Unconstitutional Authority of Indonesia's Constitutional Court: The Resolution of Pilkada Result Disputes

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ABSTRACT

Since the Era Reformasi, Indonesia has continued to progressively take shape as a young democracy. Among the most evident democratic development processes in Indonesia are the elections for the heads of local government. These elections, or “Pilkada,” have been a topic of conversation and controversy for the national government since 2002, and, most recently, the national government amended the local election laws to mandate that all Pilkada be synchronized by the year 2024. While this initiative is complicated enough, it also further complicates a preexisting jurisdictional debate over election issues in the courts. Specifically, the authority to hear disputes over the results of the Pilkada currently lies with the Constitutional Court of Indonesia, but the Court has a ruling that deems this authority unconstitutional. Based on the country's national political structure, the national legislature has to implement this decision into statutory law to give it full effect. To date, the national legislature has not taken the steps necessary to do so. With so much controversy surrounding the Pilkada in Indonesia, this article attempts to explain how the local elections are structured, what a result dispute really is, and how the Constitutional Court is currently handling the cases. Most importantly, this research identifies how the political structure of the country creates a gap between constitutional interpretation and legislative implementation. The research for this article was a combination of exploratory and empirical, with support from Pusat Studi Konstitusi (PUSaKO) of Fakultas Hukum Universitas Andalas as well as the Constitutional Court of Indonesia. This article is meant to be an in-depth description of the local election structure, with an analysis of the legal issues that arise from jurisdiction over the result dispute cases. Therefore, the article begins with a brief explanation of the Constitutional Court of Indonesia followed by an explanation of the election process itself. The article then shifts to focus on how the Court handles the disputes, with data from the Court as well as interviews from sitting Justices of the Constitutional Court. The article then concludes with an analysis of the major legal issues that remain.

Keywords: unconstitutional authority, Indonesian Constitutional Court, Pilkada result disputes, local elections

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INTRODUCTION

FOR 31 YEARS, FROM 1967 TO 1998, Suharto served as president of Indonesia, dominating the country's political system with his Golkar Party (Butt 2015, 26). During his reign, Suharto organized elections to keep himself and the Golkar Party in power, depriving Indonesian citizens a voice in national and local governance (Butt 2015, 26). However, Suharto relinquished power in 1998 and, while serving as president, Suharto's former vice president, Bacharuddin Jusuf Habibie, initiated the Era Reformasi in Indonesia, which included four amendments to the 1945 Constitution from 1999 through 2002 (Butt 2015, 1). The four constitutional amendments and laws that the Indonesian national government passed during Era Reformasi pushed for decentralization by shifting authority to local governments in order to correct the overly centralized national government following the Suharto era (Smith 2008, 215). While some might argue that these decentralization initiatives were faux, the 1999 laws on regional autonomy in Indonesia have since been described as one of the world's largest decentralization projects (Smith 2008, 212). Almost two million civil servants were transferred from the national to local level, with control over more than 40 percent of government expenditures (Smith 2008, 212).

However, decentralization and regional autonomy cannot be truly effective without free and fair elections. According to International IDEA, "in many ways, the electoral and constitution-building processes are intertwined as two elements of the overall political settlement process, and crucial elements in the establishment of a new, legitimate political order" (Underwood et al. 2017, 5). Almost 20 years after the amendments to the Indonesian Constitution, the elections of the heads of local government are still under scrutiny, despite the Era Reformasi's strong attempt to shift power closer to the people. While the Second Amendment to the 1945 Constitution further guarantees that sovereignty lies in the hands of the people (Article 1(2) of the Constitution), money politics and corruption in Indonesian elections continue to stifle complete democracy (Mulyadi and Utami 2017, 101). In order to correct some of these unethical practices that occur in Indonesian elections, the Constitutional Court of Indonesia has made progress in developing a model to handle the result disputes that arise from the elections of the heads of local govern-

ment, or "Pilkada" (Satriawan and Mokhtar 2015, 105). Ironically, in 2014 the Constitutional Court ruled that its jurisdiction over these cases is unconstitutional (Indrayana 2017, 3).

Like most countries formerly colonized by the Dutch, Indonesia implements a civil law system, which means only legislative enactments are binding for all (World Bank Group 2016). Therefore, the legislature would need to adjust the statutory law governing jurisdiction over the result dispute cases to give the Court decision full affect. The national legislature only did this in part, as the current local election law calls for the creation of a new, special judicial body to handle the result dispute cases (Article 157, Law No. 10, 2016). However, the law only requires that the national legislature create this special judicial body by 2024 (Article 157(2), Law No. 10, 2016). This means that the Constitutional Court could continue to exercise jurisdiction over the local election result dispute cases 10 years after the Court deemed the authority unconstitutional. To further complicate matters, the Pilkada are undergoing a massive reformation. Specifically, the national legislature has decided to synchronize the elections for heads of local government so that these elections all happen on the same day once every five years (Article 201, Law 10, 2016). Interestingly, this local election synchronization will also be completed in 2024 (Article 201, Law 10, 2016). This means that the Constitutional Court may maintain jurisdiction over the result dispute cases while the election structure is changing on a massive scale.

