Indonesian Constitutional Court decisions in regional head electoral disputes

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Introduction

‘Politicians, public figures or anyone aspiring for a public office may now have a new way of achieving their ambitions -- through a legal battle in court ... The requirements are simple and reasonably easy to meet. First, get a political party to nominate you; secondly, contest the election result if you happen to loose [sic] and; thirdly, enlist people who have enough guts to testify (or perhaps to lie) under oath that your rivals have robbed you of your election victory either by illegally inflating their vote tally or preventing your supporters from casting their votes ... Do not worry about the validity of their testimonies; the honorable judges will not bother to verify them. The fact that the testimonies are given under oath means they must be true ... As for you supporters who did not cast their votes, the judges will take care of them. Once you have submitted "all of the requirements", just sit back and wait for your inauguration.’

This passage, written by Kanis Dursin in a Jakarta Post article in August 2005, refers to the infamous Depok case – a case in which the West Java High Court invalidated the result of the Depok mayoral election in highly controversial circumstances. Relying on questionable evidence, the High Court took victory from Nur Mahmudi Ismail and Yuyun Wirasaputra of the Prosperous Justice Party and handed it to Golkar’s Badrul Kalam and Syihabuddin Ahmad – something that the High Court clearly lacked power to do. This decision was overturned by the Supreme Court several months later, but it became the main catalyst for the

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transfer in 2008 of jurisdiction over disputes about *Pemilukada* – elections for regional heads, whether governors, regents and mayors and their deputies – to the Constitutional Court, which was widely considered more professional than all other Indonesian courts. However, within only a few years, the government had already proposed transferring jurisdiction over these cases back to the high courts and Supreme Court, or to a special-purpose election court.

In this paper I analyse the Constitutional Court’s decision-making in *Pemilukada* disputes. I find that many of Dursin’s complaints about the high court in 2005 hold true for the Constitutional Court in 2012. I also consider the main criticism made, mostly by politicians, to support proposals to remove *Pemilukada* cases from the purview of the Constitutional Court: that, like the high court in 2005, it exceeds the jurisdiction granted to it by statute when it orders recounts and re-elections. Such criticisms began after the Court’s decision in the *East Java* governororial election case, handed down in late 2008. Prior to this case, the Court had followed statutory provisions limiting it to checking vote counts for errors.\(^3\) However, in the *East Java* case the Court was presented with significant breaches of electoral laws, most notably those prohibiting ‘money politics’. The Court decided that it would no longer allow such breaches that were proven in the cases before it to ‘pass it by’ without consequence, particularly if those breaches had a perceptible effect on the election result. If breaches were ‘structured, systematic and massive’ (*terstruktur, sistematis dan masif*), thereby affecting the votes obtained by candidates, the Court decided that it could order recounts and fresh elections to remedy them. In later cases the Court also began enforcing candidacy rules. In particular, the Court ordered re-elections if someone who stood for election was ineligible when they applied for candidacy, or if the local electoral commission wrongly refused to let someone stand, including by failing to properly check their eligibility.

This paper is divided into three parts. The first covers the origins and development of the Court’s jurisprudence in *Pemilukada* cases. In it, I describe the Depok case and the resulting transfer of jurisdiction over *Pemilukada* cases from the Supreme Court to the Constitutional Court. I then outline and analyse the Court’s decision in the *East Java* case, focusing on the Court’s legal arguments for expanding its jurisdiction to order revotes and recounts. Part II describes the Court’s jurisprudence in subsequent cases – that is, the principles it has developed and applied post-*East Java*. As we shall see, the breaches for which the Court has ordered revotes and recounts have involved a combination

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\(^3\) Article 106(2) of Law 32 of 2004 on Regional Government.
of money politics, politicisation of the bureaucracy, electoral administrator incompetence or bias, or physical intimidation.

In Part III, I analyse the Court’s decision-making in these cases, focusing on the formulation and application of its ‘structured, systematic and massive’ test and the questionable ways it has handled evidence in some cases. I show that the Court’s decision-making in many of these cases has been arbitrary and has lacked transparency. Criticisms of the Court’s formulation and application of this test and its use of evidence have not, to my knowledge, yet been subject to academic or wider public debate inside or outside of Indonesia. Rather, the main concern, mentioned above, has been that the Court has gone ‘too far’ because it lacks statutory jurisdiction to order revotes. This research aims to describe and critique the Court’s decision-making in Pemilukada cases.

This paper seeks to build on research that has examined the Court’s decision-making in judicial review cases – that is, cases in which the Court reviews legislation to determine whether it is consistent with the Indonesian Constitution. In these cases, too, the Court has been ‘activist’, significantly expanding its own jurisdiction as it deems necessary to fulfil its mandate as ‘guardian of the Constitution’. Ultimately, I will show that, like in its judicial review cases, the Court’s justification for doing this in electoral disputes might be largely sound, but that tests it has established are unclear and the Court applies them inconsistently, arbitrarily, and sometimes not at all. This paper also seeks to contribute to the small but growing body of literature that assesses the Court’s contribution to democratic practice in Indonesia. After all, the Court has declared that the main rationale for allowing itself to order revotes or recounts is


safeguarding the legitimacy of elections – a critical component of Indonesia’s constitutional democracy.

The Constitutional Court and Pemilukada

Before turning to the Constitutional Court’s jurisprudence in _Pemilukada_ cases, some background information about the Constitutional Court and _Pemilukada_ elections. The Constitutional Court was established in 2003. It has nine judges, with the Dewan Perwakilan Rakyat (DPR), President and Supreme Court selecting and appointing three judges each. Constitutional Court judges serve up to two five-year terms and elect their own Chief and Deputy Chief Justices, who hold office for two years and six months.

The Court has several very important functions. These include resolving disputes between state institutions about their relative jurisdictions, dissolving political parties and assessing impeachment motions initiated by Indonesia’s national parliament. It also ensures that statutes enacted by Indonesia’s national parliament comply with the Constitution as part of its so-called ‘judicial review’ function. This is significant because the Indonesian Constitution now contains, in Chapter XA, a Bill of Rights, incorporating many internationally-recognised human rights. The Court, therefore, enforces these rights by striking down or invalidating national legislation that illegally breaches these rights. No other Indonesian court has had power to perform this function since independence. The Court has regularly exercised its judicial review powers and has done so independently and actively.

For the purposes of this research, the most important function of the Court is to resolve electoral disputes. When the Court was first established, only participants in elections for the national parliament, the Regional Representative Council, and the presidency could bring challenges to the official vote counts announced by the National Electoral Commission before the Court. This mechanism was used

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6 Article 24C(3) of the Constitution; Articles 4(1) and 18(1) of the 2003 Constitutional Court Law.
7 Articles 4(3) and 22 of the 2003 Constitutional Court Law.
8 Articles 24C(1) and 24C(2) of the 1945 Constitution and Article 10 of Law 24 of 2003 on the Constitutional Court.
10 Articles 130(2) and 156(1) of the federal Constitution of the United States of Indonesia (Republik Indonesia Serikat, RSI), which was in force for less than a year from 1949 to 1950, permitted judicial review of state, but not federal, statutes (Lotulung, P. 1997. “Judicial Review in Indonesia.” In _Comparative Studies on the Judicial Review System in East and Southeast Asia_, edited by Y. Zhang, 176-82. The Hague: Kluwer Law International.)
11 Article 74 of the Constitutional Court Law.
very regularly by election contestants, with over 900 objections to results being lodged after the 2004 and 2009 national general elections and several high-profile presidential election disputes.\textsuperscript{12} Direct \textit{Pemilukada} elections were held from June 2005 and, as discussed below, the Constitutional Court began hearing disputes arising out of them from 2008.

The Indonesian media has recently reported various statements made by government officials and parliamentarians indicating that \textit{Pemilukada} might soon be abolished. Draft legislation abolishing \textit{Pemilukada} and reintroducing the appointment of regional heads by regional parliaments has been circulating since at least 2011. Although this Bill has not yet come before parliament\textsuperscript{13} and might, in fact, not be introduced in the near future, the abolition of \textit{Pemilukada} at some stage is possible, perhaps even likely, particularly given declining participation rates.\textsuperscript{14} Even if this does happen, the jurisprudence of the Court in \textit{Pemilukada} cases, described in this paper, will likely not be forgotten. To the contrary, the Court will, in fact, probably apply the jurisprudence it has developed in these \textit{Pemilukada} cases to the next round of \textit{national} and regional legislative elections and direct \textit{presidential} elections to be held in 2014. In other words, even if the Court loses jurisdiction over \textit{Pemilukada} cases or if \textit{Pemilukada} themselves are abolished, then the Court will likely apply the tests it developed in \textit{Pemilukada} cases to determine whether recounts or revotes should be ordered in these other elections. (Indeed, there are indications that the Court already began doing this in disputes arising out of the 2009 national and presidential elections.)\textsuperscript{15} If it does this, then the Court is likely to order more revotes and recounts that might, in turn, lead to significant controversy, instability and delays in the announcement of final results. In the face of ‘massive’ impropriety, the Court might even apply the \textit{Pemilukada} tests and order a nationwide re-election.


