

Choices of Law for Democratic Regional Head Election Dispute Resolution Institutions in Indonesia

Amancik¹✉
Putra Perdana Ahmad Saifulloh²
Zainal Amin Ayub³
Sonia Ivana Barus⁴
Susi Ramadhani⁵

^{1,2,4,5}Faculty of Law, Universitas Bengkulu, Indonesia.

³School of Law, Universiti Utara Malaysia, Malaysia.

✉amancikfhunib@gmail.com

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Abstract

This research aimed to provide a conceptual idea regarding legal options in resolving disputes of democratic regional head elections in Indonesia with two proposed options. The first option included revising the Election and Regional Election Law to grant authority to the Constitutional Court (MK) and Election Supervisory Agency (Bawaslu) for adjudicating disputes. The second option proposed implementing the Fifth Amendment to the 1945 Constitution to reconstruct the Constitutional Court as an election court correlating with the primary role of upholding regulations. These proposed options would grant the Constitutional Court the authority to examine and adjudicate substantial matters related to the constitutionality of elections. Furthermore, the analysis used normative legal research including statutory, comparative, and conceptual methods.

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1. Introduction

Handling and resolving General Election violations are crucial elements in upholding election integrity which ensures electoral justice. According to IDEA, electoral justice provides limits to the system for resolving legal issues to protect citizens' voting rights. Referring to the election law enforcement system in Law No. 7 of 2017 concerning Election Law, there are three types of election law enforcement namely (a) violations, (b) process disputes, and (c) disputes over the outcomes.¹ The Indonesian Election Supervisory Agency (Bawaslu) has authority over types of election violations and process dispute resolution called PSPP.² Furthermore, the dispute over the outcomes of General Election (PHPU) falls under the authority of the Constitutional Court (MK) as regulated by Article 24 C Paragraph (1) of the Indonesian Constitution (UUD NRI 1945).³

In practice, the authority of the Constitutional Court and Bawaslu raises complex problems. This was observed during the implementation of the 2019 simultaneous elections where Bawaslu received 30 reports of alleged election violations after determining the outcomes of the national vote recapitulation. These violations pertained to administrative issues during the election period. Additionally, two cases in Landak and Sanggau show overlaps between the authority of the Constitutional Court and Bawaslu in West Kalimantan Province.⁴

The Election Law further gives Bawaslu the authority to handle election violations related to the stages of counting and recapitulating vote outcomes. The Constitutional Court also strengthens Decision No.01/PHPU-PRES/XVII/2019 which gives the authority to handle structured, systematic, and massive administrative violations (TSM) to Bawaslu. It is also believed by Bawaslu that election violations following the

¹ Refly Harun, *Pemilu Konstitusional: Desain Penyelesaian Sengketa Pemilu Kini Dan Ke Depan* (Jakarta: Rajagrafindo Persada, 2016), 16–17.

² Bakhrul Amal, "Kewenangan Mengadili Oleh Bawaslu Atas Sengketa Proses Pemilu Yang Diatur Dalam Peraturan Komisi Pemilihan Umum (Studi Atas Putusan Penyelesaian Sengketa Proses Pemilu Bawaslu Provinsi Dki Jakarta Nomor 004/Reg.Lg/Dprd/12.00/Viii/2018)," *Masalah-Masalah Hukum* 48, no. 3 (July 31, 2019): 306, <https://doi.org/10.14710/mmh.48.3.2019.306-311>.

³ Abdurrachman Satrio, "Kewenangan Mahkamah Konstitusi Memutus Perselisihan Hasil Pemilu Sebagai Bentuk Judicialization Of Politics," *Jurnal Konstitusi* 12, no. 1 (May 20, 2016): 119, <https://doi.org/10.31078/jk1217>.

⁴ Ahsanul Minan, *Serial Evaluasi Penyelenggaraan Pemilu Serentak 2019 Perihal Penegakan Hukum Pemilu* (Jakarta: Bawaslu RI, 2020), 108.

determination of national vote outcomes by General Election Commission of Indonesia (KPU) are part of the dispute stage of the process. Therefore, Bawaslu has the authority to accept and resolve the cases.⁵

Based on these facts, an overlap occurs in the process of law enforcement and resolving election legal issues as there is no clear confirmation of the main authority of Bawaslu and the Constitutional Court in solving election violations after determining the national vote outcomes. Consequently, the authority of Bawaslu should be improved, particularly in administrative violations.⁶

After the reform era, the implementation of democracy was not only manifested in elections regulated by Article 22E of the 1945 Constitution but also in the local context through political decentralization to autonomous Provinces, Regencies, and Cities. This decentralization policy includes the democratic election of the positions of Governor, Regent, and Mayor (Pilkada). Article 18 Paragraph (4) of the 1945 Constitution further stipulates that "Governor, Regent, and Mayor as heads of provincial, district, and city regional governments are elected democratically, respectively."⁷

The issue of institutions adjudicating disputes over regional head election outcomes is a debate over constitutional law. Article 236C of Law No.12 of 2008 concerning the Second Amendment to Law No.32 of 2004 concerning Regional Government (UU Pemda) assigned the authority to adjudicate disputes over regional head election outcomes to the Constitutional Court. However, the Constitutional Court Decision No.97/PUU-XI/2013 decided that Article 236C of the Regional Government Law is contrary to the Constitution. This decision states that Pilkada is not an election regime, thereby the Constitutional Court has no authority to adjudicate disputes over Pilkada election outcomes. Despite the decision, disputes over regional head election

⁵ Ahmad Gelora Mahardika, "Diskualifikasi Calon Kepala Daerah Terpilih Serta Penyelesaiannya Dalam Sistem Ketatanegaraan Indonesia," *Electoral Governance Jurnal Tata Kelola Pemilu Indonesia* 3, no. 1 (November 20, 2021): 66, <https://doi.org/10.46874/tkp.v3i1.346>.

⁶ Irwan, "Hadapi Pemilu 2024, Fritz Nilai Harus Ada Perbaikan Wewenang Dalam Pelanggaran Administrasi," *Bawaslu RI*, March 4, 2021, <https://www.bawaslu.go.id/id/berita/hadapi-pemilu-2024-fritz-nilai-harus-ada-perbaikan-wewenang-dalam-pelanggaran-administrasi>.

⁷ Jimly Asshiddiqie, *Konsolidasi Naskah UUD 1945 Setelah Perubahan Keempat* (Depok: PSHTN FH UI, 2002), 22.

outcomes have been handled by the Constitutional Court until 2022 correlating with Article 157 Paragraph (3) of Law No. 10 of 2016 concerning Regional Head Elections. Disputes regarding the determination of vote outcomes in the final stages of an election are examined and adjudicated by the Constitutional Court until the formation of a special judicial body.⁸

The problem of institutions adjudicating regional head outcomes disputes becomes more complex when the Constitutional Court states that the 2024 referendum is a simultaneous election based on Decision No.55/PUU-XVII/2019. This implies that the elections for President and Vice President (Pilpres), members of the People's Representative Council (DPR), DPD, Provincial DPRD, Regency/City DPRD (Pileg), and Pilkada will be held simultaneously.⁹ Without clarity on the Special Court to examine, decide, and adjudicate regional head outcomes disputes, the Constitutional Court will be burdened with tasks that are not in the constitutional authority.¹⁰ By Decision No. 85/PUU-XX/2022 of the Constitutional Court, the phrase "until the establishment of a special judicial body" in Article 157, Paragraph (3) of the Regional Head Election Law is considered unconstitutional and no longer legally binding. Consequently, the Constitutional Court will have permanent jurisdiction over election dispute cases since the formation of a special judicial body is no longer possible to exist.¹¹ This implies that Pilkada has returned to being an Election Regime as a consequence of the Constitutional Court Decision.¹²

⁸ Dimas Bima Setiyawan, "Pembentukan Peradilan Khusus Pemilihan Kepala Daerah Dalam Sistem Ketatanegaraan Indonesia," *Al-Balad: Journal of Constitutional Law* 1, no. 1 (2019): 8-9.

