, and doctrines to answer its research questions.<sup>21</sup> This research was carried out normatively with secondary data used as research material. The secondary data consisted of primary, secondary, and tertiary legal materials obtained through library research study. The primary legal materials were laws related to this research, such as the 1945 Constitution of the Republic of Indonesia, Law 7 of 2020 on the Constitutional Court, and Law 10 of 2016 on Regional Head Elections.

As for methodology, data were collected by studying written data from documents or library materials through content analysis. Because this study focuses on decisions reflecting judicial activism, the researcher looked for decisions in

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<sup>21</sup> Peter Mahmud Marzuki, *Penelitian Hukum [Legal Research]* (Jakarta: Kencana Prenada Media Group, 2005), 35.

the Constitutional Court's directory of disputes over the regional head election results in the 2017-2020 period. The researcher opened the decisions one by one and then looked at the application section, court considerations, and decision section. Furthermore, sees at decisions with the character of judicial activism, the researcher also sees decisions with the character of judicial restraint as comparison material.

After a list of decisions made based on the decision number had been compiled, the data were analyzed qualitatively using the normative-juridical method. The juridical analysis was based on existing laws and regulations and the normative analysis was based on library materials following research. The decisions were analyzed by reading and understanding the judges' reasons for making decisions. The decision analysis was then adjusted to theories and concepts in democracy, especially electoral democracy.

## II. DISCUSSION

### 2.1. Judicial Activism

The Constitutional Court is the sole interpreter of the Constitution. Therefore, one important aspect of the Constitutional Court is interpretation. Basically, over time constitutional norms face the reality of society development, so that interpretation becomes necessary. Jimly Asshiddiqie divides the types of constitutional interpretation into three major schools.<sup>22</sup> The first is originalism, which interprets the Constitution by referring to the originality of norms according to the spirit of its making. The second is contextualism of basic values, namely understanding the Constitution based on the morality during its drafting, so that it does not just follow the intent of constitution makers. The third is the convergent schools, opening up the Constitution as widely as possible to all parties, not only judges or academics. Thus, the interpretation of the Constitution belongs to everyone with different rights.

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<sup>22</sup> Jimly Asshiddiqie, *Agenda Pembangunan Hukum Nasional di Abad Globalisasi [The National Legal Development Agenda in the Age of Globalization]*, 1st ed. (Jakarta: Balai Pustaka, 1998), 37–52.

There are many types of constitutional interpretations. However, judges in the world can be grouped into two major groups, namely originalists and non-originalists. Originalists interpret the Constitution according to its text or the intent of its makers. On the other hand, for non-originalists, according to the development of society, constitutional interpretation cannot be based only on the text of the Constitution or its original intent.

At first, the term judicial activism had a positive connotation, whose definition was deemed more similar to “civil rights activists” than “judges misusing authority.”<sup>23</sup> Judicial activism reflects a situation when the judiciary comes out of its sphere of traditional role and becomes active in its work while laying down policies and programs to ensure the protection of the people’s rights and liberty at the discretion of the executive and the legislature.<sup>24</sup> Christopher Buck puts four limitations on judges’ decisions characterized by judicial activism.<sup>25</sup> First, principled implications or the protection of individuals’ rights and freedom is the intent of the Constitution, even though it is not written. Second, principled minoritarians or decisions are taken to guarantee and protect the rights of minorities. Third, principled remedies, in which a decision is made to restore the constitutional rights of citizens that have been violated. Fourth, the principle of internationalism, where judges decide by looking at precedents and legal developments globally or internationally. In the Indonesian context, Pan Mohammad Faiz argues that there are limitations not to expand norms related to criminalization.<sup>26</sup>

Judicial activism was first adopted in *Brown versus the Board of Education*. The Warren Court, in its opinion, held that separate schools violated the Equal Protection Clause of the 14th Amendment. The ruling effectively removed segregation as the policy of segregating students racially created an inherently

<sup>23</sup> Keenan D. Kmiec, “The Origin and Current Meanings of Judicial Activism,” *California Law Review* 92, no. 5 (October 2004): 1451.

