



Received: 16-03-2024
Accepted: 26-04-2024

International Journal of Advanced Multidisciplinary Research and Studies

ISSN: 2583-049X

Legal Certainty Principle in *Judicial Activism* Decision of the Constitutional Court of the Republic of Indonesia Case Number 143/PUU-XXI/2023

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DOI: <https://doi.org/10.62225/2583049X.2024.4.3.2754>

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Abstract

Judicial activism in the petition for Law Number 143/PUU-XXI/2023 concerning the term of office of regional heads / deputy regional heads can present the principles of legal certainty and substantive justice. The Petitioners in the case felt that they suffered constitutional losses due to a legal vacuum where the legislators failed to regulate the calculation of the term of office of regional heads elected in 2018 but inaugurated in 2019. As a result, the applicants experienced a cut in the term of office and could not run the

full term of office for 5 (five) years. The type of research is normative, with a statutory approach, conceptual approach and comparative approach. The results showed that *judicial activism* carried out by the Constitutional Court could find substantive differences between Petition Number 143/PUU-XXI/2023 and Petition Number 62/PUU-XXI/2023, and the court could find a legal vacuum and restore the constitutional losses of the petitioners.

Keywords: Judicial Activism, Legal Certainty, Justice

1. Introduction

Judicial activism refers to the actions of judges in interpreting laws and constitutions in a proactive way, often going beyond the traditional boundaries of legal interpretation. In some countries, *judicial activism* reflects distinctive social, cultural and political dynamics. These include legal history, traditions of constitutional interpretation, and responses to pressing social issues. The Constitutional Court has several roles in the Indonesian legal system including as the *first*, Guardian of the Constitution where the Constitutional Court is responsible for maintaining and ensuring that laws in Indonesia are in accordance with the 1945 Constitution. In addition, the Constitutional Court also has the authority to conduct judicial reviews of laws that are considered contrary to the constitution. *Second*, the Constitutional Court examines and decides on the settlement of Constitutional Disputes where the Constitutional Court also has the authority to resolve disputes relating to the results of general elections, disputes over power between state institutions, and the dissolution of political parties. These matters can have a major impact on the political and legal dynamics in Indonesia and *third*, the Protection of Constitutional Rights through its decisions, where the Constitutional Court is responsible for protecting the rights of citizens, including human rights. The Constitutional Court's decision rests on whether a particular government policy or law violates those rights¹. In the practice of *judicial activism*, laws are adapted to change society through constitutional interpretation and previous court decisions to encourage the application of constitutional values². *Judicial activism* can be defined as the dynamics of judges who hold judicial power in making and delivering decisions without crossing the boundaries set by the constitution.³ The concept of *judicial activism* is still relevant in the context of Indonesia's Constitutional Court as they have an important role in interpreting and upholding the constitution. This allows the Constitutional Court to significantly influence the

¹ Ni'matul Huda dan R. Nazriyah. *Teori dan Pengujian Peaturan Perundang-undangan*. (Serang: Nusa Media, 2011)

² B.C. Smith, *Judges and Democrazitation: Judicial Independence in New Democracies*, (London: Routledge, 2022). Diakses 19 April 2024. Doi: <https://doi.org/10.4324/9781003334613>

³ S.P. Sathe, "Judicial Activism in India, Transgressing Borders and Enforcing Limits" in Zul Amirul Haq, M. Faiz Putra Syanel, "*Judicial Activism* di Pengadilan Tata Usaha Negara Sebagai Upaya Progresivisme Hakim Dalam Melindungi Hak Konstitusional Warga Negara", *Jurnal Sosial dan Budaya Syar-I (SALAM)*, Vol. 9 No. 4 (2022), hlm. 1248. Diakses 19 April 2024. Doi: <https://doi.org/10.15408/sjsbs.v9i4.26659>

development of law and public policy through its decisions. The Constitutional Court can have more of a negative legislature role and be a control mechanism for the legislature. Even in certain circumstances, the Constitutional Court acts as a *positive legislature* through its various decisions that have nuances of *judicial activism*⁴. Basically, based on the provisions of Article 56 paragraph (3) and Article 57 paragraph (1) of Law No. 8 of 2011 concerning amendments to Law No. 24 of 2003 concerning the Constitutional Court, the decision of the Constitutional Court could initially only be in the form of a ruling that granted the application, rejected the application in part or in full, or stated that the law, article, paragraph, or phrase that was contrary to the 1945 Constitution of the Republic of Indonesia did not have *legally binding force (legally null and void)*. Constitutional Court judges in their development can make various decisions, including those that are conditionally constitutional, those that are conditionally unconstitutional, those that delay the application of the decision, and those that create new regulations⁵. This includes not only judicial review, but also formal review of laws, such as the Job Creation Law.

Judicial activism often goes beyond the conventional boundaries of legal interpretation as judges are proactive in interpreting laws and constitutions, with *judicial activism* reflecting the unique social, cultural and political dynamics of different countries. This includes legal history, the practice of constitutional interpretation, and the social, political and cultural dynamics of each country which can be distinctive and unique. The experience in Pakistan sheds light on this concern as *judicial activism* in Pakistan has been brief and selective especially in cases involving military officers⁶. According to Lino Graglia, *judicial activism* is a method that allows judges to make court decisions based on political policies or even their personal perspectives⁷. In January 1947, Arthur Schlesinger introduced the term *judicial activism* which was first used by the United States Supreme Court. Some critics in the United States were concerned that *judicial activism* could threaten constitutional principles such as democracy and separation of powers with its extreme measures. Courts as a whole, and constitutional courts in particular, are heavily

influenced by the social, cultural, and economic background of a particular political system, and courts cannot work well when political and ideological systems are unstable⁸. Some legal scholars argue that *judicial activism* violates the principles of democracy and ignores the principle of separation of powers, but if viewed objectively, *judicial activism* can bring goodness and justice into the democratic system. Satjipto Rahardjo's progressive legal theory is in line with this opinion. Satjipto argues that law should function for the benefit of humans and not the other way around⁹.