\textsuperscript{15} Interview with former Constitutional Court judge, Malang, 8 May 2012.
Methodology

As for methodology, my analysis is based on a study of 46 Constitutional Court decisions in Pemilukada disputes. These cases comprise all of the cases in which the Constitutional Court ordered recounts or fresh elections arising from Pemilukada held in 2008-2011. (Several of these arose from elections held in late 2011 but were heard only in early 2012.) As figure 1 below indicates, however, the cases studied make up a relatively small proportion of the more than 400 Pemilukada disputes the Court handled during that period. In 2008, almost 80% of regional head elections were disputed; in 2009, around 94%; and in 2011 almost 90%. In 2008, the Constitutional Court heard 27 disputes arising from 34 elections, and granted four applications (15% of disputes); in 2010, heard 230 disputes arising out of 244 elections, granting 27 (12% of disputes); and in 2011, 85 disputes from 96 elections, granting 10 (11% of disputes). It was simply not possible to examine all of these cases; with the resources available, I chose to focus on cases involving breaches that the Court decided justified a recount or revote.

Figure 1 | Constitutional Court Pemilukada case statistics 2008-2012

<table>
<thead>
<tr>
<th>Year</th>
<th>Pemilukada</th>
<th>Appealed</th>
<th>Upheld</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>34</td>
<td>27</td>
<td>4</td>
<td>65</td>
</tr>
<tr>
<td>2009</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>2010</td>
<td>244</td>
<td>230</td>
<td>27</td>
<td>501</td>
</tr>
<tr>
<td>2011</td>
<td>96</td>
<td>85</td>
<td>10</td>
<td>191</td>
</tr>
<tr>
<td>2012</td>
<td>76</td>
<td>58</td>
<td>41</td>
<td>175</td>
</tr>
<tr>
<td>Total</td>
<td>453</td>
<td>403</td>
<td>82</td>
<td>938</td>
</tr>
</tbody>
</table>

I have focused on the formal decisions of the Court rather than the written transcripts of proceedings and the submissions of the parties.

Finally, a note about who appears before the Constitutional Court in these cases. In *Pemilukada* disputes, the applicants or petitioners challenge the ‘result’ of the election formally declared by the local electoral commission (KPU or Komisi Pemilihan Umum) that administered the election. The applicants are usually (but not always) either the pair of candidates ranked second after the vote count, or a pair that the local election commission did not allow to stand in the election. The local election commission is always the respondent, often accompanied by the local electoral supervisory committee (Panwaslu, or Panitia Pengawasan Pemilu). Any pair of candidates that contested the election can appear before the Court as a related party (*pihak terkait*) and is afforded the same opportunities as the respondents to make arguments and adduce evidence.\(^\text{18}\) The related party will usually seek to refute the applicants’ allegations of impropriety.

I: Origins and development of the Constitutional Court’s jurisdiction in *Pemilukada* cases

As mentioned, direct *Pemilukada* elections commenced from June 2005.\(^\text{19}\) Initially, the 2004 Regional Government Law allowed those who had contested the elections to challenge the final vote count in Indonesia’s provincial high courts.\(^\text{20}\) If dissatisfied with the provincial court’s decision, contestants could then appeal to the Supreme Court.\(^\text{21}\) From a reading of several available reported cases,\(^\text{22}\) the Supreme Court, and the high courts below them, appeared acutely aware of the confines of their jurisdiction in *Pemilukada* cases. Their main objective seemed to be ensuring that the final vote count had been tallied correctly, and that it was based on correctly formalised documents. In the Central Sulawesi Provincial Elections case,\(^\text{23}\) for example, the Supreme Court emphasised Article 106(2) of the 2004 Regional Government Law (as amended), which allowed candidates to object ‘only to the results of the counting of the votes (*hasil penghitungan suara*) that influenced the election of candidates’ (Article 106(2)). Use of the word ‘only’, according to the Court, indicated a clear intent on the part of lawmakers to limit its jurisdiction and could not be

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18 Article 3 of MK Regulation 15 of 2008 on Guidelines for Appearing in Pemilukada Election Dispute Cases.

19 The first Pilkada was held in Kabupaten Kutai Kertanegara on 1 June 2005: Emilia, S. 2005. “Direct regional elections provide a taste of democracy.” *Jakarta Post*, 26 December.

20 Articles 106 (1) and (2) of Law No 32 of 2004 on Regional Government.

21 More specifically, contestants would need to lodge a request with the Supreme Court to re-examine the case through the *peninjauan kembali* process.


23 Supreme Court Decision 01 P/KPUD/2006.
interpreted any other way. The Court admitted that it could ‘understand the disappointment of the applicants’, because it was required to respect this limitation even in the face of evidence of infringements.

Then along came the Depok case mentioned above. In August 2005 the West Java High Court in Bandung heard a dispute over the result of the Depok mayoral elections, held on 26 June. About 700,000 of more than one million eligible voters took part in this election. The Depok Electoral Commission had declared the Prosperous Justice Party pair Nur Mahmudi Ismail and Yuyun Wirasaputra as the winners with 232,610 votes, with Golkar candidates Badrul Kalam and Syihabuddin Ahmad obtaining 206,781 votes. The Badrul pair challenged the result, claiming that, because of breaches by the local election commission and the Mahmudi pair, many of their supporters had not received invitations to vote and some people who were ineligible to vote had been able to vote. They estimated that these breaches led them to lose around 65,000 votes.

The High Court agreed with the Badrul pair and declared them to have won the election, awarding them 269,551 votes to Mahmudi and Wirasaputra’s 204,828. The High Court’s decision was questionable for three main reasons, all reported in the Indonesian press and drawing speculation that the decision was the result of impropriety. First, the Court based its decision on questionable witness testimony. Very few Mahmudi supporters were summoned to testify. Most of the evidence upon which the Court relied came from Badrul supporters who said that they had been unable to cast their votes. However, the claims were never verified, which is problematic because some witnesses alleged vote-rigging without witnessing it themselves, having only been told about it by Golkar members. The Court simply accepted that, because the testimony was given under oath and was not contested, it must have been true. Second, the Court presumed that those who were unable to vote would have voted for Badrul and not for the others participating in the election and that all ineligible voters voted for Mahmudi. Third, it appears that the Court exceeded its jurisdiction because

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24 The Court made similar statements in Supreme Court Decisions 03 P/KPUD/2005 and 04 P/KPUD/2005.
25 High Court Decision 01/PILKADA/2005 PT.Bdg.
28 High Court Decision 01/PILKADA/2005 PT.Bdg, p. 64.
it did not focus purely on whether the votes were properly counted. Rather, it considered breaches affecting citizens’ ability to vote.\textsuperscript{30}

The Electoral Commission appealed to the Supreme Court. The Court annulled the decision of the High Court and reinstated Nur Mahmudi Ismail and Yuyun Wirasaputra,\textsuperscript{31} noting that the ‘high court’s verdict was based only on assumptions, not facts’. One of the bases upon which the Supreme Court justified its decision was that the High Court had wrongly done more than checking the correctness of the vote count. The Supreme Court declared that ‘neither the Supreme Court nor the High Court had jurisdiction to adjudicate upon breaches in the running of the election other than those relating to the determination of the vote count’.\textsuperscript{32}

Widespread dissatisfaction over the high court’s decision in the Depok case was the main catalyst for the national parliament transferring jurisdiction over Pemilukada disputes from the Supreme Court to the Constitutional Court on 1 November 2008.\textsuperscript{33} Presumably the Constitutional Court’s successful record in handling disputes arising out of the general and direct presidential elections in 2004 made it an attractive alternative.\textsuperscript{34} With the transfer, the Constitutional Court received almost exclusive power to adjudicate disputes arising out of all types of elections. Prior to the transfer the Court already had power over national legislative, regional legislative and presidential elections.\textsuperscript{35}

The Constitutional Court began hearing Pemilukada disputes in the last two months of 2008. As had the Supreme Court in the Pemilukada cases before it, and as the Constitutional Court had itself done in 2004 general elections disputes, the Court initially took a largely ‘mathematical’ approach in these cases. In other words, the Court limited itself to checking local electoral commission counts for mistakes. If errors were found, the Court would replace the

\textsuperscript{30} Diani, H. & Yuli Tri Suwarni, Y.T. “Experts urge review of Depok ruling.”

\textsuperscript{31} Supreme Court Decision 01 PK/PILKADA 2005. Also controversial were the North Maluku and South Sulawesi Pilkada electoral disputes discussed in Maria Farida Indrati, ‘Sengketa Pemilkada, Putusan Mahkamah Konstitusi dan pelaksanaan putusan mahkamah konstitusi, Evaluasi Pemilihan Umum Kepala Daerah’, Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, Jakarta, 25 January 2012.

\textsuperscript{32} Supreme Court Decision 01 PK/PILKADA 2005, p. 22.


\textsuperscript{34} Harijanti, S, & T. Lindsey. 2006. “Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court.” P. 150.

\textsuperscript{35} Article 24C (1) of the 1945 Constitution; Article 10(1)(d) of Law 24 of 2003 on the Constitutional Court; Law 12 of 2008 amending Law 32 of 2004 on Regional Government.
commission’s count with its own. The Court generally rejected arguments made by applicants that various breaches of electoral laws could have affected that election result, maintaining that it lacked jurisdiction to entertain such arguments, pointing to Article 106 of the 2004 Regional Government Law, mentioned above.\(^{36}\)

It was not long, however, before the Court began pushing the boundaries of its newly-acquired jurisdiction – something for which it has become well known in other types of cases.\(^{37}\) After hearing only thirteen *Pemilukada* cases, the Court decided that it would no longer allow its function to be limited to checking vote counts.