<sup>24</sup> Hamdan Zoelva and Aminuddin Kasim, “The Problems of Settlement of Disputes on the Results of the Regional Head Election by the Constitutional Court,” *Journal of the Constitution* 10, no. 3 (September 2013): 114.

<sup>25</sup> Geissel, Kneuer, and Lauth, “Measuring the Quality of Democracy,” 785.

<sup>26</sup> Pan Mohammad Faiz and M. Lutfi Chakim, *Peradilan Konstitusi: Perbandingan Kelembagaan dan Kewenangan Konstitusi di Asia [Constitutional Judiciary: Institutional and Jurisdictional Comparison in Asia]* (Depok: Raja Grafindo Persada, 2020), 8–9.

unequal learning environment. This is an example of judicial activism due to the ruling overturning *Plessy v. Ferguson*, where the Court reasoned that facilities could be separated as long as they were equal.<sup>27</sup> However, there is debate among judges in America on the use of judicial activism. The judicial activism approach is often employed by liberal judges. They are frequently more courageous to go beyond their restriction and enter the domain of other institutions. On the other hand, the approach at the Constitutional Court began to emerge with the beginning of the paradigm to promote substantive justice. It emphasizes how judges deliver justice by treating rights and obligations justly.<sup>28</sup> The Constitutional Court is the sole interpreter of the Constitution. Therefore, one important aspect of the Constitutional Court is interpretation. Basically, over time constitutional norms face the reality of society development, so that interpretation becomes necessary.

Kmiec argues that defining judicial activism in a representative manner is challenging. Bolick supports this view, noting that perceptions of judicial activism vary among individuals.<sup>29</sup> However, he provides a clear explanation, describing it as a situation where a court strikes down a law that violates individual rights or oversteps constitutional limits on other branches of government.<sup>30</sup> Jimly Asshiddiqie divides the types of constitutional interpretation into three major schools.<sup>31</sup> The first is originalism, which interprets the Constitution by referring to the originality of norms according to the spirit of its making. The second is contextualism of basic values, namely understanding the Constitution based on the morality during its drafting, so that it does not just follow the intent of constitution makers. The third is the convergent schools, opening up the Constitution as widely as possible to all parties, not only judges or academics. Thus, the interpretation of the Constitution belongs to everyone with different

<sup>27</sup> Johnston, Krahn, and Harrison, "Political Institutions, and Trust," 786.

<sup>28</sup> Pan Mohamad Faiz, "Dimensions of Judicial Activism in the Decisions of the Constitutional Court," *Journal of the Constitution* 13, no. 2 (June 2016): 423.

<sup>29</sup> Tanya Josev, "The Nursery Years of 'Judicial Activism': From a Historian's Shorthand to Media Catchphrase 1947–1962," *Studies in Law, Politics and Society* 72 (May 2017): 53–80.

<sup>30</sup> Clint Bolick, "The Proper Role of 'Judicial Activism,'" *Harvard Journal of Law & Public Policy* 42, no. 1 (January 1994): 1–15.

<sup>31</sup> Jimly Asshiddiqie, *Agenda Pembangunan Hukum Nasional di Abad Globalisasi* [The National Legal Development Agenda in the Age of Globalization], 1st ed. (Jakarta: Balai Pustaka, 1998), 37–52.

rights. The judicial activism movement is prominent in Anglo-American and Indian legal systems for prioritizing substantive justice over procedural justice, which often favors the elite while marginalizing minorities.<sup>32</sup>

The Constitutional Court's decisions on disputes over regional head election results are a manifestation of the judiciary's role in maintaining democracy in Indonesia as repeatedly emphasized in its considerations. The Constitutional Court is of the opinion that the decisions is one of the concrete efforts to build a democratic culture that respects the provisions stipulated by the law in accordance with universally applicable principles in a constitutional democratic state.

