

# The Authority of Constitutional Court in General Election Results: Is It Powerful or Meaningless?

Kamal Fahmi Kurnia<sup>1\*</sup> Tian Terina<sup>1</sup> Dinar Mahardika<sup>1</sup>

<sup>1</sup>*Faculty of Law, Sang Bumi Ruwa Jurai University, Lampung, Indonesia*

<sup>\*</sup>*Corresponding author. Email: kamal.fahmi1405@gmail.com*

## ABSTRACT

The third amendment to the 1945 Constitution of the Republic of Indonesia has raised the Constitutional Court as a constitutional justice institution in Indonesia. One of the authorities possessed by the Constitutional Court is to decide on disputes about the results of general elections. This article aims to examine the interpretation of the authority through a literature study method with a normative juridical approach. The results of this study explain that Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia is the constitutional basis for the Constitutional Court in the authority to decide disputes about the results of general elections. On Normative perspective, it can be said that the authority possessed by the Constitutional Court is only in the case of disputes that occur between participants in general elections in the case of the results of general elections authorized by the General Election Commission. When interpreted with a comprehensive approach, the Constitutional Court as the guardian of the constitution and the guardian of democracy, the authority to decide disputes on the results of the general election cannot be interpreted only speaks of disputes over results but the Constitutional Court can examine the electoral process if fraud occurs structured, systematic and massive. So, the Constitutional Court is not only a Court Calculator that only calculates the results of general elections, but more than that as the guardian of the constitution and democracy in Indonesia.

**Keywords:** *Constitutional Court, general election, democracy*

## 1. INTRODUCTION

After four Amendments to the 1945 Constitution which took place from 1999 to 2002, which was motivated by the desire to create a democratic government, now the Indonesian constitutional system has undergone several fundamental changes. One tangible manifestation of the change based on the desire to create a democratic government is the establishment of the Constitutional Court as a judicial institution formed with the aim of maintaining the implementation of constitutional values in the administration of state life.[1] The third amendment to the 1945 Constitution of the Republic of Indonesia has appointed the Constitutional Court to be the constitutional justice institution in Indonesia. After the Constitutional Court was formed through the amendment, currently the judicial power in Indonesia is exercised by two institutions namely the Supreme Court and the Constitutional Court.

In this case, the Constitutional Court was formed to ensure that the constitution can be properly enforced. The existence of the Constitutional Court not only proves that Indonesia adheres to a free and independent judicial power system but at the same time is an affirmation of the principle of a democratic rule of law.[2] The Constitutional Court in carrying out its function as guardian of the constitution in accordance with the provisions of the 1945 Constitution of the Republic of Indonesia, has four judicial authorities and one obligation, namely:

- (1) reviewing the Law against the Basic Law;
- (2) decide upon disputes over authority over state institutions as stipulated in the Basic Law;
- (3) decide on a case regarding the dissolution of a political party;
- (4) decide upon disputes concerning the results of general elections;
- (5) the authority to take decisions on the impeachment of the President and / or the Vice President.

One of the authorities held by the Constitutional Court is to decide disputes about the results of general elections. Legally the authority of the Constitutional Court to examine, hear and decide disputes or disputes regarding the results of general elections contained in the provisions of the 1945 Constitution Article 24C paragraph (1). Therefore, the Constitutional Court aside from functioning as the guardian of the constitution, the interpreter of the constitution, is also the guardian of democracy (the guardian and the sole interpreter of the constitution, as well as the guardian of the process of democratization).[3]

Elections are a necessity in a democratic country, including Indonesia. Besides that, it is a political necessity to form a democratic government. In most democracies, elections are both a symbol and a benchmark of democracy itself[4] This is because elections are a tangible manifestation of the implementation of democracy.[5] Thus it can be said that elections are a logical consequence of the principle of democracy. However, what needs to be known is that although elections are a clear manifestation of the implementation of democracy, not all elections are democratic[6] Therefore,

elections as one aspect of democracy must also be held democratically. Democratic elections are not merely symbols, but democratic elections must be competitive, periodic, inclusive and definitive.[6]

Merloe argues that one of the benchmarks of an election held democratically or not is the building of public confidence in the holding of elections that produce a legitimate government. In this connection, public trust in elections is urgently needed so as to produce a legitimate government that will naturally build. However, if there are violations and problems with the results rather than holding a general election, it can also affect the level of legitimacy given by the people.[6] If there is a possibility of election violations and disputes over election results, it can be resolved democratically and proportionally through a predetermined legal mechanism so that the holding of elections still has the legitimacy of the people. Related to this, the Constitutional Court is present as a judicial institution that has the authority to make decisions at the first and final levels whose decisions are final to decide disputes regarding the results of general elections as contained in Article 24C of the third amendment to the 1945 Constitution of the Republic of Indonesia.

