

# The Role Of The Constitutional Court In Enforcing A Democratic State

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**Abstract.** Article 24C paragraph (1) of the 1945 Constitution, the Constitutional Court shall possess the authority to try a case at the first and final level. It shall have the absolute power of decision in deciding disputes over the results of general elections, which becomes the central issue in this research. Article 75 of the Constitutional Court Law states that the object of a dispute over election results is the result of vote counting between election participants and the KPU. However, the reality shows that there are several decisions of the Constitutional Court that contradict the rules that specifically regulate election disputes. There is a need for a reconstruction of Article 24C paragraph (1) of the 1945 Constitution to provide guarantees of certainty, justice, and benefit for the people, where the phrase “final” in the dispute over the results of general elections is removed and gives the Supreme Court authority. The authority on judicial review of all laws and regulations to the Constitutional Court.

Keywords: Constitutional Court, Election, Politic, Democracy.

## 1. Introduction

The provision of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution), it is stipulated that “The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in deciding disputes over the results of general elections”. If, the authority to examine the law is given, in accordance with the doctrine of judicial power. When determining deciding over the results of general elections, it contradicts and violates the doctrine of judicial power. Article 24 of the 1945 Constitution indicated that the Judicial Power adheres to a bifurcation system, namely the ordinary court is carried out under the Supreme Court, while the Constitutional Review is carried out under the Constitutional Court.

The establishment of Constitutional Court (MK) is regulated under the third amendments of the 1945 Constitution and was formed based on Law Number 24 of 2003 concerning Constitutional Court since 2001. Historically, there were plenty of dissertation, theses or books has published, however the issues related to the Constitutional Court remains actual to be examines, which can be seen from the differences in thinking between theorists and practitioners.

Judging from its journey so far, the Constitutional Court has become a heavy court, as before, MPR heavy, legislative heavy, and executive heavy. Because, state institutions: parliamentary organs, executive organs, Judicial organs, are not in checks and balances, because they are not balanced, so checking power with power cannot be done, it is proven that many decisions of the Constitutional Court cannot be implemented. This happened, because

the division of state power in the Indonesian presidential government system does not use Trias Politica, but used state institutions with attribute authority (MPR, DPR, DPD, President, BPK, MA, and MK). State institutions that are formed with checks and balances, are not equipped with control, by checking power with power. The concept of power sharing where the division of power is based on the government system, seen from the Government System adopted by a country (Parliamentary or Presidential or Semi-Presidential). Institutions in a country are based on attribute authority, meaning the first and foremost authority, no state institution can govern other state institutions, except using the means of checking power with power [1].

According to the Lord Acton in his book titled "Hukum Tata Negara Indonesia", it is stated that: "All power tends to corrupt, and absolute power corrupts absolutely", he also stated that, "great men are almost always bad men, even when they exercise influence and not authority: still more, when you super add the tendency or the certain of corruption by authority". This statement aims to realize a good government and state power is not on one person who is vulnerable to abuse of power. Thus, there needs to be a form of power limitation through the separation of powers, in Indonesia known as the division of power with the concept of checks and balances [2].

Part of judicial power, the MK has the authority to adjudicate at the first and last levels whose decisions are final in terms of disputes over election results, this has violated its nature, aka the doctrine of judicial power. According to Bagir Manan quoted in the book *The Power of Judiciary Post-Constitutional Amendment* states that to understand the doctrine of an independent judicial power, it is inseparable from Montesquieu's idea regarding the purpose and need for "separation" of power, namely to guarantee the existence and implementation of political freedom (political liberty) for members of the state community[3]. In fact, there are several decisions of the MK regarding disputes over election results, which injure democratic and political life in Indonesia. Applications for dispute over election results, based on [www.mkri.id](http://www.mkri.id) data, totaled 676 applications or 20% and decision was final. The essence of the MK decision is final and binding and applies to all citizens (*erga omnes*) is FINAL: For the Parties, the Mahkamah Konstitusi Decision to end disputes. For the Adresat of the decision and citizens in general, this is the starting point for adjusting understanding and following up on a norm according to the mahkamah konstitusi decision. For the judge, the end of a particular case. Binding: Applies as a law that must be obeyed and implemented. *Erga Omnes* : Not only binding on litigants but also binding on all citizens, including government/state organs.

The legal issue in this paper is the object of the application in dispute over the election results based on Article 75 of the Constitutional Court Law which states, in the application submitted, the application must clearly describe about: erroneous vote count results announced by the Komisi Pemilihan Umum (KPU) and correct counting results according to the applicant; and a request to cancel the vote count results announced by the KPU and determine the correct vote count results according to the applicant.