⁹ Syarifuddin Jurdi, "Format Pemilu Serentak Pasca Putusan Mk No. 55/2019: Kajian Dan Analisis Sosiologi Politik," *Jurnal Sosiologi Reflektif* 15, no. 1 (November 9, 2020): 118, <https://doi.org/10.14421/jsr.v15i1.1955>.

¹⁰ Hendra Sudrajat, "Kewenangan Mahkamah Konstitusi Mengadili Perselisihan Hasil Pemilukada," *Jurnal Konstitusi* 7, no. 4 (2010): 162.

¹¹ Mohammad Syaiful Aris, "Pembentukan Peradilan Khusus Penyelesaian Hasil Pemilihan Kepala Daerah Dalam Pelaksanaan Pemilu Serentak Nasional," *Media Juris* 5, no. 3 (October 31, 2022): 473-506, <https://doi.org/10.20473/mi.v5i3.34154>.

¹² Ahmad and Novendri M. Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution," *Jurnal Konstitusi* 16, no. 4 (2019): 786.

The legislators as regulated in Article 20 of the 1945 Constitution namely DPR and the President¹³ agreed not to revise the existing Election and Regional Head Election Law. Empirical reflections on the 2019 simultaneous and the 2020 regional head elections show several legal issues that have not been comprehensively addressed particularly regarding the authority of the Constitutional Court. This issue is currently still adjudicating disputes over regional head election outcomes and the limits of Bawaslu's authority in handling violations after determining the national vote outcomes.

In this research, the focus is on resolving regional head election disputes and harmonizing regulations related to the handling of elections to achieve regional head elections that adhere to the principles of direct, public, free, confidential, honest, and fair as mandated by the constitution. It also provides an overview of the ideal legal options for resolving regional head election disputes by providing points on potential positive and negative outcomes of adopting different systems. Therefore, the research is interested in examining and writing a paper with the title "**Choices of Law for Democratic Regional Head Election Dispute Resolution Institutions in Indonesia**".

Before discussing further the choices of law for Democratic Regional Head Election Dispute Resolution Institutions in Indonesia, it is necessary to conduct a literature review to ensure the originality of this research¹⁴ and avoiding plagiarism.¹⁵ The research identifies three publications that discuss regional head election dispute resolution. **First**, the publication titled "The Constitutional Court's Role in Consolidating Democracy and Reforming Local Election" by Iwan Satriawan and Khairil Azmin Mokhtar. The results of this article conclude that the Constitutional Court through the decisions has stimulated a conducive political situation and provided significant contributions in the process of consolidating local democracy. Despite limited number of judges and a short period for settling disputes, the Court

¹³ Charles Simabura, "Legislative Power In The Presidential Government System: A Comparative Study Between Indonesia And In The United States Of America," *Journal of Legal, Ethical and Regulatory Issues* 24, no. 6 (2021): 1.

¹⁴ PPS FH UII, *Buku Pedoman Penulisan Tugas Akhir (Tesis) Magister Ilmu Hukum* (Yogyakarta: PPS FH UII, 2010), 8-9.

¹⁵ Eddy Damian, *Hukum hak cipta*, Edisi keempat, cetakan ke-1 (Bandung: Alumni, 2014), 265.

has resolved all disputes regarding local elections without significant delays and complaints.¹⁶

Second, “The Institutional Renewal in Settlement of Disputes of Local Election Results” by Heru Widodo. This publication states that since the 2014 legislative election, Bawaslu has possessed the authority to resolve a dispute among the candidates in General Election or between the candidates and the committee. Since the 2017 national election, Bawaslu has been given the authorization to settle any administrative violations and conflicts in local elections as well as handling money politics through TSM. The authority of the election outcomes dispute court is proposed not only on the controversy over the calculation results but also on the unreachable legal phenomenon with law enforcement on the criminal system and stages of election dispute.¹⁷

Third, “The Ideal Concept of Formal Term Application in the Dispute Settlement on Local Government Election Results in Indonesian Constitutional Court” by Anna Triningsih, Arief Hidayat, and Lita Tyesta ALW. This publication focuses on the idea that the Constitutional Court as a guardian of the polices and democracy should be subject to the constitution as the highest law in Indonesia. From 2008 to 2021, the Constitutional Court exercised this authority in two periods namely during the settlement of disputes over the outcomes of the regional head elections in General Election regime from 2008 to 2013 and the regional government regime from 2015 to 2021.¹⁸

These three publications do not harmonize the dispute resolution of regional head elections or transform the Constitutional Court's role into a comprehensive General Election court that covers both vote differences and the electoral process. Therefore,

¹⁶ Iwan Satriawan and Khairil Azmin Mokhtar, “The Constitutional Court’s Role in Consolidating Democracy and Reforming Local Election,” *Constitutional Review Journal* 1, no. 1 (2015): 103.

¹⁷ Heru Widodo, “The Institutional Renewal in Settlement of Disputes of Local Election Results,” *Jurnal Cita Hukum* 6, no. 2 (December 5, 2018): 277, <https://doi.org/10.15408/jch.v6i2.8690>.

¹⁸ Anna Triningsih, Arief Hidayat, and Lita A. L. W. Tyesta, “Ideal Concept of Formal Term Application in the Dispute Settlement on Local Government Election Results in Indonesian Constitutional Court,” *International Journal of Health Sciences*, September 21, 2022, 80, <https://doi.org/10.53730/ijhs.v6nS6.12897>.

this research is scientifically accountable by relying on the rules or academic ethics required.¹⁹

2. Problem Statement

From the background of the research, the following problems were formulated:

- a. What is the conceptual idea regarding the choices of law for democratic regional head election dispute resolution institutions in Indonesia through the revision of General Election Law and Regional Election Law?
- b. What is the conceptual idea regarding legal options for resolving election outcome disputes through the Fifth Amendment to the Constitution?
- c. What is the regional head election dispute resolution model in several countries?

3. Methods

This research used normative legal analysis²⁰ using doctrinal methods in analyzing the principles and norms relating to “Choices of Law for Democratic Regional Head Election Dispute Resolution Institutions in Indonesia”. There were three methods used namely statutory regulatory, historical, and conceptual methods.²¹

The data in this research was obtained qualitatively and presented using a descriptive-analytical method focusing on the legal basis.²² Existing data and facts were also described and then analyzed based on the theory used. Analysis was carried out by examining and classifying the data collected based on the problem being analyzed.²³

¹⁹ A.F. Elly Erawaty, *Pedoman Penulisan Esai Akademik Bagi Mahasiswa Ilmu Hukum* (Bandung: PT. Refika Aditama, 2012), 33–34.

²⁰ Purnima Khanna, “Constitutionalism and Human Rights: A Critical Analysis of the Rights of Transgender People in India,” *Lentera Hukum* 9, no. 3 (December 30, 2022): 373, <https://doi.org/10.19184/ejrh.v9i3.28631>.

²¹ Yati Nurhayati et al., “Investment in Indonesia After Constitutional Court’s Decision in the Review of Job Creation Law,” *Lentera Hukum* 9, no. 3 (December 30, 2022): 393–340, <https://doi.org/10.19184/ejrh.v9i3.32368>.

²² Mukhlis Mukhlis et al., “Regional Regulation Problems in the Field of Salt Industry Development Perspective of Farmers in Sampang Regency,” *Trunojoyo Law Review* 6, no. 1 (February 29, 2024): 81, <https://doi.org/10.21107/tlr.v6i1.23321>.

²³ Putra Perdana Ahmad Saifulloh, “The Obligation of the Constitutional Court of Indonesia to Give Consideration in the Process of Dissolution of Societal Organizations,” *Constitutional Review Journal* 4, no. 1 (2018).

