

Passive Constitutional Rights of Former Convicts in Regional Head Elections (Perspective of Constitutional Court Decision No. 42/PUU-XIII/2015)

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Abstract. *This study discusses the political rights of former convicts to run as regional head candidates. This article is the result of an analysis of the Constitutional Court's decision No. 42/PUU-XIII/2015 which grants political rights to former convicts to run as regional head candidates. The basis for consideration (ratio decidendi) of the Constitutional Court's decision is; the right to vote and be elected can only be revoked based on a court decision, not based on statutory provisions; a person who has served a sentence and is released from prison is essentially a person who has repented and regrets his actions, so it is not appropriate to be given another punishment through statutory provisions that prohibit running in regional head elections. On that basis, the Constitutional Court grants the right to former convicts to run as regional heads. The Constitutional Court's decision has legal consequences for former convicts who were previously not allowed to run as regional head candidates. After the Constitutional Court's decision, convicts have the same rights to run in regional elections.*

Keywords: *Convicts; Election; Political; Regional.*

1. Introduction

The Republic of Indonesia is a state of law (*rechtsstaat*) not a power state (*machsstaat*). The characteristics of a state of law (*rechtsstaat*) include; the protection of human rights, the separation or division of powers to guarantee these rights, government based on regulations (*wetmatigheid van bestuur*) and the existence of administrative justice (Bisariyadi, et al., 2013: 537). Indonesia itself as the fourth largest democracy in the world has held a number of general elections from 1955, 1971, 1977, 1982, 1987, 1992, 1997, 1999, 2004, 2009, 2014, 2019 and 2024. The existence of the implementation of general elections reflects the representation of the implementation of healthy democracy and is a real manifestation of the means of people's sovereignty and a means of community participation in realizing Indonesia as per Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia as a constitutional democratic state.

AV Dicey, an Anglo Saxon legal expert, stated that *the rule of law* is characterized by the supremacy of law, which means that there should be no arbitrariness in the law, so that a person can only be punished if he breaks the law; equal standing for ordinary people and state officials before the law; guaranteed human rights by laws and court decisions. Both the rule of law in the European Constitutional legal concept and the Anglo Saxon rule of law emphasize the protection of human rights. In addition, Indonesia is a democratic, constitutional country. In a democratic country, general elections, including regional head elections (pemilukada) are a means to realize the sovereignty of the people to play an active role in organizing the state. General elections in Indonesia are a means to form a democratic government through honest and fair mechanisms. The existence of general elections is recognized by countries that adhere to the principle of popular sovereignty, and are held at all levels of politics, both democratic, authoritarian and totalitarian systems. In several democratic countries, general elections are considered a symbol and also a benchmark of the democratic system (Aryani, et al., 2020: 415).

Elections are a logical consequence of the adoption of democratic principles in national and state life, where the basic principle of democratic life is that every citizen has the right to actively participate in the political process. The political rights of citizens in general elections including regional head elections (pemilukada), namely the right to vote and be elected are basic rights guaranteed in the 1945 Constitution of the Republic of Indonesia. This is as emphasized in Article 28 letter D of the 1945 Constitution of the Republic of Indonesia that: "everyone has the right to obtain equal opportunities in government" (Riewanto, 2014: 39).

In CHAPTER VI concerning Regional Government, Article 18 paragraph (1) states that "The Unitary State of the Republic of Indonesia is divided into provincial regions and these provincial regions are divided into districts and cities, and each province, district and city has a regional government, which is regulated by law."

Article 18 paragraph (4) of the 1945 Constitution concerning the Election of Regional Heads states that Governors, Regents and Mayors are carried out democratically. The election of Regional Heads and Deputy Regional Heads is not categorized as a general election because the election of Regional Heads and Deputy Regional Heads is included in the realm of Regional Government. The provisions of Article 18 paragraph (4) of the 1945 Constitution concerning the filling of the positions of Governor, Regent and Mayor which are included in Law No. 22 of 1999 concerning Regional Government through indirect elections, namely being elected by the DPRD. However, after the enactment of Law No. 32 of 2004 concerning Regional Government, the Regional Election has been directly elected by the people. With this, the people can choose their own leaders through the Regional Election since 2005.