As noted above, local elections are critical for a young democracy. As Indonesia goes through the synchronization process, it is essential that the national legislature does not forget the motives of the Era Reformasi. These principles are laid out in the Amended Constitution, and the Constitutional Court was created to serve as the "guardian of the Constitution" (Satriawan and Mokhtar 2015, 114). The Constitutional Court continuing to hear Pilkada result dispute cases is counterintuitive and, as Indonesia continues to reform its election processes, this dichotomy between Court decisions and national legislation is of heightened importance. Recent literature on this topic (Aspinall and Mas'udi 2017; Seran 2017) focuses on Court rulings and the synchronization schedule, but does not fully explain the complexity of the local elections. This article attempts to contribute to existing literature by providing a comprehensive overview of the Pilkada and also how the Constitutional Court is currently

involved. Moreover, the article focuses on the issue of jurisdiction over the Pilkada dispute resolution cases to draw attention to what creating a special judicial body actually means, and why it is critical.

THE CONSTITUTIONAL COURT OF INDONESIA

In order to fully analyze the current situation for the local election result dispute cases, it is necessary to provide background on the Constitutional Court of Indonesia. The Indonesian national government created the Constitutional Court of Indonesia through the Third Amendment to the 1945 Constitution in 2001 (Article 24C of the 1945 Constitution). Subsequently, Law No. 24 2003 as amended by Law No. 8/2011 granted the Court its full authority (Law No. 8, 2011). Under the national statutes and the Amended Constitution, the Court has five functions (Faiz 2016, 159). The Court's main function is constitutional review, which grants the Court the jurisdiction to hear cases challenging the constitutionality of national statutes (Faiz 2016, 159), similar to the Supreme Court of the United States of America. The Court's most pertinent authority for the purpose of this article is the final authority over the resolution of electoral disputes (Faiz 2016, 159). Initially the Constitutional Court's authority over electoral disputes only extended to national elections, leaving the local election disputes to the Supreme Court of Indonesia (Harijanti and Lindsey 2006, 138–150), but in 2008 the national legislature shifted the authority over local election result disputes to the Constitutional Court (Law No. 12, 2008).

INDONESIAN LOCAL GOVERNMENT AND ELECTION STRUCTURE

It is also important to note the structure of local governance throughout Indonesia. In the Second Amendment to the 1945 Constitution, Chapter VI establishes the regional authorities of the Unitary State of the Republic Indonesia (Article 18(1) of the Constitution). At the local level, Indonesia is broken down into provinces, regencies (*kabupaten*), and municipalities (*kota*), and each of these levels has an elected head of regional government (Article 18 of the Constitution). Provinces are the largest subdivision of local governance in Indonesia, with a governor serving as the head of the provincial gov-

ernment (Article 18 of the Constitution). The regencies and municipalities are equal subdivisions that fall within provinces, with regencies covering larger areas of land and municipalities as cities. Regents (*bupati*) serve as the regional heads of government for the regencies, while mayors (*walikota*) fulfill the role in municipalities (Article 18 of the Constitution).

The election of governors, regents, and mayors in Indonesia are referred to as *Pemilu Kepala Daerah*, and this is shortened to *Pemilukada* or *Pilkada* (Satriawan and Mokhtar 2015, 105). Today, three national statutes govern the Pilkada, starting with Law No. 1/2015, as amended by Law No. 8/2015, and Law No. 10/2016. For now, these laws and the Amended Constitution serve as the guidelines for the election of the local heads of government. Under these recent statutes, the Pilkada are to be based on the principles: direct, public, free, confidential, honest, and fair (Article 2, Law No. 1, 2015).

Governors, regents, and mayors are elected every five years (Article 3, Law No. 8, 2015), and in the Pilkada elections, the potential local heads of government run as a candidate pair with their prospective deputy (Ufen 2010, 282). Any Indonesian citizen who meets the personal candidacy requirements of Article 7 of Law 10/2016 may stand for election, whether they are nominated by a national political party, nominated by a coalition of national political parties, or registered as an independent candidate (Article 1(4), Law No. 8, 2015).

LOCAL ELECTION IMPLEMENTATION AND SUPERVISION

The current local election statutes break down the election process into preparation and implementation (Article 5, Law No. 8, 2015). Preparation includes developing budgets, organizing local election rules and schedules, establishing and forming voting commissions and supervisors, and submitting updated voter lists (Article 5(2), Law No. 8, 2015). Implementation includes the announcement and certification of candidates, campaign implementation, execution of voting and vote counting, determination of the winners, and settlement of disputes (Article 5(3), Law No. 8, 2015).