But it is very unfortunate during his trip, there are still problems regarding the electoral process in the Constitutional Court itself in the resolution of violations of the election administration. This makes the Constitutional Court has not been able to play its role properly in resolving disputes over election results, especially specifically the presidential and vice presidential elections. In addition, it also makes the elections that take place in Indonesia are now not fully run democratically. Some issues related to the electoral process as referred to include:

The narrow meaning of the phrase "election results" which is only interpreted as "disputes regarding the determination of election results conducted nationally by the General Election Commission". The narrow meaning of the phrase "election results" makes the Constitutional Court now touted only as "calculator court" in terms of resolution of disputes over election results, no longer the constitutional court that functions to oversee democracy, including overseeing the principles of elections, namely "Direct, general, free, confidential and fair" stated in Article 22 E paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Then, regarding the limited time given by the law to the constitutional court to resolve the dispute over the election results of the President and Vice President, which is only 14 days.[7] The limited time makes it impossible for people seeking justice just to rely on justice for the running of democracy and elections to the constitutional court.

The last one are no benchmarks that can be used by judges as a reference in proving the elements of "Structured, Systematic and Massive", in proving the trial of disputes over the election results of the President and Vice President. This makes the interpretation "Structured, Systematic and Massive" becomes "wild" and has implications for the different basic considerations for each judge in deciding cases in the Constitutional Court.[7] besides that in the provisions of law number 7 of 2017 concerning general elections, structured, systematic and massive phrases are more recognized in the resolution of election violations in the election supervisory body.

## 2. RESEARCH METHOD

This type of research is normative legal research. Data sources used are secondary data sources consisting of primary legal material; secondary legal material; and tertiary legal material. This study was analyzed descriptively qualitatively, which is collecting and selecting legal materials in accordance with the problem under study, then described so as to produce a picture or conclusion that is in accordance with the actual situation so as to be able to answer all existing problems. This research uses a legal approach in the form of a statutory approach because the main material to be analyzed is the Law on the Constitutional Court and the Law on General Elections.

## 3. RESULTS AND DISCUSSION

### *A. Interpret the Implementation of Democratic Elections*

Democracy (demos + cratos or demos + kratien) is envisioned as a government by all people which is the opposite of the concept of government by one person (autocracy).[8] Democracy according to the origin means "people in power" or "government or rule by the people". In Greek, demos means people, kratos / kratien means power / power,[9] which has the meaning of power essentially recognized from the people so that the people are actually authorized to determine and give direction in the administration of government, besides that which actually organizes state life.

The whole system of state administration is also basically intended for all the people themselves, in other terms it says "the government of the people, by the people and for the people". In fact, a good state should be held together with the people in the sense of involving the entire community in every policy that is made.

The practice of democracy in every country is not always the same. Nevertheless, Lijphard said that a country can be said to be a democracy at least must meet the following elements:

- 1) Have the freedom to form and become members of community associations;
- 2) has the freedom to express opinions;
- 3) has the right to vote in elections;
- 4) has the opportunity to be elected in general elections or hold various government positions;
- 5) Has the right for political activists to campaign;
- 6) holding free and honest elections;
- 7) There is an open source of information;
- 8) All institutions tasked with formulating government policies must be based on the interests and desires of the people.[10]

Sargent gave his opinion that the elements that must also be fulfilled by a democratic country are:

- 1) citizen investment in political decision making;
- 2) some degree of equality among citizens;
- 3) some degree of freedom or freedom granted to or retained by citizens;
- 4) a system of representation; and
- 5) an electoral system majority role.[10]

To form a democratic government in a democratic country requires the institutionalization of substantial democratic values into institutionalized values. This institutionalized value is what

political science experts call procedural democracy. In the conception of procedural democracy, it requires the holding of general elections as a space for citizens to contest and compete in a healthy manner in government.