The Constitutional Court of the Republic of Indonesia has several times carried out *judicial activism* which is divided into several types and dimensions of *judicial activism*, namely (1) *Majoritarianism*, which is a dimension that views policies that have been chosen and implemented on the basis of a democratic process that is denied in the judicial process as seen in the Constitutional Court's Decision on the "majority vote" case Number 22-24 / PUU / PUU-VI / 2008 concerning Testing Law Number 10 of 2008 concerning General Elections for Members of the DPR, DPD and DPRD; (2) *Interpretive Stability*, which is a dimension that assesses the extent to which decisions, doctrines, and courts that have existed previously from a change, where this dimension is found in Constitutional Court Decision Number 072-073/PUU-II/2004 concerning Testing Law Number 32 of 2004 concerning Regional Government and Constitutional Court Decision Number 97/PUU-XI/2013 concerning Testing Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Regional Government; (3) *Interpretive Fidelity*, where this dimension describes the extent to which articles in laws and regulations produce interpretations that differ from the intentions of the institution that made the constitution, as seen in Constitutional Court Decision Number 11/PUU-III/2005 regarding the Examination of Law Number 20/2003 on the National Education System; (4) *Substance/Democratic Process Distinction* where this dimension looks at the extent to which judges' decisions create substantive policies compared to maintaining the results of political democratic process decisions as seen in Constitutional Court Decision Number 5/PUU-IX/2011 regarding the Examination of Law Number 30 of 2002 concerning the Corruption Eradication Commission by issuing a *conditionally unconstitutional* interpretation; (5) *Specificity of Policy* where this dimension considers the extent to which the court's decision creates its own policy that contradicts the principle of discretion controlled by other institutions or individuals as seen in the Constitutional Court's Decision on the Nomination of KPU Members case Number 81/PUU-IX/2011 regarding the Examination of Law Number 15 of 2011 concerning General Election Organizers; and (6) *Availability of an Alternate Policymaker* where this dimension analyzes the extent to which the court decision substitutes sufficient considerations from other government institutions as seen in

⁴ Beni Kharisma Arrasuli, Yumni Nadhilah, "Praktik Judicial Activism dalam Putusan Mahkamah Konstitusi Dikaitkan dengan Prinsip Pemisahan Kekuasaan", *UNES LAW REVIEW*, Vol. 6 No. 1 (September 2023), hlm. 767. Diakses 19 April 2024. DOI: <https://doi.org/10.31933/unesrev.v6i1.882>

⁵ Mahrus Ali, M., Rahmawaty Hilipito dan Syukri Asy, M., Pusat Penelitian dan Pengkajian Perkara, ari, & Teknologi Informasi dan Komunikasi Mahkamah Konstitusi Republik Indonesia Jl Medan Merdeka Barat No, P. (n.d.). *Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru the Implementation of Constitutional Court Verdict on Conditionally Constitutional and New Legal Norm*.

⁶ Nauman Reayat, Neelam Farid, Muhammad Kamran Khan, Anwarul Mujahid Shah, "Judicial Activism and its Implication for Good Governance: A Case for Judicial Reforms in Pakistan", *Review of Applied Management and Social Sciences*, Vol. 4 (1) (2021), hlm. 1. Diakses 19 April 2024. DOI: <http://dx.doi.org/10.52567/pjsr.v4i03.748>

⁷ Keenan D. Kmiec, "The Origin and Current Meanings of Judicial Activism", *92 Calif. L. Rev.* 1441 (2004). hlm. 1464. Diakses 19 April 2024. DOI: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/calr92&div=42&id=&page>

⁸ Bagus Surya Prabowo, "Menggagas Judicial Activism Dalam Putusan Presidential Threshold Di Mahkamah Konstitusi", *Jurnal Konstitusi* Vol. 19 No. 1 (2022), hlm. 77. Diakses 19 April 2024. DOI: <https://doi.org/10.31078/jk1914>

⁹ Cholidin Nasir, "Mahkamah Konstitusi Dan Kebijakan Kriminal", *Jurnal Konstitusi* Vol. 15 No. 3 (2018), hlm. 548. Diakses 19 April 2024. DOI: <https://doi.org/10.31078/jk1535>

the Constitutional Court Decision on DPT Presidential Election case Number 85/PUU-X/2012 regarding the Examination of Law Number 32 of 2004 concerning Regional Government¹⁰.

2. Decision of the Constitutional Court Case Number 143/PUU-XXI/2023

Case Position

The petition for judicial review in Case No. 143/PUU-XXI/2023 (hereinafter referred to as PUU No. 143) is a petition to review Article 201(5) of Law No. 10/2016 on the Second Amendment to Law No. 1/2015 on the Stipulation of Government Regulation in Lieu of Law No. 1/2014 on the Election of Governors, Regents and Mayors into Law (hereinafter referred to as the Pilkada Law) against Article 1(2) and (3), Article 18(4), Article 27(1), and Article 28D(1) of the 1945 Constitution. The petitioners in this case consist of 7 (seven) individual Indonesian citizens who are currently serving as Regional Heads of Provinces, Regencies and/or Cities, namely (1) Murad Ismail as Governor of Maluku, (2) Emil Elestianto Dardak as Deputy Governor of East Java, (3) Bima Arya Sugiarto as Mayor of Bogor, (4) Dedie A. Rachim as Deputy Mayor of Bogor, (5) Marten A. Taha as Mayor of Gorontalo, (6) Hendri Septa as Mayor of Padang, and (7) Khairul as Mayor of Tarakan.

Article 201 paragraph (5) of the Election Law reads "Governors and Deputy Governors, Regents and Deputy Regents, Mayors and Deputy Mayors resulting from the 2018 Election shall hold office until 2023". The provisions of the Article are essentially related to the term of office of Regional Heads who are subject to arrangements regarding simultaneous elections as stipulated in the Pilkada Law, where the Plaintiffs object because there is a reduction in the term of office from the time they should have completed. The 1st Applicant Murad Ismail was inaugurated on April 24, 2019 and will experience a reduction in time in office for 4 months; 2nd Applicant Emil Elestianto Dardak was inaugurated on February 13, 2019 and will experience a reduction in time in office for approximately 2 months; 3rd Applicant Bima Arya Sugiarto and 4th Dedie A. Rachim were sworn in on April 20, 2019 and will experience a reduction in time in office for approximately 4 months; 5th Applicant Marten A. Taha was sworn in on June 2, 2019 and will experience a reduction in time in office for approximately 6 months; and 6th Applicant Hendri Septa was sworn in on May 13, 2019 and will experience a reduction in time in office for approximately 5 months; and 7th Applicant Khairul was sworn in on March 1, 2019 and will experience a reduction in time in office for approximately 3 months.

The Plaintiffs in their petition also listed the differences from PUU Petition No. 143 which is different from a similar Petition with case register No. 62/PUU-XXI/2023 (hereinafter referred to as PUU No. 62) where the article submitted for review is the same, namely Article 201 paragraph (5) of the Pilkada Law but different constitutionality test stones, where PUU No. 62 uses Article 18 paragraph (4), paragraph (5), paragraph (7) and Article

28D paragraph (1) of the 1945 Constitution. Petitioner No. 62 filed a reason that basically the results of the 2018 Election limit the applicant's term of office to end in 2023, where the Panel of Judges who examined and tried the case of Petition No. 62 rejected the entire petition.