4. Choices of Law for Dispute Resolution Institutions for Democratic Regional Head Elections in Indonesia Through Revision of the Election and Regional Head Election Laws

4.1. The Constitutional Court as the Guardian of Electoral Justice

Abraham Lincoln famously stated that democracy served as a government of the people, by the people, and for the people. Having free and impartial elections that followed the principles of directness, generality, freedom, secrecy, honesty, and fairness was crucial to ensure the proper functioning of democracy. These principles were essential components of any democratic government.²⁴ The realization of the desire to achieve fair elections and based on the intention to create a democratic government prompted the establishment of the Constitutional Court as a judicial institution which was formed to maintain the implementation of constitutional values in the administration of state affairs.²⁵

The Constitutional Court as the Guardian of Democracy and the Constitution further played a role as the Guardian of Electoral Justice. International IDEA defined electoral justice as the medium and mechanisms available in a particular country, local community, or at the regional or international level to ensure that every action, procedure, and decision related to the electoral process complied with the legal framework. It further aimed to protect or restore voting rights and allowed citizens who believed the obligations have been violated to lodge complaints, attend conferences, and obtain rulings. In simpler terms, the Court represented a system that ensured fair and transparent electoral processes as well as safeguarding the right to vote for every citizen.²⁶

The Constitutional Court as the guardian of election justice possessed the authority to adjudicate PPU based on Article 24 C (Paragraph) 1 of the 1945 Constitution.²⁷ The

²⁴ Jimly Asshiddiqie, "Partai Politik Dan Pemilihan Umum Sebagai Instrumen Demokrasi," *Jurnal Konstitusi* 3, no. 4 (2006): 6.

²⁵ Sidik Pramono, *Penanganan Sengketa Pemilu* (Jakarta: Kemitraan Bagi Pembaharuan Tata Pemerintahan di Indonesia, 2011), 19–20.

²⁶ IDEA, *Keadilan Pemilu: Buku Acuan International IDEA (Electoral Justice: The International IDEA Handbook)* (Stockholm: IDEA, 2010).

²⁷ Abid Ulil Albab, "Problem Kewenangan Mahkamah Konstitusi Memutus Perselisihan Hasil Pilkada," *Jurnal Hukum & Pembangunan* 48, no. 3 (December 5, 2018): 543, <https://doi.org/10.21143/jhp.vol48.no3.1745>.

democratic Unitary State of Indonesia also possessed the authority to obtain justice in disputes over election outcomes. Katherine Glenn Bass and Sujit Choudry suggested that the Constitutional Court could resolve these disputes, supporting the perspective of responsibility for ensuring fair and transparent elections.²⁸

The role of the Constitutional Court extended beyond enforcing justice in organizing elections. It also ensured that the outcomes of vote recapitulation by KPU prioritized substantive rather than formal justice. This was made possible by the strict and thorough selection process of the Constitutional Court judges, aimed at appointing professional judges with a deep understanding of the Constitution.²⁹ Based on the selection of judges, the Constitutional Court played a role in resolving election welfare.

According to the research, the function of the Constitutional Court in adjudicating PHPU was correct. This was supported by a comparison of the legal considerations used by the Constitutional Court in issuing the interpretation that the judges should not allow formal elections to override substantive justice. Therefore, violating the election principles regulated by Article 22E paragraph (1) of the 1945 Constitution should not be entertained.

Examining the Constitutional Authority of MK to maintain Constitutionalism required that government power be limited to prevent arbitrariness in terms of content and time.³⁰ Departing from the concept of Constitutionalism known as Limitation of Authority should also be motivated.³¹ When selecting the legal framework, the law needed to firmly state the authority of the Constitutional Court and Bawaslu to avoid any overlap. This was necessary because dualism in authority was observed to be dangerous as it could lead to legal conflicts. Therefore, limiting power was crucial to prevent future issues that could undermine justice and legal certainty in election case resolution. This need arose from the shift to a results-focused regime after

²⁸ Katherine Glenn Bass and Sujit Choudry, "Constitutional Review in New Democracies" (Berlin, Germany: Democracy Reporting International, 2013), http://www.democracy-reporting.org/files/dri-bp_40_en_constitutional_review_in_new_democracies_2013-09.pdf.

²⁹ Sri Soemantri Martosoewignyo, *Hukum Tata Negara Indonesia: Pemikiran Dan Pandangan*, Cetakan pertama (Bandung: PT Remaja Rosdakarya, 2014), 70.

³⁰ Miriam Budiardjo, *Dasar-Dasar Ilmu Politik* (Jakarta: Gramedia Pustaka Utama, 1998).

³¹ M. Laica Marzuki, "Konstitusi, Dan Konstitusionalisme," *Jurnal Konstitusi* 7, no. 4 (2010): 6.

determining the national vote recapitulation where reported violations or disputes could change the election outcomes. These changes should have fallen under the jurisdiction of the Constitutional Court and not Bawaslu.

According to Jan Michael Otto, there were a minimum of three factors influencing legal certainty namely the legal rules, the institutions applying the law, and the social environment of the community where the law was to be enforced. In adjudicating PHPU, the Constitutional Court was also able to carry out the duties as guardian of the Constitution.³² For this reason, the Constitutional Court should provide legal certainty in election cases strengthened by the final and binding nature of the decisions.³³

The Constitutional Court could decide election violation cases where Justices were selected by three supporting institutions including the President, DPR, and the Supreme Court. This was achieved due to the statesmanship and understanding of the Constitution ensuring there were no doubts and errors in deciding election cases based on the Constitution.³⁴ In contrast to Bawaslu judging an election case based on existing laws, the Court did not examine the disputes against the Constitution but normatively examined election cases against the related articles. Therefore, the Constitutional Court possessed the authority to decide disputes over election results and related to the post-determination of election results. This was a form of the results regime and no longer included the process of holding elections which was the authority of Bawaslu.

The authority of the Constitutional Court to adjudicate Regional Head Election Results Disputes was further strengthened by Decision No. 85/PUU-XX/2022. The decision eliminated the distinction between regimes in General Election and Regional Head Election asserting that the authority of special judicial bodies to handle Regional Head Election Results Disputes was the Constitutional Court with no implications. Furthermore, Article 157 paragraph (1) and paragraph (2) of Law 10/2016 were

³² Sulistyowati Irianto, *Kajian sosio-legal*, Edisi pertama (Denpasar, Bali: Pustaka Larasan bekerja sama dengan Universitas Indonesia, Universitas Leiden, Universitas Groningen, 2012), 131.

³³ M. Agus Maulidi, "Menyoal Kekuatan Eksekutorial Putusan Final Dan Mengikat Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 2 (July 11, 2019): 342, <https://doi.org/10.31078/jk1627>.

³⁴ Fence Wantu et al., "Proses Seleksi Hakim Konstitusi: Problematika Dan Model Ke Depan," *Jurnal Konstitusi* 18, no. 2 (November 2, 2021): 240–41, <https://doi.org/10.31078/jk1820>.

contrary to the 1945 Constitution and further nullified Article 157 paragraph (3). This temporarily assigned the Constitutional Court to decide regional head election disputes until a special judicial body was formed. The unconstitutionality of Article 157 paragraph (1) and paragraph (2) of the Regional Head Election Law implied losing the temporality regulated in Article 157 paragraph (3). Therefore, the authority to examine and adjudicate disputes over election outcomes was no longer limited to the establishment of a special judicial body but remained with the Constitutional Court.

Synchronizing election laws and regulations regarding the duration for handling election cases was further necessary based on a suggestion from Fritz Edward Siregar who believed that there was a need to improve the time for resolving election cases by Bawaslu. The improvements were divided into two namely adjusting the deadline for settling cases according to the needs of Bawaslu for example 14 days and confirming that all cases were resolved by Bawaslu before the election outcomes were determined. After determining the election outcomes, Bawaslu possessed no right to receive election case reports.