The article states that the object of the petition is the result of vote counting between election participants and the KPU. However, in fact the doctrine of dispute over election results as regulated in Article 75 of the Constitutional Court Law and its final decision was violated by the Constitutional Court in its decisions including the 2008 East Java Regional Head Election which ordered re-voting in two regencies (Bangkalan and Sampang districts) and recounting of votes in Pamekasan Regency. because it assesses the violations that have occurred are systematic, structured, and massive. This is of course contrary to Article 77 of the Constitutional Court Law which only provides three decisions of the Constitutional Court,

namely (1) an application cannot be accepted if the applicant and/or application does not meet the requirements, (2) the application is granted if it is justified, and (3) the application is rejected if it is unreasonable. In the Constitutional Court Decision Number 145/PHP.BUP-XIX/2021 concerning disputes over the 2020 Yalimo Regency District Head Election Results, the Constitutional Court decided that the KPU should carry out a re-vote within 120 (one hundred and twenty) working days after this decision was pronounced. This could be interpreted as providing legal remedies to the KPU related to improving the voting results. This decision also annulled Erdi Dabi's Regent Candidate, on the grounds that he did not meet the requirements as a Regent candidate, which the KPU should have done.

Mahkamah Konstitusi decision in the authority to decide disputes over election results, often draws criticism in the community because the judicial activism carried out by the Constitutional Court exceeds the authority explicitly granted in Article 24C of the 1945 Constitution, which in further elaboration in the Constitutional Court Law is only limited to the results of vote counting. Issues related to the electoral process are the responsibility of other state institutions to decide. From the background of the problem, two questions are formulated as follow: What is the form of settlement of electoral disputes in countries that have a Constitutional Court? How is the legal reconstruction in resolving election disputes?

## **2. Methods**

The legal research used is the normative legal research method. Normative legal research method, namely legal research from an internal perspective with the object of research on norms, law. This legal research, departing from the conflict of norms, there is a conflict between several decisions of the Constitutional Court regarding the authority to dispute election results and the norms in Article 24C of the 1945 Constitution. The research approach used is a statutory approach and a conceptual approach. Sources of legal materials used in this study are primary, secondary and tertiary legal materials. After the legal materials have been collected, then an analysis is carried out to obtain the final argument in the form of answers to the research problems.

## **3. Results and Discussion**

When discussing elections, it is inevitable to describe the importance of the concept of democracy. The two have a close relationship that cannot be separated from the study. Referring to the term of Arbi Sanit, elections are an institution that embodies democracy. In fact, according to Valentino Larcinese, the level of participation in elections is a measure of the quality of democracy itself. Further, according to Stephen A. Siegel, the problem of counting votes in elections is the oldest activity in a nation state among various other oldest problems in constitutional law. In terms of the authority to decide disputes over election results, the settlement in each country is certainly different, this cannot be separated from the country's historical factors [4].

Austria has the world's first constitutional court. It was designed by Hans Kelsen as a special judiciary to ensure that the constitution as the highest law can be enforced in practice. One of the powers of the Austrian Constitutional Court is to decide electoral disputes in the federal presidential election, general representative bodies (national councils), the European parliament, as well as elections to the executive government in the regions, this is based on Article 141 (Bundes-Verfassungsgesetz – B-VG). The mechanism for submitting an election dispute application to the Austrian constitutional court must be based on the alleged illegality of the electoral procedure or the reasons provided for by law, which caused the application to

lose its seat in the representative body. If the illegality is proven, the court will allow the re-election process and submit the case to the competent authority, this is clearly regulated in Article 141 paragraphs 1 and 2 (Bundes-Verfassungsgesetz – B-VG), however in Bundes Verfassungsgesetz – B-VG, there is no provision that regulates decisions that are final in the authority to decide electoral disputes.

Bundesverfassungsgericht, based on Article 41 paragraph (2) Basic Law 1949 stated that a complaint against the decision of the Bundestag can be submitted to the Federal Constitutional Court. All decisions of the Federal Constitutional Court are final and binding, and announced directly in front of a court open to the public. It is based on the provision of Article 30 paragraph (1) of the Bundesverfassungsgesetz (BVergGG). Further, the provision of Article 31 paragraph (1) of the Bundesverfassungsgesetz (BVergGG) states, the decisions of the Federal Constitutional Court are binding on federal and state institutions, as well as all courts and citizens). The examination procedure regarding the authority to decide on election disputes is further regulated in Article 48 of the Bundesverfassungsgesetz (BVergGG), clearly stated, electoral dispute complaints can be filed against the electoral process which results in the applicant losing his/her seat in parliament. If a violation of the Federal Constitutional Court of Germany is found, it is authorized to declare the election invalid. Although it looks the same as the authority of the Indonesian Constitutional Court, Article 75 of the Constitutional Court Law clearly stipulates that the petition submitted is limited to errors in the results and requests to cancel the vote count results announced by the KPU. Furthermore, in Article 77 of the Constitutional Court Law, it states: the decision shall declare the appeal rejected; , the decision declares that the appeal is granted favour; MK declares the annulment of the ballot count as announced by the KPU and determines the correct ballot count.

The purpose of granting the authority to dispute election results to the Constitutional Court is inseparable from the history of the poor reputation of Indonesia's elections. The problem of election results does not lead to a legal settlement, this is due to inefficiency in submitting a dispute request, for instance the vote dispute at the polling station which should be resolved directly at the polling station, if the evidence of the dispute request is collected and brought to Jakarta as evidence of the dispute over the election results, of course it takes a lot of time and money.