Table 1: Differences in the Constitutionality of Petition Number 62 and Number 143

Case No.	Article of application	The touchstone of constitutionality	Verdict
62/PUU-XXI/2023	Article 201 paragraph (5) of the Pilkada Law	Article 18 paragraph (4), paragraph (5), paragraph (7) and Article 28D paragraph (1) UUD NRI 1945	Rejected in its entirety
143/PUU-XXI/2023	Article 201 paragraph (5) of the Pilkada Law	Article 1 paragraph (2) and (3) , Article 18 paragraph (4), Article 27 paragraph (1) , and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia	Partially granted

It appears from table 1 that the difference in the constitutionality of the two petitions is Article 1 paragraphs (2) and (3) and Article 18 paragraphs (5) and (7) with conflicting decisions. The differences in the reasons for the petition are as follows where in Petition No. 62 the reason for the petition is that the 2018 election results limit the applicant's term of office to end in 2023 and depart from a concrete event, namely the refusal of the Governor of North Sulawesi to inaugurate the elected Regent and Deputy Regent of Talaud Regency, while the reason for Petition No. 143 is that Article 201 paragraph (5) cuts the term of office without considering the inauguration schedule. Petitioner Number 143 also argued that the end of the Petitioners' term of office did not interfere with the simultaneity of the 2024 elections.

Petitioner No. 143 is of the view that simultaneous elections are a way out for the "hubhub" of elections that occur almost without knowing the time following each other from one region to another, so that there is uniformity of time and is expected to minimize conflicts that may occur. The Plaintiffs do not question the political law of simultaneous elections, but their constitutional rights are potentially violated because they cannot complete their term of service as regional heads in full for 5 years considering that there is a time lag between the results of the 2018 elections while they were only inaugurated in 2019. With the simultaneous election policy held in November 2024, it actually does not affect the 5-year periodization of the Plaintiffs (starting in 2019).

The provisions of Article 201 paragraph (4) of the Election Law, according to the Plaintiffs, only regulate the simultaneity of elections, but do not regulate the simultaneity of the inauguration of each regional head, including the Plaintiffs, considering that there are regional heads elected in 2018 but only inaugurated in 2019. The 5-year term of office has been explicitly and clearly regulated in the provisions of Article 162 paragraph (1) and paragraph (2) of the Pilkada Law, thus the provisions of Article 201 paragraph (5) of the Pilkada Law refer to the provisions of Article 162 paragraph (1) and paragraph (2) of the Pilkada Law. The application of the norm of simultaneous elections

¹⁰ Galuh Nur Hasanah, Dona Budi Kharisma, "Eksistensi *Judicial Activism* Dalam Praktik Konstitusi Oleh Mahkamah Konstitusi", *Jurnal Sovereignty* Vol. 1. No. 4 (2022), hlm. 739-742. Diakses 19 April 2024. DOI: <https://doi.org/10.13057/sovereignty.v1i4.122>

should not reach the situation and conditions of the Plaintiffs. On this basis, there are problems of legal uncertainty and justice to the Plaintiffs and hundreds of other similar regional heads.

Judge's Consideration and Decision

The panel of judges in its deliberations explained that the provisions of Article 201 paragraph (5) of the Election Law cannot be separated from the provisions of Article 201 paragraph (4) of the Election Law which states that "Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office end in 2018 and 2019 will be held on the same date and month in June 2018". The provisions of Article 201 paragraph (4) of the Election Law have created a legal fact that in 2018 simultaneous elections have been held, both for regional heads whose terms of office expire in 2018 and 2019. The norm of Article 201 paragraph (4) of the Pilkada Law does not cause problems for regional heads whose term of office ends in 2018 because the simultaneous elections are held in the same year as the end of their term of office. However, the provisions of Article 201 paragraph (4) of the Pilkada Law will cause problems for regional heads who are "forced" to participate in the simultaneous regional elections in 2018, because the previously serving regional heads will take office and end their term of office as well as be inaugurated in 2019. Thus, the 5-year term of office should end in 2024, not 2023 as the simultaneous norm in the provisions of Article 201 paragraph (5) of the Pilkada Law. Referring to the term of office or time span of a regional head, the provisions of Article 201 paragraph (5) of the Pilkada Law cannot be separated from the provisions of Article 162 paragraph (1) and paragraph (2) of the Pilkada Law. Article 162 paragraph (1) of the Pilkada Law states "The Governor and Deputy Governor as referred to in Article 161 paragraph (1) hold office for 5 (five) years as of the date of inauguration and thereafter may be re-elected in the same position only for 1 (one) term of office". Furthermore, Article 162 paragraph (2) of the Pilkada Law states "Regents and Deputy Regents and Mayors and Deputy Mayors as referred to in Article 161 paragraph (3) hold office for 5 (five) years from the date of inauguration and thereafter may be re-elected in the same position for only 1 (one) term of office". The panel of Constitutional Court judges examining the case concluded that Article 162 paragraphs (1) and (2) guarantee that the term of office of the regional head/deputy regional head is 5 (five) years calculated from the time the regional head/deputy regional head is inaugurated. In other words, the periodization of the term of office of the regional head / deputy regional head for 5 (five) years is calculated from the time the regional head / deputy regional head is inaugurated, not based on the time the election or voting is held unless it is expressly regulated in certain norms that the term of office is not even 5 (five) years as stipulated in the provisions of Article 201 paragraph (7) which reads "Governor and Deputy Governor, Regents and Deputy Regents and Mayors and Deputy Mayors of the 2020 election results serve until 2024", where the provision is known in advance by the regional head / deputy regional head who will run for office that they will only serve for 4 (four) years, not 5 (five) years in general. The panel of judges examining the case concluded from the interrelationship of several articles, namely: Article 201

paragraph (4), Article 201 paragraph (5), and Article 162 paragraphs (1) and (2) of the Election Law as well as the legal facts in the trial that the provisions of Article 201 paragraph (5) are obviously in accordance with the provisions of Article 162 paragraphs (1) and (2) of the Election Law related to the term of office of the regional head / deputy regional head who serves for 5 (five) years from the time of inauguration, as long as the inauguration is carried out in 2018. According to the panel of judges, the legislator placed the stages and inauguration of the regional head / deputy regional head in 2018, so that if it is drawn related to the 5 (five) year term of office, the 5 (five) year term of office will end automatically in 2023 and will not experience a cut in the term of office due to the simultaneous elections. However, the panel of judges found problems in the norms of Article 201 paragraph (5) of the Pilkada Law, especially for regional heads / deputy regional heads who were elected in the 2018 elections but were only inaugurated in 2019 because the term of office of the previous regional head / deputy regional head ended in 2019. On the other hand, the provisions of Article 201 paragraph (4) of the Pilkada Law implicitly states that the existence of regional heads / deputy regional heads whose term of office ends in 2019 is not regulated separately in relation to Article 162 paragraph (1) and paragraph (2) of the Pilkada Law. As a result, regional heads / deputy regional heads who are newly appointed in 2019 are "forced" to follow the term of office of regional heads / deputy regional heads who were appointed in 2018. In addition, the regional heads / deputy regional heads inaugurated in 2019 did not depart from concrete events, but because the previous regional heads / deputy regional heads only ended in 2019, resulting in the elected regional heads / deputy regional heads in 2018 can only be inaugurated in 2019.