Article 27 paragraph (1) of the 1945 Constitution stipulates that "All citizens have equal standing before the law and government and are obliged to uphold the law and government without exception." Article 28D paragraph (1) of the 1945 Constitution stipulates that "every person has the right to recognition, guarantees, protection and certainty of fair law and equal treatment

before the law." Then, Article 28D paragraph (3) stipulates that every citizen has the right to receive equal opportunities in government."

Provisions on voting rights In Law No. 39 of 1999 concerning Human Rights in Article 43 which stipulates that: "Every citizen has the right to be elected and to vote in general elections based on equal rights through direct, general, free, secret, honest, and fair voting in accordance with the provisions of laws and regulations." All aspects of the implementation of elections are returned to the people who determine them and this is in accordance with the principle of people's sovereignty. The absence of guarantees for citizens' rights in choosing their country's leaders is a violation of human rights. Moreover, Article 2 Paragraph (1) of the 1945 Constitution states that sovereignty lies in the hands of the people. 8 In the nomination stage, candidates must first register themselves with the requirements stipulated by law to the General Election Commission (KPU) (Huda, 2017: 268).

Based on the description above, the requirements for running as a Regional Head are stated in Article 7 of Law No. 8 of 2015:

- a. Fear of God Almighty;
- b. Loyal to Pancasila, the 1945 Constitution of the Republic of Indonesia, the ideals of the Proclamation of Independence of 17 August 1945, and the Unitary State of the Republic of Indonesia;
- c. Minimum education is high school or equivalent;
- d. Has taken a public test;
- e. Minimum age of 30 (thirty) years for gubernatorial candidates and 25 (twenty five) years for regent and mayoral candidates;
- f. Physically and mentally capable based on the results of a comprehensive health examination by a team of doctors;
- g. Never been sentenced to prison based on a court decision that has permanent legal force for committing a crime that is punishable by imprisonment of 5 (five) years or more;
- h. Not having had his/her voting rights revoked based on a court decision that has permanent legal force;
- i. Never commit a disgraceful act;
- j. Submit a list of personal assets;
- k. Not currently having any debt obligations as an individual or legal entity which are the responsibility of the individual which is detrimental to state finances;

- l. Not being declared bankrupt based on a court decision that has permanent legal force;
- m. Have a Taxpayer Identification Number and have a personal tax report;
- n. Never served as Governor, Regent or Mayor for 2 (two) terms in the same position;
- o. Resignation from office for Governors, Regents and Mayors who are running for office in other regions;
- p. Not having the status of acting Governor, acting Regent, or acting Mayor;
- q. Have no conflict of interest with the incumbent;
- r. Notify the nomination as Governor, Regent, and Mayor to the Leadership of the People's Representative Council for members of the People's Representative Council, to the Leadership of the Regional Representative Council for members of the Regional Representative Council, or to the Leadership of the DPRD for members of the DPRD;
- s. Resign as a member of the Indonesian National Army, the Indonesian National Police, and a Civil Servant since registering as a candidate; and
- t. Resign from office at a state-owned enterprise or regional-owned enterprise.

However, the right of every person to be elected in the General Election/Regional Election is limited by the provisions of Law No. 8 of 2015 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. Article 7 letter g states that: "Indonesian citizens who can become candidates for Governor, Candidates for Regent, Candidates for Mayor are those who meet the following requirements;(g). never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a crime that is threatened with imprisonment of 5 (five) years or more". The provisions of Article 7 letter g of Law No. 8 of 2015 above provide a limitation that former convicts who are sentenced based on a court decision cannot run as regional head candidates. However, the Constitutional Court in its Decision Number 42/PUU-XIII/2015 provides the right for former convicts who have completed their sentences to run as regional head candidates, either as Governor, Regent or Mayor.

In the 2019 Election, the General Election Commission has issued a KPU Regulation or what is called PKPU Number 20 of 2018 Concerning the Nomination of Members of the DPR, Provincial DPRD and Regency/City DPRD. This PKPU will be a guideline for the KPU in implementing the nomination stages for Members of the DPR, Provincial DPRD and Regency/City DPRD in the 2019 Election. One of the points in the PKPU regulates the prohibition of former corruption convicts from running as legislative candidates. This regulation is stated in Article 7 paragraph (1) letter h of the PKPU, which reads "Not former convicts of drug dealers, sexual crimes against children, or corruption".

