

Available online at: <http://jurnal.uns.ac.id>**Yustisia Jurnal Hukum**

| ISSN (Print) 0852-0941 | ISSN (Online) 2549-0907 |

**YUSUSTISIA**  
Yustisia Jurnal Hukum

## The Postponed Regional Head Elections in Emergency Situations: a Constitutional Democracy Perspective in Indonesia

Fikri Ahsan<sup>1</sup>; Wahyu Andrianto<sup>2</sup>; Djarot Dimas Achmad Andaru<sup>3</sup>; Mohamad Hanapi<sup>4</sup><sup>1,2,3</sup>Faculty of Law, Universitas Indonesia;<sup>4</sup>COLGIS University Utara MalaysiaCorresponding author's email: [fkrsnsh@gmail.com](mailto:fkrsnsh@gmail.com)

### Article Information

Submitted : September 15, 2022

Reviewed : December 12, 2022

Revised : April 19, 2023

Accepted : August 27, 2023

**Keywords:** democracy; regional head election; emergencyDoi: [10.20961/yustisia.v12i2.64638](https://doi.org/10.20961/yustisia.v12i2.64638)

### Abstract

The postponement of regional head elections may be done when the country is declared in a state of emergency. Emergencies such as war, economic crises, disease epidemics, and natural disasters affect the constitutional rights of citizens regulated by the 1945 Constitution. Therefore, legal instruments are needed to avoid unconstitutionality in fulfilling constitutional rights and democratic values during emergencies, including postponing regional elections during the COVID-19 pandemic. Article 12 of the 1945 Constitution is the most relevant legal basis for activating emergency constitutional law when the state is declared dangerous. However, Article 22 of the 1945 Constitution was preferred in postponing regional elections. Even though the holding of elections itself is guaranteed by the constitution every five years, on the other hand, the constitution has not regulated the postponement of elections if the country is in danger or an emergency. So, in the future, there will need to be constitutional amendments and new regulations that further widen the spectrum of dangerous or emergency conditions without forgetting Article 12 of the 1945 Constitution as a consideration.

## I. Introduction

A state of emergency, in other terms, is a condition where the government in a country carries out an extraordinary response in responding to dangerous threats. The country can be said to be in a state of emergency or danger, usually in certain conditions such as war, economic crisis, mass strikes, disease epidemics, and natural disasters (Adi Suhariyanto, 2021). These circumstances are behind Richard Posner's "A constitution that will not bend will break," meaning that flexibility is needed to be regulated in the face of abnormal conditions in the constitution. Sometimes, the state is run under normal conditions, where all state devices function properly according to the ideal state design. In certain situations, the state faces unusual conditions that require a special

constitutional approach through emergency regulations ([R.A. Posner, 2006](#)). Emergency regulations are products of legislation used to anticipate or respond to emergencies or other urgent needs. Legal products in this abnormal situation may activate certain legal statuses or even form a new law ([Y. Mehozay, 2016](#)). Indonesia has experienced the emergencies mentioned above, such as the civil emergency in Maluku and North Maluku, martial law in Aceh, the Aceh tsunami disaster, the economic crisis in 1998, and the public health emergency of the Coronavirus Disease 2019 (COVID-19) pandemic. These conditions impact the abnormality of people's social lives and the course of government, including holding general elections (elections). These emergencies are also mentioned in Articles 431 and 432 of Law Number 7 of 2017 concerning General Elections (hereinafter abbreviated to Law Number 7 of 2017) as the basis for conducting further elections and follow-up elections, which are held after there is a determination of postponement of the implementation of the elections.

In the same context, the COVID-19 pandemic is behind the postponement of the 2020 Regional Head Election, which was supposed to be held in September 2020 (Ali Mashudi, 2020). With these conditions, the implementation of citizens' constitutional rights in politics is channeled only sometimes. Ultimately, the president issued Government Regulation in Lieu of Law Number 2 of 2020, later stipulated into Law Number 6 of 2020, concerning the Election of Governors, Regents, and Mayors. In Article 120, paragraph (1) of the law states that due to non-natural disasters, namely COVID-19 ([Presidential Decree Number 12 of 2020](#) concerning the Determination of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (COVID-19) as National Disasters), some stages of holding regional head elections cannot be carried out further.