However, in practice, the Court's efforts to maintain democracy through its decisions have become a dilemma. Legal norms have not allowed these efforts. As a state institution, the Constitutional Court is subject to statutory provisions. The Constitutional Court must comply with the limits of authority in the law as a form of power control. Regarding regional head elections, the Constitutional Court is only authorized to resolve disputes over the determination of vote acquisition results from the regional head elections under Article 157 Paragraph (3) of Law Number 10/2016 concerning the Election of Governors, Regents, and Mayors, which states "disputes over the determination of the final stage of the election results examined and tried by the Constitutional Court until a special judicial body is formed."

This norm has imposed a limit for the Constitutional Court to promote democracy in the context of regional head elections. The Constitutional Court can only adjudicate disputes over regional head elections in the form of numbers. The Court cannot go beyond the limit to examine, hear, and make decisions. This is logical because the authority to handle other than disputes over results has become the domain of other state institutions such as the General Elections Commission (KPU), Elections Supervisory Agency (Bawaslu), Election Organization Ethics Council (DKPP), and even law enforcement officials. All disputes should be resolved at each stage of local elections. However, in practice,

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<sup>32</sup> Indriati Amarini, "Implementation of Judicial in Judge's Decision," *Jurnal Hukum dan Peradilan* 8, no. 1 (March 2019): 21–38.

these institutions have not been able to consistently enforce regulations in the event of a violation.

Violations in local elections were not stopped so the Constitutional Court upheld democratic values by making legal breakthroughs. Throughout the implementation of regional head elections in the last three times, namely 2017, 2018, and 2020, the Constitutional Court issued several decisions normatively exceeding its authority on disputes over the determination of local election results. In the 2017 regional head elections, out of 60 applications, the Court granted two requests from parties who wanted vote recounts in the Yapen Islands and Intan Jaya Regency regional head elections. One more request was granted, but only in the form of a further recapitulation order. Meanwhile, in the 2018 regional head elections, out of the 72 cases brought their applicants, the Court only granted 2 of them in the Election of the Regent and Deputy Regent of Deiyai Regency and the Election of the Governor and Deputy Governor of North Maluku.

#### **2.1.1. Note from Several Cases**

In the 2020 regional head elections, out of 151 applications, 22 were granted and the Court ordered re-voting in 17 elections. In fact, the Constitutional Court issued three decisions to disqualify regional head candidates in the regional head elections of Boven Digoel, Yalimo, and Sabu Raijua.

A candidate for the regional head of Boven Digoel Regency had not gone through 5 years from the last being subject to criminal sanctions, so he did not meet the administrative requirements for a regional head candidate. There were different opinions from the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) on calculating the 5 years for former convicts to run for regional head elections. Against this debate, the Constitutional Court explained that for prisoners who are granted parole, even though they are no longer prisoners in correctional institutions, their legal status is still convicts. The Constitutional Court wanted to present a leader who is clean, honest, and has integrity in implementing a clean and transparent regional head election,

and there is no possibility of mistakes in determining the candidate pairs for former convicts to take part in the election.

Meanwhile, in the Yalimo election dispute, a regional head candidate drove a vehicle while drunk so that he hit a policewoman to death and he was disqualified by the Constitutional Court through Decision Number 145/PHP.BUP-XIX/2021. The Court believed that the first voting and subsequent voting, both in the form of follow-up voting and re-voting, are essentially a form of voting stages whose results are not yet known so that all contestants are still candidates for regional heads because there has been no legal action. Who appointed them as regional heads? Consequently, the candidates' status can be canceled if conditions cause non-fulfillment of requirements for regional head candidates.

Meanwhile, in the Sabu Raijua regional head election, the elected regional head candidate violated a fundamental administrative requirement, namely citizenship. Through the evidence on trial at the Constitutional Court, it is known that the Orient Patriot Riwu Kore is a citizen of the United States. Different from the case in Boven Digoel, where there were interpretations between election management institutions, Orient Patriot Riwu Kore was never honest about his citizenship status, including not recognizing that status when registering as a candidate for the Regent of Sabu Raijua.

The three decisions reflect judicial activism because the disqualification of candidates is not the authority of the Constitutional Court. However, the unresolved issue at the pre-voting level made the Constitutional Court as the final decider in regional head election conflicts issue a decision outside its authority. It should ensure that the implementation of regional head elections reflects democratic values because it will affect public confidence in regional leadership.<sup>33</sup> The following is the trend of Constitutional Court decisions in the last three regional head elections.

