



## Legal Analysis of Restrictions on the Political Rights of Exconvicts to be Elected in Local Elections Regional Head Election

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### ABSTRACT

*The purposes of this study are: 1) To find out the restrictions on the political rights of ex-convicts to participate in the election of Regional Heads 2) To find out the legal consequences of restrictions and revocation of political rights of ex-convicts to be elected in regional head elections. The type of normative legal research is doctrinal legal research or library research. The results of the research are: 1) Limiting the political rights of ex-convicts to be elected is contrary to the hierarchy higher regulations. Based on Law No.12 of 2011 concerning the Formation of Legislation and Invitation and is not in line with the principle (Lex Superior Derogat Legi Inferiori) meaning that there should be no lower regulations contrary to higher regulations. 2) Due to the law limiting the political rights of ex-convicts to be elected, it can be canceled through a request for examination. Judicial review at the Supreme Court based on Law Number 12 of 2011 concerning the Establishment of Legislation, Law Number 39 of 1999 concerning Human Rights and Law Number 7 of 2017 concerning General Elections*

**Keywords:** Restrictions, political rights, prisoners, election of regional heads

## 1. Introduction

The restriction of the rights of a prisoner, apart from being mentioned in the law, is further emphasized by the presence of the General Election Commission Regulation of the Republic of Indonesia Number 18 of 2019 concerning the Second Amendment to General Election Commission Regulation Number 3 of 2017 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors, in Article 4 paragraph (1) Letter g (Sibarani, 2019). Political rights in the frame of human rights in Indonesia are not only regulated in the constitution but also contained in Article 23 paragraph (1) of Law Number 39 of 1999 concerning Human Rights. When referring to the article, there are ten classifications of human rights, namely the right to life, the right to have a family and continue offspring, the right to self-development, the right to obtain justice, the right to personal freedom, the right to a sense of security, the right to welfare, the right to participate in government, women's rights, and children's rights. The right to be free to choose on the basis of one's political beliefs is the right to personal freedom. Furthermore, the political rights of a citizen are emphasized in Article 43 paragraph (1), paragraph (2) and paragraph (3). This means that Law No. 39/1999 on Human Rights when associated with the revocation of political rights (loss of the right to elect and be elected) is considered inappropriate.

Historically, electoral laws that regulate the prohibition of former convicts who have been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offense punishable by a maximum imprisonment of 5 years since the decision of the Constitutional Court Number 42/PUU-XIII/2015, the provision has been declared conditionally unconstitutional (Mahrus, 2015). This Constitutional Court decision was then followed up in Law Number 7/2017 on General Elections. However, even though there has been a Constitutional Court decision that allows former convicts to run for elections under certain conditions, in its follow-up, the KPU then issued General Election Commission Regulation (PKPU) Number 18 of 2019 concerning the Second Amendment to General Election Commission Regulation Number 3 of 2017 concerning Candidacy for the

Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors, which in essence, this PKPU still prohibits former convicts from running in the 2019 elections.

The presence of restrictions on the political rights of a prisoner is certainly not in accordance with the concept of human rights. In addition, it is contrary to Article 28D of the 1945 Constitution, but in Indonesia, the right to vote and be elected continues to be used as an excuse by general election organizers such as the KPU to limit the right to be elected and vote for a prisoner, as in the enactment of the General Election Commission Regulation of the Republic of Indonesia Number 18 of 2019 concerning the Second Amendment to General Election Commission Regulation Number 3 of 2017 concerning Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayor and Deputy Mayor and General Election Commission Regulation (PKPU) Number 1 of 2020 concerning the Third Amendment to General Election Commission Regulation Number 3 of 2017 concerning Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors, which prohibits a former prisoner from participating in the nomination for regional head, this certainly creates a legal polemic for the Indonesian state which recognizes and upholds equal human rights including concerning one's political rights granted by the state to its citizens as mentioned in the applicable laws and regulations (Asshiddiqie, 2020).

In this regard, this study will review 2 (two) problem formulations, namely: First, How are the restrictions on the political rights of former prisoners to be elected in regional head elections based on General Election Commission Regulation Number 1 of 2020 concerning the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors? Second, What are the legal consequences of limiting the political rights of ex-convicts to be elected in regional head elections?