The COVID-19 pandemic situation has also caused elections in several countries to be postponed. This is because several countries have taken policies to reduce the death rate due to COVID-19. Based on data from the Institute for Democracy and Electoral Resistance (IDEA), it is explained that several countries have also postponed elections, including Australia, Poland, and Argentina ([IDEA Int, 2020](#)). Australia has postponed local government elections in New South Wales and legislative elections in Tasmania. Election postponements also occurred in Poland, which resulted in the presidential election being pushed back about 1 to 2 months from the original plan. Meanwhile, the government of Argentina delayed the legislative election for several months due to COVID-19.

In Indonesia, the government considers the postponement of regional head elections urgent since these efforts were chosen to protect the public and prevent the increase and spread of COVID-19. In handling the COVID-19 pandemic, the Government of Indonesia chose the Large-Scale Social Restrictions (*Pembatasan Sosial Berskala Besar* or PSBB) policy as outlined in Government Regulation Number 21 of 2020 concerning the Large-Scale Social Restrictions in the Context of Accelerating COVID-19 Handling ([Government Regulation Number 21 of 2020](#)), which has implications for the limited activities of certain people in an area suspected of being infected with COVID-19. However, restrictions on

these activities must still consider the needs of education, work productivity, worship, and the population's basic needs. With these restrictions, the practical implementation of regional head elections becomes constrained because the community is restricted in its movement. Indonesians usually participate in face-to-face political campaign activities in elections, such as voting and counting. However, with these restrictions, it is unlikely that the regional elections can be carried out normally as before the pandemic, especially since information technology in elections in Indonesia is still in the preparation stage regarding regulations and digital infrastructure development (Ministry of Information and Communication of the Republic of Indonesia, 2022).

But the question arises: Can COVID-19 justify postponing the regional head elections? Then, is the postponement of the regional head elections conducted by the government appropriate under the concept of emergency constitutional law in Indonesia? The postponement of the regional head elections, which has implications for suspending citizens' constitutional rights, is a feature of the Emergency Constitutional Law ([Rizki Bagus Prasetyo, 2021](#)). Whether the existing legal instruments for postponing regional elections are constitutionally correct, other constitutional rights must be protected, namely the health rights of citizens during the COVID-19 pandemic.

Legal materials obtained through library research were used to conduct qualitative research using three approaches: the legal, comparative, and case approaches. These approaches were used to gather secondary data from reliable sources such as books, scientific journals, laws and regulations, and other sources related to postponing regional elections because of COVID-19 and the Emergency Constitutional Law. The legal approach guides regulations related to the issues studied such as the 1945 Constitution, Law Number 04 of 1984 on Infectious Disease Outbreaks, Law Number 39 of 1999 on Human Rights, Law Number 11 of 2005 on Ratification of the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights), Law Number 36 of 2009 on Health, Law Number 6 of 2018 on Health Quarantine, Law Number 6 of 2020 on Stipulation of Government Regulation in Lieu of Law Number 2 of 2020 concerning Third Amendment to Law Number 1 of 2015 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 concerning Election of Governors, Regents, and Mayors into Law, and Government Regulation Number 21 of 2020 on the Large-Scale Social Restrictions in the Context of Accelerating the Management of Corona Virus Disease 2019 (COVID-19). Meanwhile, using a comparative approach to compare facts and data obtained regarding the postponement of elections or regional head elections in several countries to obtain differentiating components used as material for problem-solving. While the case approach itself is used to examine cases related to the problems being faced, namely the postponement of elections or regional head elections during the COVID-19 pandemic, research results can be obtained that can be explained comprehensively concerning the problems studied.

## II. Pandemic COVID-19 Emergency

Since March 2020, the COVID-19 outbreak has been hitting Indonesia. Later, the World Health Organization (WHO) has determined it as a pandemic. The announcement of the first positive COVID-19 case by President Joko Widodo in the first week of March 2020 forced the government to establish a Public Health Emergency status as stated in Presidential Decree Number 11 of 2020 concerning the Determination of Coronavirus Disease 2019 (COVID-19) Public Health Emergency as the legal basis for implementing COVID-19 mitigation policies, which is based on Law Number 6 of 2018 concerning Health Quarantine ([Law Number 16 of 2018](#)). This law gives the President the authority to declare a public health emergency; although it does not use Article 12 of the 1945 Constitution as a consideration, this law still uses the “emergency” clause as a terminology for the use of this law ([Fitra Arsil and Qurrata Ayuni, 2020](#)).