The holding of elections is a sign of guarantee of individual rights, individual freedom, public participation, and awareness of citizens' political rights in the form of active involvement in governance. However, in this case what needs to be stressed is that the holding of elections is not just a procedure for legitimating power in mere government. Elections have broad implications, more than just a change or formation of power, which is to change the life of a better and more democratic society, to good governance and of course clean governance.

In this matter there are normatively several requirements to realize democratic elections, including:

- 1) There is recognition of universal suffrage. This means that all citizens, without exception, are given the right to vote and be elected in general elections;
- 2) There is freedom to form a "shelter" for the plurality of aspirations of the voting community. Limiting the number of election contestants who consider formal juridical reasons by denying the development of real people's aspirations is a distortion of this principle;
- 3) There is a political recruitment mechanism for democratic candidates for the people's representatives;
- 4) There is freedom for voters to discuss and make choices;
- 5) There is an independent election committee or committee;
- 6) There is freedom for each contestant to compete in a healthy manner;
- 7) Honest vote counting;
- 8) Neutral bureaucracy.[11]

In this case there are state responsibilities which also cannot be ignored in realizing democratic elections. These things are:

- 1) States must take legislative steps and other necessary actions in accordance with their constitutional process to guarantee constitutional rights and frameworks for periodic, pure, free and fair elections, all with their obligations under International Law, which include: drafting a procedure effective, impartial and not discriminatory for voter registration; prepare clear criteria for voter registration by age, citizenship and residence, and ensure that the provisions are implemented without any difference; support the formation and free functioning of political parties, as far as possible regulate the financing of political parties and election campaigns, guarantee the separation between parties and the state and create conditions for competition in legislative elections on the basis of equality;
- 2) Taking policies and institutional steps to progress the achievement and consolidation of democratic ideals, including the establishment of a neutral mechanism in the holding of elections, which includes: the responsibility of providing trained and impartial personnel, as well as election procedures that are made known to the public; guarantee voting; encourage parties, candidates and the media to carry out a code of conduct to regulate election and voting campaigns; ensure the integrity of the ballot box through appropriate measures to prevent multiple votes, or votes by unauthorized persons; ensure the integrity of the vote counting process;
- 3) The state must respect and guarantee everyone's human rights and must obey its laws;

- 4) The state must guarantee the principle of trial in secret, voters can vote freely, without fear or intimidation;
- 5) The state must guarantee voting in secret, voters can vote freely, without fear or intimidation;
- 6) The state must guarantee voting to avoid counterfeiting and unauthorized matters, the vote count is carried out by trainers, may be monitored and / or verified fairly;
- 7) The state guarantees transparency of the entire electoral process;
- 8) The state guarantees that parties and candidates and supporters have shared experience, the state must prevent violence in elections;
- 9) The State guarantees that violation of human rights and all complaints relating to the electoral process are dealt with immediately within the electoral process period and effectively by an impartial independent body, such as an election commission or court.[12]

Seeing this, then Merloe's opinion that classifies democratic elections must include 3 important things, namely:

- 1) whether human rights are recognized, protected and promoted;
- 2) there is fair competition from participants in the election;
- 3) Building public trust in elections that results in a legitimate government.

These three things are a unity that cannot be separated to realize democracy and democratic elections.[6]

While Mukthie Fadjar stated that the realization of democratic elections is not enough just to fulfill the formal attributes of democracy, such as the existence of representative institutions, the presence of more than one political party competing in elections, and the existence of periodic elections. Democratic elections are also not just symbols, but democratic elections must be competitive, periodic, inclusive and definitive.[6] Democracy and the process of democratization of elections must be based on human rights standards to be more participatory and emancipator. Because if not, democracy will be easily manipulated.[6]

However, the question now is whether the elections that have taken place in Indonesia, especially the presidential and vice presidential elections have been running democratically? This question becomes important to answer, because after all realizing democratic elections is an obligation for a democratic country. A simple way that can then be used to measure whether or not an election is democratically administered is through the electoral laws and the electoral processes of the election itself. With regard to electoral laws, elections can be considered democratic if the regulations governing elections do not conflict with the 1945 Constitution, whereas in the case of electoral process, elections can be said to be democratic if there are no violations and problems with the results rather than the implementation of the election itself. If then there is the possibility of violations of election violations and disputes over election results, there are legal mechanisms that can be used to be able to solve these problems democratically and proportionally.