4.2. Transforming Bawaslu into an Election Court

After the Constitutional Court Decision 81/PUU-IX/2011, the position of Bawaslu as part of the Independent State Election Organizing Institutions was equal to KPU and DKPP. The authority of Bawaslu as Election Law Enforcement was also strengthened by the existence of the Election Law which included the following:

- a. Receiving and following up on reports related to alleged election violations.
- b. Examining and reviewing election violations and recommending actions to related parties.
- c. Receiving, examining, mediating, or adjudicating, and deciding on the resolution of election process disputes.
- d. Recommending actions based on monitoring violations of neutrality for all parties prohibited from participating in campaign activities.
- e. Temporarily taking over the duties, authority, and obligations of Bawaslu at lower levels.

- f. Requesting information from parties in the context of preventing and acting against election violations and election process disputes.

This correlated with the simultaneous elections to be held in 2024 including legislative, presidential, and regional head elections. Therefore, the authority of Bawaslu to resolve administrative violations regulated in Article 460 Paragraph (1) became more significant. Administrative violations related to errors in the process of implementing the recapitulation of election outcomes which were in Article 461 Paragraph (5) of the Election Law required Bawaslu to resolve these cases in 14 days after the report was received. In practice, election administration violations related to the recapitulation of outcomes often conflicted with the authority of the Constitutional Court in deciding disputes over election results.

Overlapping laws would evolve when both Bawaslu and the Constitutional Court handled administrative violations related to vote recapitulation potentially impacting decisions about vote outcomes.³⁵ Considering the authority of Bawaslu in handling election administration violations should have been post-determination of national outcomes by KPU. When related to administrative violations and no decision was made, then the authority of Bawaslu would handle administrative violations until a final and binding decision was agreed. This could further be explained as follows:

- a. The violation was an administrative violation within the authority of Bawaslu to resolve and approve. Administrative violations pertained to processes regarding procedures and recapitulation procedures.
- b. Bawaslu regulation number 8 of 2018 in Article 25 Paragraph (5) stated that reports of election and TSM administration violations should be submitted in 7 days from discovery as asserted in Paragraphs (1) and (2). Even when the election process had passed the recapitulation stage or entered the domain of the PHPU dispute at the Constitutional Court, Bawaslu still possessed the authority to handle the case.

³⁵ Muhammad Ihsan Maulana dan Rahmah Mutiara Mustikaningsih, "Ketidakpastian Hukum Penyelesaian Pelanggaran Administrasi Dalam Proses Rekapitulasi Hasil Pemilu," in *Konferensi Nasional Tata Kelola Pemilu Indonesia 2019* (Konferensi Nasional Tata Kelola Pemilu Indonesia 2019, Bogor: KPU RI, 2019), <https://journal.kpu.go.id/index.php/ERE/issue/view/40>.

- c. The decisions of Bawaslu were limited to correcting procedures violated by KPU. Even though the decision would influence the results of the vote count, it remained an administrative area whose authority lay with Bawaslu.

When Bawaslu was limited in authority in handling election violations after national results were determined, it would close the door to justice for election participants aiming justice. Article 22E Paragraph (1) of the 1945 Constitution further stated that General Election was held directly, publicly, freely, secretly, honestly, and fairly every 5 years. According to these provisions, "fairness" was part of the principles of holding elections. The principle should further animate the electoral system consisting of electoral law and election process.³⁶

Bawaslu was established as an institution with semi- or quasi-judicial authority.³⁷ According to the Election Law, Bawaslu was authorized to handle election administration violations and determine the PSPP. However, Fritz Edward Siregar argued that the role of Bawaslu as a quasi-judicial institution was not effective.³⁸

The ineffectiveness was observed in several cases that Bawaslu failed to resolve such as the incidents including Oesman Sapta Odang (OSO) as chairman of the Hanura party and the TUN settlement dispute in Gunung Kidul Regency, Yogyakarta Special Region Province. Both cases emphasized the problem of excessive avenues for justice, born out of having many institutions handling election violations including the DKPP, PTUN, Gakumdu, Supreme Court, Constitutional Court, and Bawaslu. This caused an overlap in authority and conflicting decisions.³⁹

The role of Bawaslu further needed to be thoroughly reconstructed and the position strengthened. The idea of forming a special election court was mandated by Article 157 of the Regional Head Election Law. Juridically and normatively, the Election Law in the provisions containing the authority of Bawaslu clarified that it had transformed

³⁶ Khairul Fahmi, "Menelusuri Konsep Keadilan Pemilihan Umum Menurut UUD 1945," *Jurnal Cita Hukum* 4, no. 2 (December 2, 2016): 184, <https://doi.org/10.15408/jch.v4i2.4098>.

³⁷ Jimly Asshiddiqie, "Pengadilan Khusus" (Makalah, Jakarta, 2021), 13, www.jimly.com.

³⁸ Fritz Edward Siregar, *Menuju Peradilan Pemilu* (Jakarta: Themis Publishing, 2019), 57.

³⁹ Topo Santoso and et.al, "Laporan Akhir Analisis Dan Evaluasi Hukum Terkait Pemilihan Umum" (Jakarta: Badan Pembinaan Hukum Nasional, 2020), 119, https://bphn.go.id/data/documents/ae_1_buku_pokja_pemilu.pdf.

from an election supervisory institution to a functioning as both supervisor and adjudicator.⁴⁰ The authority of Bawaslu as an electoral court included handling administrative violations through an open adjudication process leading to final and binding decisions.⁴¹ Considering that the role and function of Bawaslu were crucial in the process of organizing elections, it was essential to make Bawaslu a special judicial institution. In the context of election law enforcement after national vote determination by KPU, disputes over the outcomes could be resolved by the Constitutional Court. However, many of the disputes submitted to the Constitutional Court were not related to the election outcomes.

In the 2019 General Election, 334 applications were submitted to the Constitutional Court.⁴² Requests regarding disputes over election results were handled more by the Constitutional Court than the main function mandated by the constitution to review the laws.⁴³ Correlated to the statement by Saldi Isra in the article titled "*The Fading of the MK's Crown*" which strengthened the argument after the handover of authority from the Supreme Court to the Constitutional Court in resolving regional head election result disputes. The main task of the Constitutional Court was to adjudicate election outcome disputes and not to review laws that became the crown.⁴⁴ Therefore, the urgency of forming a Special Election Justice Agency as mandated by Article 157 of the Regional Head Election Law before the 2024 General Election should be formed.⁴⁵

Transforming Bawaslu into a Special Election Judicial Body was an option for the design of law enforcement for election violations. The idea was proposed by Fritz

⁴⁰ Fritz Edward Siregar, *Menuju Peradilan Pemilu*.

⁴¹ Pulung Abiyasa, "Kewenangan Bawaslu Dalam Penyelenggaraan Pemilu Di Kota Semarang Suatu Kajian Undang-Undang Nomor 7 Tahun 2017 Tentang Pemilu," *Jurnal USM Law Review* 2, no. 2 (November 20, 2019): 149, <https://doi.org/10.26623/julr.v2i2.2266>.

⁴² CNN Indonesia, "MK Terima 334 Gugatan Pemilu 2019, Termasuk Prabowo-Sandi," *CNN Indonesia*, May 27, 2019, <https://www.cnnindonesia.com/nasional/20190527164915-32-398812/mk-terima-334-gugatan-pemilu-2019-termasuk-prabowo-sandi>.

⁴³ Achmad Rifqi Nizam, R Fauzi Zuhri Pradika, and Anwar Noris, "Penguatan Badan Pengawas Pemilihan Umum Sebagai Badan Peradilan Khusus Pemilihan Umum," *SPIRIT PRO PATRIA* 5, no. 2 (2019), <https://jurnal.narotama.ac.id/index.php/patria/article/view/1001>.