Article 1 number 2 of Law Number 16 of 2018 explains that a public health emergency is an extraordinary public health circumstance characterized by the spread of infectious diseases or events caused by nuclear radiation, biological pollution, chemical contamination, bioterrorism, and food that pose health hazards and have the potential to spread across regions or countries. Law Number 16 of 2018 provides an opportunity to enact temporary laws in an emergency with public interest propositions in the form of public health. The government can restrict the activities of people, containers, transportation equipment, and goods that can transmit diseases or prevent other contamination. The authority given by this law is the authority to restrict the movement of people and goods, close areas and borders, or detain ships or aircraft that are considered dangerous to public health ([Fitra Arsil and Qurrata Ayuni, 2020](#)).

With the declaration of the COVID-19 public health emergency in Indonesia, the 2020 regional elections covering 270 regions consisting of 9 provinces, 224 regencies, and 37 cities, which were originally planned for September 23, 2020 ([Nur Rohmi Aida, 2020](#)), were then postponed to December 9, 2020, with the issuance of Law Number 6 of 2020. Like Indonesia, several countries have postponed elections due to the COVID-19 pandemic. Based on IDEA data in 2020, around 48 countries, or 53.79 percent of the 193 UN member states, are postponing elections due to the COVID-19 pandemic, both central and local elections ([IDEA Int, 2020](#)).

An example is Australia’s local government elections in New South Wales, which were decided to be postponed for 12 months until September 4, 2021. However, in the end, elections were held on December 4, 2021, based on the decision of the New South Wales Local Government Minister. After discussions with the New South Wales Electoral Commission and New South Wales health authorities, the decision was made. In conducting elections, voters, especially vulnerable residents, can vote directly by post or online. Another thing that is implemented is that all voters can pre-vote 13 days before election day (Megan Gorrey, 2021). The postponement of local government elections in

New South Wales extends councilors' terms until 2021, which were supposed to end in 2020. Although the councilors elected in the 2021 election will still end in 2024, This may be one factor in many board members' decisions not to run for reelection. A turnover rate of 44% of the 54 elected member positions on the four New South Wales councils, 24 of which were filled by newly elected councilors ([Sarah Artist, 2022](#)).

Another example of a country postponing elections due to COVID-19 is Poland, which postponed presidential elections originally scheduled for May 10, 2020, to June 28, 2020, and July 12, 2020. In mid-March 2020, the threat of COVID-19 was visible, and the government began introducing restrictions and lockdown measures throughout April 2020. With the policy of banning non-essential movements, the use of public spaces, all gatherings, and community gatherings, it is evident that the elections cannot go as planned, and calls to postpone the elections can be heard from various parties, especially opposition political parties. As COVID-19 cases continue to rise and lockdowns continue throughout April, the government's plans for elections in May are under increasing criticism at home and abroad. The Polish government decided on a state of emergency under the constitution so that elections could be postponed. The Polish constitution has three types of emergencies or extraordinary regimes: martial law, emergencies, and natural disasters. There are differences in the legal consequences and who can declare a state of emergency. Still, Poland has one common result: as long as the status comes into effect and for 90 days after its termination, national and local elections will not be held, and the term of office of elected bodies must be appropriately extended. In addition, the government is constitutionally authorized to declare a state of natural disaster for up to 30 days, pushing the election date to autumn ([Vasil Vashchanka, 2020](#)).

Meanwhile, in Argentina, in the first months of 2021, when the central government had to propose an election date, the second wave of COVID-19 was on the rise, and vaccinations were slow ([Maria Celeste Ratto, 2022](#)). In early May, the ruling left-wing Peronist coalition Frente de Todos (FdT) reached an agreement with the opposition, led by the center-right Juntos por el Cambio (JC) alliance ([Economist Intelligence, 2021](#)), thus represents the Argentine Government agreeing with opposition parties to postpone the primary and midterm elections due to take place in August for five weeks due to the COVID-19 pandemic. As a result, legislation was enacted to modify for one-time the dates of primary and mid-term legislative elections due to health emergencies. The primary, to be held on August 8, will be postponed to September 12, 2021, while the midterm will be held from October 24 to November 14, 2021 (Maximilian Heath, 2021). The goal is to enable national vaccination plans to reach as large a population size as possible on the ballot ([Maria Celeste Ratto, 2022](#)). We can look at how Indonesia, Australia, Poland, and Argentina compare for postponing elections in Table 1.