In order to facilitate free and fair elections, there is both an election commission and a supervisory body at every level of the election process (Pettalolo et al. 2016, 37) as displayed in Figure 1. The

FIG. 1. Election implementation and supervision at every level of the election process.

implementation of the Pilkada begins at the national level with the National Komisi Pemilihan Umum (National KPU), which makes general guidelines and facilitates the work of the election commissions at the local level (Article 9, Law No. 1, 2015). Under the National KPU are the Provincial, Regency, and City KPU, which are in charge of the overall implementation process for the elections of governor, regent, and mayor (Articles 12–13, Law No. 8, 2015). Each city or regency within a province has its own City or Regency KPU, which work under the Provincial KPU to support the elections of governors (Article 12, Law No. 8, 2015). In the election of regents and mayors, Regency and City KPU are the top election commission, but still must follow guidelines and regulations from the National and Provincial KPU (Article 13, Law

No. 8, 2015). The Regency and City KPU also create all lower election commissions (Article 13, Law No. 8, 2015). Each regency or city is broken down into sub-districts, of which the Panitia Pemilihan Kecamatan (PPK) has oversight of the implementation (Article 15, Law No. 8, 2015). Then, each sub-district is further divided into villages, overseen by the Panitia Pemungutan Suara (PPS) (Article 18, Law No. 8, 2015). Finally, the implementation process of the local elections at each individual polling place, Tempat Pemungutan Suara (TPS), is within the care of the Kelompok Penyelenggara Pemungutan Suara (KPPS) (Articles 21–22, Law No. 8, 2015).

One of the main functions of implementation for the election commissions is the determination of the final vote count, or “recapitulation,” and the announcement of the elected candidates (Article 5(3), Law No. 8, 2015). This section of the implementation process is essential to the disputes over the result of the elections, which could lead to a challenge before the Constitutional Court. The KPPS is responsible for the ballot box and final vote count at each TPS, which it then submits to the PPK through the PPS (Article 22, Law No. 1, 2015). The PPK then recapitulates the vote count of all TPS within its working area and announces the results, submits the results to election participants, and reports to the Provincial, City, or Regency KPU (Article 17 of Law No. 1/2015). The City or Regency KPU then makes the official vote count and announcement for the election of mayors or regents, and the Provincial KPU makes the official vote count and announcement for the election of governors (Articles 12–18, Law No. 8/2015).

To ensure that the implementation process follows both the Constitution and the guidelines of the local election legislation, each level of election commission has an equivalent supervisory body (Pettalolo et al., 2016, 42). Both the election commissions and supervisory bodies are involved in the preparation of elections, and the supervisory bodies monitor the election commissions during the implementation process (Articles 23, Law No. 8, 2015). The purpose of this supervision is to ensure that the election commissions’ actions at every stage of the election are neither detrimental nor overly beneficial for a particular participant or voter (Pettalolo et al., 2016, 42). At the national level, the Bawaslu oversees the lower level supervisory boards (Article 1(10), Law No. 8, 2015). Parallel to the Provincial KPU, the Provincial Bawaslu

oversees the election commissions and processes for the election of governor (Article 28, Law No. 1, 2015), and the City and Regency Panwas do the same at the lower level for the election of mayors and regents (Article 30, Law No. 1, 2015). Underneath the City and Regency Panwas are the Sub-District Panwas (Article 33, Law No. 1, 2015), the Panitia Pengawas Lapangan (PPL) at the village level (Article 35, Law No. 1, 2015), and a TPS supervisor overseeing each individual TPS (Article 27, Law No. 8, 2015). Separate from the election supervisory bodies, the “Honorary Council of the General Election Organizer,” abbreviated as “DKPP,” also handles the misconduct of the election organizers (Article 137, Law No. 8, 2015).

THE PILKADA

The Amended Constitution does not directly address the structure of the Pilkada, which leaves it open to some interpretation. Constitutional Court interpretations distinguish the Pilkada from the national elections based on a few imperative words written in the text of the Amended Constitution (Constitutional Court Decision 072-073). The Indonesian Constitution specifically provides that national elections for the National House of Representatives (DPR), the Regional Representative Council (DPRD), the president and vice president, and the Regional House of Representatives are “general elections” (Article 22E(2) of the Constitution). However, the Constitution only specifies that governors, regents, and mayors be elected “democratically” (Article 18(4) of the Constitution). Further, “democratic” is undefined in the Constitution, and, as a result, the process for the Pilkada is an ongoing source of controversy in Indonesia. An example of this arises from a constitutional review decision by the Constitutional Court in 2004 (Constitutional Court Decision, 072-073, 109). In that case, the Constitutional Court ruled that indirect elections for the Pilkada are constitutional, as they are sufficiently democratic (Constitutional Court Decision, 072-073, 27). However, the current local election legislation passed in 2015 makes the Pilkada direct (Article 2, Law No. 1, 2015).