#### *B. The Constitutional Court as the Guardian of Democracy in Carrying Out the Authority to Resolve Dispute Over Election Results*

The Constitutional Court, as determined in Article 24 C paragraph (4) of the 1945 Constitution of the Republic of Indonesia is an institution authorized to carry out the function of resolving disputes over the results of elections in Indonesia.

But it is unfortunate, during his journey there are still problems regarding the electoral process in the Constitutional Court in the resolution of disputes over election results. This makes the Constitutional Court unable to play its role properly in resolving disputes over the results of general elections.

It also makes the elections that take place in Indonesia are now not fully run democratically. Ideally, resolving disputes over election results should offer hope for change in boring and tiring conditions. It really depends on the tools, processes and implementation mechanisms that undoubtedly influence the results. Now is the time to realize that democratic elections are reflected in the electoral laws and the electoral process.

The spirit of reform to democratize elections on its way now faces several obstacles. One of the obstacles in question is that the spirit of reform has not been internalized in the electoral process of the election itself. This is clearly seen by the limited space for the Constitutional Court to explore justice in the process of resolving disputes over election results.

Article 24 C paragraph (4) of the 1945 Constitution of the Republic of Indonesia states that, among other things, the Constitutional Court has the authority to settle disputes over election results. But the problem is, the provisions which form the basis of the Constitutional Court's authority do not provide a clear understanding of the purpose of disputes over election results in the provisions of Article 77 of Law No. 24 of 2003 concerning the Constitutional Court. In these provisions, disputes over election results are narrowly interpreted, that is only as disputes over election results nationally determined by the General Election Commission. The narrow meaning of the election results makes the Court now "hostage" in carrying out its duties as the guardian of the democracy. The implication is that the Constitutional Court is now referred to as the "Calculator Court" because in resolving disputes over election results, the Constitutional Court is only limited to assessing whether or not votes are properly determined nationally by the General Election Commission.

Nevertheless, if we look at the Constitutional Court's journey in resolving disputes over the results of the general election (Legislative Election, Regional Head and President and Vice President), it is interesting to note that the Constitutional Court actually made a legal breakthrough through the act of judicial activism by deciding a dispute over election results. Exceed the mandate given to him. In other words, the Constitutional Court has shifted the concept of disputes over election results not only to move on disputes "the number of votes obtained by general election participants", but in a more substantial direction than that. For example, the Constitutional Court's decision on East Java Regional Election in 2008, South Bengkulu Regional Election in 2009, Tebing Tinggi Regional Election in 2010, Mandailing Natal Regional Election in 2010, and West Kotawaringin Regional Election in 2010.[13]

Seeing the resolution of the dispute over the results of the election, the violations that caused the vote count results which were then disputed must also be assessed to uphold justice, especially the violations are structured, systematic and massive. This is in line with the spirit of the formation of Article 24 paragraph (1) of the 1945 Constitution which reads: "Judicial power is an independent power to administer justice to enforce law and justice," and Article 28 D paragraph (1) of the 1945 Constitution which reads: " Every person has the right to recognition of guarantees, protection and certainty of fair law and equal treatment before the law ".

John Rawls also added in his book entitled "Theory of Justice", that justice is the main virtue in social institutions, as is the truth in systems of thought.[14] In connection with what was conveyed by Rawls, as a constitutional court, the Constitutional Court in principle should not allow the rules of procedural justice to override and override substantive justice. This is because however the legal facts revealed in disputes over election results are in fact constitutional violations, in particular violating the principles of election. One universally adopted law and justice principle states that "... nullus / nemo commodum capere potest de injuria sua propria", which means that no one can benefit from deviations and violations committed by themselves and no one should be harmed by irregularities and violations committed by others[14]

In other words, none of the electoral participants may benefit from the vote acquisition due to violations of the principles of election implementation and the principle of justice in the holding of elections.