⁴⁴ Saldi Isra, "Memudarnya Mahkota MK," *Kompas*, August 14, 2013, <https://www.saldiisra.web.id/index.php/tulisan/artikel-koran/11-artikelkompas/250-memudarnya-mahkota-mk.html>.

⁴⁵ Fritz Edward Siregar, *Menuju Peradilan Pemilu*.

Edward Siregar, Refly Harun, and Ida Budhiati in the publication. According to this idea, Bawaslu would become a special election court enabling it to handle all enforcement of election violations and process disputes under a roof. This would eliminate the need for time restrictions on resolving the issues.

5. Choices of Law for Settlement of Election Results Disputes Through the Fifth Amendment to the Constitution

According to Ni'matul Huda, the fundamental reason for needing amendments to a country's Constitution originated from substantial weaknesses in the regulations that could undermine stability. Substantial weaknesses could be due to weak substance in all or certain (sectoral) norms. This weakness needed to be corrected through amendments to the Constitution, both overall amendments and specific regulatory areas to anticipate and end negative implications originating from weaknesses in the constitution's substance on Indonesian constitutional life.⁴⁶ Constitutional amendments were normal in a society that was developing and changing.⁴⁷ Consequently, constitutional amendments were procedures regulated by the constitution regarding how to amend the constitution to not be labeled haram as the constitutional practice of certain countries. Yusril Ihza Mahendra emphasized that a constitution should not be sacred and cultish considering it was not a holy book whose content could not be changed.⁴⁸

The methods used to change the Constitution varied in each country and could be influenced by the political landscape. Changing the constitution was done according to the needs of the country and there were different amendment procedures used in several countries. For example, Taufiqurrahman Syahuri cited amendments of the Netherlands, Germany, and France that were carried out through the creation of new

⁴⁶ Ni'matul Huda, "Gagasan Amandemen (Ulang) Uud 1945 (Usulan Untuk Penguatan Dpd Dan Kekuasaan Kehakiman)," *Jurnal Hukum Ius Quia Iustum* 15, no. 3 (2008): 373-92, <https://doi.org/10.20885/iustum.vol15.iss3.art4>.

⁴⁷ Sonia Ivana Barus, "Proses Perubahan Mendasar Konstitusi Indonesia Pra Dan Pasca Amandemen," *University Of Bengkulu Law Journal* 2, no. 1 (April 22, 2017): 29-55, <https://doi.org/10.33369/ubelaj.2.1.29-55>.

⁴⁸ Yusril Ihza Mahendra, *Dinamika Tata Negara Indonesia* (Jakarta: Gema Insani Press, 1996), 12-13.

constitutions while America used addendums.⁴⁹ According to K.C. Wheare, there were three attempts to amend the Constitution namely formal amendments, grounding constitutional customs, and through the judge's interpretation.⁵⁰ Formal amendments included amending the constitution following the mechanisms regulated by a country.⁵¹ To the Indonesian state, formal amendments were regulated by Article 37 of the 1945 Constitution.⁵² Interpreting the constitutional amendments was not only interpreted narrowly but through the constitution and changes to the Constitution could also occur through constitutional conventions.⁵³ K.C. Wheare further stated that constitutional amendments could be made through a judge's interpretation rather than amending the text.⁵⁴

Examining and initiating the fifth amendment to the 1945 Constitution was further necessary due to the discoveries. The most basic reason was that the 1945 Constitution had weaknesses due to the limited authority of the Constitutional Court in resolving General Election disputes. Therefore, many legal issues could not be resolved properly, specifically when faced with cases of General Election fraud increasingly complex and sophisticated. To answer the nation's increasingly dynamic problems, the constitution was required to be present in responding to state problems and the demands of the times.⁵⁵ Through changes to the 1945 Constitution, the Constitutional Court should be designed to become an election court. This thinking was based on the theory of electoral justice and the theory of free as well as fair elections which was a guide in creating designs for resolving election legal

⁴⁹ Taufiqurrohman Syahuri, "Metode Perubahan Undang-Undang Dasar 1945 Dan Perbandingannya Dengan Konstitusi Di Beberapa Negara," *Jurnal Hukum Ius Quia Iustum* 17, no. 4 (2010): 513, <https://doi.org/10.20885/iustum.vol17.iss4.art1>.

⁵⁰ Allan Fatchan Gani Wardhana, "Perubahan Undang-Undang Dasar Negara Republik Indonesia 1945 Melalui Putusan Mahkamah Konstitusi: Studi Terhadap Putusan Nomor 92/PUU-X/2012," *Jurnal Hukum Ius Quia Iustum* 21, no. 2 (2014): 255.

⁵¹ Bayu Aryanto, "Demokrasi Deliberatif Dalam Konsep Amandemen Konstitusi Indonesia," *Mulawarman Law Review*, December 19, 2020, 102, <https://doi.org/10.30872/mulrev.v5i2.366>.

⁵² Ahmad and Novendri M. Nggilu, "Denyut Nadi Amandemen Kelima UUD 1945 Melalui Pelibatan Mahkamah Konstitusi Sebagai Prinsip the Guardian of the Constitution."

⁵³ B. Hestu Cipto Handoyo, *Hukum Tata Negara Indonesia* (Yogyakarta: Universitas Atma Jaya, 2012), 181.

⁵⁴ Feri Amsari, *Perubahan UUD 1945 Perubahan Konstitusi Negara Kesatuan Republik Indonesia Melalui Putusan Mahkamah Konstitusi* (Jakarta: Rajawali Pers, 2011), 21.

⁵⁵ Muwaffiq Jufri, "Urgensi Amandemen Kelima Pada Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Terkait Hak Dan Kebebasan Beragama," *Jurnal HAM* 12, no. 1 (April 22, 2021): 123, <https://doi.org/10.30641/ham.2021.12.123-140>.

problems in the future. The theory of electoral justice required the restoration of violated electoral rights rather than punishing violators for the integrity of free and fair elections to be maintained. Furthermore, the theory of free and fair elections among other things required a legal framework that regulated effective legal mechanisms and solutions. Placing the resolution of election disputes and violations to the Constitutional Court was believed to fulfill the prerequisites for these two theories.

Designing the Constitutional Court as an election court complemented the function or authority which was stated explicitly in the 1945 Constitution. Article 24C Paragraph (1) of the 1945 Constitution also stated that part of the authorities of the Constitutional Court was to decide at the first and last level whose decision was final to decide "disputes about the outcomes of General Election". As mentioned in the previous section, the court served as part of the mediums and mechanisms for resolving election disputes known as electoral dispute resolution (EDR). Furthermore, Jesus Orozco Henriquez classified the institutions authorized to resolve election disputes into four including the following.⁵⁶

6. *Legislative Body*

6. *Judicial Body*

6. *Electoral Management Body with Judicial Powers*

6. *Ad Hoc Body*

Regular courts could resolve election disputes in the regular court of the judicial branch, constitutional council, administrative, and specialized electoral court. Similar to Henriquez's classification, the Bridge Project divided the institutions that could resolve election disputes into five groups namely legislative, judicial, election organizers with judicial authority, ad hoc, and mixed institutions combining administrative and judicial.⁵⁷

All existing election legal issues were handled by the Constitutional Court as an

⁵⁶ Wilma Silalahi, *Desain Penyelesaian Sengketa Pemilu Serentak* (Depok: Rajawali Pers, 2019), 261–66.