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<sup>33</sup> W. A. Johnston, Harvey Krahn, and Trevor Harrison, "Democracy, Political Institutions, and Trust: The Limits of Current Electoral Reform Proposals," *The Canadian Journal of Sociology / Cahiers Canadiens de Sociologie* 31, no. 2 (2006): 165–82.

**Table 1. The Trend of Constitutional Court Decisions:  
Effort to Uphold Democracy**

No.	Year	Accepted	Not Accepted
1.	2017	2	53
2.	2018	2	68
3.	2020	22	129

**Source:** Constitutional Court as compiled by the researcher

From these data, the trend of the Constitutional Court decisions to test outside disputes over regional head election results increased. However, the increase in disputes that the Constitutional Court granted could be due to several things. First, the increase number of local election violations in 2020. Second, the non-functioning mechanism for resolving pre-election violations by electoral institutions. The increasing number of local election violations is not a problem that threatens democracy should law be enforced at each stage. However, unfortunately, this did not happen, so that the violations were brought to the Court. Third, the Constitutional Court increasingly wielded its authority substantially beyond regulations or carried out judicial activism in adjudicating disputes over local election results. In fact, in 2020, three regional head candidates were disqualified by the Constitutional Court.

Here are some examples of disputes over the results of the local elections in 2017, 2018, and 2020:

**Table 2. Results of Local Election Disputes**

No	Region	Decision	Infringement
52/2017	Kepulauan Yapen	It was partly granted regarding the request for the validity of voting results.	The Constitutional Court could not find documents as the basis for determining the difference in votes as the object of dispute.

No	Region	Decision	Infringement
54/2017	Intan Jaya	It was partly granted regarding the request for the validity of voting results.	Counting and re-voting as the Constitutional Court did not receive the object of dispute over the vote count
35/2018	Deiyai	It was partly granted regarding the request for the validity of voting results.	Re-voting as the Constitutional Court did not receive the object of dispute over the vote count
36/2018	Maluku Utara	partially accepted	Re-voting due to voter administrative problems
84/2021	Nabire	partially accepted	Re-voting due to DPT and election mechanism
21/2021	Banjarmasin	partially accepted	Re-voting due to fraud in the selection process not according to procedure (massive fraud)
70/2021	Rokan Hulu	partially accepted	Re-voting due to voter mobilization
132/2021	Boven Digoel	partially accepted	Re-voting by disqualifying candidates (different views between the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu))
104/2021	Morowali Utara	partially accepted	Re-voting because the right to vote was blocked and not registered with the DPT

No	Region	Decision	Infringement
135/2021	Sabu Raijua	accepted	Re-voting by disqualifying a candidate (due to his candidate)
124/2021	Kalimantan Selatan	partially accepted	Re-voting because it did not follow the procedure (inflated and the level of attendance)
145/2021	Yalimo	partially accepted	Re-voting by disqualifying a candidate

*Source: Constitutional Court as compiled by the researcher*

In its decision, the Constitutional Court gave good reasons for promoting normative and substantive justice. Regarding the latter, the Constitutional Court based its authority in deciding disputes over regional head election results on Constitutional Court Decision Number 1/PHP.BUP-XV/2017, dated April 3, 2017. The Court stated that there is no legal basis for the Court to exceed its authority so that it goes beyond the authority granted by Article 157 paragraph (3) of Law 10/2016 to adjudicate disputes over the results of governor, regent, and mayor elections without taking over the authority of another institution.

Regarding the threshold requirement for the difference in votes as the basis for the application, the Court referred to Article 158 of Law 10/2016. If the Constitutional Court had overruled the article, it would have opposed its own decisions and regulations requiring a limit on the difference in votes as a condition of the application as contained in Constitutional Court Decision Number 58/PUU-XIII/2015 and PMK 1/2016 as amended by PMK 1/2017. This made the applicant meet the minimum difference in vote requirements to apply to the Constitutional Court under the population and total valid votes. However, the Constitutional Court turned out to deviate from the provisions of the difference

by considering that it could delay the enforcement of the provisions of Article 158 of Law 10/2016 as long as certain conditions were met. The Constitutional Court will only consider the applicability of the provisions of Article 158 of Law 10/2016 on a case-by-case basis.