In Article 4 of the Regulation of the General Election Commission of the Republic of Indonesia Number 18 of 2019 with the following points: f. "never been a convict based on a court decision that has obtained permanent legal force for convicts who are not serving their sentence in prison including: 1. convicts due to negligence; or 2. convicts for political reasons; 3. removed and must openly and honestly state to the public that the person concerned is serving a sentence not in prison;" g. "For Former Convicts who have completed their sentence, cumulatively, must meet the requirements to openly and honestly state to the public and are not repeat offenders."

With these requirements, many candidates feel disadvantaged by the Law. The candidates who feel disadvantaged are Jumanto, who was once imprisoned for 7 years for a corruption case and will run as a regional head in Probolinggo Regency. And Fathor Rasyid, who was once imprisoned for 4 years and fined 100,000 (one hundred million rupiah) for a corruption case, and will run as a regional head of Situbondo Regency.

2. Research Methods

The method used in this research is a literature review (*library study*). *research*. Literature review is a research technique by conducting searches on the Passive Constitutional Rights of Former Convict Citizens in the Regional Head Election Based on the Constitutional Court Decision No. 42 / PUU-XIII / 2015. In order to facilitate obtaining the results of the literature review of this research, the researcher uses the technique of reading and analyzing all writings related to the Passive Constitutional Rights of Former Convict Citizens in the Regional Head Election Based on the Constitutional Court Decision No. 42 / PUU-XIII / 2015.

The data sources used consist of two, namely primary sources and secondary sources. Data sources are divided into 2: 1). Primary sources, including the Constitutional Court Decision No. 42 / PUU-XIII / 2015. 2). Secondary sources, including works on the Passive Rights of the Constitution of Former Convict Citizens in Regional Head Elections. In analyzing the data that has been collected, the researcher will use *content analysis*. This analysis is carried out to explain the contents of a book that describes the situation of the author and society at the time the book was written (Sugiyono, 2018: 68).

3. Results and Discussion

3.1. Leader

Suradinata (1997:11) argues that a leader is a person who leads a group of two or more people, either an organization or a family. While leadership is the ability of a leader to control, lead, influence the thoughts, feelings or behavior of others to achieve previously determined goals. While leadership is an ability inherent in a person who leads which depends on various factors, both internal and external factors. Leaders when translated into English become "LEADER", who has the task to LEAD members around him. While the meaning of LEAD is:

- a. *Loyalty*, a leader must be able to inspire the loyalty of his co- workers and provide his loyalty in goodness.
- b. *Educate*, a leader is able to educate his colleagues and pass it on to his colleagues.
- c. *Advice*, providing suggestions and advice on existing problems.
- d. *Discipline*, providing an example of discipline and enforcing discipline in all activities.

Three theories that explain the emergence of leaders are as follows (Kartono, 1998:29):

- 1) Genetic Theory states as follows: *First*, Leaders are not made, but are born leaders by extraordinary natural talents since birth. *Second*, He is destined to be born as a leader in any situation and condition, which is special. *Third*, Philosophically, the theory adheres to a deterministic view.
- 2) Social Theory (opposite to Genetic Theory) states the following: *First*, Leaders must be prepared, educated, and formed, not just born. *Second*, Everyone can become a leader through preparation and education efforts and driven by their own will.
- 3) The Ecological or Synthetic Theory (emerged as a reaction to the two previous theories) states the following: A person will be successful as a leader if he has had leadership talents since birth, and these talents have been developed through experience and educational efforts; also in accordance with the demands of his environment/ecology.