In addition, in ruling No. 190 / PHPU.D-VIII / 2010 The Court also has stated that:

"The cancellations of election results or post-conflict local election due to violations that are structured, systematic and massive are not intended by the Court to take over the authority of other judicial bodies. The court will never try criminal and administrative violations in elections and post-conflict local elections, but only take violations that are proven in the field that affect the election and post-conflict local election results, but do not impose criminal and administrative sanctions on the perpetrators".<sup>1</sup>

Deemed it necessary to create a legal breakthrough to realize the democratization of elections and break away from the habit of structured, systematic and massive violations. Because however elegant and economical a theory is, it must be rejected or revised if the theory is incorrect. Likewise law and institutions, no matter how efficient and neat, must be reformed or abolished if they are unfair.<sup>2</sup>

For this reason, it is time that we now consider that the prohibition of the Constitutional Court in handling various cases of violations that occur in the process of disputing the election results means that the Court does not may perform the function of criminal justice or administrative justice, but still may question and try any violations that result in the results of vote counts. It is also time to shift the meaning of the Constitutional Court's authority in handling disputes over election results. When previously the authority in handling disputes over election results was only limited to the calculation of election votes, now disputes on election results must be interpreted as all forms of cheating that violate the principle of direct, general, free, confidential, honest and fair. In other words, the Constitutional Court as the guardian of the democracy was given more substantive authority to maintain elections in accordance with the principles of direct, public, free, confidential, honest and fair.

If the Constitutional Court has been able to determine whether a provision of democratic electoral laws or not through a constitutional test of the Election Law on the 1945 Constitution, then the Constitutional Court should also be able to play a good role in the electoral process through the election

<sup>1</sup> Putusan Nomor 190/PHPU.D-VIII/2010.

<sup>2</sup> John Rawls, *Op, Cit.* hlm. 3.

dispute court in order to explore the profound justice in the implementation process elections conducted by the General Election Commission.

The ideal dispute resolution process at the Constitutional Court is essentially intended to protect and fight for the constitutional rights of all parties involved, as mandated in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that "Sovereignty is in the hands of the people and is carried out according to the Law "Basic Law". In other words, the aim is to ensure that the right to vote conversion by the people can be carried out fairly and not violated by the rampant manipulative actions by election participants. Much more important than that is how the ideal election dispute resolution mechanism is able to return the converted people's voices to the rightful parties, in accordance with the wishes of the real people. If the settlement process has not been able to run effectively, it certainly has implications for the protection of the rights of the parties involved in the electoral process.

Democratic elections in a democratic country become very important considering the purpose of the election itself. In an effort to realize democratic elections and create electoral dispute resolution results that can provide a sense of legal certainty, justice and benefits for all parties, the redesign of the Constitutional Court's authority in terms of dispute resolution of election results is no longer negotiable. Because Indonesia can strengthen its existence as a democratic country. This is considering that however the benchmark of success of a democratic country is when the country is able to hold an electoral process democratically.

#### 4. CONCLUSION

Democratic elections in a democratic country become very important considering the purpose of the election itself. As an effort to realize democratic elections and to create dispute resolution in the election results that can provide a sense of legal certainty, justice and benefit for all parties, the redesign of the Constitutional Court's authority in terms of dispute resolution of election results. Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia is the constitutional basis of the Constitutional Court in its authority to decide disputes regarding the results of general elections. In a normative perspective, it can be said that the authority possessed by the Constitutional Court is only in the case of disputes that occur between participants in the general election in the event that the results of the general election are endorsed by the General Election Commission.

The narrow meaning of the election results makes the Court now "hostage" in carrying out its duties as the guardian of the democracy. The implication is that the Constitutional Court is now referred to as the "Calculator Court" because in resolving disputes over election results, the Constitutional Court is only limited to assessing whether or not votes are nationally determined by the general election committee and not more

than that. When interpreted with a comprehensive approach, the Constitutional Court as the guardian of the constitution and guardian of democracy, the authority to decide disputes about the results of general elections cannot be interpreted to only talk about disputes over results but the Constitutional Court can examine the electoral process if structured, systematic and massive fraud occurs.

The ideal dispute resolution process at the Constitutional Court is essentially intended to protect and fight for the constitutional rights of all parties involved, as mandated in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that "Sovereignty is in the hands of the people and is carried out according to the Law "Basic Law". So, the Constitutional Court is not only the Court Calculator that only calculates the results of general elections, but more than that as the guardian of the constitution and democracy in Indonesia.

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