This lack of clarity in the Constitution over the Pilkada is also what causes the jurisdictional issue of which court should handle the disputes that arise from the elections. As previously noted, the

Supreme Court had jurisdiction over the disputes until 2008 when the DPR passed Law No. 12 2008 and officially shifted jurisdiction over Pilkada dispute resolution to the Constitutional Court (Law No. 12, 2008). Specifically, this law grants the Constitutional Court the authority to review challenges to election *results* (Article 236C, Law No. 12, 2008).

Because the Constitution separates the national and local elections but offers no hard line rule for the jurisdiction of the disputes over the local elections, which court should have jurisdiction is a matter of constitutional interpretation. Interestingly, the interpretation of the Amended Constitution is one of the authorities of the Constitutional Court under its constitutional review power (Butt 2015, 2). In fact, the Constitutional Court used this authority to conclude that it should not have jurisdiction over the Pilkada disputes in 2014 (Constitutional Court Decision No. 97, 60). The Court concluded that the framers of the Amended Constitution never intended to include the local elections under the Constitutional Court’s authority (Constitutional Court Decision No. 97, 60). Specifically, the Court stated that, “the addition of the authority of the Constitutional Court to adjudicate cases of dispute over the results of regional head elections by expanding the meaning of elections provided for in Article 22E of the 1945 Constitution is unconstitutional” (Constitutional Court Decision No. 97, 60). Article 22E of the 1945 Constitution includes only the national, general elections, and here the Court specifically concludes that this should be the extent of its electoral dispute authority. However, a change in laws dealing with elections becomes an obvious political issue, where party members in the national legislature have some influence over the elections of party members at the local level. Knowing this would be an issue at the national level, the Court exercised some foresight in its decision and determined that the Constitutional Court was the most fit to deal with the local election disputes until the DPR passed a national statute shifting the jurisdiction to another court (Constitutional Court Decision No. 97, 62).

As a result of the Court’s 2014 decision, the current local election legislation calls for the DPR to create a “special judicial body” to handle the local election result disputes (Article 157, Law No. 10, 2016). So, the national legislature did react to the decision, but the change does not have to be immediate as it would be in a common law

country. As a byproduct of the decision, the law also maintains that the Constitutional Court will continue to have jurisdiction over the disputes until the national legislature establishes the special judicial body (Article 157(3), Law No. 10, 2016). Although the law was passed in 2016, the Constitutional Court heard the most recent round of Pilkada disputes in 2018. Therefore, the Constitutional Court, as the guardian of the Indonesian Constitution, continued to exercise an authority that it has already deemed unconstitutional because of the legislature's failure to fully implement the decision. In some ways, though, the Court allowed the national legislature to delay the implementation by stating that the Court should retain jurisdiction until the creation of the special judicial body. While the Court may argue it is best suited to hear the cases, the fact remains that the jurisdiction is unconstitutional. Full democracy requires fair elections, and the final results of local elections are absolutely critical. If the Court that hears disputes over these final results does so unconstitutionally, then it should be viewed as a violation of the Indonesian voters' constitutional rights.

Further displaying democratic development, the national government decided to synchronize the Pilkada so that every governor, regent, and mayor in Indonesia will be elected on the same day once every five years (Article 201, Law No. 10, 2016). Previously, the five-year terms for governors, regents, and mayors ended in different years, meaning that only a portion of the heads of local government were up for election each year. Now, the national government wants all 542 local heads of government to be elected on the same day in the same year (Article 201, Law No. 10, 2016). The local election law requires that this be done by 2024 (Article 201, Law No. 10, 2016). The law also states that this is the deadline for the DPR to create the special judicial body to handle the result disputes, which would fully implement the Constitutional Court's decision (Article 157(2), Law No. 10, 2016).

While synchronized elections may be beneficial to the democracy of Indonesia long term, the current transition period adds a layer of complexity to the already murky local election law structure. Prior to the passage of this law, the Pilkada that occurred in the same year were not even set for the same date. This means that in the short term, the election commissions must synchronize the Pilkada yearly in order to prepare for the overall synchronization in

2024 (Election Commission Regulation No. 1, 2017). For 2018, the KPU set the Pilkada Election Day for June 27 and held 171 Pilkada elections (Election Commission Regulation No. 1, 2017). These Pilkada included 17 elections for governor, meaning that half of Indonesia's 34 provinces elected a new governor on the same day (Indonesian Ministry of Internal Affairs 2018). The 2018 Pilkada elections also included a total of 115 elections for regent and 39 elections for mayor. The elections for mayors and regents were spread across 30 of the 34 provinces. Of these 171 elections, five incumbent governors, 37 incumbent regents, and 10 incumbent mayors were not set to end their term until 2019 (Indonesian Ministry of Internal Affairs 2018). For any incumbent that ran for reelection, they were required to step away from office during the election process. This meant that the secretary of Internal Affairs on behalf of the president appointed a temporary governor, regent, or mayor during the election process (Election Commission Regulation No. 1, 2017). Even if the incumbent lost, they returned to office after the election to finish their original term. This also meant that the Court had to hear and decide on the disputes that arose from 171 elections instead of just the 119 whose term actually ended in 2018, despite the fact that the national legislature is supposed to create a new judicial body to hear these cases.