According to Stogdill in Lee (1989), states that a leader must have several advantages, namely:

- 1) Capacity: intelligence, alertness, ability to speak or verbal facility, originality, ability to judge.
- 2) Achievement: bachelor's degree, science, achievements in sports, and athletics, and so on.
- 3) Responsibility: independent, initiative, diligent, tenacious, self-confident, aggressive, and have a desire to excel.
- 4) Participation: active, have high sociability, able to socialize, cooperative or like to work together, easy to adapt, have a sense of humor.
- 5) Status: includes a fairly high socio-economic position, popular, famous. Then, in Islam a good leader is a leader who has at least 4 (four) characteristics in carrying out his leadership, namely; 1) *Siddiq* (honest) so that he can be trusted; 2) *Tabligh* (deliverer) or the ability to communicate and negotiate; 3) *Amanah* (responsible) in carrying out his duties; 4) *Fathanah* (intelligent) in making plans, visions, missions, strategies and implementing them.

Furthermore, Ishak Arep and Tanjung (2003:23) stated that in achieving the goals as stated above, namely to be able to control or influence and motivate other people, in the application of Human Resource Management, 4 (four) types of leadership styles are generally used, namely:

- a) Democratic Leadership is a leadership style that emphasizes the ability to create morale and the ability to create trust.
- b) Dictatorial or Autocratic Leadership, namely a leadership style that emphasizes the ability to

enforce one's will which is able to gather followers for one's personal and/or group interests with a willingness to accept any risk.

c) Paternalistic Leadership, which is a form between the first style (democratic) and the second (dictatorial) above. Which basically the will of the leader must also apply, but by means of or through democratic elements. The system can be likened to a dictator who is disguised as democratic.

d) Free Rein Leadership, which is a leadership style that 100% fully hands over all operational policies for Human Resource Management to subordinates by only adhering to the basic provisions set by their superiors.

3.2. Political Rights of Former Convicts

Political rights are the rights that every person has that are given by law to achieve, seize power, position and wealth that are useful for him/her. The distribution of these political rights is realized through general elections (Pemilu). General elections are a means to channel the political rights of citizens, to be elected and to vote, to join political organizations, or to directly participate in election campaign activities (Tangwun, 2023: 190).

General Election (Pemilu) is a democratic celebration in order to realize the sovereignty of the people, which provides an opportunity for all citizens to choose their representatives and leaders democratically for the sake of improving welfare. As a basis for organizing the General Election, Article 22E paragraph (1) of the 1945 Constitution mandates that elections be held with better quality by involving the widest possible participation of the people on the principles of democracy, direct, general, free, secret, honest and fair through legislation. The implementation of elections in a democracy is carried out to fill political positions, both legislative and executive. Political positions are the most open positions. With this open character, political positions can be contested by every citizen without looking at any qualifications of the person. The only requirement that can lead him to be able to occupy this political position is political support itself, both political support from people's representatives, higher bureaucrats, and from the community (Handayani, 2014: 1).

The emergence of candidates for people's representatives who have been convicted to be able to participate as participants in the Election has given rise to various views regarding the rights of former convicts in public office. In Indonesia, guarantees of Human Rights (HAM) have been regulated in the 1945 Constitution both in the preamble and its body. Article 27 paragraph (1) of the 1946 Constitution emphasizes that every citizen has the same position before the law and government, and is obliged to uphold the law and government without exception. Even more firmly, in Article 28D paragraph (1) of the 1945 Constitution which states that everyone has the right to recognition, guarantees, protection, and certainty of fair law and equal treatment before the law, as well as Article 28D paragraph (3) of the 1945 Constitution which

states that every citizen has the right to receive equal opportunities in government. All of this is a form of the realization of the sovereignty of the people [Article 1 paragraph (2)].

In an integrated justice system, the limits of criminal law apply to a person when that person is named a suspect, then a defendant, and a convict until the completion of the criminal sanctions that have been determined by the judge. If the convict has served the sentence according to the sanctions given to him, then the convict returns to being an ordinary person/legal subject who must be returned to all his rights and obligations. The purpose of criminal law is the imposition of criminal sanctions in the form of imprisonment for violations of criminal law so that they can return to being honorable members of society by serving a prison sentence with a correctional system regulated in the correctional law (Baharita, 2023, 12).

In relation to prisoners who are serving their sentences, based on Law No. 12 of 1995 concerning Corrections, correctional institutions have a function of coaching for prisoners. Someone who has been imprisoned in a correctional institution (prison) must have undergone a coaching program implemented in the prison so that they can return to being good citizens. Administrative requirements that prohibit former prisoners from nominating themselves as legislative candidates can be interpreted as a distrust of the coaching system in prison.