The Constitutional Court waived the law to deliver justice for the applicant in cases that could not be resolved in the previous process by other institutions. For example, in the disqualification decisions in the Boven Digoel and Sabu Raijua regional head elections, the two cases did not meet the minimum vote difference requirement to become the object of the petition. However, the Constitutional Court still examined, heard, decided, and even granted the request. In the latter, the difference in votes between the applicant and related parties was 11,806 votes or 26.69%. In the former, the difference in the number of votes between the petitioners and the related parties was 7,163 votes or 23.2%. The two applications did not meet the requirements stated in the law requiring the difference in votes of not more than 0.5%, 1%, 1.5%, or 2%, depending on the population.<sup>34</sup> The limit on the difference in the number of votes is no longer relevant because the Constitutional Court disqualified a candidate.

However, the Constitutional Court tried to consider its decision on the dispute over regional head election results. In determining the voting or recounting of votes, for instance, it considered that the results of recapitulated vote counts, as the object of the petition, could not be the basis of a valid object. Therefore, for the sake of legal certainty as well as justice for the parties, the Constitutional Court ordered the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) to hold a re-vote and vote count.

Meanwhile, in the case of candidate disqualification, the Constitutional Court was of the opinion that it was important to carry out re-voting by disqualifying candidates who were proven not to meet the administrative requirements as candidates for regional heads. The pass of a candidate who violated this provision could occur due to misunderstanding between the election organizers. In the

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<sup>34</sup> Article 158 of Law 10/2016

Boven Digoel regional head election, the Elections Supervisory Agency (Bawaslu) and the General Elections Commission (KPU) promoted their understanding to interpret provisions for the prohibition of nominations for convicts at least five years after the end of their sentence. This was then mediated by the Court through its judges' interpretation of the existing provisions.

In determining whether re-voting was acceptable, the Constitutional Court considered the applicant's arguments. In the application for the South Kalimantan regional head election, for instance, because the arguments and evidence submitted were quite clear, namely that it was not certain how many ballot boxes were open and unsealed and their effect on changes in the numbers of vote results were detrimental to both candidate pairs, the Constitutional Court might order re-voting. While the re-voting was not granted by the Constitutional Court in the Rokan Hulu regional head election where the applicant applied for the re-voting due to a violation of engineering/falsification of the contents of documents, especially regarding Voter Data and Voting Rights Users with Data on the Use of Ballots contained in Form Model C. Copies of KWK at 25 TPS, according to the Constitutional Court, it did not change the vote acquisition of each candidate pair and there were no objections from the witnesses of each candidate pair.

However, in 2017 2018, and 2020 regional elections, the Constitutional Court only bypassed normative provisions or carried out judicial activism in cases where violations occurred during and post-voting processes, such as miscalculations, administrative errors, errors in the Permanent Voter List (DPT), and the non-fulfillment of the right to vote for a certain group of people. Meanwhile, for violations in the pre-election process, such as money politics, the use of civil servants (ASN), and other violations, the Constitutional Court rejected the application. It relied on the arguments presented by the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) as the organizers of regional head elections. This indirectly gave rise to the "standardization" of judicial activism carried out by the Constitutional Court on its authority to handle regional head election cases.