⁵⁷ Refly Harun, "Mendesain Penyelesaian Sengketa Proses Dan Hasil Pemilu," in *Tantangan Menjaga Daulat Rakyat Dalam Pemilihan Umum* (Konferensi Nasional Hukum Tata Negara ke-5, Andalas: Pusat Kajian Konstitusi Fakultas Hukum Universitas Andalas, 2018), 36–40.

election court including the review of KPU and KPUD regulations. According to the 1945 Constitution, testing KPU and KPUD regulations as statutory regulations under the law was the authority of the Supreme Court. Since it concerned the implementation of elections based on the 1945 Constitution, testing KPU/KPUD regulations and others related to elections fell under the authority of the Constitutional Court. The first authority was given to Bawaslu and provincial Bawaslu for administrative election violations. It would be better when provincial Bawaslu's decision regarding administrative violations could be compared to the Constitutional Court when the sanctions were severe and affected the election results such as disqualification. Similarly, Bawaslu first decided with the possibility of an appeal to the Constitutional Court when the decision affected the election outcomes for handling election disputes. Disputes between election organizers could also be submitted directly to the Constitutional Court.⁵⁸

Criminal election violations remained under general court's authority. However, for these violations, the Constitutional Court could judge from the aspect of imposing administrative sanctions. For example, the Constitutional Court could judge from the aspect of election violations in money politics cases. When proven, the perpetrator could be subject to administrative sanctions up to disqualification. It was further recommended that cases of criminal violations taken to the Constitutional Court for review from the aspect of administrative violations were those impacting disqualification or influencing the election results.⁵⁹

An objective of reconstructing the Constitutional Court's authority was to turn it into an election court ensuring faster handling of election cases with more integration, following the principles of electoral justice. To achieve this, not all cases would pass through two levels of court as in the judicial mechanism under the Supreme Court. Certain cases could be directly handled by the Constitutional Court as a court of first and final level. Furthermore, several cases handled by Bawaslu could no longer be brought to the Constitutional Court.

⁵⁸ Refly Harun, "Mendesain Penyelesaian Sengketa Proses Dan Hasil Pemilu."

⁵⁹ Ibid.

Reconstructing the Constitutional Court as an election organizer correlated with the mandate to uphold the Constitution. The judicial process carried out by the Constitutional Court included examining and deciding on the constitutionality of a case by making the constitution the main touchstone. This implied that in deciding disputes about election outcomes the Constitutional Court should have the authority to examine and adjudicate the constitutionality of the election. The Constitutional Court should also ensure that elections were carried out following the basic rules in the constitution with the principles of democracy and nomocracy, as well as election regulations contained in the 1945 Constitution. Based on the description, the Constitutional Court's jurisdiction was clear with the role to enforce substantial matters related to the constitutionality of elections. Technical administrative issues should also be resolved by KPU or Bawaslu. Although the Constitutional Court might still address these issues, it was limited to certain cases that significantly impacted the election outcomes.

Examining the Constitutional Court Decisions No. 41/PHPU.D-VI/2008 and 133/PHP.BUP-XIX/2021 showed that disputes in regional head elections occurred due to the socio-political development of society and General Election apparatus as well as the weaknesses of statutory provisions. These factors contributed to unsatisfactory dispute resolution processes before disputes regarding vote results were placed before the Constitutional Court. All irregularities that occurred in the process and stages of the Regional Head Election have a fundamental influence on the final results. In the absence of effective dispute resolution in the Regional Head Election process, the Constitutional Court was required not to allow the outcome when the evidence was sufficient and faced with meeting the requirements for the validity of the law and the weight of the event. This was not intended to take over the authority to decide on violations and irregularities in the Regional Head Election process but rather to assess and consider the implications arising in the vote tallies counted in the Vote Count Recapitulation carried out by KPU.

The Constitutional Court was mandated to be the guardian of the Constitution in ensuring that it was implemented responsibly following the will of the citizen and democratic ideals, as well as to maintain the implementation of a stable state

government based on the Constitution. The implications gave a different nature and character to the resolution carried out by the Court with the transfer of authority, interpreting statutory provisions within the framework of the principles and spirit contained in the 1945 Constitution. This provided freedom to assess the severity of violations and irregularities that occurred in all stages of the regional election process and the relation to the vote results for candidate pairs.

The rules of procedural justice should not be allowed by the Constitutional Court to obstruct and override substantive justice when there was a pair of regional head candidates who violated the constitution, particularly Article 18 Paragraph (4) of the 1945 Constitution. Regional elections were carried out democratically and did not violate the principles of General Election which were direct, general, free, secret, honest, and fair as stipulated in Article 22E Paragraph (1) of the 1945 Constitution. A principle of law and justice universally adhered to stated that "no candidates should benefit or be harmed by deviations and violations committed by others" (*nullus/nemo commodum capere potest de injuria sua propria*). Therefore, no candidates for regional head elections could benefit from voting due to the violations of the constitution and the principles of justice in holding General Election. The handling of law enforcers would process all criminal acts in the Regional Head Election quickly and fairly to become evidence in Regional Head Election disputes before the Constitutional Court. The Constitutional Court would further consider it necessary to create a breakthrough to advance democracy and break away from the habit of practicing systematic, structured, and massive violations.

In deciding disputes over the outcomes of the Regional Head Election, the Constitutional Court should not only recalculate the actual vote count results from the voting but also explore justice by assessing and adjudicating the disputed counting outcomes. Because when counted in a technical-mathematical sense, a recount could be carried out by KPUD under the supervision of Bawaslu and Integrated Law Enforcement. Therefore, the Constitutional Court had to judge violations leading to the vote count results being disputed should also be assessed to uphold justice. This correlated with the provisions of Article 24 Paragraph (1) of the 1945 Constitution, which reads "Judicial power was independent power to administer justice in

upholding law and justice". Article 28D Paragraph (1) of the 1945 Constitution further confirmed this by stating "Everyone had the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law."

Consequently, the two provisions of the 1945 Constitution were stated in Article 45, Paragraph (1) of the Constitutional Court Law asserting that "The Constitutional Court decided cases based on the 1945 Constitution of Indonesia following the evidence and the belief of judges."

Article 1 Paragraph (2) of the 1945 Constitution stated that sovereignty was in the hands of the citizens and was implemented according to the Constitution. Therefore, the Constitutional Court also possessed the authority to oversee the upholding of democracy as regulated in the Constitution. To safeguard the upholding of democracy, it should also assess and provide justice for violations that occurred in the implementation of democracy including the holding of regional head elections. For this reason, Article 1 Paragraph (2) of the 1945 Constitution was frequently connected to the principle of the rule of law (nomocracy) as regulated in Article 1 Paragraph (3) of the 1945 Constitution. As a logical consequence, democracy could not be carried out based on the struggle of political forces but should also be implemented following the rule of law. Consequently, every decision obtained democratically could simply be annulled by the court when there was a violation of nomocracy (legal principles) which could be legally proven in court.

As the election organizer, the Constitutional Court would handle most election legal issues. However, it was best not to submit all election legal cases directly to the Constitutional Court. When that happens, the Constitutional Court would not be able to handle all cases. Specifically when there were legislative elections held simultaneously with the presidential and vice presidential elections including simultaneous regional head elections in all regions. Administrative violations should first be handled by the provincial Bawaslu/Bawaslu. Parties who did not accept the decision of the provincial Bawaslu/Bawaslu could question it to the Constitutional Court when the decision possessed the potential to violate constitutional rights and affect the election outcomes. For example, sanctions in the form of disqualification of

election participants possessed the potential to eliminate the right to vote which was a constitutional right. All of this was related to the Constitutional Court's function to assess the constitutionality of elections.

This research suggested not to follow up on alleged election violations by regional head candidate pairs tried by Bawaslu without sufficient evidence to avoid an overload of cases at the Constitutional Court. This aimed to ensure compliance with the democratic dispute resolution system for regional head elections creating legal certainty.

For criminal election violations, the criminal aspect remained the domain in the justice system which included law enforcers from police and prosecutors to judges at various levels of court. However, every criminal election violation was essentially an election violation. In this context, Bawaslu and provincial Bawaslu possessed the authority to prosecute the violations in question. Provincial Bawaslu decisions could also be submitted to the Constitutional Court when the decision possessed the potential to violate constitutional rights and affect election outcomes.