**Table 1.** Comparison of countries postponing elections

Country	Postponed Elections	Delay Duration
Indonesia	Regional Head Elections	September 23 to December 9, 2020 (about 2 months 15 days)
Australia	1. Local government elections 2. Legislative council elections for Rosevears and Huon divisions, Tasmania	1. September 2020 to December 2021 (about 1 year 3 months) 2. May 2 to August 1, 2020 (3 months)
Polandia	Presidential Election	May 10 to June 28 and July 15, 2020 (approximately 1 month and 2 months)
Argentina	1. Primary legislative elections 2. Mid-term legislative elections	1. August 8 to September 12, 2021 (about 1 month) 2. October 24 to November 14, 2021 (20 days)

Source: Validated and processed data and information sourced from online news media.

### III. Postponement of Regional Head Elections in Review of the Emergency Basic Law

Explicitly, Law Number 6 of 2020 shows the waiver of citizens' political rights by postponing regional head elections to prevent the spread of COVID-19, so with this, the government chooses to prioritize the right to health of its citizens. Constitutionally, health is the right of every individual or human being, and the state must be able to fulfill and protect it. Several statutory provisions in Indonesia affirm that the right to health is a human right, including Article 28 H paragraph (1) of the 1945 Constitution, Article 8 of Law Number 39 of 1999 concerning human rights, Article 12 of Law Number 11 of 2005 concerning the Ratification of the International Covenant on Economic, Social, and Cultural Rights (International Covenant on Economic, Social and Cultural Rights), as well as Articles 4, 5, 15, 16, and 17 of Law Number 36 of 2009 concerning health.

While still a pandemic, COVID-19 became a serious threat to public health because this disease was contagious and had claimed many lives. Therefore, the fulfillment of political rights in elections is reduced due to the urgency of fulfilling the right to health. Even though these two rights are the rights of every citizen protected by the state. The state needs to be present by establishing extraordinary and emergency policies to counter the dilemma between political rights and public health rights. So that detailed arrangements are needed regarding the mechanisms and systems of legal norms in the conditions of the COVID-19 pandemic so that the legal context that applies to this abnormal state, or (law in the state of exception, can be truly distinguished from the law that applies in normal circumstances, or law in the normal state ([Jimly Asshiddiqie, 2007](#)).

All kinds of abnormal circumstances involve the use of power to overcome them. Therefore, it is necessary to identify the various forms, patterns, and types of power measures applied in the so-called state of emergency. In Venkat Iyer's opinion, the form of power action related to the postponement of regional head elections can be categorized by the imposition of wide-ranging restrictions on the civil liberties of citizens and the suspension of constitutional guarantees concerning human rights. Therefore, such actions fall into the category of the authority of the ruler to impose restrictions on the human rights and fundamental freedoms of its citizens ([Jimly Asshiddiqie, 2007](#)). The postponement of regional head elections constitutionally needs to consider the implementation of the Emergency Constitutional Law because its implementation suspends human rights, which is one of the characteristics of the Emergency Constitutional Law. Two articles in the constitution related to emergency constitutional law in Indonesia:

1. Article 12 of the 1945 Constitution

This article is the key to implementing emergency constitutional law because the constitutional clause related to emergency constitutional law is considered a form of constitutional exception in a state of emergency. Article 12 of the 1945 Constitution states, "The President declares a state of danger, the conditions and consequences of which are determined by law." This clause authorizes the President as the head of state to determine a state of emergency (original text of the 1945 Constitution). Therefore, the norms for emergency law regulations, law enforcement instruments, and their establishment differ from normal law or may even be contradictory. Even as Beni Prasad said, the government can do anything in an emergency. Another opinion was expressed by Carl Schmitt, who said in an emergency, "All is justified that appears to be necessary for a concretely gained success." The need to declare the country in a state of danger or emergency is commonly known in conditions such as wars, economic crises, mass strikes, epidemics of diseases, and natural disasters ([Fitra Arsil and Qurrata Ayuni, 2020](#)).