**East Java Gubernatorial Election case (2008)**\(^{38}\)

On 11 November 2008, the East Java Electoral Commission declared that Sukarwo and Saifullah Yusuf (‘the Sukarwo pair’) had been duly elected Governor and Deputy Governor of East Java province respectively. They had narrowly won a second-round run-off election, receiving 7,729,944 votes (50.2% of the total votes) to the 7,669,721 votes (49.8%) of their competitors – Khofifah Parawansa and Mujiono (the ‘Khofifah pair’).\(^{39}\) The Khofifah pair disputed the result before the Constitutional Court, alleging that numerous mistakes or improprieties had occurred in 26 counties or cities in the province. In particular, they claimed that in some polling stations officials had used left over ballot papers to lodge hundreds of additional votes for the Sukarwo pair (in some villages, the number of votes exceeded the number of registered voters by several fold) or had simply made up the vote count in the Sukarwo pair’s favour. The Khofifah pair estimated that, taking these breaches into account, they won by 22,461 votes. They asked the Court to invalidate the results of the run-off and declare them the winners.\(^{40}\)

In response, the Sukarwo pair, who were permitted to make arguments as a related party (*pihak terkait*), argued that their election victory should be upheld, adducing documentary and witness testimony to show that there was not, in fact, significant impropriety or miscounting. The respondents, the East Java

\(^{36}\) For example the Luwu Kabupaten case (Constitutional Court Decision 033/PHPU.D-VI/2008), although compare the Kepulauan Talaud case (Constitutional Court Decision 039/PHPU.D-VI/2008).


\(^{38}\) Constitutional Court Decision 41/PHPU.D-VI/2008.


\(^{40}\) Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.27].
Electoral Commission, argued that Article 260C of the 2004 Regional Government Law gave the Court power only to investigate and correct miscounts. According to the Commission, the Constitutional Court, therefore, lacked jurisdiction to consider whether fraud or other violations of electoral law had occurred. Any alleged administrative violations should be reported to the relevant election supervision committee (*Panwaslu*), and any suspected criminal activity to police.

The Court did not accept the arguments of the Khofifah pair or the Commission. As for the former, the Court found that the applicants had put forward insufficient evidence of mistakes or impropriety in the twenty six counties and cities.\(^{41}\) According to the Court, the applicants had adduced only ‘preliminary indications’ of error that did not constitute ‘valid’ evidence under Indonesian law and that these indications had been successfully countered by evidence presented by the local election commission and the Sukarwo pair.

This was not the end of the matter, however. The Court itself identified impropriety in three of the four counties comprising the island of Madura located off of East Java.\(^{42}\) These counties were Sampang, Pamekasan and Bangkalan, and the Sukarwo pair had won all of them. The Court accepted that Sukarwo had, in these three counties, made a ‘contract’ with village administrators under which he pledged financial support if they helped him win the election. The amount depended on the number of villagers who voted and the percentage of votes the Sukarwo pair received as indicated in the following table reproduced in the judgement.\(^{43}\)

<table>
<thead>
<tr>
<th>Number of voters present</th>
<th>Percentage of votes obtained in villages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>51 – 60%</td>
</tr>
<tr>
<td>Less than 2500</td>
<td>Rp 50 million(^{44})</td>
</tr>
<tr>
<td>2501 - 5000</td>
<td>Rp 60 million</td>
</tr>
<tr>
<td>5001 and above</td>
<td>Rp 70 million</td>
</tr>
</tbody>
</table>

\(^{41}\) Constitutional Court Decision 41/PHPU.D-VI/2008, para [4.1].

\(^{42}\) The remaining county of Madura is Sumenep. Even though the applicant alleged that impropriety had occurred there, the Court did not mention Sumenep in its legal consideration.

\(^{43}\) Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.24.1].

\(^{44}\) At 22 January 2013, 10 million Indonesian Rupiah (Rp) was valued at just below AUD$1000.
Under the agreement, Sukarwo also promised other types of financial assistance, such as stimulant funds, support for local state enterprises and increased allowances for village heads and other officials. More than 20 village heads had signed another document in which they pledged their support for the Sukarwo pair. The Court accepted that they had been approached by a man named Haji Ali, who had admitted to arranging the agreement in a formal statement he made before a notary in Sidoardjo.\footnote{Constitutional Court Decision 41/PHPU.D-VI/2008, paras [3.24.1 -3.24.3].} In Sampang, polling officials admitted in writing to increasing the votes for the Sukarwo pair by perforating additional ballot papers. Some of these admissions were also made before a notary. According to the Court, this evidence, combined with other evidence which the Court did not mention, proved that breaches of electoral laws had taken place and required the Court to order fresh elections in those three counties.\footnote{Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.34].}

To issue this decision, the Court needed to address two legal impediments using arguments discussed below. The first issue was that, as mentioned, the Court had statutory jurisdiction only to recheck the ‘final vote recapitulation’ – essentially a mathematical exercise. It was not authorised to entertain allegations of violations of election laws, whether administrative or criminal, in electoral disputes. The second issue was related to the first. If it could justify examining electoral ‘violations’ and found such violations to have occurred in this case, conducting a recount would not be an effective remedy because the impropriety would have occurred before the vote. A recount would just confirm the recapitulation, unless a mistake had been made in counting. The Court needed to find a legal justification to order re-elections.

**Adjudicating breaches of electoral laws**

In the interests of ensuring ‘substantive justice’ and to ‘uphold democracy and the Constitution’, the Court refused to be confined to checking the count of votes recorded in the official election documents. The Court’s constitutional argument to justify this self-proclaimed ‘breakthrough to advance democracy’\footnote{Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.27].} was as follows. According to the Court, the handover of jurisdiction from the Supreme Court to decide *Pemilukada* disputes was not merely a ‘transfer of institutional authority’. Rather, it changed the nature of *Pemilukada* electoral dispute resolution because the Constitutional Court was the ‘guardian of the Constitution’. In this capacity, the Court would view and interpret the law applicable to electoral disputes within the framework of the principles and spirit
of the Constitution, including democracy and justice. Democracy was a fundamental constitutional principle: Article 1(2) declares that sovereignty is in the hands of the people and is to be exercised in line with the Constitution. The Court’s jurisdiction’s clearly extended to safeguarding democracy, including addressing violations that occur when democracy is ‘implemented’, such as at all stages of *Pemilukada.*48 The Court also referred to Article 18(4) of the Constitution, which requires that *Pemilukada* be democratic, and Article 22E(1) which requires that elections be direct, public, free, secret, honest and just.49 As for justice, the Court pointed to Article 28D(1) (‘Every person has the right to recognition, guarantees, protection and legal certainty that is just, and to equal treatment before the law’). The Court decided that justice required it to assess alleged breaches leading to disputed vote count results.50

In this context, achieving what the Court called ‘substantive justice’ could not be hampered by procedural limitations, particularly when constitutional principles were at stake in the face of breaches such as those that had occurred in this case.51 One such limitation was Article 106 of the Regional Government Law, which the Court labelled ‘very limited’, ‘inflexible’ and ‘unclear’,52 and an impediment to truth and justice.53

The Court also made two non-constitutional arguments to help justify its examination of electoral breaches. The first appeared to be pragmatic and seemed to reflect the Court’s fear that violations of electoral rules would not be addressed without its intervention. It needed to play a more substantial role in *Pemilukada* disputes because other institutions had not satisfactorily handled them.54 In this context, failure to intervene would allow a breach of what the Court described as a universal principle of law and justice: ‘no one can benefit from their own violations and infringements and no one should be disadvantaged by the violations and infringements of another’. Election candidates must not, therefore, ‘be disadvantaged in obtaining votes as a result of a breach of the Constitution and of the principle of justice’.55

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48 Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.29].
49 Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.27].
50 Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.28].
51 Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.27].
52 Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.25].
53 Constitutional Court Decision 41/PHPU.D-VI/2008, para [4.4].
54 Constitutional Court Decision 41/PHPU.D-VI/2008, paras [3.25, 3.27].
55 Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.27].
Second, the Court declared that alleged breaches of election laws remained within the corridor of resolving disputes over election results in any event. After all, significant breaches would affect the final vote count. And in investigating these violations, the Court would not be intruding upon the jurisdiction of other courts in election-related cases. The general courts would still be able to adjudicate alleged breaches of a criminal nature, and the administrative courts would retain exclusive jurisdiction to adjudicate and punish electoral malfeasance perpetrated by the state.\footnote{56}

**Ordering recounts and re-votes**

The Court decided that it could order re-counts or even re-votes ‘after considering all the evidence put before it during the case hearings’.\footnote{57} Before reaching that conclusion, however, the Court considered the types of breaches that would justify a recount or revote. These are breaches that ‘significantly influence the final result’ and carry ‘significant weight’ in their ‘impact upon the number of votes obtained by each pair’.\footnote{58} They would be ‘systematic, structured and massive’. And, the ‘intensity and magnitude’ of the breach would determine whether a revote or recount would be ordered.\footnote{59}

By contrast, breaches that were ‘mostly personal’ or ‘not very significant’ would not suffice.\footnote{60} The Court neither defined the types of breaches that would be ‘systematic, structured and massive’ nor explained how significant they would need to be to justify a revote over a recount. The Court did observe, however, that a recount would be inappropriate if improprieties took place before or after the voting.\footnote{61} This was because a recount would almost certainly lead to the same result, even though that result was tainted by illegality and injustice.\footnote{62}