Additionally, some of the elected officials' terms ended prior to June 27. To facilitate the synchronization, the secretary of Internal Affairs appointed a person to fill the temporary vacancy until Election Day (Article 201, Law No. 10, 2016). The local election laws also mandate that the appointment of temporary governors, regents, and mayors will happen on a massive scale in 2022 and 2023, suspending the direct Pilkada elections for two years (Article 201, Law No. 10, 2016). This portion of the law can be supported by the Court's decision that indirect elections for the Pilkada are sufficiently democratic (Constitutional Court Decision 072-073, 109), displaying how a Constitutional Court ruling can be used to support this national legislation.

In order to prepare for the synchronization in 2024, the secretary of Internal Affairs will fill the offices for any head of local government whose term is set to end in 2022 or 2023 (Article 201, Law No. 10, 2016). This is because all governors', regents', or mayors' terms will end on the same date in 2024, which will be the official Election

Day for the nationally synchronized Pilkada. The effort will also require that any governor, regent, or mayor elected in 2020 or 2021 will have a shortened tenure (Article 201, Law No. 10, 2016). After 2024, the elected governors, regents, or mayors will serve full, five-year terms on a synchronized schedule, and the Pilkada will once again be direct (Article 201, Law No. 10, 2016). Theoretically, by this time the DPR will have formed a special judicial body, as the law requires. If it does not, and the Constitutional Court retains jurisdiction over the Pilkada result disputes, then the Court will have to find a way to deal with the influx of applications occurring in the same year. While it is ultimately the decision of the legislature, the Constitutional Court ruling that indirect elections are sufficiently democratic aided this messy local election reform process. As a result, if the legislature does not create the special judicial body, the Constitutional Court will have a much larger caseload in 2024 for the result dispute cases. However, the Constitutional Court, by its own decision, should never have been granted this jurisdiction in the first place.

PILKADA RESULT DISPUTES

Despite the national legislature's failure to shift Pilkada dispute resolution jurisdiction to an appropriate judicial body, the Constitutional Court has done its best to preserve the Constitution within the scope of its authority; thus, when and if the national legislature creates a special judicial body to handle the result disputes, the Constitutional Court's process would serve as an excellent model. Under the current legislation, a candidate can challenge the final vote count to the Constitutional Court when the dispute is significant enough to influence the result of the election, which should be the same under a special judicial body (Article 156, Law No. 10, 2016). Specifically, a dispute over the result of the election is when a losing candidate pair asserts that the final recapitulation of votes is incorrect (Article 156(2), Law No. 10, 2016). This could be due to an election commission mistake in counting or unethical procedures or campaigning that leads to an incorrect final vote count. In the past, examples that have led to successful election result disputes have included the winning candidates buying votes, the local KPU inflating or deflating a candidate pair's vote total, the local

KPU failing to open ballot boxes in the presence of witnesses, and discrepancies between the vote count at local polling stations and the aggregated vote count (Butt 2015, 256–260). Typically the Court only determines the correct mathematical count of the final results, but in cases where the errors in vote counting are “systematic, structured and massive,” the Constitutional Court has gone so far as to order a new election (Butt 2015, 286).

Historically, the Supreme Court did not order new elections based on any substantive errors in the election process, but simply decided whether the mathematical count was correct (Butt 2015, 286). However, one year after the DPR shifted the authority of local election disputes, the Constitutional Court “shifted the meaning of local election disputes from formal justice approach to substantive justice approach” in a 2008 case reviewing an election dispute arising from East Java (Satriawan and Mokhtar 2015, 112). This case was the beginning of a new era in Pilkada dispute resolution under which the Constitutional Court developed a way to become involved in the election process through its dispute resolution power. While this action was criticized as an overstep of authority, it seems to be necessary to preserve the concept of free and fair elections (Butt 2015, 286). If campaign finance and corruption are the cause of a miscalculation of the final vote count, it is logical that the Court should be able to order a revote when the violations caused the mistake in vote totals. It is important to note that the even in cases where the Constitutional Court finds corruption, it cannot issue any criminal indictments, as the Court's authority strictly deals with determining the correct outcome of the election (Article 157, Law 10, 2016). Today, the Constitutional Court continues to use the mathematical formula for simple dispute cases, and offers some flexibility in the use of the “systematic, structured, and massive” consideration for ordering a new election. These considerations both stem from an election dispute challenge where the losing candidates argue that the final vote count should be different from what the KPU announced.