For disputes between election participants or between participants and the organizers, it were first resolved by the central Bawaslu (delegated to the provincial Bawaslu). When Bawaslu decision potentially eliminated constitutional rights, it could be submitted to the Constitutional Court. Theoretically, there should be no more disputes between election organizers due to the permanent, hierarchical, and independent institutional unit of KPU as well as the role of Bawaslu in resolving election violations and disputes. However, disputes often occur between election organizers and supervisors. There could also be disputes between provincial and district/city KPU. When that happened, the resolution was immediately taken to the Constitutional Court regarding disputes including KPU. For disputes that did not only include KPU in the regions, the resolution was carried out as the institution overseeing KPU in the regions.⁶⁰

Disputes over election outcomes including regional head elections were the jurisdiction of the Constitutional Court and were immediately resolved with a first,

⁶⁰ Ibid.

final, and binding decision. Three other legal issues that were also immediately resolved at the Constitutional Court were the review of laws related to elections, the review and challenges of KPU/KPUD regulations as well as decisions. The Constitutional Court's decisions on these three legal issues were also first, final, and binding.

6. Optional Model for Resolving Regional Head Disputes in Other Countries

6.1. Scope of Authority for Resolving Election Disputes by the Constitutional Court in Several Countries

Referring to the practice of democracy in several countries, Henry W. Ehrimann added two fundamental principles in a democratic political system namely (i) the existence of a balancing function in the separation of powers between the government, parliament, and the judiciary as well as (ii) the existence of freedom of choice as an important part of community participation. Based on these principles, the existence of the Constitutional Court in resolving disputes over General Election outcomes was believed to contribute to a democratic political system. Currently, numerous countries in the world selected the Constitutional Court as the judicial institution with the authority to resolve election disputes. The following countries provided an overview of the implementation of election dispute resolution at the Constitutional Court.⁶¹

6.1.1. Austria

Austria represented a federal country with a parliamentary democratic system consisting of nine states. This country was a pioneer in the formation of the Constitutional Court in Europe by adopting it in the Austrian Constitution in the 1920 Constitution. The provisions of Chapter VI of the Austrian Constitution regulated the authority of the Constitutional and the State Administrative Courts. The Constitutional Court possessed the authority to determine the level of constitutionality of Federal, state, and the legality of statutory regulations under the Law. Additionally, the Constitutional Court was also given the authority to review international agreements and decide competency disputes occurring between

⁶¹ Henry W Ehriman, *Democracy in Changing Society* (USA: Frederick A Preager Publisher, 1964), 1.

General and Administrative Courts or the Administrative and other courts. The Constitutional Court could also decide on impeachment cases against high-ranking state officials who were suspected of violating the law in exercising the authority.⁶²

Besides the stated authorities, the Constitutional Court was further given the authority to resolve disputes over election outcomes. What was implied by resolving election outcome disputes in the Austrian constitution consisted of (i) election disputes, (ii) application for loss of parliamentary membership, and (iii) requests for objections to the referendum outcomes. The constitution stipulated that parties who felt disadvantaged by the election outcomes could file an election dispute petition based on procedural errors in voting and vote counting which affected the final results. Regulations regarding the resolution of election disputes were further regulated in the Austrian Constitutional Court Law (Verfassungsgerichtshofgesetz). The aggrieved parties who possessed legal standing to file election dispute cases were candidates, political parties, and members of the election management commission.⁶³

The Austrian Constitutional Court Law further determined the deadline for registering election dispute applications which was 4 weeks after the completion of the vote count. As for certain cases by the Election Law, when there was a case that should be resolved through another judicial jurisdiction, the registration of an election dispute regarding the case was 4 weeks after the judicial decision was handed down. When the Constitutional Court observed that there was a procedural error affecting the outcome of the vote count, the Constitutional Court would decide to conduct a re-election which could be conducted in part or whole. Re-elections should be held in a hundred days after the Constitutional Court decision was read out in open session.⁶⁴

6.1.2. Germany

The Federal Republic of Germany consisting of 16 states represented a democratic

⁶² Austria, "The Constitution of Austria," Pub. L. No. The Constitution of Austria (2009), https://www.constituteproject.org/constitution/Austria_2009.

⁶³ Ronal Faber, "The Austrian Constitutional Court: An Overview," *Vienna Journal on International Constitutional Law* 1, no. 1 (2008): 49–53.

⁶⁴ Austria, The Constitution of Austria.

parliamentary federation with each state possessing a personal constitution and government where the highest state power lay in the Federation. Following the parliament (Bundestag), there was the Federal Assembly whose members were appointed by each state government to participate in making laws at the federal level. The Constitution was the basic order of the state in the fields of law and politics. Special importance belonged to the fundamental rights enshrined in the Constitution. As a rule of law, the Federal Republic of Germany guaranteed law enforcement, protection of freedom rights, and equality before the law for every citizen. In this connection, the Constitution possessed a major contribution to these basic rights due to the principles of governance of the rule of law being constitutional which were realized through protection and enforcement by the Constitutional Court (*Bundesverfassungsgerichts*).⁶⁵

This institution possessed the authority to decide disputes between the federation and states or between federal government institutions. The Court also had the authority to examine federal and state laws following the Constitution. It only worked when there was a request from the federal, or state government, a minimum of a third of members of parliament or other courts. The Court also possessed the authority to decide the fate of a political party when considered a threat to democracy. Complaints from citizens who felt the human rights were violated by the state were also handled by the court. The Constitutional Court was outside the five courts in the German judicial system including (i) General court consisting of four levels District Court (Amtsgericht), District Court (Landgericht), High Court (Oberlandesgericht), and Federal Supreme Court (Bundesgerichtshof), (ii) Federal Labor Court, (iii) Administrative Court, (iv) Social and Financial Affairs Court. In resolving election disputes, the Constitutional Court obtained the authority based on Article 41 Paragraph (2) of the German Constitution.⁶⁶

From Article 41 Paragraph (2) of the German Constitution, the authority of the

⁶⁵ Bisariyadi and et.al, "Komparasi Mekanisme Penyelesaian Sengketa Pemilu Di Beberapa Negara Penganut Paham Demokrasi Konstitusional," *Jurnal Konstitusi* 9, no. 3 (2012): 547.

⁶⁶ Germany, "Basic Law for the Federal of the Republic of German," Pub. L. No. Basic Law for the Federal of the Republic of German, Basic Law for the Federal of the Republic of German (2010), <https://faolex.fao.org/docs/pdf/ger128242E.pdf>.

German Constitutional Court concerning election disputes was to examine the election outcomes. In this case, when the individual objecting to the election outcomes was parliament, then a special commission was formed in parliament with the authority to examine the election outcomes and further submit to the Constitutional Court. However, it was also possible that parliamentarians individually or collectively could appeal for the validity of the election outcomes. This objection was only related to errors in the balance calculation for the distribution of the number of seats in Parliament. Citizens who possessed the right to vote could also submit objections to the number of seats in parliament. The objection would be supported by a minimum of a hundred worthy voters or a group in parliament or a minority in Bundestag (legislative institution) which was a minimum of 1/10 of the number of seats in Bundestag. The deadline for submitting objections to election outcomes determined by the German Constitutional Court Law was 2 months from the decision by Bundestag.⁶⁷

6.1.3. Azerbaijan

As a former country that broke up the Soviet Union, Azerbaijan represented a democratic and secular legal country in the form of a Unitary Republic. The power system in Azerbaijan was based on the principle of division of power such as the Milli Majlis/National Assembly (Parliament) which exercised legislative power. Executive power rested with the President and the courts exercised judicial power.⁶⁸ Azerbaijan adhered to an independent judicial system where judicial power was exercised through the Constitutional, high, appeals, and special as well as ordinary law courts. The Azerbaijan Constitutional Court was the highest body of constitutional justice as stated in the constitution. Similar to other judicial institutions, the Court was independent of the legislative and executive branches of power as well as other parties. The purpose was to ensure the supremacy of the Constitution and the

⁶⁷ Donald P Komers, *The Constitutional Jurisprudence Of The Federal Republic* (USA: Duke University Press, 1997), 196.