In the context of the principles of international law or principles that apply concerning the imposition of emergencies, one of them refers to the principle of threat privileges, namely the principle that refers to the belief that the crisis that occurs is indeed a real danger that is occurring (actual threats), or at least dangers that have the potential to seriously threaten the community of ordinary life (potential threats). Both types of threats must be special in the sense that they are absolutely serious because they are capable of causing harm to the life, physique, property, economy, or social life of the people and the life of the state, or they may concern the territorial integrity and sovereignty of the state ([Jimly Asshiddiqie, 2007](#)). Until now, only one regulation has activated Article 12 of the 1945 Constitution in its preamble, namely Government Regulations In Lieu of Laws Number 23 of 1959 concerning the Establishment of a State of Emergency. The issuance of this law summarizes and revokes all similar previous laws and regulations, namely Law Number 6 of 1946 and Law Number 74 of 1957. Law Number 23 of 1959 concerning Conditions

of Danger provides for provisions concerning three emergency conditions in Indonesia, namely a civil emergency, a military emergency, and a war emergency. The President can stipulate these three conditions:

- a) There is a threat to security or law and order in some or all areas of Indonesia due to rebellion, riots, or the result of natural disasters, so it is feared that it cannot be handled by ordinary means;
- b) There is war, the danger of war, or the occupation of Indonesian territory;
- c) The country's life is in a state of danger or from other special circumstances that endanger the country's life;

Government Regulations in Lieu of Laws Number 23 of 1959 provides "permission" to the government to commit legal and human rights irregularities that are not commonly carried out during normal situations according to the declaration of emergency conditions submitted by the President (Civil Emergency, Martial Law, or Martial Law). In a state of civil emergency, such as in the events in Maluku and North Maluku in 2000 and Aceh in 2004, the government, according to Law ([Government Regulation in Lieu](#)) Number 23 of 1959, is allowed to carry out inspections and seizures of goods that are suspected of being used to interfere with security or public service items, conduct wiretaps and restrictions on telecommunications media, prohibit activities and gatherings, and restrict people from outside the home. In martial law conditions, such as in the conflict in Aceh between the Free Aceh Movement (GAM) and the Indonesian government in 2003–2004, the government was given the authority to, among others, prohibit the production and trade of firearms and explosives, control communication devices, limit land, air, and sea traffic, limit shows and printing, withhold postal papers and telegrams, militarize certain positions, and make arrests for 21 days. Meanwhile, in a state of war emergency, the government is given the right to take ownership of goods for security and defense purposes, move goods into state property rights that are free from all dependents of the right to the goods, prohibit performances and close printing houses, force conscripts or militarized people, and make regulations that are contrary to legislation for the sake of security and defense during war. So, it can be concluded that three (3) categories of emergency conditions, according to Government Regulations in Lieu of Laws Number 23 of 1959, tend to be handled from a state security and defense perspective.

## 2. Article 22 of the 1945 Constitution

This article is the basis for granting authority for the President to issue law-level regulations without involving parliament by issuing Government Regulations in Lieu of Laws. The power of forming that regulation is prevalent in various countries, especially those with presidential systems. In various works of literature, this type of regulation is known by various designations, including constitutional, executive,



and presidential decree authority ([Fitra Arsil, 2018](#)). According to Fitra Arsil, The Constitutional Decree Authority (CDA) in presidential system countries can be conceptually explained in five characteristics, namely: (1) it is the constitutional power of the president; (2) it has statutory-level binding power and charges material; (3) it is issued under certain conditions; (4) it takes effect immediately without going through the process of discussion in the legislature; and (5) although the regulation is effective immediately, its applicability is temporary because it requires parliamentary approval to be enacted as a law or repealed. The legitimacy for the president to issue this type of regulation lies in the phrase “the crunch is compelling.” Bagir Manan and Susi Dwi Harijanti said that the emergency referred to in Article 22 of the 1945 Constitution with a “coercive crunch” is very real and even called diametrical, which is different from the “state of danger according to Article 12 of the 1945 Constitution. The opinion is based on a semantic assessment of the phrase’s origin. It traces the phrase’s appearance in the 1945 Constitution, the Republic of the United States of Indonesia of 1949, the 1950 Constitution, and Article 93 of the *Indische Staatsregeling* or constitutional regulations of the Dutch East Indies period ([Bagir Manan and Susi Dwi Harijanti, 2017](#)).