Before examining case number 143, the panel of judges of the Constitutional Court had also decided case number 62, which requested a constitutionality test of Article 201 paragraph (5) of the Pilkada Law. Case number 62 departs from a concrete event where the Petitioner in the case, namely the regional head / deputy regional head of the Talaud Islands Regency, North Sulawesi Province, was elected in the 2018 simultaneous regional elections but was only inaugurated or took the oath on February 26, 2020. Specifically, the Petitioner requested that the phrase "the results of the 2018 elections serve until 2023" in the norms of Article 201 paragraph (5) of the Regional Elections Law be interpreted as "holding a term of office for 5 (five) years or holding the maximum possible term of office until the period of simultaneous regional elections in 2024 is held, starting from the date of inauguration". According to the Applicant, the phrase "the results of the election year" cannot be used as a valid handle because it only concerns two things, namely the announcement of the results of the vote acquisition of the candidate pairs participating in the election and the announcement of the results of the elected candidate pairs participating in the election. The Applicant argues that the election results are not related to the term of office of the regional head/deputy regional head, but in this case are related to the inauguration event.

The panel of judges in its consideration also explained the design of the transition to simultaneous regional head / deputy regional head elections nationally, where the transitional provisions have undergone several changes or

adjustments, especially in the norms of Article 201 and Article 202 of Law Number 1 Year 2015 which originally stated:

1. Simultaneous voting in the elections of governors, regents and mayors whose terms of office expire in 2015 will be held on the same day and month in 2015;
2. Simultaneous voting in the elections of Governors, Regents and Mayors whose terms of office ended in 2016, 2017 and 2018 will be held on the same day and month in 2018, with the terms of office of Governors, Regents and Mayors until 2020;
3. In the event that the election as referred to in paragraph (2) cannot be held because there are no candidates who register, the acting Governor, acting Regent, and acting Mayor shall be appointed until the election of the Governor, Regent, and Mayor in 2020;
4. Simultaneous voting in elections where the term of office ends in 2019 will be held on the same day and month in 2020;
5. Simultaneous voting in the elections of Governors, Regents and Mayors in all regions of the Republic of Indonesia will be held on the same day and month in 2020;
6. To fill the vacancies of Governors, Regents, and Mayors whose terms of office expire in 2016 and 2017, acting Governors, acting Regents, and acting Mayors are appointed until the election of definitive Governors, Regents, and Mayors in 2018;
7. To fill the vacant positions of Governors, Regents, and Mayors whose terms of office expire in 2019, acting Governors, acting Regents, and acting Mayors are appointed until the election of definitive Governors, Regents, and Mayors in 2020.

Article 202 states that:

1. Governors, Regents, and Mayors who were inaugurated in 2018 with a term of office until 2020 then the term of office is not counted as one period;
2. Governors, Regents, and Mayors who were inaugurated in 2018 with a term of office until 2020 are given pension rights as former Governors, Regents, and Mayors for one period;
3. Regions whose Governors, Regents, and Mayors ended their terms of office in 2016, 2017 and 2018, due to something that resulted in the non-completion of the election stages in December 2018, then to fill the vacant positions of Governors, Regents, and Mayors, acting Governors, acting Regents, and acting Mayors are appointed until 2020;
4. Governors, Regents, and Mayors whose terms of office expire in 2018 and whose terms of office are less than 5 (five) years due to the implementation of simultaneous elections are given monetary compensation equal to the basic salary multiplied by the number of remaining months and receive pension rights for one period.

In line with the revision of Law No. 1/2015, the provision was later revised again into Law No. 8/2015. Article 201 states:

1. Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office ended in 2015 and January to June 2016 were held on the same date and month in December 2015;

2. Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office ended in July through December 2016 and whose terms of office ended in 2017 were held on the same date and month in February 2017;
3. Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office expire in 2018 and 2019 will be held on the same date and month in June 2018;
4. The simultaneous voting of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors from the 2015 elections will be held in 2020;
5. Simultaneous voting for Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor of the 2017 election results will be held in 2022;
6. Simultaneous voting for Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor of the 2018 election results will be held in 2023;
7. Simultaneous national voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors in all regions of the Republic of Indonesia will be held on the same date and month in 2027;
8. To fill the vacancy of the position of Governor, an acting Governor is appointed from a middle high leadership position until the inauguration of the Governor in accordance with the provisions of laws and regulations;
9. To fill the vacancy of the position of Regent/Mayor, an acting Regent/Mayor shall be appointed from a high-ranking pratama leadership position until the inauguration of the Regent, and Mayor in accordance with the provisions of laws and regulations.
10. Further provisions regarding the organization of the Election as referred to in paragraph (1), paragraph (2), paragraph (3), paragraph (4), and paragraph (5) shall be regulated by KPU Regulation.

Furthermore, Article 202 states that Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors who do not complete one period due to the provisions of Article 201 are given monetary compensation equal to the basic salary multiplied by the number of months remaining and receive pension rights for one period.