## **2. Method Research**

The method used in this research is qualitative research through a normative legal approach, namely an approach that uses a positivist juridical conception, namely that the law is identical to written norms made by the authorities, so far made as a normative system that is autonomous closed and detached from community life (Hanitijo, 2008). This research focuses on positive law in the form of laws and regulations and the object of research regarding restrictions on political rights to be elected in the Regional Head election based on General Election Commission Regulation Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors. The data collected is the use of literature studies, legal sources, and other sources related to the research. This is done because in analyzing the abuse of official authority, the opinion of legal experts (doctrine) cannot be ruled out as part of the reference and comparison, besides that written and unwritten legal sources are also the basis for researchers to take quotations to add to the repertoire in the discussion of this article. in the discussion in this article. As stated by (Ibrahim, 2013) that normative legal research is a scientific research procedure to find truth based on scientific logic from the normative side. The normative side is not limited to laws and regulations. This is as said by (Mahmud, 2005) that legal research is normative research but not only. legal research is normative research but it does not only examine positivism.

## **3. Results and Discussion**

### **3.1 Results**

#### **Restriction of Political Rights of Former Prisoners to be Elected in Regional Head Elections**

Such restrictions can only be justified if they are obviously necessary, given the severity of their handicap, which makes it impossible for them to exercise their rights in a meaningful way. Restrictions imposed by law to the extent that they are deemed necessary by reason of the severity of their handicap so as to make it impossible for the person concerned to exercise their rights "in a meaningful way" are justified because they cannot be considered discrimination. Thus it is clear that, in accordance with the provisions of Article 28J paragraph (2) of the 1945 Constitution, the requirement to be able to restrict the exercise of human rights is not merely that the restriction must be carried out by law, as explained by the legislators (DPR and President) in the case a quo. A person who has committed a crime and is threatened or sentenced to imprisonment of 5 years or more who runs for election is very disturbing and closely related to the rights or freedoms of others. Considering that the regional head is a public position where the community should be treated to a truly clean candidate leader without any legal defects that are synonymous with damage to moral values, religion, public order in an ex-convict. So it is permissible to tighten the

election nomination of candidates for regional heads of former prisoners (Widyatama & Isharyanto, 2019). Here are some former prisoners who are running for regional head candidates in various regions. As for some former prisoners who participated in the Pilkada contestation, namely:

- a. Elly Engelbert Lasut. The person concerned was imprisoned for 7 (seven) years in Class I Sukamiskin Prison for corruption of fictitious official travel orders (SPPD) in 2006-2008;
- b. Jimmy Rimba Rogi. Jimmy Rimba Rogi is a former Manado Mayor who was involved in a corruption case of the Manado Regional Budget 2006-2007 and was sentenced to 7 (seven) years;
- c. Vonny Panambuan, a businessman and former Regent of North Minahasa, was detained for 18 months due to corruption in the feasibility study project for the construction of Loa Kulo Kutai Kartanegara Airport in 2008;
- d. Soemarno Hadi Saputra who is a former Mayor of Semarang who is also running for the same position in the simultaneous regional head election (Purba, 2024).

Pancasila as the basis of the Republic of Indonesia has regulated the rights of every citizen, this is implicitly stated in the fifth principle of social justice for all Indonesian people. This principle means that there should be no discriminatory treatment for all children of the nation in all fields of life unless otherwise required by law or a judge's decision. The regulation of political rights is regulated by the 1945 Constitution, the Election Law, (PKPU). Then, regulation through court decisions from the Constitutional Court (MK) and the Supreme Court (MA). Where political rights are rights that originate from the inherent dignity of every human being which is then guaranteed and respected by the state so that free humans can enjoy political rights and fulfill and be competent in being accountable to the state. Regulations governing political rights are also regulated in Article 43 paragraphs (1), (2) and (3) of Law No. 39 of 1999 concerning Human Rights because that is why Indonesian citizens have the same rights without any restrictions either directly or indirectly in any form. Political rights are also the right to elect and be elected by every citizen and get the political right to be elected as a state leader.

### **Legal Consequences of Restricting the Political Rights of Former Prisoners to be Elected in Regional Head Elections**

The basic regulation regarding the political rights of former prisoners is the state constitution of the 1945 Constitution of the Republic of Indonesia, which means that the basis for the implementation of this is embodied in Article 27 paragraph (1) of the 1945 Constitution which states "All citizens are equal before the law and government and must uphold the law and government with no exceptions." The purpose of Article 27 is not only to place citizens in the same position before the law and government, but also to have an equal obligation to uphold the law and government as well as possible. In the context of regulating former corruption convicts, they must obey the law and government so that it is in accordance with the laws and regulations because the position of citizens is the same before the law (Iskandar & Prasetyoningsih, 2019).