Regarding former convicts who nominate themselves as legislative candidates, it is the political right of the former convicts to be elected in the election, and the right to receive equal treatment in law and government. The theory of justice was born from criticism of the theory of positivism. The figures who initiated the theory of justice are Ronald Drowkin and John Rawls. Drowkin's theory underlies that the state has an obligation to treat its citizens equally. This means that the state uses moral values, power, and other bases as reasons to set aside human rights, except for the principle of equal treatment. Meanwhile, according to Rawls, every individual has the same rights and freedoms (Tangwun, 2023: 193).

The participation of former convicts is a basic human right, that humans have the same rights and obligations, and are guaranteed in the Declaration of Human Rights, International Conventions, the 1945 Constitution of the Republic of Indonesia, and various other national laws and regulations. In principle, every right held by a person as a legal subject in a society immediately brings certain obligations, both towards the entire community or the state that protects them as citizens and towards fellow human beings. Every citizen also has the right to get the same opportunities in government. Therefore, former convicts should also have the right to nominate themselves as members of the legislature (Mpesau, 2024: 27).

Every citizen who has served a sentence (prison sentence) based on a court decision that has permanent legal force is the same as other citizens who were born in a clean, free, dignified and dignified state, and are equal in the eyes of the law. The legal status of former convicts after serving their sentence according to the concept of criminal law returns to being a respected member of society as before and obtains full legal rights.

3.3. Constitutional Court Decision No. 42/PUU-XIII/2015

The Constitutional Court (MK) has annulled the ban on former convicts from running as participants in regional head elections (Pilkada). The Constitutional Court ruled that Article 7 letter g of Law No. 8 of 2015 concerning Amendments to Law No. 1 of 2015 concerning the Stipulation of Perppu Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors (Pilkada Law) was declared conditionally unconstitutional as long as the convict in question is honest in front of the public. Article 7 letter g of the Pilkada Law is conditionally contrary to the 1945 Constitution as long as it is not interpreted to exclude former convicts who openly and honestly state to the public that they are former convicts, said Chairman of the Panel Anwar Usman when reading out the verdict. The Constitutional Court also removed the Explanation of Article 7 letter g which contained four requirements for former convicts to be able to run as regional heads. Explanation of Article 7 letter g of the Regional Election Law reads: This requirement does not apply to a person who has completed serving his sentence, calculated five years before the person concerned is determined as a prospective candidate in the election of an elected public office (elected official) and the person concerned honestly and openly states to the public that the person concerned has been convicted and is not a repeat perpetrator of crimes.

There are certain conditions based on the consideration of the Constitutional Court in the 1945 Constitution, namely in articles 27 paragraph (1), 28C paragraph (1), 28D paragraph (1) and (3). Based on the legal perspective of the Constitutional Court decision no. 42/PUU- XIII/2015 which allows former prisoners to take part in Regional Head Elections in accordance with the *Siyasah Dusturiyah* concept which includes the rights of the people because former prisoners are also people in Islam whose rights must be protected if they have repented.

Based on the above explanation, it can be concluded that the Constitutional Court Decision No. 42/PUU-XIII/2015 states that former convicts are allowed to participate in the Regional Head election if they meet the requirements. And the Constitutional Court Judge in giving the decision has been in accordance with existing norms, so as not to reduce the rights of every citizen. In Islam, former convicts are allowed to run as Regional Heads because they have served their sentences that have been determined and have repented.

4. Conclusion

Every citizen who has served a sentence (prison sentence) based on a court decision that has permanent legal force is the same as other citizens who were born clean, free, dignified and equal in the eyes of the law. The legal status of former convicts after serving their sentence according to the concept of criminal law returns to being a respected member of society as before and obtains full legal rights. In the Constitutional Court Decision No. 42/PUU- XIII/2015 which states that former convicts are allowed to participate in the election of Regional Heads if they meet the requirements. And the Constitutional Court Judges in giving their decisions have been in accordance with existing norms, so as not to reduce the rights of every citizen. In Islam,

former convicts are allowed to run for Regional Head because they have served their sentences that have been determined and have repented.

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