The use of the phrase “coercive crunch” is currently already given by the Constitutional Court (Mahkamah Konstitusi (Hereinafter abbreviated to MK). Based on the consideration of the Court (ratio decidendi) in Constitutional Court Decision Number 138/PUU-VII/2009, there are three conditions as a parameter for the existence of a “compelling crunch” for the President to establish a Government Regulations in Lieu, namely: ([Fitra Arsil, 2018](#))

- a) The circumstances, namely the urgent need to resolve legal issues quickly under the Law.
- b) The required Act does not yet exist, so there is a legal vacuum or an Act, but it is inadequate.
- c) The legal vacuum cannot be resolved by making laws in the usual procedural manner because it will take considerable time. At the same time, the urgent circumstances need certainty to be resolved;

In another decision of the Constitutional Court, namely the decision of the Constitutional Court Number 003/PUU-III/2005 dated July 7, 2005, the Constitutional Court held that “the occurrence of a compelling crunch” should not be equated with the presence of a state of danger with the level of civil, military, or state of war emergency. At the time, it was stated that the matter of “coercive crunch” became the subjective right of the President to determine it, which would then become objective if approved by the parliament to be enacted as Law.

The Constitutional Court also ensures that the Government Regulation in Lieu is a statutory regulation at the law level and has the same substance as a law. The Constitutional Court explained that the 1945 Constitution distinguishes between

Government Regulation in Lieu and government regulations used to implement laws. Government Regulation in Lieu is regulated specifically in the constitution, while the parliament is the holder of the power to form laws, so the Government Regulation in Lieu material should be material that, according to the constitution, is regulated by law and not material that implements the law as referred to in Article 5 paragraph (2) of the Constitution of 1945.

Given the concept mentioned earlier, it can be said that “coercive crunch” is not a reason to activate the emergency law. The prevailing legal system is legal under normal circumstances. Government Regulation in Lieu does not put the country in an emergency or a dangerous one. However, because the position of Government Regulation in Lieu is equivalent to the law, as long as it is regulated differently, the provisions in Government Regulation in Lieu can override the law. The constitution, which is higher than the Government Regulation in Lieu and the law, must not be ruled out by the provisions contained in the Government Regulation in Lieu. Therefore, the guarantee of human rights and the rights of citizens contained in the constitution must still be upheld; it must not be ruled out by the enactment of norms regulated by the Government Regulation in Lieu.

Conditions of non-natural disasters (COVID-19) ideally need to apply a system or legal norms different from normal conditions before the pandemic. It is necessary to have a separate legal norm to enable state power to function properly in emergency conditions. This law is expected to 1) overcome abnormal conditions, 2) be temporary until the emergency ends, and 3) be poured separately ([Jimly Asshiddiqie, 2007](#)). However, efforts to overcome the state of danger must still be ensured that they do not override human rights that are classified as “non-derogable rights” or human rights that cannot be reduced under any circumstances, according to the provisions of Article 28I paragraph (1) of the 1945 Constitution. The rights that can be limited only concerning the class of human rights that do not fall into the category of non-derogable rights, which are regulated in Article 28J paragraph (2) of the 1945 Constitution.

Regarding the postponement of regional head elections, in Indonesia, it has not been specifically regulated in a statutory provision, both in the constitution and at the law level. The regional head elections are a fundamental state agenda guaranteed by the constitution, so according to George Jellinek and KC Wheare, constitutional law provides an exit law through constitutional changes. Changes to the constitution itself can be made in two ways. First, *verfassungsänderung* was carried out in a formal way specified in the constitution or amendments. Secondly, *verfassungswandelung* was carried out not based on the formal method specified in the constitution but through non-formal channels such as extraordinary events, revolutions, coups, conventions, and emergencies or dangers (Kompas.id, 2022).