The enactment of General Election Commission Regulation Number 1 of 2020 concerning the Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors, has caused reactions and polemics in the community that the General Election Commission which regulates the prohibition of former convicts to become candidates for Regional Heads in the General Election from the beginning has caused debate and has until now become a polemic in the community. The core of the polemic is the General Election Commission Number 1 of 2020 concerning the Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors who continue to impose a ban on former convicted drug dealers, sexual violence against children to become candidates for regional heads in the General Election even though this is considered contrary to various laws and regulations above it, namely the 1945 Constitution of the Republic of Indonesia and Law Number 39 of 1999 concerning Human Rights, including the Constitutional Court Decision (MK) Number 56 / PUU- XVII / 2019.

According to researchers, there must be a development of legal products in order to provide legal certainty to the community, especially to regional head candidates who are ex-convicts by submitting a judicial review application at the Supreme Court against the General Election Commission Regulation of the Republic of Indonesia

Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors. In the event that the KPU Regulation is allegedly contrary to the Law, the test is carried out by the Supreme Court and Bawaslu and / or parties who are harmed by the enactment of the KPU Regulation are entitled to become applicants to submit a test to the Supreme Court as referred to in paragraph (1). So the Supreme Court in examining a legislation on the basis of whether or not there is a conflict with higher regulations and whether or not there is a discrepancy in the procedure for making regulations with laws and regulations and also based on public interest standards, so that testing of public interest depends on aspects of the validity of various types of laws and social norms that exist in society (Swantoro, 2017).

Based on this, the existence of General Election Commission regulation Number 1 of 2020 concerning the Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors which is contrary to the laws above it such as the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999 concerning Human Rights and based on the Constitutional Court Decision (MK) Number 56 / PUU-XVII / 2019 can be canceled through judicial review of the substance of general election commission regulations that limit the political rights of former prisoners to be elected in regional head elections through the Supreme Court judicial institution which can be submitted by applicants who object to the existence of KPUNo.1 regulations. 2020 concerning the Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors which limits the political rights of ex-convicts to nominate and be elected as candidates in the Regional Head elections.

### **3.2 Discussion**

#### **Restriction of Political Rights of Former Prisoners to be Elected in Regional Head Elections**

In Indonesia, restrictions on the political rights of ex-convicts to be elected in regional head elections were initially mentioned in 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. However, in its development, restrictions on the political rights of former prisoners are mentioned in Article 7 paragraph (2) letter g which states that: Candidates for Governor and Deputy Governor, Candidates for Regent and Deputy Regent, and Candidates for Mayor and Deputy Mayor as referred to in paragraph (1) must fulfill the following requirements: letter g "has never been convicted based on a court decision that has obtained permanent legal force". This law was rejected by various parties, resulting in a judicial review filed by Indonesia Corruption Watch (ICW), in this case represented by Adnan Topan Husodo as Applicant I and the Association for Elections and Democracy (Perludem). Then in this case represented by Titi Anggraini as Applicant II at the Constitutional Court (MK) against the law. As a result of Decision Number 56/PUU-XVII/2019, the Constitutional Court stated that Law Number 10/2016 on the Election of Governors, Regents and Mayors violates the provisions of the 1945 Constitution, meaning that juridically, the restrictions on the political rights of ex-convicts to be elected in regional head elections can no longer be enforced in Indonesia (Oktafiansyah, 2022).

The juridical basis for the issuance of regulation Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors by the General Elections Commission (KPU) is Law Number 10 of 2016 should not be valid because it has been declared contrary to the 1945 Constitution by the Constitutional Court (MK) through Decision Number 56 / PUU-XVII / 2019 which in essence in the ruling, states that Law Number 10 of 2016 is contrary to the 1945 Constitution and has no conditional binding legal force. Law No. 10/2016 is 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. This law was passed on July 1, 2016 (Law, 2016).