**II: Types of breaches**

In subsequent cases, the Court has applied the ‘systematic, structured and massive’ test to various breaches. The types of breaches that have justified a revote or a recount in these cases have been ‘money politics’ or ‘vote buying’; candidate pairs co-opting public servants or using public facilities or programs to

\footnote{56}{Constitutional Court Decision 41/PHPU.D-VI/2008, paras [3.28, 4.6].}
\footnote{57}{Constitutional Court Decision 41/PHPU.D-VI/2008, para [4.5].}
\footnote{58}{Constitutional Court Decision 41/PHPU.D-VI/2008, paras [3.25-3.26].}
\footnote{59}{Constitutional Court Decision 41/PHPU.D-VI/2008, para [4.2].}
\footnote{60}{Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.33].}
\footnote{61}{Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.32-33].}
\footnote{62}{Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.33].}
assist in their election campaigns, particularly during cooling off periods (‘politicisation of the bureaucracy’); impropriety or incompetence of the local electoral commission (‘KPU breaches’) and intimidation. In several cases, the Court has also been asked to determine whether the local electoral commission had, erroneously or deliberately, either allowed a candidate to stand for election even though that candidate did not meet the requirements to stand, or refused to allow a candidate to stand even though he or she did meet the requirements (‘candidacy cases’). All of these breaches constitute contraventions of Indonesia’s 2004 Regional Government Law (amended in 2008)63 and other lower level laws. A rough breakdown of the types of breaches identified in the forty six cases examined in this study appears in figure 2 below (Please note that more than one breach was identified in most cases).

**Figure 2 | Types of Breaches**

In the words of the Court, three categories of electoral breaches can be distinguished:

*First*, infringements that do not affect, or the influence of which cannot be estimated, upon the votes obtained in an election or *Pemilukada*, such as making a billboard, example ballots that display logos of political

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63 For example, money politics is prohibited under Article 116; politicisation of the bureaucracy under Article 16; various KPU breaches under Article 118; and intimidation under Article 117. Many candidacy rules are contained in Article 115.
parties, and promotional materials that breach procedures stipulated by law. These types of cases have flooded the general and/or administrative courts. Second, breaches in the process of an election or Pemilukada that influence the result of the election or Pemilukada, such as money politics, involvement of government officials or civil servants, allegations of criminal activity, etc. These types of infringements can lead to the invalidation of the election results provided that their impact was significant, that is, because it occurred in a structured, systematic and massive way, the measurement of which has been stipulated by the Constitutional Court in various decisions. On the other hand, breaches that do not significantly affect election results, such as those which are sporadic, partial, individual, or [if they involve provision] of gifts that cannot be proven to influence the choice of voters, are insufficient for the Constitutional Court to invalidate the electoral commission’s count. Third, breaches of principal and measurable requirements for becoming a candidate (such as never having been convicted of a criminal offence and the validity of support for independent candidates) can form the basis for invalidation of the election because the participants did not fulfil the requirements from the start.64

Before discussing these categories in more detail and providing case examples, I note that the Court has not, to my knowledge, limited the types of breaches that could lead it to invalidate an election to the categories it has already identified. In other words, these categories of breaches are not closed; the Court might decide, in future cases, to order revotes or recounts based on other types of breaches.

Money politics

The most common allegation made before the Constitutional Court is undoubtedly that another candidate pair has engaged in ‘money politics’ or ‘vote buying’ (see figure 2 above). To my knowledge the Court has provided no definition of ‘money politics’ in its decisions, though it is commonly understood to occur when candidates, their support teams or sympathisers, give or promise money or goods to voters or election administrators, the bureaucracy or security

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64 Taken from the Pandeglang Kabupaten case (Constitutional Court Decision 190/PHPU.D-VIII/2010), para [3.18.1].
forces, intending to influence voters and/or other parties so that they vote for, or are partial towards, a particular pair.65

Money politics appears to have been the main reason for the Court ordering a revote in several cases. For example, in the Tanjung Balai mayoral election case66 the Court accepted that the winner’s ‘Support Team’ (Tim Sukses) had promised to pay voters if they voted for a particular candidate pair (though the Court did not specify how much they were paid).67

In the Mandailing Natal County election case,68 the Court found that the winners of the election had established a ‘Volunteers Team’, which had not been registered as required by law69 and had been distributing cash and vouchers worth Rp 20,000, 30,000, and 100,000 to eligible voters across ‘almost all’ subdistricts in Mandailing Natal. The winning pair alleged that the vouchers were intended to be given only to Volunteer Team members to repay their expenses. But the Court found that the number of vouchers far outnumbered the members of the Team and the applicant proved that many vouchers, and cash, were handed out to eligible voters so that they would vote for the winners.70 (Ironically, the vouchers were issued as part of a campaign to publicise the prohibition on candidate pairs promising or giving money or goods to influence voters.71)

In most cases, however, money politics has been alleged alongside other breaches such as politicisation of the bureaucracy. In these cases, relatively small cash handouts to citizens or local government officials,72 donations to local

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65 Laporan akhir Eksaminasi atas putusan makamah konstitusi RI Pada sengketa hasil Pemilukada Yang diputus tahun 2008-2010 (on file with author)
66 Constitutional Court Decision 166/PHPU.D-VIII/2010.
67 Constitutional Court Decision 166/PHPU.D-VIII/2010, para [3.22.2-3].
68 Constitutional Court Decision 41/PHPU.D-VIII/2010.
70 Constitutional Court Decision 41/PHPU D-VIII/2010, para [3.24.2].
72 For example in the Sintang Bupati (Constitutional, Court Decision25/PHPU.D-VIII/2010); Pandeglang bupati (Constitutional Court Decision190/PHPU.D-VIII/2010); and Konawe selatan (Constitutional Court Decision 22/PHPU D-VIII/2010) election cases.
institutions such as mosques,\textsuperscript{73} and provision of basic necessities such as clothes, food and electricity generators,\textsuperscript{74} have constituted money politics.

**Politicisation of the bureaucracy**

Allegations of politicisation or co-option – usually against an incumbent regional head or deputy seeking re-election, or a family member – are almost as common as money politics (see figure 2 above). When the Court orders recounts or revotes in these cases, however, ‘politicisation’ is rarely the only ground established; most often, applicants also prove that the incumbent engaged in ‘money politics’.

Examples of ‘politicisation’ prompting the Court to order recounts or revotes include the incumbents making campaign speeches or attempting to garner support at official government meetings or at launches of government programs;\textsuperscript{75} ‘directing’ public servants and officials to support them;\textsuperscript{76} ordering local government officials, village heads, subdistrict heads and teachers to put up campaign posters around their houses;\textsuperscript{77} threatening to transfer or sack civil servants who refused to support them;\textsuperscript{78} and using government facilities to coordinate their election campaigns.\textsuperscript{79} In one case, the Court even condemned the incumbent’s use of government officials to organise a public school marching band (with the symbols of the incumbent’s political party affixed to the instruments) for use in an election campaign.\textsuperscript{80}

Cases in which the incumbent uses official government programs or funds might appear similar to money politics. In both, candidates give something in return for

\textsuperscript{73} For example in the Gresik case (Constitutional Court Decision 28/PHPU.D-VIII/2010); and Sumbawa bupati election case (Constitutional Court Decision 158/PHPU.D-VIII/2010).

\textsuperscript{74} See, for example, the Sumbawa bupati election case (Constitutional Court Decision 158/PHPU.D-VIII/2010).

\textsuperscript{75} See, for example, the Cianjur bupati (Constitutional Court Decision 10-12-PHPU.D-IX-2011); Gresik bupati (Constitutional Court Decision 28/PHPU.D-VIII/2010); Tanjungbalai (Constitutional Court Decision 166/PHPU.D-VIII/2010); and Manado mayoral (Constitutional Court Decision 144/PHPU.D-VIII/2010) electoral cases.

\textsuperscript{76} See, for example, Tebo Bupati (Constitutional Court Decision 33/PHPU.D-IX/2011); Pandeglang bupati (Constitutional Court Decision 190/PHPU.D-VIII/2010); and South Tangerang mayoral (Constitutional Court Decision 209-210/PHPU.D-VIII/2010) election cases.

\textsuperscript{77} As occurred in the Manado mayoral election case (Constitutional Court Decision 144/PHPU.D-VIII/2010).

\textsuperscript{78} Sumbawa bupati (Constitutional Court Decision 158/PHPU.D-VIII/2010); Manado mayoral (Constitutional Court Decision 144/PHPU.D-VIII/2010); and Kotawaringin Barat (Constitutional Court Decision 25/PHPU.D-VIII/2010) election cases.

\textsuperscript{79} Tanjungbalai election case (Constitutional Court Decision 166/PHPU.D-VIII/2010).