In the current context, George Jellinek and K.C. Wheare's thoughts are relevant to consider, but changing the provisions of Article 22 E paragraphs (1) and (2) or Article 18 paragraph (4) of the 1945 Constitution by adding clauses related to postponing elections or regional elections with formal changes (*verfassungsänderung*) under the provisions of Article 37 of the 1945 Constitution is difficult to materialize because it will open up a discourse on the wishes of many parties to change some or part of the contents of the constitution, which can result in conflicts of interest and domestic political uproar. Changing the constitution informally (*verfassungswandelung*) can be done in two ways, namely, first through some primary forces (several primary forces), for example, one of the driving forces is the state in a state of emergency during the COVID-19 pandemic, and based on objective considerations, concentrated state finances for handling COVID-19 so that they are unable to finance the general election or regional head election (Kompas. id, 2022). Second, informal amendments to the constitution can be carried out through judicial interpretation (interpretation of the constitution by the court). In its development, the MK has the authority to interpret the constitution as stipulated in Article 24C of the 1945 Constitution. The Constitutional Court has made history through its decisions interpreting the text of the 1945 Constitution, which is equivalent to amending the 1945 Constitution. The exit law provided by the Constitutional Law ensures whether or not the postponement of the general election or regional head election can be carried out through a judicial review by the Constitutional Court. It is this Constitutional Court decision that can later become the legal basis for provisions permissible or not to postpone and can be the answer to the void in constitutional law in regulating the postponement of general elections and regional head elections, both in the 1945 Constitution and the Election Law, as well as being the final breaker for debates on fundamental state issues to achieve legal certainty (Kompas.id, 2022).

#### **IV. Analysis of COVID-19 as the reason for postponing the Regional Head Election**

The postponement of regional head elections due to COVID-19, considering the public health interests that COVID-19 can have a negative impact and endanger lives because these non-natural disasters have had an impact on increasing the number of victims and property losses, expanding the scope of disaster-affected areas, and causing implications for broad socio-economic aspects in Indonesia, the conditions of the spread and impact of COVID-19 are also considered to be included in the terminology of infectious disease outbreaks according to Law Number 04 of 1984 concerning infectious disease outbreaks. However, the impact of COVID-19 did not make the government and parliament consider the inclusion of Article 12 of the 1945 Constitution in regulations related to efforts to mitigate the impact of COVID-19 in Indonesia as part of implementing the Emergency Constitutional Law. The regulations used in efforts to overcome COVID-19

include Law Number 04 of 1984 concerning infectious disease outbreaks, Law Number 24 of 2007 concerning disaster management, and Law Number 6 of 2018 concerning health quarantine, as well as Law Number 2 of 2020 concerning state financial policy and financial system stability for handling the COVID-19 pandemic.

When viewed from a regulatory point of view, in general, the existence of disease outbreaks, especially the COVID-19 pandemic, is considered not to be included as a background for the implementation of Emergency Constitutional Law in Indonesia at this time, which is still regulated in a limited manner in the constitution, whose emergency perspective is still in defense and security aspects. The decision to postpone the regional head elections by the government is a ratio legis of limiting people's rights, especially activities outside the home to avoid transmission of disease outbreaks, as stipulated in Law Number 04 of 1984 on Infectious Disease Outbreaks and Law Number 6 of 2018 on Health Quarantine, and is not a constitutional mandate. The postponement of the 2020 regional head elections certainly caused various public responses. Some parties supported the postponement of the regional elections, but not a few people refused.

**Table 2.** The results of a survey by several institutions related to the public response to the postponement of the 2020 Regional Head Elections

Survey Institute	Time	Respond	Agree	Disagree	Don't know/ Unanswered	Agree in red zone areas	Information
Litbang Kompas	March 24-25, 2020	1315	91,8%	2,5%	5,7%		
Charta Politika	July 6-12, 2020	2000	54,2%	31,8%	14,1%		
			50,2%	43,4%	6,4%		Generally
Indikator Politik Indonesia	September 24-30, 2020	1200	47,9%	46,3%	5,8%		Regions conducting the regional head elections
Polmatrix Indonesia	September 1-10, 2020	2000	72,4%	10,6%	4,9%	12,1%	
Roda Tiga Konsultan	May 7-17, 2020	1200	51,2%	29,5%	19,3%		Postponed back from December 9, 2020