In disqualifying a regional head candidate, the Constitutional Court requires very clear evidence that it violates regulations and has not been handled by the election organizers. For matters denied by the election organizers on trial, such as money politics, the Constitutional Court was reluctant to enter this realm, for instance in the South Kalimantan regional head election, where the petitioner talked about money politics and the politicization of government aid. The Constitutional Court rejected the request based on information from the election organizers. In fact, when referring to the evidence presented by the applicant, it was very strong. This shows that the Constitutional Court considered granting the application submitted by the parties who objected to the calculated results of the regional head election. The Court did not immediately grant or reject the application submitted on trial. On the one hand, the Constitutional Court policies have also become inconsistent and arbitrary.<sup>35</sup>

The disqualification of regional head candidates raised the questions of how the process of law enforcement and administration was in the pre-election process and how other institutions such as the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) carry out their duties to enforce rules to uphold democratic values in the implementation of regional head elections. In addition, the increase in the number of re-voting in the 2017 and 2018 regional head elections to the 2020 regional head elections also raised questions about the effectiveness of law enforcement in responding to violations of the implementation of regional head elections by related parties. To uphold substantive justice and maintain democracy, the Constitutional Court made a legal breakthrough.

## 2.2. The Constitutional's Court Effort to Uphold Democracy

Democracy is defined as a method of people's participation in state government. Initially, the democratic system took the form of direct democracy, carried out directly by the people to make political decisions by all citizens

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<sup>35</sup> Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Canberra: Center for Democratic Institutions, Australian National University, 2013), 34.

following the majority rule procedure.<sup>36</sup> Over time, the growing population and increasingly complex public policy issues have made it no longer possible to practice direct democracy, so modern democracy uses the method of representation. The general election method is used to elect representatives of the people. In addition, according to Henry B Mayo, one of the important values in democracy is the regular change of leaders.<sup>37</sup>

The clearest measure of democracy is universal suffrage, namely the right of every citizen to vote.<sup>38</sup> General elections are a prerequisite for democracy. Even so, it is not just a general election but a free and fair election or commonly called electoral democracy. Democracy has a much broader meaning than electoral democracy. A regime can be democratically elected but fails to maintain and realize the basic principles of democracy.<sup>39</sup> General elections alone do not guarantee the preservation of democracy. Even elections are also commonly used by authoritarian regimes to legitimize their power. However, going back to the beginning, it is impossible to realize democracy without electoral democracy. Democracy can flaw if elections are conducted full of pressure, intimidation, coercion, violence, fraud, and money politics. The goal of democracy to guarantee people's participation in government is hindered if the people are not freedom to make choices.

Free and fair elections do not guarantee that those elected are committed to maintaining democracy and fulfilling their promises to represent and realize the aspirations of the people. It determines how they exercise their power while in office. Moreover, general elections full of fraud are even more difficult to produce democratic representatives of the people. Fraudulent elections are usually held by non-democratic regimes. They certainly have no intention of realizing democracy through elections. For them, elections are held to keep their

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<sup>36</sup> Miriam Budiardjo, *Dasar-Dasar Ilmu Politik* [The Basics of Political Science] (Jakarta: Gramedia Pustaka Utama, 2008), 109.

<sup>37</sup> Budiardjo, *Dasar-Dasar Ilmu Politik* [The Basics of Political Science], 119.

<sup>38</sup> Carlton Clymer Rodee, *Pengantar Ilmu Politik* [Introduction to Political Science] (Jakarta: Raja Grafindo Persada, 2008), 218.

<sup>39</sup> Andreas Schedler, "Elections Without Democracy: The Menu of Manipulation," *Journal of Democracy* 13, no. 2 (April 2002): 30–50.

power lasting. Schedler suggests several strategies for violating norms in general elections, including limiting the scope of elective offices, excluding opposition forces, restricting political and civil liberties, restricting legal suffrage, intimidating voters and buying their votes, perpetrating electoral fraud, and preventing elected officers from exercising their institutional powers.<sup>40</sup>

Efforts to maintain democracy must start with maintaining free and fair elections. Realizing the importance of free and fair elections, Indonesia includes the principles of general elections in the 1945 Constitution. Through the third amendment to Article 22E of the 1945 Constitution, general elections are held in a direct, general, free, secret, honest, and fair manner every five years. Direct means that voters have the right to cast their votes directly without any intermediary. General means that the general election applies to all citizens regardless of their ethnicity, religion, race, and class. Free means that voters have freedom without any coercion or pressure to make their choice. Confidential means that voters in casting their votes will not be known by any party. Honest means that all parties involved in the general election act honestly in accordance with the laws and regulations. Fair means that every voter and participant in the general election gets the same and equal treatment and is free from fraud by any party. Finally, the 1945 Constitution adheres to the limitation of power in the sense that officials will be re-appointed every five years. This is in accordance with one of the democratic values, namely the regular change of leaders.