Finally, the provisions of Article 201 of Law Number 8 Year 2015 have also changed following the second amendment of Law Number 1 Year 2015 to Law Number 10 Year 2016 which states:

1. Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office ended in 2015 and January to June 2016 were held on the same date and month in December 2015;
2. Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office ended in July through December 2016 and whose terms of office ended in 2017 were held on the same date and month in February 2017;

3. Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors resulting from the 2017 elections are in office until 2022;
4. Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office expire in 2018 and 2019 will be held on the same date and month in June 2018;
5. Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors from the 2018 Elections are in office until 2023;
6. The simultaneous voting for Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor of the 2015 election results will be held in September 2020;
7. Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors from the 2020 Elections are in office until 2024;
8. Simultaneous national voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors in all regions of the Republic of Indonesia will be held in November 2024;
9. To fill vacancies in the positions of Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor whose terms of office expire in 2022 as referred to in paragraph (3) and whose terms of office expire in 2023 as referred to in paragraph (5), acting Governors, acting Regents, and acting Mayors are appointed until the election of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors through simultaneous national elections in 2024;
10. To fill the vacancy of the position of Governor, an acting Governor is appointed from a middle high leadership position until the inauguration of the Governor in accordance with the provisions of laws and regulations;
11. To fill the vacancy of the position of Regent/Mayor, an acting Regent/Mayor shall be appointed from a high-ranking pratama leadership position until the inauguration of the Regent, and Mayor in accordance with the provisions of laws and regulations;
12. Further provisions regarding the organization of the Election as referred to in paragraph (1), paragraph (2), paragraph (4), paragraph (6), and paragraph (8) shall be regulated by KPU Regulation.

The panel of judges is of the opinion that within the limits of reasonable reasoning, the main purpose of the amendment to the Article above is to prevent or minimize addressat losses as a result of changes in the arrangements for regional head elections. In the Applicant's petition, the norm of Article 201 paragraph (5) of Law 10/2016 which states, "Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors resulting from the 2018 Election shall hold office until 2023", is a transitional arrangement for regional head elections held in 2018. Furthermore, the panel is of the opinion that systematically it must still be read in relation to other norms, such as the norm of Article 201 paragraph (4) of Law 10/2016 which is in the family of transitional norms towards simultaneous regional head elections nationally and the norm of Article 162 paragraph (1) and paragraph (2) of Law 10/2016 regarding the calculation of the transition period of the

regional head position.

Furthermore, the panel of judges also considered the issue of the constitutionality of the norms of Article 201 paragraph (5) of Law 10/2016 which, according to the Plaintiffs, had caused legal uncertainty and equal treatment before the law because the norms of Article 201 paragraph (5) of Law 10/2016 did not regulate and take into account the term of office of regional heads / deputy regional heads elected in the 2018 simultaneous elections but were only inaugurated and began their term of office in 2019 because they were waiting for the completion of the term of office of the previous regional head / deputy regional head. If the norm of Article 201 paragraph (5) of Law 10/2016 is followed, the regional heads/deputy regional heads inaugurated in 2019 will end their term of office in 2023, so that the Plaintiffs will lose their constitutional right to serve as regional heads for 5 (five) years as stipulated in Article 162 paragraph (1) and paragraph (2) of Law 10/2016. The panel of judges in their legal considerations stated that the norm of Article 201 paragraph (5) of Law 10/2016, which is part of the wave of simultaneous regional head / deputy regional head elections in the transition period towards the holding of simultaneous national regional head / deputy regional head elections in 2024, cannot be separated from its relationship with the norm of Article 201 paragraph (4) of Law 10/2016 which is also a transitional rule which states, "Simultaneous voting in the elections of Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors whose terms of office expire in 2018 and 2019 will be held on the same date and month in June 2018". Based on the provisions of Article 201 paragraph (4) of Law 10/2016, there are legal facts that there are regional heads / deputy regional heads whose terms of office expire in 2018 and there are also facts of regional heads / deputy regional heads whose terms of office expire in 2019. Despite the fact that there are differences in the end of the term of office, for reasons of efficiency and efforts towards simultaneous national elections, the term of office of regional heads / deputy regional heads ending in 2018 and 2019, simultaneous voting was held in June 2018. Furthermore, by carefully reading Article 201 paragraph (5) of Law 10/2016 which states, "Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors as a result of the 2018 Election shall hold office until 2023", within the limits of reasonable reasoning, the regional heads/deputy regional heads elected from the results of the 2018 simultaneous voting will hold office for 5 (five) years until 2023.

The panel of judges was of the opinion that the norm of Article 201 paragraph (5) of Law 10/2016 also cannot be separated from the provisions governing the term of office of the regional head / deputy regional head as stipulated in Article 162 paragraph (1) which reads "The Governor and Deputy Governor as referred to in Article 161 paragraph (1) shall hold office for 5 (five) years as of the date of inauguration and thereafter may be re-elected in the same position only for 1 (one) term of office" and paragraph (2) which reads "Regents and Deputy Regents and Mayors and Deputy Mayors as referred to in Article 161 paragraph (3) hold office for 5 (five) years from the date of inauguration and thereafter may be re-elected in the same position only for 1 (one) term of office". Based on the norms of Article 162 paragraph (1) and paragraph (2) of Law 10/2016, the regional head / deputy regional head is given a period of

office for 5 (five) years, the calculation of which starts from the time the regional head / deputy regional head is inaugurated. This means that, in general, the calculation of the term of office of the regional head / deputy regional head starts from the time of inauguration, not based on the time when the election or voting is held, except those that are expressly regulated in certain norms that the term of office is not even 5 (five) years (referring to the norms of Article 201 paragraph (7) of Law 10/2016) which have been known by the regional head / deputy regional head since before nominating in the regional head election.

The norm of Article 201 paragraph (5) of Law 10/2016 has been found to be in accordance with the provisions of Article 162 paragraph (1) and paragraph (2) of Law 10/2016 related to the term of office of the regional head / deputy regional head, namely *serving* for 5 (five) years from the *inauguration* in 2018. With regard to this matter, according to the Court, the legislator has placed the stage or time of inauguration of the elected regional head / deputy regional head in the 2018 election whose inauguration was held in 2018, so that the calculation of the term of office of the regional head / deputy regional head for 5 (five) years starting from 2018 to 2023 is 5 (five) years as stipulated in the norms of Article 162 paragraph (1) and paragraph (2) of Law 10/2016. However, the norms of Article 201 paragraph (5) of Law 10/2016 in particular and the transitional norms in the provisions of Article 201 of Law 10/2016 as a whole still leave problems with regard to regional heads / deputy regional heads elected in the 2018 elections but only inaugurated in 2019 because the term of office of the previous regional head / deputy regional head only ended in 2019. In fact, Article 201 paragraph (4) of Law 10/2016 implicitly states that the existence of regional heads / deputy regional heads whose term of office ends in 2019 is not regulated separately in relation to Article 162 paragraph (1) and paragraph (2) of Law 10/2016. As a result, regional heads / deputy regional heads who are newly appointed in 2019 are "forced" to follow the term of office of regional heads / deputy regional heads who were appointed in 2018. Moreover, those who were inaugurated in 2019 were not inaugurated because they experienced a concrete event that caused them to be late, but because the term of office of the previous regional head/deputy regional head ended in 2019.