In order to limit the number of challenges and prevent a dispute on the results from every losing candidate pair in a Pilkada election, the local election laws limit the conditions under which an applicant may bring the result dispute before the Court (Articles 156–158, Law No. 10, 2016). Article 156(1) stipulates that the dispute must be between

the Provincial or City/Regency KPU and election participants (Article 156(1), Law No. 10, 2016). Article 156(2) further stipulates that the dispute over vote acquisition must be “significant and influence the determination of candidates selected” (Article 156(2), Law No. 10, 2016). This means that the Court would not have to hear something as trivial as a challenge over 15 votes in a landslide election. Instead, Article 158 creates an election result “margin,” which limits the challenges that can be brought before the Court based on the final vote count (Article 158, Law No. 10, 2016). The losing candidate must be within a certain percentage of final votes in order to have legal standing to bring the result dispute. Table 1 displays the margin for the different elections based on the population of the respective regions (Article 158, Law No. 10, 2016). The difference in vote percentage is between the applicant challenging the result and the candidate with the highest vote total. This means that theoretically, in an election involving three parties, the third place finisher could challenge the results if they are within the percentage margin. Or vice versa, in an election with three candidate pairs it is possible that only one of the two losing pairs would fall within the margin to have standing before the Constitutional Court. Still, the margin requirement is the primary reason that the Constitutional Court would dismiss a result dispute case at the application stage (Palguna 2018).

While this election margin may limit the number of cases brought before the Court, it seems counterintuitive to limit the challenges. If campaign finance

and corruption are an issue that causes miscounts in the election results, then the margin could protect wrongdoers. If a candidate pair buys votes or bribes election officials, then it is an election crime that can be dealt with by the Supreme Court. However, if the winning candidate and wrongdoer successfully corrupted the system and won the election by a margin of just 2.1%, then the losing candidates would have no legal standing before the Constitutional Court to challenge the results due to the effectiveness of the corruption. Essentially, with the margin requirement in place it seems possible for corrupt candidates to protect themselves by being better at corruption. Justice Palguna explains that the reason for this margin is to ensure the peaceful transition of power that is necessary to any democracy (Palguna 2018). If there was no margin, then losing candidates could potentially challenge every election. Having no margin requirement could open the floodgates of the court, allowing frivolous suits to make it through to one of the country’s top two courts (Palguna 2018). This concern is heightened by the looming simultaneous elections in 2024. However, if there is a special judicial body that only has jurisdiction over the Pilkada result dispute cases, then the margin requirement might not be necessary. If these cases are the body’s sole responsibility, then they should be able to specialize and hear more cases more efficiently. Still, it is possible that this will never happen.

If the Constitutional Court’s composition changes following the national elections in 2019, the new Court could overturn the 2014 decision ruling that the Pilkada disputes should not lie with the Constitutional Court. Justice Palguna explains that while overturning a prior decision of that magnitude is not common, it is possible (Palguna 2018). It is also possible that the newly elected DPR could change the local election laws that call for the creation of a special judicial body. If these hypotheticals occur, then the Constitutional Court would need every mechanism possible to limit the number of Pilkada result challenges when they all occur in the same year. For now, the jurisdiction lies with the Constitutional Court, and the margin requirement is in place. There would need to be a successful challenge of the local election laws under the constitutional review power in order to change the margin requirement, but this seems unlikely given the fact that the margin limits the number of cases and the Amended Constitution is silent on the issue (Palguna 2018).

TABLE 1. MARGIN FOR ELECTION COUNT DISPUTES FOR THE ELECTION OF GOVERNOR

<i>Province population (total people)</i>	<i>Final election count within (percentage of votes)</i>
Up to 2,000,000	2.0%
2,000,001–6,000,000	1.5%
6,000,001–12,000,000	1.0%
More than 12,000,000	0.5%

MARGIN FOR ELECTION COUNT DISPUTES FOR THE ELECTION OF REGENT/MAYOR

<i>District/city population (total people)</i>	<i>Final election count within (percentage of votes)</i>
Up to 250,000	2.0%
250,001–500,000	1.5%
500,001–1,000,000	1.0%
More than 1,000,000	0.5%

Table is created based on the contents of Article 158 of Law No. 10/2016.

PROCESS FOR DISPUTE FILING

Getting a Pilkada result dispute to the court is also quite strenuous under the current regional election laws. The strictest of the provisions is the deadline for filing, which logically follows the need to fill the respective office following the election. Under Article 157 the contestants must file their application no later than three working days after the announcement of the vote, and the application must include evidence and documents pertaining to the challenge of the KPU decision (Article 157(5–6), Law No. 10, 2016). If the application is not completely correct, the applicant can correct the application within three working days of the Court's receipt of the application (Article 157(7), Law No. 10, 2016). Then the Court must rule on all applications within 45 working days of the receipt of the complaint (Article 157(8), Law No. 10, 2016). With the exception of very urgent constitutional review cases, the Court will only hear election dispute cases over these 45 days. While the official election of local government heads is pressing for the nature of governance throughout Indonesia, the Constitutional Court's current jurisdiction over these disputes creates a gap in the judiciary system. The Court has to hear these cases quickly, but it comes at the price of not being able to exercise its other authorities for a month and a half. Ultimately, the Court has to delay its constitutional authorities in order to exercise unconstitutional authority over the Pilkada dispute cases. This further emphasizes the need for a special judicial body.