The norm of a fair and free general election is not only aimed at general elections for the President, DPD, DPR, and DPRD. In the second amendment to the 1945 Constitution, the norms for democratic regional head elections were included. Article 18 paragraph 4 of the 1945 Constitution stipulates that the governors, regents, and mayors of each province as heads of provincial, district, and city governments are democratically elected. This norm opens the interpretation that regional head elections can be carried out directly or indirectly, as long as they are conducted in a democratic manner. Indonesia's indirect regional head elections was practiced before the amendment to the

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<sup>40</sup> Schedler, "Elections Without Democracy," 39.

1945 Constitution. Previously, regional heads were elected by the DPRD. The direct election for regional heads only started in 2005 based on Law Number 32 of 2004. The election of regional heads in Indonesia is currently carried out directly, so it must be carried out according to the principles of general elections, namely direct, general, free, secret, honest, and fair. This is to ensure the implementation of democratic norms in regional head elections according to the 1945 Constitution.

The implementation of regional head elections is still accompanied by various violations. The Constitutional Court, through its decisions, sought to maintain electoral democracy. The reason for maintaining democracy was the background for the Constitutional Court for the first time in Decision Number 41/PHPU.D-VI/2008 in the East Java regional head election dispute to get out of the shackles of law, which basically only gave authority over regional election result disputes. It tried to deliver substantive justice by assessing the violations that caused the vote count results to be disputed. In contrast, the law did not give the authority to judge election violations. They were handled by the Elections Supervisory Agency (Bawaslu), General Elections Commission (KPU), Election Organization Ethics Council (DKPP), and law enforcement officers in accordance with their respective authority.

The Constitutional Court practice of legal breakthroughs to achieve substantive justice is categorized as judicial activism. On the one hand, it is needed to protect democracy. However, it also has its ups and downs. The Constitutional Court in the East Java regional head election dispute was very progressive by making legal breakthroughs to examine structured, systematic, massive local election violations. However, in the 2017, 2018, and 2020 regional elections, the Constitutional Court, despite granting more and more granted applications (especially in 2020), only assessed violations during the current and post-ballot processes and even administrative aspects such as miscalculations, administrative errors, errors of permanent voter lists (DPT), and the non-fulfillment of the right to vote for a certain group of people. It did not consider pre-voting violations such as money politics, mobilization of civil servants, and abuse of authority.

### III. CONCLUSION

The function of the Constitutional Court is not only to decide disputes over vote acquisition in regional head elections, but also to ensure that electoral democracy is maintained. This function can only be carried out by the Constitutional Court by conducting judicial activism when needed. The trend of the Constitutional Court decisions in disputes over the results of the 2017, 2018, and 2020 regional elections shows an increase in judicial activism. However, the increasing use of judicial activism by the Constitutional Court is increasingly limited to administrative reasons. The decisions on disputes over the results of the 2017, 2018, and 2020 local elections, which were reviewed, shows that the Constitutional Court was not willing to enter into disputes over local election results due to very substantive violations such as money politics, mobilization of civil servants, and abuse of authority. The reviewed rulings show that the Constitutional Court restrained itself when it had to carry out judicial activism, as seen in the South Kalimantan local election dispute. The trend of the Constitutional Court decision with the type of judicial activism has contributed to efforts to maintain electoral democracy. Without judicial activism, the Constitutional Court cannot adjudicate violations of regional head elections not resolved at the previous stage. In fact, violations that are not handled will affect the results of regional head elections. By carrying out judicial activism, the Court will more substantively judge the things that affect the election results. Finally, the Constitutional Court joins in adjudicating violations of regional head elections to protect the results of regional head elections from all forms of fraud. Judicial activism contributes to electoral democracy, the norm for regional head elections according to the Constitution.

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