\textsuperscript{80} Tebo Bupati election case (Constitutional Court Decision 33/PHPU.D-IX/2011).
electoral support. What appears to distinguish these disbursements from money politics or vote buying is that, for the most part, they probably would have been legal disbursements had they not been ‘tied’ to the campaign, usually by being made during the cooling off period.\textsuperscript{81} Breaches falling into this category have included making donations to village institutions such as mosques; promising equipment, such as motorbikes for schools; pledging extra funding for neighbourhood associations; and issuing food rations to community members who promised to vote for the incumbent.\textsuperscript{82} However, if the incumbent can show that the government program (which the applicant argues was exploited to the electoral advantage of the incumbent) or its actions were routine, took place as a matter of course, or had been previously planned and budgeted, then Court might decide that a breach did not occur.\textsuperscript{83}

Electoral commission breaches

The Court has ordered recounts and revotes in cases in which it finds that the local electoral commission has committed breaches that bring the legitimacy of the election into question.\textsuperscript{84} For example, in the North Tapanuli Bupati election case,\textsuperscript{85} the Court found that ‘serious and significant’ breaches had affected the votes obtained by each candidate pair.\textsuperscript{86} In particular, 6,000 eligible voters had been unable to vote because the North Tapanuli electoral commission had not sent them voting invitations.\textsuperscript{87} More significant, however, was that 26,000 duplicate single identity numbers appeared on the electoral rolls in fourteen out of the fifteen subdistricts of North Tapanuli. The Court declared that the North Tapanuli electoral commission had been ‘manipulative, full of intimidation, dishonest and arbitrary’ and had thereby ‘betrayed democracy’ and Articles

\textsuperscript{81} Most of these disbursements contravene Home Affairs Minister Circular 270/214/SJ, 25 January 2010.
\textsuperscript{82} Cianjur bupati election case (Constitutional Court Decision 0-12-PHPU.D-IX-2011); and Manado mayoral election case (Constitutional Court Decision 144/PHPU.D-VIII/2010).
\textsuperscript{83} See, for example, Tomohon mayoral (Constitutional Court Decision 137/PHPU.D-VIII/2010); Manado mayoral (Constitutional Court Decision 144/PHPU.D-VIII/2010); and Cianjur bupati (Constitutional Court Decision 0-12-PHPU.D-IX-2011) election cases.
\textsuperscript{84} The Court found that local election commissions breached electoral rules in more than ten cases from 2008-2010 all of which, for reasons of space are not considered here. See also “Special courts needed to handle electoral disputes.” \textit{Jakarta Post}, 27 January 2012.
\textsuperscript{85} Constitutional Court Decision 49/ PHPU.D-VI/2008.
\textsuperscript{86} Constitutional Court Decision 49/ PHPU.D-VI/2008, para [3.31].
\textsuperscript{87} Ironically, in a later Constitutional Court Decision (102/PUU-VII/2009), the Court struck down a statutory provision that required voters to possess an invitation in order to vote. The Court held that this requirement was unconstitutional and allowed citizens to vote without an invitation, provided that they presented their official identity card (\textit{Kartu Tanda Penduduk}, KTP), passport or other form of valid identification.
22E(1) and 18(4) of the Constitution. The Court ordered fresh elections in those fourteen subdistricts.

While the Court attributed responsibility for the electoral roll’s accuracy to the local electoral commission in the North Tapanuli case, in many subsequent decisions it has been slower to do so. In those subsequent cases, the Court has found that proper maintenance of the electoral roll is a nationwide problem of population administration over which local electoral commissions have little or no control.

In several other cases, however, the Court has appeared to hold local electoral commissions to unfairly high standards of responsibility, ignoring or underplaying significant difficulties in running elections in regional areas. For example, the Court refused to accept that logistical difficulties were a legitimate reason for delaying polling in two districts of Merauke, an isolated island that marks the north-western outer limit of Indonesia’s territory. The Court rejected claims made by the local commission that the delays were caused by bad weather, which had made it dangerous to transport equipment needed for the election to the island. The Court appeared to overlook that the commission had not been granted official authorisation to travel by boat because of hazardous conditions at sea.

The Court has ordered local electoral commissions to hold re-elections for other breaches, including failure to: invite eligible citizens to vote, open ballot boxes in the presence of witnesses representing those contesting the election or to allow witnesses to sign off on vote counts, count valid twice-perforated votes,

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88 Constitutional Court Decision 49/PHPU.D-VI/2008, paras [3.30, 4.3].
89 See, for example, the Pekanbaru mayoral (Constitutional Court Decision 63/PHPU.D-IX/2011 at [3.26.2.3]); Manado mayoral (Constitutional Court Decision 144/PHPU.D-VIII/2010); South Tangerang Selatan (Constitutional Court Decision 209-210/PHPU.D-VIII/2010); Pandeglang bupati (Constitutional Court Decision 190/PHPU.D-VIII/2010) election cases.
90 Constitutional Court Decision 157/PHPU.D-VIII/2010. See also Pandeglang bupati election case (Constitutional Court Decision 190/PHPU.D-VIII/2010).
91 See, for example, the Bangka Barat bupati election case (Constitutional Court Decision 116/PHPU.D-VIII/2010).
92 See, for example, the Minahasa Utara bupati election case (Constitutional Court Decision 145/PHPU.D-VIII/2010); South Timor Tengah Bupati Election case (Constitutional Court Decision 44/PHPU.D-VI/2008).
93 See the Lamongan Bupati (Constitutional Court Decision 27/PHPU.D-VIII/2010); Tomohon mayoral (Constitutional Court Decision 137/PHPU.D-VIII/2010); and Surabaya (Constitutional Court Decision 31/PHPU D-VIII/2010) election cases.
and to correct discrepancies between vote counts at polling stations and aggregated counts.\textsuperscript{94}

In other cases, the Court has found that polling or electoral commission officials have been involved in more sinister endeavours geared towards helping one pair win, including inflating candidates’ vote counts;\textsuperscript{95} sending excessive numbers of extra ballot papers to polling stations, leading to suspicions that they were used to add votes for particular pairs;\textsuperscript{96} and issuing quick counts favouring one pair well before voting had concluded.\textsuperscript{97} In one case, the Court ordered a revote after accepting that polling officials perforated ballot papers during the night before the election and had declared the result even before citizens had come to vote.\textsuperscript{98}

### Intimidation

The Constitutional Court has found ‘intimidation’, such as threats of physical violence, to have taken place in several cases. Intimidation has not, however, been an independent factor leading the Court to invalidate an election.\textsuperscript{99}

### Candidacy cases

As mentioned, in these cases, the Constitutional Court assesses whether local election commissions complied with provisions of the 2004 Regional Government Law (amended in 2008) when they determined whether candidates were eligible to stand for election. Most of these cases fall into two categories. The first is when a commission allows candidates to stand when they did not meet candidacy requirements; the second is when it prohibits candidates from standing when they were, in fact, eligible. These kinds of infringements, the Court has declared, are ‘very dangerous for the development of democracy in Indonesia’ and require electoral commissions to take ‘strong administrative action’ to prevent the infringement of the constitutional rights of candidates.\textsuperscript{100}

\textsuperscript{94} See, for example, the Sintang Bupati election case (Constitutional Court Decision 25/PHPU.D-VIII/2010).
\textsuperscript{95} Morotai bupati election case (Constitutional Court Decision 59/PHPU.D-IX/2011), para [3.15].
\textsuperscript{96} South Timor Tengah Bupati Election case (Constitutional Court Decision 44/PHPU.D-VI/2008); Gresik Bupati case (Constitutional Court Decision 28/PHPU.D-VIII/2010).
\textsuperscript{97} Gresik Bupati case (Constitutional Court Decision 28/PHPU.D-VIII/2010).
\textsuperscript{98} Constitutional Court Decision 25/PHPU.D-VIII/2010.
\textsuperscript{99} The Court has rarely specified the precise threat. See, for example, the Kotawaringin Barat (Constitutional Court Decision 25/PHPU.D-VIII/2010); Ketapang Kabupaten (Constitutional Court Decision 117/PHPU.D-VIII/2010); Manokwari bupati (Constitutional Court Decision 169/PHPU.D-VIII/2010); and Merauke bupati (Constitutional Court Decision 157/PHPU.D-VIII/2010) election cases.
\textsuperscript{100} Bangka Selatan election case (Constitutional Court Decision 118/PHPU.D-VIII/2010).
Several of the Court’s candidacy cases have been disputes about local electoral commissions’ application of Article 58(f) of the 2004 Regional Government Law. This provision prohibits people who have served a criminal sentence of five years or more from standing for election as the head or deputy head of a regional government. In its first candidacy case – the South Bengkulu mayoral election case (2008)\textsuperscript{101} – the Court ordered a re-election because the local commission had allowed a mayoral candidate, Dirwan Mahmud, to stand even though he had served seven years in prison for murder.