Based on these provisions, it is clear that the General Election Commission Regulation (KPU) Regulation Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors is contrary to the 1945 Constitution Article 28D, meaning that the General Election Commission regulation here violates the hierarchy of Legislation because it conflicts with the three laws above it, this is certainly not in accordance with what is stated in Law Number 12 of 2011 concerning the Formation of Legislation. Basically what is explained by the theory above because, legal norms should be the lowest level rules apply and sourced, and based on higher norms, and higher norms also sourced and based on higher norms and so on until it stops at a supreme norm called the Basic Norm (Grundnorm) or in other words by



analyzing the theory put forward by Hans Kelsen that lower norms (inferior) can be formed based on higher norms (superior), in the end the law becomes tiered and layered forming a hierarchy. This implies that lower rules are formed to explain higher rules (Anggono, 2014).

Legislation, states that in legislation there is a requirement that lower regulations must not contradict higher regulations or higher laws and regulations override lower-level laws and regulations (*Lex Superior Derogat Legi Inferiori*). When viewed from the hierarchy of laws regarding restrictions on the political rights of former prisoners, there is disharmony between the law and the General Election Commission Regulation. This can be seen that the General Election Commission Regulation Number 1 of 2020 concerning the Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors shows a discrepancy between the regulations of the Law and is harmonized with the regulations or legal norms above it, such as Article 4 letter f of the General Election Commission Regulation Number 1 of 2020 concerning the Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors which is contrary to the 1945 Constitution and Law No. 39 of 1999 concerning Human Rights. 39 of 1999 concerning Human Rights, besides that the article has the consequence of harming the political rights of ex-convicts who have finished serving their sentence.

Furthermore, Article 8 paragraph (1) of Law of the Republic of Indonesia Number 12 of 2011 concerning the Formation of Legislation states that the types of laws and regulations other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the House of Representatives, the Regional Representatives Council, the Supreme Court, the Constitutional Court, the Supreme Audit Agency, the Judicial Commission, Bank Indonesia, Ministers, Institutions, or Commissions of the same level established by Law or Government by Order of Law, Provincial Regional Representatives Council, Governor, Regency / City Regional Representatives Council, Regent / Mayor, Village Head or equivalent Then in Article 8 paragraph (2), it is stated that the Laws and Regulations as referred to in paragraph (1) are recognized and have binding legal force as long as they are ordered by higher Laws and Regulations or formed based on authority.

As stipulated in Article 8 above, the General Election Commission regulation referred to here is one of the regulations that can apply because it is ordered by higher laws and regulations when viewed from the substance of Article 4 letter f of the General Election Commission Regulation Number 1 of 2020 concerning the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors, then the rule of law made by the General Election Commission is contrary to higher-level regulations, meaning that this General Election Commission regulation should be a lower-level regulation that must refer to or be guided by regulations that are above it or that have a higher level, and are guided by the principle (*Lex Superior Derogat Legi Inferiori*), meaning that there cannot be lower regulations that contradict the regulations that are above or higher, namely, the 1945 Constitution including Law Number 39 of 1999 concerning Human Rights For this reason, if you look at some of the substance of the articles of the General Election Commission Regulation Number 1 of 2020 concerning the Nomination for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors, it contradicts several articles, namely Article 28D of the 1945 Constitution and Article 28J. In this case, the General Election Commission institution does not pay attention to the requirements for the formation of Legislation based on Law Number 12 of 2011 concerning the Formation of Legislation as explained above. Based on the explanation of these legal principles, Article 4 letter f of the General Election Commission Regulation Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors should also have no validity because there is a legal principle that regulates it, namely the principle of *Lex Superior Derogat Legi Inferiori* or higher laws and regulations that defeat lower-level laws and regulations, meaning that articles that limit the political rights of former prisoners as stated in the General Election Commission Regulation can be canceled or cannot be enforced as a rule of law or as a condition for being elected in regional head elections.

### **Legal Consequences of Restricting the Political Rights of Former Prisoners to be Elected in Regional Head Elections**

Konsekuensi Hukum Pembatasan Hak Politik Mantan Narapidana untuk Dipilih dalam Pemilihan Kepala Daerah

Efforts to realize dignified elections are part of the ideals of democracy (Ari, Putra, & Mayasari, 2023). On the other hand, citizens have the same rights to vote and be elected. A former prisoner also has the same right to participate in the contestation of Regional Head Elections. The provisions regarding the rights of citizens to be elected in general elections as stated in the 1945 Constitution and the Human Rights Law in reality can be said to

have not been implemented properly because the political rights of former prisoners to become candidates for Regional Heads in Indonesia are still being restricted. This is indicated by the regulation of PKPU Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors.