Election disputes are inherent in elections, a fundamental issue in the theory of electoral dispute resolution:

1. the validity of the results;
2. administrative actions of election officials to correct a problem;
3. criminal prosecution of persons who have injured or attempted to injure the electoral process [5].

This certainly cannot be stated as a form of weakness in the electoral system, but as evidence of political openness in a country. Therefore, a country's electoral law must provide a mechanism to invalidate election results [6].

Arend Lijphart stated that the effort to form a democratic state is not an easy job. For Lijphart the whole idea of democratization is just an utopian imaginative concept if applied rigidly, but the will for the form of a democratic state will be realized if it is put to the highest possible level. Hence, the right democratic government is not entirely a government managed by the common people.

Realizing the principles of democracy in the implementation of the government of a country will not be possible to involve all citizens. Although conceptually it might be ideal. However, as stated by Lijphart, this is impossible, so that it is necessary to limit the role of the people to a certain degree in order to realize the principle of democracy itself. From several

statements of articles in the 1945 Constitution and the Constitutional Court Law, as well as the comparison of two countries in resolving election disputes, there is a gap between *das sollen* and *das sein*, between the legal norms regulated and the implementation that occur within the authority of the Constitutional Court as a state institution to decide disputes over election results. It requires legal reconstruction to provide legal certainty to the sound of legal norms, therefore it will not cause multiple interpretations in society.

According to Jimly Asshiddiqie, the formulation of the rule of law is to create certainty, equity, and utility. Hence, every legal norm must produce a balance between the value of certainty (*zekerheid*), equity (*billijkheid*, *evenredigheid*), and utility. According to the Cambridge Dictionary, reconstruction means “the process of building or creating something again that has been damaged or destroyed”[7].

The reconstruction referred to is the phrase “final” which means that the decision is binding after being read before a court that is open to the public and there are no other legal remedies. In the case of dispute resolution on election results, this is certainly contrary to the sense of justice possessed by the applicant who feels that his constitutional rights have been harmed by the calculation of the vote results carried out by the KPU. According to Eliska Wagnerova regarding the interpretation of the final meaning attached to the Constitutional Court decision. Many parties reject the characteristics of the Constitutional Court decision, because if the decision is accepted or on the other hand it is not accepted, then there are no other legal remedies for applicants who do not accept the decision, such as a review of the rule of law or a constitutional complaint. This certainly cannot guarantee justice and certainty for the applicant, whose constitutional rights have been violated [8].

Another problem is that there are differences between *das sollen* and *das sein*, within the authority of the MK as a state institution to decide disputes over election results. Between Article 24C paragraph (1) of the 1945 Constitution and Article 75 of the Constitutional Court Law. However, in reality the Constitutional Court exceeds the limits of its authority, for instance, in the Constitutional Court Decision Number 145/PHP.BUP-XIX/2021; The Constitutional Court's Decision Number: 41/PHPU.D-VI/2008. Compared to 2 (two) countries that apply the same system to the Constitutional Court as a state institution that resolves election disputes, the two countries strictly regulate the limits of authority that the Constitutional Court does in its authority to resolve electoral disputes. In addition, the Constitutional Court is considered by some to have carried out what in law is called *ultra petita*. *Ultra petita* is the imposition of a decision by a judge on a case that is not prosecuted or decides beyond what is requested. Meanwhile, in the 1945 Constitution and the Constitutional Court Law, the authority to make decisions that are *ultra petita* does not get enough space [9]. Therefore, the Constitutional Court is not actually authorized to make decisions outside of what is requested by the applicant.

Therefore, it is necessary to reconstruct Article 24C paragraph (1) of the 1945 Constitution, to provide guarantees of certainty, justice and benefit for the people of Indonesia. In essence, Indonesia adheres to the concept of a bifurcation system because there is an ordinary court (ordinary court) under the authority of the Supreme Court. The Supreme Court as a court of justice relates to the demands of justice fighters, for individuals or other legal subjects whose essence is the Supreme Court adjudicating injustice to bring justice. Meanwhile, the Constitutional Court as a court of law does not deal with individuals, but with the public interest. The cases being tried in the Constitutional Court generally involve matters of state institutions or relate to the testing of norms, laws that are general and abstract, not individual matters that are concrete individuals, essentially judging the legal system and the justice system itself

#### 4. Conclusion

Based on the abovementioned it can be concluded that the form of election dispute resolution in Austria and Germany is carried out by the Constitutional Court, but the authority for dispute resolution and the procedure mechanism is strictly regulated in the constitution and specific regulations concerning the Constitutional Court. Therefore, reconstruction of Article 24C paragraph (1) of the 1945 Constitution needs to be carried out in order to provide guarantees of certainty, justice and benefit to the people of Indonesia, by granting authority over election results disputes to the Supreme Court as an ordinary court, and judicial review of all laws and regulations to the Constitutional Court.

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