In 2009 the Court was asked to consider the constitutionality of Article 58(f).\textsuperscript{102} (This was a judicial review application, not an electoral dispute. The Court was, therefore, considering a general question – whether Article 58(f) complied with the Constitution – not whether a particular candidate should have been allowed to stand for election.) The Court upheld the applicant’s constitutional rights to equality, including in government (see Articles 27(1), 28D(1) and 28D(3) of the Constitution), deciding that Article 58(f) could not prevent people found guilty of a crime from standing for election provided certain conditions were met. These were openly and honestly disclosing their previous conviction to the public, five years having passed since the sentence had been served, and the crime not being a repeat offence.\textsuperscript{103}

Article 58(f) was again at issue in the Tebing Tinggi Mayoral election case. One of the pairs defeated in this election complained before the Court that Mohammad Syafri Chap, of the winning pair, had been ineligible to stand because he had been convicted of corruption and sentenced to one year’s imprisonment.\textsuperscript{104} This was the minimum sentence for the crime and it had been suspended for 18 months, during which time Chap had stood for mayor. The Court split five judges to four. The Majority\textsuperscript{105} found, following the judicial decision mentioned above, that Chap fell foul of Article 58(f) because five years had not passed since his criminal punishment ended. He was, therefore, ineligible. The Minority,\textsuperscript{106} on the other hand, emphasised that Syafri Chap had not been incarcerated and had openly admitted his conviction, and that the other candidates had not objected to his candidacy at the time of registration or verification. Amidst claims from the

\textsuperscript{101} Constitutional Court Decision 57 PHPUD-VI/2008.
\textsuperscript{102} In Constitutional Court Decision 4/PUU-VII/2009.
\textsuperscript{104} Constitutional Court Decision 12/PHPUD-D-VIII/2010.
\textsuperscript{105} Moh. Mahfud MD, Achmad Sodiki, Muhammad Alim, M. Arsyad Sanusi, dan Ahmad Fadiil Sumadi.
\textsuperscript{106} M. Akil Mochtar, Maria Farida, Hardjono, Hamdan Zoelva.
Tebing Tinggi electoral commission that it could not afford to hold the revote and hundreds rallying in front of the commission’s office, the Court ordered a fresh election and disqualified Chap from standing in that election.

The Court has also been regularly called upon to determine whether local electoral commissions have verified whether candidates have the requisite support in order to stand. According to electoral laws, party-nominated candidates require support from a party or coalition that won at least 15% of votes in their most recent local legislative elections. Political parties, whether alone or in a coalition, can support only one candidate in each Pemilukada. Independent candidates can stand but need to meet various thresholds of public support.

These cases arise when local election commissions disqualify candidate pairs in one of two circumstances. The first is when candidates think that they do, in fact, have the requisite ‘factual’ support but the local electoral commission has determined that they do not. The cases become complex if a coalition of parties initially supports a candidate, but then one or more of the parties withdraws that support. Predictably, the applicant and the commission usually disagree about whether this loss of support has taken the candidate’s support below 15%. Nevertheless, the electoral commission must verify with the party in question whether it has in fact withdrawn its support for the candidate and in many cases applicants argue that the commission has not performed this verification. Verifying support can be particularly onerous. For example, in the Tapanuli Tengah mayoral election case (2011), one pair claimed support from 14 political parties, some of which had more than one central administration.

The second circumstance is when more than one candidate pair claims support from the same political party. Given that each party can only support one

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108 See Article 59(2) of Law 32 of 2004 on Regional Government; Government Regulation 6 of 2005 on the Election and Appointment of Regional Heads.
109 The requisite support differs depending on the level or tier of government. See Law 12 of 2008 amending Law 32 of 2004 on Regional Government.
110 For cases involving the verification of independent candidates, see Buton mayoral (Constitutional Court Decision 91-92/PHPU.D-IX/2011); Kepulauan Yapen bupati (Constitutional Court Decision 218-219-220-221/PHPU.D-VIII/2010); and Jayapura mayoral (Constitutional Court Decision 196-197-198/PHPU.D-VII/2010) election cases.
111 Such as occurred in the Pati mayoral election (Constitutional Court Decision 82/PHPU.D-IX/2011)
112 Constitutional Court Decision 31/PHPU.D-IX/2011.
113 ‘Kemenangan Bonaran Situmeang Tertunda’, Hukumonline, 11 April 2011.
candidate, the local electoral commission must check which of the candidate pairs the party supports. It must do this through the party’s national executive.\textsuperscript{114} The commission’s task can become difficult if a party has split and one side gives support to one candidate while the other side supports another candidate in the same \textit{Pemilukada}.\textsuperscript{115} If the party has split, the commission must check with both the national party executive and the Department of Law and Human Rights.

In cases arising out of these circumstances, the applicant often complains that the commission has not followed these procedures and seeks a stay on the election until proper ‘verification and clarification’ has taken place. Generally speaking, if the applicant can create enough doubt about whether the local commission has properly verified a candidate’s support then the Court will order the electoral commission to verify (or re-verify). In several cases, such as the Jayapura\textsuperscript{116} and Maluku Tenggara Barat Bupati election cases,\textsuperscript{117} applicants have later claimed that the local commission ignored, or imperfectly implemented, Constitutional Court verification orders. In both cases, however, the Court held that the commission had, in fact, re-verified as ordered by the Court.

\textbf{III: Critique of decision-making}

\textbf{Formulation and application of the \textit{East Java} tests}

As mentioned, in the \textit{East Java} case the Court decided that it would not limit itself to the mathematical exercise of checking vote counts in \textit{Pemilukada} cases, but rather would examine ‘breaches’ that were ‘structured, systematic and massive’ which affected the number of votes obtained by contestants in the election. The Court also decided that it could order a revote or recount if such breaches were proven. By contrast, the Court would not interfere in elections marred by ‘incidental, individual and sporadic’ breaches. The Court did not, however, clearly define ‘structured, systematic and massive’ or ‘incidental, individual and sporadic’ in the \textit{East Java} case.

Even though the Court has mentioned and apparently used the \textit{East Java} tests in subsequent cases, it has not yet, to my knowledge, provided a comprehensive definition of any of these phrases. (In some cases the Court has even

\textsuperscript{114} See Article 60 of Law 32 of 2004 on Regional Government (as amended) and Article 61 of Electoral Commission Regulation 13 of 2010.

\textsuperscript{115} Such as in the Buton election case (Constitutional Court Decision 91-92-PHPU.D-IX-2011) and the Tapanuli Tengah mayoral election case (Constitutional Court Decision 31/PHPU.D-IX/2011).

\textsuperscript{116} Constitutional Court Decision 127-PHPU.D-IX/2011.

\textsuperscript{117} Constitutional Court Decision 124/PHPU.D-IX/2011.
inconsistently cast the test. For example in the Tapanuli case, it referred to breaches that were ‘serious, significant and structured’. The Court has, however, provided clues in subsequent cases about what types of behaviour might be considered structured, systematic or massive breaches. Structured appears to mean that the breach involved local government apparatus or officials, or electoral administrators working collectively rather than individually, although the required extent of involvement seems to differ from case to case. Massive breaches will generally have an impact across a large portion of the electorate. Systematic means that it was planned.

On a plain reading, the *East Java* test appears to have two limbs – the Court must be satisfied both that the breach was ‘structured, systematic and massive’ and that the votes obtained by the candidates were affected. In practice, however, the Court appears to conflate the various elements of the test in two ways. First, the Court appears not to require that the breach be structured, systematic and massive because, as we shall see, it has ordered recounts and revotes in cases where the breach was clearly not massive. (The test might, therefore, be better cast as ‘systematic or massive and structured’. In my view, it is difficult to see how a structured or massive breach would not be also be necessarily systematic given that perpetrating it on a sufficiently large scale would presumably require significant planning.) Second, it seems that the Court does not always require that both limbs be fulfilled. In some cases, the Court has appeared to presume that a breach that affects the votes obtained by the parties will be structured, systematic and massive and, vice versa – that a structured, systematic and massive breach will always affect the vote count.

**Scope of the breaches**

It seems that applying the structured, systematic and massive test would naturally require the Court to attempt to precisely determine the scope of the breach that is alleged to have taken place. In some cases, the Court appears to have done this, with breaches and their effect on the election being specifically

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119 These observations were confirmed by interviews I conducted with former Constitutional Court judges and registrars in Jakarta in June 2012.


121 Mandailing Natal Bupati election case (Constitutional Court Decision 41/PHPU.D-VIII/2010), para [3.24.2].
mentioned in its decision.\textsuperscript{122} For example, the Court has refused to order fresh elections in money politics cases because the applicant has failed to prove who gave and received the money, and how much money changed hands.\textsuperscript{123}

However, in many cases the Court has not considered whether the breach was structured, systematic and massive, or whether the breach could have actually affected the votes obtained by the contesting pairs. The Court’s general approach is to set out the facts that indicate breaches and then, without determining the actual scope of the breach, to simply assert either that they are ‘structured, systematic and massive’ or merely ‘incidental, individual and sporadic’.\textsuperscript{124} As mentioned, this is problematic given that the test the Court itself devised seems to require it to assess this scope.

Some of the Court’s money politics cases illustrate this problem clearly. In them, the Court has found, often on the basis of testimony from several witnesses, that handouts of cash or goods constituted money politics that justified fresh elections without specifying how many people received them. Of course, it is simply not possible to determine whether a breach was ‘massive’ or could have affected the vote count without identifying how many voters were influenced and what proportion they constituted of overall voters.