⁶⁸ Shohib Muslim et al., "The Meaning of "strength Executive" in the Constitutional Court Decision for the Execution of Fiduciary Securities," *Legality: Jurnal Ilmiah Hukum* 31, no. 1 (March 19, 2023): 1-20, <https://doi.org/10.22219/ljih.v31i1.23244> See also; Doni Punu, Ridwan Dilapanga, and Tiara Namira Oktaviana Daud, "Judicial Power as a Material Content of The 1945 Constitution in The Perspective of Its Development and Objectives," *Jurnal Legalitas* 16, no. 1 (January 6, 2023): 15-29, <https://doi.org/10.33756/jelta.v16i1.17966>.

protection of the basic individual rights and freedoms of the citizens.⁶⁹

Furthermore, this authority was further regulated in Articles 54, 55, and 56 of the Azerbaijan Constitutional Court Law. Based on these articles, it appeared that the Azerbaijani Constitutional Court possessed the authority to examine and decide on election outcomes in both parliamentary and presidential elections. The Constitutional Court held a plenary session within ten days after the application was received. Additionally, it was regulated that verification of re-election outcomes was carried out within seven days after the application was received. The parties invited to the hearing to verify the accuracy of the election outcomes were the chairman and members of KPU.⁷⁰

For the Presidential Election, the Azerbaijan Constitutional Court was limited only to examining the relevant documents submitted by the Central KPU by complying with the requirements stipulated in the Election Law and the announcement of the election outcomes held by the Central KPU. Besides examining and deciding on election outcomes, the Constitutional Court could also decide on complaints coming from the public including voters as well as election and prospective participants. For example, right before the election took place, there were complaints from the public regarding actions taken by a particular institution. However, these complaints were only limited to issues related to interference in the election process. The Constitutional Court asked the Prosecutor's Office to investigate any reported violations in the election process.⁷¹

6.2. Scope of Authority for Resolving Election Disputes by Special Judicial Institutions

Democracy had spread across the world leading to the creation of institutions that could handle election disputes according to a country's traditions, culture, and politics. Several Latin American countries established special electoral courts that

⁶⁹ "The Constitution of the Republic of Azerbaijan," Pub. L. No. Azerbaijan 1995 (2016), https://www.constituteproject.org/constitution/Azerbaijan_2016.

⁷⁰ Law of The Azerbaijan Republic "on Constitutional Court".

⁷¹ Rauf Guliyev, "The Role of Constitutional Court of The Republic of Azerbaijan within Electoral Process" (Paper of The 7th Conference of Asia Constitutional Court Judges, Jakarta: Indonesian Constitutional Court, 2010), 2-3.

effectively combined election administration tasks with handling election disputes.

6.2.1. Tribunal Federal Electoral Mexico

In 1996, an electoral court was created at the Federal Court (Electoral Court of the Federal Judiciary, Tribunal Electoral del Poder Judicial de la Federacion (TEPJF)) due to the comprehensive constitutional reform. TEPJF was given the responsibility for enforcing the Election Law with the federal election management body or the Federal Electoral Institute (IFE). In this case, the IFE was granted the authority to enforce administrative election regulations while TEPJF was given the juridical mandate to resolve election disputes and certify the validity of election outcomes. The authority of TEPJF was regulated in Article 41, part IV, Article 60 Paragraphs (2) and (3), as well as Article 99 Paragraph (4) of the Mexican Constitution. TEPJF of Mexico was highly respected and effective where trust in this institution was crucial in deciding the 2006 Presidential Election through narrowly contested vote.⁷²

6.3. Election Dispute Resolution by Non-Judicial Institutions

Currently, progressive thinking was evolving from experts who tended to support the creation of special bodies to handle election disputes. The basis for this idea was that election organizing bodies as was the case in practice in several countries were very busy with the heavy burden of holding elections. This was common to be the object of an election dispute. Additionally, the courts which were also given the authority to resolve election disputes were busy with routine duties, affecting the process of resolving election disputes.⁷³

6.3.1. Election Management Bodies Thailand

Thailand represented a country with a constitutional monarchy system of government. By adopting democracy in the government system, the King was positioned as the head of state who exercised legislative power through parliament, executive power through the cabinet, and judicial power through the government. In the context of election management, the Election Commission of Thailand (ECT) was given the authority by the Thai Constitution to resolve disputes or agreements that occurred. The approval handling system in Thailand was different from most

⁷² Bisariyadi and et.al, "Komparasi Mekanisme Penyelesaian Sengketa Pemilu Di Beberapa Negara Penganut Paham Demokrasi Konstitusional."

⁷³ Ibid.

countries because it was the ECT that possessed the function of an approval handling institution. The ECT was given the right by law to exercise broad powers to investigate, prosecute, and impose severe penalties to punish violators of the Electoral Law based on the historically maintained emphasis on preventing “vote buying”. Even though it possessed special authority to referee and handle election violation cases, the ECT could not handle criminal cases originating from the implementation of elections because the cases were still handed over to the courts.⁷⁴

6.4. Adoption of Regional Head Election Dispute Resolution Institutions in Comparison to Other Countries

According to the publication of Víctor A. Hernandez-Huerta, the evolution of institutions adjudicating election disputes since the constitutional changes and before the first democratic elections in each presidential democracy was after the start of the third wave of democracy in 1974. Contrary to the idea that special election courts were more compared to the Constitutional Court in resolving election disputes, Huerta found the Constitutional Court could resolve disputes more independently than special election courts. Although this did not imply that the institution possessed advantages over the election courts in terms of expertise.⁷⁵

Huerta further found an increasing trend in the global average level of electoral autonomy since the late 1970s. Since the end of the 20th century, a large number of Latin American countries adopted special electoral courts to handle election disputes. Most presidential democracies in Asia and Africa delegated the task to the Supreme or the Constitutional Court. Therefore, the choice of regional head election dispute resolution institutions to be given to the Constitutional Court was the right decision. This correlated with the discoveries observed from a comparison of regional head election dispute resolution institutions in Austria, Germany, and Azerbaijan.

7. Conclusion

In conclusion, this research found that the selection of legal options regarding democratic regional head election dispute resolution institutions in Indonesia was

⁷⁴ Ibid.

⁷⁵ Víctor A. Hernández-Huerta, “Judging Presidential Elections Around the World: An Overview,” *Election Law Journal: Rules, Politics, and Policy* 16, no. 3 (September 2017): 377, <https://doi.org/10.1089/elj.2016.0373>.

essential. Improvements could further be made with two options namely legal options which could be provided through the revision of General and Regional Election Laws as well as the choices of law given by initially implementing the Fifth Amendment to the 1945 Constitution.

First, Legal Choices for Dispute Resolution Institutions for Democratic Regional Head Elections in Indonesia through Revision of the Election and Regional Election Laws. There were several methods the option could be achieved which included the selection of an institution currently possessing the authority to adjudicate regional election disputes namely the Constitutional Court. Additionally, the institution that previously adjudicated regional election disputes such as the Supreme Court could also be selected. Transforming Bawaslu into an election court and forming a completely new special election court could also be used in achieving this option.

Second, the concept of electoral justice in Indonesia was to reconstruct the Constitutional Court as an election court following the main task which was to uphold the constitution. Consequently, the Constitutional Court possessed the authority to examine and adjudicate substantial matters related to the constitutionality of holding elections. Issues including technical administrative matters also fell under the authority of Bawaslu which could be implemented by making changes to the 1945 Constitution.

Third, according to the results of a comparative research, the Constitutional Court could resolve disputes more independently compared to other institutions through Bawaslu or related institutions. Therefore, the choice of regional head election dispute resolution institutions to be given to the Constitutional Court was the right decision. This correlated with the observations from a comparison of regional head election dispute resolution institutions in Austria, Germany, and Azerbaijan.

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