Law No. 10/2016 on the prohibition of ex-convicts from running as candidates for regional heads. According to the applicant, the article has harmed his constitutional right to participate as a candidate in regional elections and the rules that limit the rights of convicts in Article 7 paragraph (2) letter g, are clearly contrary to the 1945 Constitution (Aryani & Hermanto, 2020). The Constitutional Court in its ruling granted the petitioners from ICW and Perludem by stating that Article 7 paragraph (2) letter of the Law and does not have legal binding force conditionally as long as it is not interpreted as having passed a period of 5 years after the former convict has finished serving his imprisonment based on a court decision that has permanent legal force, meaning that former convicts can run for regional head after going through a waiting period of 5 years (Muzayanah & Saputra, 2020). The Constitutional Court in its ruling partially granted ICW and perludem's request by stating that Article 7 Paragraph (2) Letter g of Law Number 10/2016 on Pilkada is contrary to the 1945 Constitution and has no binding legal force conditionally as long as it is not interpreted as having passed a period of 5 years after the former convict has finished serving his imprisonment based on a court decision that has permanent legal force (Mastura, Sampara, & Qamar, 2020).

The existence of general elections is recognized by countries adhering to the principle of popular sovereignty, and is held in all types of political levels, whether democratic, authoritarian or totalitarian systems. By some democracies, general elections are considered a symbol and also a benchmark of the democratic system (Budiardjo, 2009) However, in reality, many disagree with the decision handed down by the Constitutional Court. Many people consider that the Constitutional Court in deciding a case must form a black or white decision, meaning that the Constitutional Court's decision is only seen from two diametrically different criteria, namely canceling, or not canceling the article, paragraph, or the entire law at all. The statement that the law is contrary is of course different from the material conditions that are not in accordance with the constitution. In addition, the decision of the Constitutional Court is retroactive, namely a decision that also cancels all legal consequences that have arisen before the law is canceled, and is non-retroactive, namely legal consequences that existed before the law was canceled are also canceled, in other words, the Constitutional Court's decision is prospective (A.Syahrizal, 2006).

The restriction of political rights in PKPU Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors which is the implementation of the General Election Law, of course has consequences for the right to political participation of citizens, but the restriction of political rights of ex-convicts results in a violation of the essence of democracy. Violation of the essence of democracy with the restriction of political rights of ex-convicts is meant here because the principle of implementing elections that are honest, fair, free, and participatory, and based on the will of the people is not fulfilled. The provisions of General Election Commission Regulation Number 1 of 2020 concerning Candidacy for the Election of Governors and Deputy Governors, Regents and Deputy Regents, and / or Mayors and Deputy Mayors hinder the fulfillment of people's basic rights to vote and be elected with these restrictions. With the restrictions on the political rights of former prisoners, it indirectly results in the presence of political rights discrimination for citizens, especially for former prisoners related to the restrictions on political rights carried out by the General Election Commission. This is a punishment that degrades human dignity and results in a violation of international agreements by the Indonesian state which has agreed to the elimination of punishment that degrades human dignity. Denying or limiting the political rights of ex-convicts is an act of arbitrary discrimination and is contrary to the principles of human justice. The constitutional right of citizens to vote and be elected is a right guaranteed by the Constitution, laws and international conventions, so that restrictions are a form of deviation and the denial and elimination of the right is a violation of the human rights of citizens.

#### **4. Conclusion**

From the description of the main problem above, it can be concluded as follows:

1. The restriction of the political rights of former prisoners to be elected in regional head elections based on General Election Commission Regulation Number 1 of 2020 concerning the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors is contrary to the hierarchy of higher regulations. Based on Law Number 12 of 2011 concerning the Formation of Legislation and is not in line with the principle (*Lex Superior Derogat Legi Inferiori*), which means that there should be no lower regulations that contradict higher regulations.

2. The legal consequences of limiting the political rights of ex-convicts to be elected in regional head elections regulated in General Election Commission Regulation Number 1 of 2020 concerning the Election of Governors and Deputy Governors, Regents and Deputy Regents, and/or Mayors and Deputy Mayors can be canceled through an application for judicial review in the Supreme Court based on Law Number 12 of 2011 concerning the Formation of Legislation, Law Number 39 of 1999 concerning Human Rights and Law Number 7 of 2017 concerning General Elections

## 5. Speech Thank You

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