The Konawe Selatan case\textsuperscript{125} provides a typical example of this. In it, the Court accepted that money had been distributed at the official residence of the incumbent Bupati. This claim had been substantiated by four affidavits and by one witness at trial who also presented a photograph of himself receiving money at the Bupati’s house; and ‘other evidence’ which the Court did not specify.\textsuperscript{126} The incumbents did not attempt to refute this evidence. The Court concluded that money politics had occurred, but did not attempt to assess how much money was paid or received, the number of recipients, or even whether recipients were required to promise to vote for the incumbent in return for the money.

\begin{itemize}
\item \textsuperscript{122} See, for example, the Tebo Bupati election case (Constitutional Court Decision 33/PHPU.D-IX/2011), para [3.24.6]; Kotawaringin Barat mayoral election case (Constitutional Court Decision 45/PHPU.D-VIII/2010).
\item \textsuperscript{123} As in the Cianjur bupati election case (Constitutional Court Decision 0-12-Phpu.D-IX-2011), para [3.26].
\item \textsuperscript{124} For example, in the Surabaya mayoral (Constitutional Court Decision 31/PHPU.D-VIII/2010); Gresik Bupati (Constitutional Court Decision 28/PHPU.D-VIII/2010); Surabaya mayoral (Constitutional Court Decision 22/PHPU D-VIII/2010); and Mandailing Natal Bupati (Constitutional Court Decision 41/PHPU.D-VIII/2010) election cases.
\item \textsuperscript{125} Constitutional Court Decision 22/PHPU D-VIII/2010.
\item \textsuperscript{126} Constitutional Court Decision, 22/PHPU D-VIII/2010, para [3.34].
\end{itemize}
The Pekanbaru mayoral election case\textsuperscript{127} provides another example of the Court ordering fresh elections without outlining the scope of the breach. In that case, the Court accepted that a group from a neighbouring district had travelled to Pekanbaru the night before the poll to vote illegally using false names, but it did not disclose how many people had travelled to vote illegally, where they voted, or whether they did in fact vote.\textsuperscript{128} It is entirely possible that, even if they did vote, there were so few of them that their votes could not have significantly affected the election. The Court also found that the Pekanbaru mayor had used his position to garner support for the winners. He had introduced them at official functions and inauguration ceremonies, urging attendees such as village and neighbourhood association heads to vote for them in official speeches. The Court held that the mayor had ‘made decisions or taken action that favoured one of the pairs or had at least allowed his or her officials to be active in the victory of one of the pairs’.\textsuperscript{129} However, the Court did not attempt to determine how many people attended the meetings or to call witnesses to state that they voted as a result of the meetings. Without this information, it seems very difficult, perhaps impossible, to determine whether these meetings actually affected the votes obtained by the pairs.

In some cases, the Court has even ordered recounts for breaches that could not have materially affected the votes obtained and could not, therefore, have affected the outcome of the election. The most extreme example of this that I found occurred in the Gorontalo Governor Election case (2008).\textsuperscript{130} In it, the Court ordered the electoral commission to reduce the winning pair’s vote count by a mere four votes, taking their count from 23,108 votes to 23,104.\textsuperscript{131} This decision was based solely on the evidence of four witnesses who admitted to voting illegally, either by voting more than once, accepting bribes to vote for a candidate pair, or voting despite not being registered.\textsuperscript{132} In cases such as this, the Court appears more concerned with punishing breaches than with ensuring the legitimacy of elections. Yet punishing breaches that do not affect the outcome of elections is, as the Court has been at pains to emphasise in some decisions, a matter for other institutions, such as the police and ordinary courts.

\textsuperscript{127} Constitutional Court Decision 63/PHPU.D-IX/2011.
\textsuperscript{128} Constitutional Court Decision 63/PHPU.D-IX/2011, para [3.26.3.3].
\textsuperscript{129} Constitutional Court Decision 63/PHPU.D-IX/2011, para [3.26.5.3].
\textsuperscript{130} Constitutional Court Decision 31/PHPU.D-VI/2008.
\textsuperscript{131} Narrowly defeating the second-place getter, who obtained 23,047 votes.
Evidence in *Pemilukada* cases

Legal cases the world over turn on the evidence that can be produced by the various parties involved in the dispute – the person making the allegation (whether that be the prosecutor (in criminal cases) the plaintiff (in civil cases) or the applicant (including in constitutional cases)), the person responding to those allegations (the respondent or defendant) and any other party (including related parties or *pihak terkait*). In many countries – particularly those following the civil law tradition – judges will actively seek out information and call their own witnesses, usually if the evidence adduced by the parties is unclear, incomplete or requires verification.

Generally speaking, *Pemilukada* cases in the Indonesian Constitutional Court are no different. Applicants and respondents put their arguments before the Court and must substantiate them with evidence such as documents, witness testimony, videos, photographs or audio recordings. Related parties have similar opportunities to defend themselves, make arguments and adduce evidence. The Court will often call its own expert witnesses to clarify electoral laws and practices.

In many cases, however, the Court’s use of evidence has been problematic in at least three ways. First, the Court has relied heavily on evidence – particularly witness testimony – that the Court does not appear to have scrutinised and might be of dubious trustworthiness. Second, the Court has ordered recounts and revotes on the basis of weak or unspecified evidence. Finally, sometimes the Court will simply assert that an argument has been proven when unrefuted evidence has been presented to support it. In some cases, however, the respondent has had no opportunity to counter evidence put forward by the applicant.

Uncritical approach to evidence

As mentioned, prior to the *East Java* case, the evidence upon which allegations were made and responded to in *Pemilukada* disputes was largely documentary. The main function of the Constitutional Court, like the Supreme Court before it, was to ensure that documents containing vote counts were formally valid and that the votes had been aggregated correctly. However, since the expansion of the Court’s jurisdiction in *East Java* and the Court’s new focus on breaches of various electoral rules, the Court has needed to consider a much wider variety of evidence. Of course, even after *East Java*, applicants still substantiate their allegations with documentary evidence (such as ballot papers, vote counts and aggregated tallies). However, in many cases in which breaches are alleged little
or no relevant documentary evidence is available, particularly if perpetrators cover their tracks. Many cases have, therefore, hinged on the testimony of citizens or officials who claim to have directly seen a breach or even admitted to being involved in one.\(^{133}\) The increase in the Court’s reliance on witness testimony has, it seems, led to a commensurate increase in the number of witnesses parties call to support their arguments. In the Merauke election case (2010),\(^{134}\) for example, fifty eight witnesses testified before the Court.\(^{135}\)

Use of witness testimony is problematic in the Indonesian context, however, because it leads to perceptions that candidates involved in the case, and their political parties, are involved in ‘witness-buying’. If electoral money politics is as widespread as is commonly claimed, then bribing or paying off witnesses to help build one’s case is unlikely to be beyond most parties and candidates.

However, the Court has done very little to address these inherent problems of witness credibility. It has not developed a systematic body of principles or practices to help it determine whether evidence, particularly witness testimony, is reliable and can, therefore, be used to determine whether a breach has occurred. The Court only rarely casts doubt on the credibility of particular witnesses. And when it has, the Court either did not explain why a witness lacked credibility,\(^{136}\) or based its credibility assessment largely on whether the testimony was consistent with the testimony of other witnesses presented at trial.\(^{137}\)

For example, in the 2008 Gorontalo Governor Election case,\(^{138}\) mentioned above, the Court reduced the winners’ vote count by four votes, relying solely the testimony of four witnesses who admitted to voting illegally.\(^{139}\) The Court rejected the testimony of seven further witnesses called by the applicants,

\(^{133}\) For example, witnesses admitted to illegally voting in the Pekanbaru mayoral election case (Constitutional Court Decision 63/PHPU.D-IX/2011 [3.26.3.3]).

\(^{134}\) Constitutional Court Decision 157/PHPU.D-VIII/2010.

\(^{135}\) In the South Tangerang Mayoral election case (Constitutional Court Decision 209-210/PHPU.D-VIII/2010) 31 witnesses; Surabaya Mayoral election case (Constitutional Court Decision 31/PHPU.D-VIII/2010), 40 appeared; Bandar Lampung Kabupaten election case (Constitutional Court Decision 88/PHPU.D-VIII/2010), 35 witnesses; Medan mayoral election (Constitutional Court Decision 68/PHPU.D-VIII/2010) 33 appeared; South Nias Kabupaten election (Constitutional Court Decision 05/PHPU.D-IX/2011) 28 witnesses.

\(^{136}\) See the Manado mayoral election case (Constitutional Court Decision 144/PHPU.D-VIII/2010); and Konawe Utara election case (Constitutional Court Decision 191/PHPU.D-VIII/2010).

\(^{137}\) Many are actually heard by teleconference, which surely would make it more difficult to consider whether a witness is being truthful and prevents an effective cross-examination.

\(^{138}\) Constitutional Court Decision 31/PHPU.D-VI/2008.

claiming that their testimony was inconsistent with the testimony of others and was hearsay (that is, not experienced by the witness him or herself, but was based on explanation of another person). Remarkably, the Court also held that some of these seven witnesses could not be considered ‘honest’ because they had admitted to taking money, but had not then voted for the candidate who gave them the money.

The Court has also upheld arguments based on the testimony of a single witness. In the Manado mayoral election case, for example, the applicants had argued that the local electoral commission had breached electoral rules because some voters had received more than one invitation to vote and because non-citizens of Manado received invitations to vote even though they were ineligible. In support of this argument, the applicant called one witness who testified that she did not receive an invitation letter and that someone else had used her letter in order to vote. On the basis of this testimony alone, the Court found that the electoral commission had breached electoral rules.

This finding is problematic for several other reasons that appear to illustrate the Court’s failure to critically assess evidence in light of the circumstances surrounding the case. First, the Court did not investigate how the witness could have known that someone else had used her invitation. The plausibility of the witness’s explanation might have assisted the Court to assess her credibility. Second, the Court did not disclose the evidence upon which it relied to conclude that some people had received more than one invitation to vote. No witnesses were called to testify that they had received two invitations or had seen someone voting twice. The Court also did not seek to explain how it might be possible for people to vote twice in the same election, at least absent complicity with polling officials. Before citizens are permitted to vote, a polling official should check their fingers. This is because, after voting, citizens are required to submerge a finger in ink of strong indelibility that cannot be removed before polling closes. It should, therefore, not be possible to vote twice if ink can be seen on one’s fingers.