With regard to situations and conditions that are similar but not the same as Application Number 62, the panel of judges was of the opinion that Case Number 62/PUU-XXI/2023 departed from the concrete case experienced by the Applicant which resulted in the Applicant suffering a loss so that it requested that the Court interpret Article 201 paragraph (5) of Law 10/2016 to read "Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors hold a term of office for 5 (five) years or hold the maximum possible term of office until the Simultaneous Regional Election period in 2024 is held, starting from the date of inauguration". In its decision, the Court rejected the petition of the Petitioner. The rejection is based on the consideration of general norm testing that relies on concrete cases experienced by the Plaintiffs that are different from the constitutional losses experienced by the Plaintiffs in petition number 143. Moreover, the petition requested by the Petitioner in Case Number 62, the Petitioner requested to eliminate the phrase "2018 election results". In fact, regional heads and deputy regional heads who were inaugurated in 2018 based their inauguration on

the 2018 election results. If the Court grants by eliminating the phrase "2018 election results" it will create legal uncertainty for regional heads / deputy regional heads inaugurated in 2018 who are based on the 2018 election results. This is different from the main petition of Case No. 143 where the Court can see that the constitutional loss experienced by the Plaintiffs in the form of cutting their term of office is not due to the implementation of the norms of Article 201 paragraph (5) of Law 10/2016 but rather due to the existence of a vacuum of norms governing Article 201 paragraph (5) of Law 10/2016 with Article 162 paragraph (1) and paragraph (2) of Law 10/2016 for regional heads / deputy regional heads elected in 2018 and newly inaugurated in 2019 due to waiting for the expiration of the term of office of the previous regional head / deputy regional head.

With regard to the Plaintiffs' arguments about two factual conditions that caused differences among 171 regional heads and deputy regional heads elected in 2018, where *first*, the regional heads/deputy regional heads elected at the same time were inaugurated in 2018 and *second*, the regional heads/deputy regional heads elected in 2018 but only inaugurated in 2019. According to the panel of judges in case number 143, these factual conditions have led to different treatment in terms of inauguration, which in turn has led to differences in the length of term of office to be obtained by each regional head or deputy regional head. In fact, the 171 regional heads or deputy regional heads were elected in the same election, namely in 2018. With regard to this matter, according to the Court, transitional arrangements related to simultaneous voting cannot ignore arrangements related to the inauguration of regional heads and their deputies so that arrangements regarding simultaneous voting must be followed by norms governing simultaneous inauguration.

In the end, based on the entire description of legal considerations according to the Court, the argument of the Plaintiffs related to the provisions of the norms of Article 201 paragraph (5) of Law 10/2016 is contrary to the 1945 Constitution and has no binding legal force is a justifiable argument. However, with regard to the calculation of the term of office for 5 (five) years from the date of inauguration as long as it does not pass the day of the national simultaneous vote in 2024 as requested by the Plaintiffs in their Petition, According to the Court, this cannot be fulfilled considering that sufficient time is needed to appoint an acting regional head so that there is no vacancy in the position of regional head / deputy regional head which is based on reasonable reasoning and is considered sufficient, namely 1 (one) month before the "D" day of the national simultaneous voting which applies to regional heads / deputy regional heads whose term of office passes the day of the simultaneous voting in 2024. Meanwhile, for regional heads / deputy regional heads whose term of office ends before 1 (one) month before the 2024 simultaneous voting, their term of office ends 5 (five) years after the inauguration.

Therefore, the Court in its verdict number 143 then stated that the norm provision of Article 201 paragraph (5) of Law 10/2016 is conditionally unconstitutional as long as it is not interpreted as "Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors from the 2018 elections and inaugurations serve until 2023 and Governors and Deputy Governors, Regents and Deputy

Regents, and Mayors and Deputy Mayors from the 2018 Elections whose inauguration is held in 2019 hold office for 5 (five) years from the date of inauguration as long as it does not exceed 1 (one) month before the holding of simultaneous national elections in 2024". According to the Court, this affirmation is necessary for the holding of simultaneous regional elections nationally in 2024 as well as according to the Court has turned out to cause legal uncertainty, injustice, and provide different treatment before the law as argued by the Plaintiffs. However, because the ruling decided by the Court is not the same as the Petition requested by the Plaintiffs, so that the arguments of the Plaintiffs are reasonable according to law in part.

The verdict in Case No. 143 essentially states that Article 201 paragraph (5) of Law No. 10 of 2016 concerning the Second Amendment to Law No. 1 of 2015 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2014 concerning the Election of Governors, Regents and Mayors (State Gazette of the Republic of Indonesia of 2016 Number 130, Supplement to State Gazette of the Republic of Indonesia Number 5898) which originally stated "Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors from the 2018 elections serve until 2023", is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force conditionally to the extent that it is not interpreted, "Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors from the 2018 elections and inaugurations serve until 2023 and Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors from the 2018 elections whose inauguration is held in 2019 hold office for 5 (five) years from the date of inauguration as long as it does not exceed 1 (one) month before the holding of simultaneous national elections in 2024". Thus, the norm of Article 201 paragraph (5) of Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors reads, "Governor and Deputy Governor, Regent and Deputy Regent, The Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor from the 2018 election and inauguration will hold office until 2023, and the Governor and Deputy Governor, Regent and Deputy Regent, and Mayor and Deputy Mayor from the 2018 election whose inauguration is held in 2019 will hold office for 5 (five) years starting from the date of inauguration as long as it does not exceed 1 (one) month before the holding of simultaneous national voting in 2024".

3. Discussion

Referring to the comparative approach of several countries, there are approaches to *judicial activism* that have their own characteristics and hallmarks. *The Court of Justice of the European Union* (CJEU) is an EU institution responsible for ensuring the implementation of laws across EU member states and resolving legal disputes between national governments of EU members and EU institutions, where in some cases, *judicial activism* can be used by individuals, companies, or certain groups¹¹. One of the CJEU's powers is

to interpret legislation (*preliminary rulings*), which broadly speaking allows the CJEU to ascertain whether EU regulations are being applied correctly by EU member states, including if authorities in EU member states need to ascertain whether or not their regulations comply with EU provisions¹². In carrying out its duties and functions, *The Court of Justice of the European Union* (CJEU) has several approaches in conducting *judicial activism* in the form of regulatory interpretation in 6 (six) approaches, namely: 1) *teleological*, 2) *functional*, 3) *consequentialist*, 4) *systemic*, 5) *historical*, and 6) *literal*¹³. The approach is broadly divided into two types, namely: *Judicial Activism* and *Judicial Non-Activism*. *Teleological*, *functional*, *consequentialist*, and *systemic* interpretations are included in *Activist Interpretation*, while *historical*, and *literal* are included in *Non-Activist Interpretation*¹⁴. Teleological interpretation can be interpreted as an interpretation that is consistent with the aims and objectives set by the *European Treaties*. Functional interpretation, which means the interpretation of legal provisions that apply or are enacted in such a way as to ensure effectiveness or beneficial effects. *Consequentialist* interpretation, which is an interpretation that foresees the consequences of interpersonal decisions. *Systemic* interpretation is an interpretation where there is consistency between treaties with each other¹⁵.