Source: Data and information from the internet that has been validated and processed

Table 2, the compilation of survey results from various research institutions in Indonesia on the postponement of the 2020 regional head elections, shows mixed

results. Still, it is dominated by people who agree with postponing the regional head elections for health reasons and to avoid COVID-19 transmission. On the other hand, few people disagree with postponing the regional head elections despite the potential risk of COVID-19 transmission. The pros and cons of postponing regional elections can be interpreted as a phenomenon of ambiguity that occurs in society because existing legal instruments cannot provide legal guarantees. The postponement of this regional head election will provide benefits or even negatively impact democracy because it raises the potential to be perverted by the ruling parties. In the end, the postponement of this regional head election is inevitably carried out considering various limitations and considerations. As an anticipatory effort to address the existence of emergency conditions, the government and the framer of the law need to regulate the postponement of elections in the Constitution through amendments so that there is legal certainty. Reflecting on other countries, technology-based elections have been implemented using an online system so that the implementation is fast and efficient, and there is no need to gather people in one place. The government and the framers of the law need to conduct a more in-depth study of the modernization of the implementation of elections through the online system because this is a certainty that will occur.

The pros and cons of postponing regional head elections in Indonesia are also almost similar to the elections held in Argentina, where the Argentine government took political steps to get the support of opposition parties to postpone their legislative elections because elections were too risky to be held when the COVID-19 wave was high while intensifying the vaccination program. The Australian government, meanwhile, has used information technology (online) when voting for vulnerable groups despite the postponement of the election. This situation can be the preference of election organizers in Indonesia to adopt these efforts, regardless of emergency or not, if using e-voting in elections provides advantages, namely that the counting of votes will be faster, it can save the cost of printing ballots, voting is simpler, and the equipment used can be used repeatedly ([Masrully, 2022](#)). The Polish government declared a state of emergency before the lockdown and postponed elections, a move guaranteed by the country's constitution.

## V. Conclusion

Apart from the legal terminology that separates elections (Presidential and Legislative Elections) from regional head elections, these two things can be interpreted as elections or elections by the people periodically in the context of implementing democratic values guaranteed by the constitution. However, due to COVID-19, the 2020 Regional Head Elections were postponed. COVID-19 itself is designated as a national disaster, as stated in Law Number 6 of 2020 Concerning the Election of Governors, Regents, and Mayors, which is the legal basis for postponing the 2020 regional head elections. So, postponing regional head elections is not impossible to carry out as long as certain conditions



strongly influence it, such as the public health emergency of the COVID-19 pandemic. The postponement of regional elections is part of suspending human rights (the political rights of citizens), and every suspension of human rights must be determined before a state of emergency. While the constitutional legality of emergencies refers to Article 12 and Article 22 of the 1945 Constitution, before the Constitutional Court decisions Number 003/PUU-III/2005 and Number 138/PUU-VII/2009, Article 22 was still debated as the basis for the legitimacy of emergencies.

Another solution to the constitutionality of the practice of postponing regional head elections can be done by amending the constitution or amendments, especially to Article 22 E paragraphs (1) and (2) or Article 18 paragraph (4) of the 1945 Constitution, which explains the implementation of elections or regional head elections, with the addition of clauses regulating the postponement of their implementation if the state is declared in a state of danger or emergency that makes both elections temporarily unable to be held. Due to its practice in 2020, the Government Regulation in Lieu can regulate the postponement of regional head elections. Although the holding of elections is guaranteed in the 1945 Constitution, the postponement of this fundamental matter should also be constitutionally regulated in the 1945 Constitution. Because the current constitution does not regulate this and ideally should not be regulated at the level of law or Government Regulation in Lieu, it violates the hierarchy of Indonesian laws and regulations. However, constitutional amendments should only be implemented after the 2024 elections because this can potentially cause national political instability. Considering that the People's Consultative Assembly (MPR) of the Republic of Indonesia, it is also necessary to compile another emergency concept that includes Article 12 of the 1945 Constitution so that the concept of emergency is not only patterned on state security and defense problems as in Government Regulation in Lieu Number 23 of 1959 concerning the Determination of Dangerous Conditions but also related to handling outbreaks, natural disasters, or economic crises.

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