Moreover, the local election laws only contain three articles dealing with the election dispute settlement, and these three articles provide no substance on the actual procedure for filing a dispute with the Court (Articles 156–158, Law No. 10, 2016). Instead, the Court provides its own procedural guidelines for candidates filing a dispute through Constitutional Court decrees (*Peraturan Mahkamah Konstitusi*). Specifically, Decree No. 1/2016 and its amendment from Decree No. 1/2017 govern the process for applicants (Constitutional Court Decree No. 1, 2016; Constitutional Court Decree No. 1, 2017). Again, these guidelines could serve as an excellent model, making the creation of a special judicial body even easier.

The decrees establish that there will be three parties in a regional election dispute: the applicant/petitioner, the respondent, and related parties (Article

2, Constitutional Court Decree No. 1, 2016). In a challenge over a gubernatorial election result, the applicant is a losing candidate pair for governor and vice governor and the respondent is the Provincial KPU (Article 3, Constitutional Court Decree No. 1, 2016). In a challenge over the election for regent or mayor, the applicant is the respective candidate pair challenging the result and the respondent is the City or Regency KPU (Article 3, Constitutional Court Decree No. 1, 2016). Related parties are the winning candidate pairs who clearly have an interest in the result of the case, or potentially other losing candidate pairs (Article 3, Constitutional Court Decree No. 1, 2016).

The applicant must follow the deadlines for filing described by the local election laws, and may submit the application electronically or manually (Articles 5–6, Constitutional Court Decree No. 1, 2016). The petition must include the applicant's full name and address and/or the attorney's name and address and the applicant's telephone number or e-mail address (Articles 6–11, Constitutional Court Decree No. 1, 2016). The application must also contain a description of the Court's authority in hearing the case, an explanation of the petitioner's legal standing, the principal issue causing the petition with an explanation, and a request to cancel the recapitulation of the votes and the supposed correct vote count according to the applicant (Articles 6–11, Constitutional Court Decree No. 1, 2016). Substantively, the applicant must also include the KPU's decisions with at least two documents as evidence of an error (Article 8, Constitutional Court Decree No. 1, 2016). Evidence may include letters or writings, statements of the parties, testimony of witnesses, expert descriptions, election committee minutes, or official KPU recapitulation reports (Article 32, Constitutional Court Decree No. 1, 2016).

The KPU, now respondent, must file an answer to the petition (Article 17 Constitutional Court Decree No. 1, 2016). The answer must also contain names, addresses, and phone numbers (Article 18, Constitutional Court Decree No. 1, 2016). Substantively, the answer must contain a specific section that responds to the petitioner's argument for jurisdiction, the petitioner's legal standing, and the deadline for filing the petition (Article 18, Constitutional Court Decree No. 1, 2016). The respondent must also argue that the recapitulation of the votes was correct with evidence in the form of documents to support their arguments, and request that the Court uphold

their determination of the votes (Article 18, Constitutional Court Decree No. 1, 2016). The related parties file a statement that is very similar to the respondent's answer, arguing that the recapitulation was correct (Article 22, Constitutional Court Decree No. 1, 2016).

Once the application and answers are filed, the examination of disputes over the results of the elections moves to a preliminary examination session (Article 25, Constitutional Court Decree No. 1, 2016). During the preliminary examination, the Court will review the completeness of the filed documents (Articles 26–28, Constitutional Court Decree No. 1, 2016). The Court will also review the evidence, hear witness statements, listen to expert testimony, and review relevant data during the preliminary examination (Articles 26–28, Constitutional Court Decree No. 1, 2016). If the applicant meets the margin requirement and the application is correct, then the Court will move the case to a trial examination. This trial examination is conducted in a panel session or plenary session, where three justices preside to hear the arguments (Articles 29–30, Constitutional Court Decree No. 1, 2016).

PILKADA CASES

In 2017, the Constitutional Court received 60 applications for disputes over the local election results, which was actually much less than the 152 the Court received in 2016.¹ Of the 60 applications the Court received, four were over the election of a governor, nine were over the election a mayor, and 47 were over the election of a regent. The Court accepted only nine of the applications, which included one gubernatorial challenge, two mayoral challenges, and seven regency challenges. The other 51 applications were not accepted because of a failure to meet the margin requirement, a lack of evidence, or other issues with the application. Even when the Court deems an application unacceptable, it is still recorded as a Constitutional Court Decision by the court registrar.