The cases of *Van Gend en Loos* (C-26/62) and *Costa vs. Enel* (C-6/64), are examples of *judicial activism* at the CJEU. In these cases the CJEU used *teleological* interpretation to interpret the phrase "*The objective of the EEC Treaty ...*", "*in accordance with the spirit, the goals and purposes of the Treaty*". The CJEU based its decision on the *preamble* of the EEC Treaty, namely the phrase "*an ever closer union*". In this decision, the CJEU ensured that the members of the EEC Treaty have the same vision regarding *togetherness/union*¹⁶. In another case, the CJEU interpreted using *consequentialist* interpretation. They tried to interpret the words "*could*" and "*would*" to anticipate the consequences of using those two words. The interpretation of *a fortiori* reasoning and *argumentum ad absurdum* has also been done using *systemic* interpretation¹⁷. It is interesting that the CJEU's interpretative approach has received two different responses at once. In cases where the interpretation is supported by supranational powers (the Commission and Parliament) but opposed by member states, the interpretation is considered moderate. In cases where the interpretation is opposed by both supranational powers (Commission and Parliament) and member states, the interpretation is considered high¹⁸.

Dorte Sindbjerg Martinsen describes the CJEU ruling process as a court decision that is not fully enforceable immediately because many other things are involved and

budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en. Accessed April 19, 2024

¹² *ibid.*

¹³ Fabien Terpan, Sabine Saurugger, *Assessing judicial activism of the CJEU in the case of the court's defence procurement rulings*, *Journal of European Integration*, (2018), pp. 3-4. Accessed April 19, 2024. DOI: <https://doi.org/10.1080/07036337.2018.1537268>

¹⁴ *loc.cit.*

¹⁵ Fabien Terpan, Sabine Saurugger, *op.cit.*, pp. 4.

¹⁶ *loc.cit.*

¹⁷ *loc.cit.*

¹⁸ Fabien Terpan, Sabine Saurugger, *op.cit.*, pp. 5.

¹¹ *Court of Justice of the European Union* (CJEU), <https://european-union.europa.eu/institutions-law->

require necessary actions and statements. In addition, Martinsen states that two main factors affect the CJEU's legal activity: *first*, CJEU rulings require the approval of the political power, or political consent, of member states. Political forces have different views and interpretations of CJEU rulings based on their political interests, perceptions, and interpretations. The *second* factor is the fact that the EU Commission is often not in line with CJEU rulings, even refusing to implement them in some cases¹⁹. Some researchers have found similar results. They found that although the CJEU makes a supra-national order (at the EU level), its decisions cannot always be applied in member states, especially in countries with the concept of separation of powers (executive-legislative). However, they argue that the CJEU is an early warning tool for EU member states to comply with the treaties they have agreed to²⁰.

In Thailand, another example of *judicial activism* occurred particularly during the 2006-2008 crisis. This phenomenon is known as the "*judicialization of politics*", and involved Thailand's *Constitutional Court*, which became quite involved in decision-making on disputes over election results, executive actions, and broader public policy choices. Unfortunately, this involvement of the Thai *Constitutional Court* demonstrates the conclusion and judgment that legal activity should be conducted in the proper context and not influenced by other political, power or sectoral interests²¹. Another example is in South Africa, where South Africa has also practiced *judicial activism* in several court decisions, such as in the Makwanyane case in 1995 when judges decided on the death penalty. The Constitutional Court of South Africa conducted *judicial activism* by stating that the death penalty is not in line with the commitment to human rights. The Court also prohibited the execution of death sentences for convicts awaiting death and recommended the replacement of the death penalty with a new punishment. In its decision, the Court ruled that the death penalty is cruel, inhuman, and undignified. The reason or basis for the court's consideration in determining the reason for the death penalty as a cruel, inhuman, and degrading act is based on the interpretation of the constitution along with the development of society in space and time (*depends to a great degree upon changing societal values and norms*)²².

The norm of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which reads "The State of Indonesia is a state of law", reflects that the law in

¹⁹ Dorte Sindbjerg Martinsen, *Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union*, Journal Comparative Political Studies, Vol. 48 (12) (2015), pp. 1647-1648. Accessed April 19, 2024. DOI: <https://doi.org/10.1177/0010414015592591>

²⁰ Clifford Carrubba, Charles R. Hankla, Matthew Gabel, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, American Political Science Review, Vol. 102, No. 4 (November 2008), pp. 450. Accessed April 19, 2024. DOI: <http://www.jstor.org/stable/27644537>

²¹ Bjorn Dressel, *Judicialization of politics or politicization of the judiciary? Considerations from recent events in Thailand*, The Pacific Review, Vol. 23 No. 5 (December 2010), pp. 686-687. Accessed April 19, 2024. DOI: <https://doi.org/10.1080/09512748.2010.521253>

²² Lucky Mathebe, *The Constitutional Court of South Africa: Thoughts on its 25-year-Long Legacy of Judicial Activism*, Journal of Asian and African Studies, Vol. 56 (1) (2021), p. 30. Accessed April 19, 2024. DOI: <https://doi.org/10.1177/0021909620946848>

question is in the context of the flow of positive law, but if we refer to the provisions of Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which reads "sovereignty is in the hands of the people and shall be exercised according to the Constitution" then the positive law in question is based on the constitution itself (1945 Constitution of the Republic of Indonesia). Laws made must reflect the will of the people made based on democratic principles. Thus, the state of law referred to by the 1945 Constitution is colored by the concept of *rechtsstaat* and *the rule of law*. The principle of law that is prioritized is to uphold justice and truth with the support of law enforcement²³. This concept is a change from the previous conception of the manifestation of the distribution of sovereignty of the people where in the session of the Preparatory Committee for Indonesian Independence (PPKI) on August 18, 1945 which agreed on the implementation of popular sovereignty through the People's Consultative Assembly (MPR)²⁴. This initial concept was envisioned by the founding fathers and took the concept of parliament in England which is the highest institution of the state, where *sovereignty* is located (*locus of sovereignty*) as well as the place of highest policy making²⁵. The Third Amendment of the 1945 Constitution encourages substantive changes in the manifestation of popular sovereignty with two principles, namely *first*, the principle of democracy in the phrase "sovereignty is in the hands of the people" and *second*, the principle of state law or constitutionalism in the phrase "implemented according to the Law"²⁶. The concept of the rule of law according to Magnis Suseno is based on the belief that state power must be exercised on the basis of good and just law, which consists of two elements, namely *first*, the relationship between the ruler and the ruled based on objective norms, not power, and *second*, the objective norm is not only formally qualified but must also be defensible by legal ideas²⁷. Furthermore, Margarito Kamis formulated a number of characteristics of the Indonesian rule of law, among others: (1) The state is based on law; (2) The government is run based on law; (3) Government actions must be accountable; (4) Government actions are based on legal principles; (5) Government actions can be legally corrected and (6) Law *i.e.* normative limits on power.²⁸