Another case that seems to illustrate some of the problems with the Court’s reliance on witness testimony and its apparent reluctance to critically assess the available evidence was the South Bengkulu case – one of the most evidentially

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141 Constitutional Court Decision 31/PHPU.D-VI/2008, para [3.21].
142 Constitutional Court Decision 144/PHPU.D-VIII/2010.
143 Constitutional Court Decision 144/PHPU.D-VIII/2010, para [3.28].
bizarre cases studied. In this case, the Court decided that the South Bengkulu election should be repeated without one of the successful candidates, Dirwan Mahmud. This was because, according the Court, Dirwan had been ineligible to stand because he had been convicted of a crime for which a maximum penalty of five years or more applied.

The case turned largely on evidence as to whether Dirwan had, in fact, served a seven-year prison sentence. Dirwan argued that he had not. At the time candidates were applying to stand, the applicant informed the South Bengkulu electoral commission about Dirwan’s conviction. The commission sought clarification from the court that allegedly convicted him and the police who were said to have investigated him, but could find no record of the case. Given the lack of documentary evidence, the applicant called several witnesses, including prisoners who testified that they had served with Dirwan, and prison officials who said that they recognised Dirwan as a prisoner. These witnesses explained that they knew Dirwan by a different name: Roy Irawan bin Mahmud Amran. The Head of Cipinang prison, where Dirwan had allegedly been held, testified that records for the relevant period had been destroyed in a fire at the jail, but that East Jakarta District Court had convicted a person named Roy Irawan bin Mahmud Amran of the murder of an official from the Agriculture Department and sentenced him to prison in 1985 until 1993.144 The Court accepted the witness testimony, largely because Dirwan and the South Bengkulu Local Election Commission could not refute it.145 According to the Court, then, Dirwan was ‘none other than Roy Irawan bin Mahmud Amran’.146

It is unclear why the Court relied upon witness testimony in this case, at least without explaining its rationale for doing so. It seems that the Court could have imputed from the lack of documentary evidence held by the police that allegedly investigated and the court that allegedly convicted Dirwan that Dirwan had not, in fact, been investigated or convicted of the crime. Surely if Dirwan had in fact committed the crime the respondent or the Court could have at least attempted to call one of the police officers that investigated him or the judges that convicted him to testify if they were still alive. The alternative – relying on the testimony of prison officials and even prisoners – was hardly a credible option.

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144 Constitutional Court Decision 144/PHPU.D-VIII/2010, para [3.23.6].
145 Constitutional Court Decision 144/PHPU.D-VIII/2010, para [3.23.6].
146 Constitutional Court Decision 144/PHPU.D-VIII/2010, para [3.23.7].
Unspecified evidence

In some cases, the Court has failed to specify the evidence upon which it has relied to establish breaches. For example, in the Merauke bupati election case, both the applicants and the winners claimed that the other had conducted a ‘morning raid’ on the day of the election, giving out basic necessities and cash to voters, local institutions and figures. The Court declared that the evidence adduced during hearings indicated that the winner was the culprit. The Court did not specify this evidence, and the applicants themselves did not specifically mention the evidence in its pleadings.

In the Tebo Bupati election case, the Court accepted that at least four subdistrict heads had publicly supported the incumbents, attended their campaign functions and allowed them to use state-owned facilities for their activities. However, the Court did not specify the evidence upon which it made this finding, declaring merely that the ‘applicant’s written evidence and witnesses were sufficient’.

Proven unless refuted

It is usually for applicants to prove the breach that they allege. The Court has thrown out many cases in which applicants have been unable to adduce sufficient evidence to convince it of the alleged breach and in which respondents have successfully challenged applicants’ evidence. As mentioned, however, the Court can, and regularly does, call witnesses, including experts in electoral and constitutional law, when it needs further information. This regularly occurs in other Indonesian courts and in many courts throughout the civil law world. This the Court does in an endeavour to be ‘convinced’ that its decision is correct. Following these practices, the Court has been highly active in examining the arguments of the parties in some cases. In others the Court has even made findings and orders based on facts that the parties did not mention in their applications.

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147 Constitutional Court Decision 157/PHPU.D-VIII/2010.
149 Tebo Bupati election case (33/PHPU.D-IX/2011).
150 Tebo Bupati election case (33/PHPU.D-IX/2011) [3.23.4.4].
However, in other cases, the Court appears to have taken a somewhat adversarial approach. That is, the Court seems content to hear the evidence given by the applicant and, if the respondent or the related party does not refute that evidence, the Court accepts as proven whatever the applicant seeks to prove with that evidence.\textsuperscript{153} In other words, the Court appears to function as an umpire, determining which argument or evidence was stronger. These cases seem to be inconsistent with cases, mentioned above, in which the Court is an active participant in the process. This inconsistency gives an air of arbitrariness to the Court’s decision-making.

Most problematic, however, are cases in which the respondent has no opportunity to counter evidence put forward by the applicant, but the Court considers the evidence unrefuted and bases its decision on that evidence. This occurred in the \textit{East Java} case itself. The formal proceedings of the case had closed. All formal submission had been made and all witnesses called. All that remained for the case to conclude was for the judges to deliberate and write their decision, a process which can take several weeks or months. It was at this point – that is, \textit{after} the hearings had concluded – that the pivotal evidence in the \textit{East Java} case about the ‘contract’ and the notarised admissions mentioned above was lodged with the Court. None of this evidence appears in the complete written transcripts of proceedings published on the Court’s website. This means that neither the respondents nor the related parties were given a chance to respond to the evidence, including by submitting their own evidence casting doubt on the ‘contract’ or the notarised document. The Court simply accepted the contract and admissions to bolster the applicant’s claims, which the Court had noted in it is decision were not initially accompanied by significant evidence.\textsuperscript{154} The Court then used that evidence to invalidate the elections in the places in which the contract had been applied.

Of course, the contract and the notarised admissions should have been adduced during the proceedings proper so that the related party and the respondent could counter them or challenge their veracity. After all, one of the primary purposes of judicial proceedings is to allow the parties to put forward evidence to be scrutinised by the other party and the Court. The respondent, for example, might have demanded that the notary, Haji Ali, and the person making the


\textsuperscript{154} Constitutional Court Decision 41/PHPU.D-VI/2008, para [3.33].
admission be brought in to testify and be cross-examined. A pertinent line of enquiry might have been to question why the person had admitted their wrongdoing before a notary. There may have been an acceptable explanation for this, but in its absence, one is left to speculate about whether the witness testimony was credible. As for the contract, the Court should have tested its authenticity to ensure that it was not simply made up by the applicant and checked whether village heads had followed it and received money.

Critically, the Court did not, in its published reasons, mention that the evidence was submitted to it after the ‘trial’ let alone explain why it allowed the applicants to submit it. Again, one is left to speculate whether this indicates impropriety on the part of the Court – after all, allowing the applicant to produce uncontestable winning evidence might be seen as indicating bias in favour of the applicants. At the very least it seems to demonstrate a lack of concern for transparency.

Conclusion

In *East Java*, the Constitutional Court seemed to have sound motivations and good constitutional arguments for going beyond mere vote counting in *Pemilukada* disputes to examine alleged breaches of electoral laws and to order recounts and revotes if necessary. However, the way the Court has formulated the ‘test’ and subsequently applied it has been inconsistent and appeared arbitrary. In particular, the Court has, in several cases, identified a breach and ordered re-elections without specifying the extent of the breach or considering whether that breach could have affected the votes received by the pairs or the outcome of the election. This does not sit comfortably with the primary justification the Court provided in *East Java* for expanding its jurisdiction beyond vote counting: to guard democracy and the legitimacy of the elections. It appears that, in some cases at least, the Court has pursued breaches *per se*, which, the Court has emphasised, is properly the mandate of the general and administrative courts. Also highly questionable has been the Court’s use of evidence in many cases. The Court has rarely appeared to adequately test the credibility of the witnesses, despite the real possibility of partiality. It has never sought to punish a witness for perjury. It has upheld applications based on evidence that was vague and unspecified or that was not refuted, even when – as in the *East Java* case – the respondent was not given the opportunity to refute. In short, the Court has given itself wide-ranging power, but has not exercised it accountably or transparently. These criticisms, particularly those relating to witness testimony, mirror some of those encapsulated in the quote criticising the performance of the high court in the *Depok* case set out at the beginning of this paper.
However, even though this assessment of the Court’s decision-making has not been positive, perhaps it unfairly ignores the extraordinary difficulties the Court faces when hearing and deciding *Pemilukada* cases. Determining the scope and impact of electoral impropriety is surely a challenging task, particularly when parties often lodge very significant amounts of documentation and, as mentioned, adduce dozens of witnesses to support their arguments. The Court is under enormous pressure, with its nine judges resolving well over 100 *Pemilukada* cases annually over the past few years, all within a self-imposed deadline of fourteen days,155 and alongside the dozens of other complex cases the Court decides each year. In this context, the Court’s limited time and resources make precisely determining the scope of breaches and fully interrogating the evidence in every case very difficult.

155 Article 13 of Constitutional Court Regulation 15 of 2008.
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