The two successful applications in 2017 resulted in Court Decision No. 52/2017 and Court Decision No. 54/2017. In Case No. 54, the court ordered a revote in seven TPS in the elections of a regent in Papua. This case was especially complicated because of the fact that Papua is classified as a special province in Indonesia. The status of “special prov-

ince” is recognized under the Amended Constitution (Article 18B of the Constitution), and it is meant to recognize and protect the culture differences of several areas in Indonesia. For Papua, this means that in elections certain voting districts still employ the “Noken” voting system (Azali and Fionna 2015, 247). The Noken system allows the local tribal chief to cast one, unified vote on behalf of his entire tribe (Azali and Fionna 2015, 247). While this allows the Papuans to retain their culture, it obviously complicates voting procedures. In fact, Case No. 50/2017 also dealt with the elections in Papua but in a much different way. Candidate pairs wanted to challenge the vote result, but the KPU in Papua had not announced all of the final votes (Azali and Fionna 2015, 66). Eventually, the final Constitutional Court decision in Case No. 50 was to order the Papua KPU to announce all vote totals. This creates an interesting dilemma for the Court, because if the vote totals have not been announced then there is no real way to determine if the applicant has standing based on the margin requirement.

CONCLUSION

As Indonesia moves closer to a fully synchronized local election system, resolving the Constitutional Court's ruling on jurisdiction over the Pilkada result dispute cases becomes critical for the survival of democracy in the country. While the indirect elections that will occur through the early 2020s are constitutional per the Court's ruling, the result dispute jurisdiction must be resolved by the national legislature to truly uphold the Constitution. The geography of the country alone makes election processes understandably difficult, and this is exacerbated by the structure of local governance. While the Amended Constitution and local election laws call for autonomous regions, the central government still controls most of the country's functions. This is evidenced by the structure of election implementation, with a chain of command leading back to the national level. The benefits of the centralized system include

¹Concise data was provided by researchers at the Constitutional Court of Indonesia. The researchers provided a summation of the cases which can all be found on the Court's website: <https://web.archive.org/web/20190417062215/http://otda.kemendagri.go.id/CMS/Images/InfoOTDA/Daftar%20Daerah%20yang%20Melakukan%20Pilkada%20Serentak%20Tahun%202018.pdf>

one standardized set of local election laws. With the exception of a few special provinces like Papua, virtually all of the Pilkada are the same throughout Indonesia. This makes it easier for the Court to decide Pilkada result dispute cases, because the factual substance of each case is similar as a result of the standardized implementation system. However, the Era Reformasi had a theme of decentralization, and the Amended Constitution specifically calls for autonomous local governments. The fact that the national legislature still controls these elections in so many ways diminishes the actual autonomy of the regions, and this is highlighted by the synchronization schedule for 2024. If the local regions had control over the elections, then there would be no real reason to control the schedule on a national level, as each local region could simply implement the elections as they see fit.

This centralized civil law system also prevents the Constitutional Court from fully serving its purpose. Had the national legislature granted the Constitutional Court binding authority upon its creation, then the jurisdiction over the Pilkada result disputes would already be solved as a matter of law. Instead, Indonesia is going through a major electoral reform with the Constitutional Court only having jurisdiction over a limited scope of the process. More concerning is the fact that even that small piece of authority is deemed unconstitutional by the Court itself.

As mentioned above, it is unknown whether or not the national government will create a special judicial body by 2024 to handle the synchronized Pilkada dispute cases. Furthermore, even if they do create a special judicial body, the structure and functionality of that special judicial body are still unknown. The Constitutional Court has created a seemingly good model for the special judicial body, but implementation of the new judicial body is under the authority of the legislature. From a legal standpoint, this creates a clear dilemma that highlights the nature of the developing democracy in Indonesia. The Constitutional Court has already decided it should not have jurisdiction over the Pilkada result disputes, but the Court still has to begin preparations for the synchronized elections in 2024 because the legislature is not required to immediately implement the Court decisions. There is no guarantee as to what the future holds, especially when it is a question of the political will of the national government. Therefore, the Constitutional Court should likely proceed as if they expect to

have unending jurisdiction over the Pilkada dispute resolution cases. However, in a true democracy, the Constitution should be the supreme law of the land as a protection for the people. Yet, Indonesia's national legislature has in many ways failed to respect this principle as evidenced by its failure to implement the Constitutional Court's decision on Pilkada result disputes.

Under the current structure, the Constitutional Court only decides upon the mathematical results of local election dispute cases and rarely orders new elections. The most interesting legal question that this situation creates is what happens when an election crime leads to an incorrect final vote count. The Supreme Court retains jurisdiction over election crimes and the Constitutional Court cannot investigate criminal accusations. This ensures that the Constitutional Court will not be involved in the election process; but the process is what leads to the result. If a losing candidate pair has evidence of corruption on the part of the winning party but cannot precisely prove how it changed the final vote count, then they likely cannot present their case to the Constitutional Court. The legal division of the electoral process and results in Indonesia creates a grey area where corruption and money politics can continue to exist between the lines. To facilitate a real free and fair democracy with autonomous and effective local governments, there must be a better solution to deal with legal questions that arise from the local elections. This solution could come from the special judicial body with exclusive jurisdiction over the Pilkada dispute cases. The Constitutional Court has provided a model to deal with the mathematical results, but the new special judicial body could theoretically do more. This might include expanding the margin requirement, or even eliminating it all together.

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