In case number 143 there are at least two interesting issues to be explored in more depth, namely *first*, the aspect of legal certainty which is indicated by the repetition of the touchstone of constitutional norms and *second*, how judges encourage and decide on the application of substantive justice to the case *a quo*.

²³ Pusat Pendidikan Pancasila dan Konstitusi Mahkamah Konstitusi, *Modul Pendidikan Negara Hukum dan Demokrasi*, (Jakarta, 2016), pp. 22.

²⁴ Rivalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) Panitia Persiapan Kemerdekaan Indonesia (PPKI), Sekretariat Negara Republik Indonesia, Jakarta, 1998, p. 547. 547.

²⁵ Yudi Latif, *Negara Pripurna: Historisitas, Rasionalitas, dan Aktualisasi Pancasila*, (Jakarta: Gramedia, 2011), pp. 439

²⁶ Eduardus Marius Bo, *Negara Hukum dan Keadulatan Rakyat*, (Malang: Setara Press, 2019), p. 210. 210.

²⁷ Frans Magnis Suseno, in Eduardus Marius Bo, *ibid.* p. 248.

²⁸ Margarito Kamis, in Eduardus Marius Bo, *ibid.* p. 254.

A. Legal Certainty

In the legal reasoning of Petition No. 62, the panel of judges argued that the case was based on a concrete case experienced by the Petitioner which resulted in the Petitioner suffering a loss, thus requesting that the Court interpret Article 201 paragraph (5) of Law 10/2016 to read "Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors hold a term of office for 5 (five) years or hold a maximum term of office until the Simultaneous Regional Election period in 2024 is held, starting from the date of inauguration". In the verdict, the Court rejected the petition of the Petitioner. The rejection is based on the consideration of general norm testing that relies on concrete cases experienced by the Plaintiffs that are different from the constitutional losses experienced by the Plaintiffs in petition number 143. Moreover, the petition requested by the Petitioner in Case Number 62, the Petitioner requested to eliminate the phrase "2018 election results". In fact, regional heads and deputy regional heads who were inaugurated in 2018 based their inauguration on the 2018 election results. If the Court grants by eliminating the phrase "2018 election results" it will create legal uncertainty for regional heads / deputy regional heads inaugurated in 2018 who are based on the 2018 election results. This is different from the main petition of Case No. 143 where the Court can see that the constitutional loss experienced by the Plaintiffs in the form of cutting their term of office is not due to the implementation of the norms of Article 201 paragraph (5) of Law 10/2016 but rather due to the existence of a vacuum of norms governing between Article 201 paragraph (5) of Law 10/2016 and Article 162 paragraph (1) and paragraph (2) of Law 10/2016 for regional heads / deputy regional heads elected in 2018 and newly inaugurated in 2019 due to waiting for the expiration of the term of office of the previous regional head / deputy regional head.

The principle of legal certainty of the Constitutional Court judges is not only in line with the building and conception of legal formalities, but also the idea of law as outlined by Magnis Suseno. In addition, the consideration of judges and *judicial activism* shown by the court, according to Margarito Kamis, refers to government actions that show partiality to the principles of law. The attitude of the court that stated that the subject matter of the case could be re-examined (not declaring *Niet Onvankelijke Verklaard*) showed the use of the principle of legal certainty in distinguishing the subject matter of case number 62 and application number 143.

B. Substantive Justice

The panel of judges in its consideration found problems in the norms of Article 201 paragraph (5) of the Pilkada Law, especially for regional heads / deputy regional heads who were elected in the 2018 elections but were only inaugurated in 2019 because the term of office of the previous regional head / deputy regional head ended in 2019. On the other hand, the provisions of Article 201 paragraph (4) of the Pilkada Law implicitly states that the existence of regional heads / deputy regional heads whose term of office ends in 2019 is not regulated separately in relation to Article 162 paragraph (1) and paragraph (2) of the Pilkada Law. As a result, regional heads / deputy regional heads who are newly appointed in 2019 are "forced" to follow the term of office of regional heads / deputy regional heads who were appointed in 2018. In addition, the regional heads / deputy

regional heads inaugurated in 2019 did not depart from concrete events, but because the previous regional heads / deputy regional heads only ended in 2019, resulting in the elected regional heads / deputy regional heads in 2018 can only be inaugurated in 2019.

The principle of alignment with substantive justice is demonstrated by the court by finding a constitutional loss that is obviously experienced by the regional head / deputy regional head elected in 2018 but only inaugurated in 2019. The Court can subjectively see the location of substantive justice that can be corrected as *negative legislature* through *judicial activism* where this gap is not or has not been thought of during the law-making process. The process of *judicial activism* in case number 143 can find substantive justice to the petitioners of case number 143.

4. Conclusion

Judicial activism carried out by the judges examining case number 143/PUU-XXI/2023 has succeeded in upholding the principles of legal certainty and substantive justice. This is reflected in two aspects, namely *first*, the re-hearing of case number 143/PUU-XXI/2023 even though it has a constitutionality test that is partly the same as case number 62/PUU-XXI/2023, namely Article 18 paragraph (4) and Article 28D paragraph (1) of the 1945 Constitution. The Court has its own interpretation regarding the use and application of the provisions of Article 60 of the Constitutional Court Law which essentially states the prohibition to re-examine the same article or paragraph, where Application Number 62 and Case Number 143 have the same article constitutionality test. *Secondly*, the panel of judges was very observant in seeing the loss of constitutionality experienced by the Applicant in Case No. 143 due to a legal vacuum that had not been considered by the legislators. There is a legal vacuum that has not been considered before, especially the application of Article 201 paragraph (5) of the Pilkada Law, especially for regional heads / deputy regional heads who were elected in the 2018 election but were only inaugurated in 2019. The Court can provide substantive justice to the petitioners and play a role as *negative legislature*.

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