



Legal Politics of Ex-Convicts in Contesting Regional Head Elections

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ABSTRACT <p>The regulation of ex-convicts' political rights in legislative and executive elections has historically prohibited those sentenced to five years or more imprisonment from running for office. This legal framework has undergone significant changes following the Constitutional Court Decision Number 42/PUU-XIII/2015. To analyze the legal politics surrounding ex-convicts' participation in regional head elections and examine the implications of the Constitutional Court's decision on their political rights. This study employs a normative legal research methodology, analyzing relevant legislation, Constitutional Court decisions, and public response to changes in electoral regulations regarding ex-convicts' participation. The Constitutional Court Decision Number 42/PUU-XIII/2015 declared the blanket ban on ex-convicts unconstitutional, allowing their participation provided they publicly disclose their status. This decision was subsequently incorporated into Law Number 7/2017 on Elections. However, significant public opposition to ex-convicts' participation in elections persists despite these legal reforms. While legal reforms have expanded ex-convicts' political rights through conditional participation in elections, there remains a notable disconnect between legal developments and public sentiment regarding ex-convicts' electoral participation.</p> <p>Keywords: <i>Constitutional Court, Electoral Law, Ex-convicts' Rights, Political Participation, Public Opposition</i></p>			

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INTRODUCTION

Article 1 paragraph (2) of the 1945 Constitution states that sovereignty is vested in the people and exercised according to the provisions of the Constitution (Hummel et al., 2021) (Fieldhouse et al., 2023). Article 1(3) of the 1945 Constitution states that Indonesia is a state of law (Liu et al., 2021). Based on the formulation of the article, it is clear that the Indonesian state must guarantee the implementation of a free election without exception (Lu & Wang, 2021), as proof that Indonesia is a state of law (Abdel-Basset et al., 2023). In this context, regional head elections and general elections are in the legal dimension as a form of human rights (Fang et al., 2021) (Townesley et al., 2023).

Human rights are legal rights that seek to translate beliefs about human dignity into concrete legal language with the aim that these rights can be enforced as necessary before the courts (Dragu & Lupu, 2021) (Hopkins et al., 2022). The conception of human rights in its development is closely tied to the conception of the rule of law (Wachter et al., 2021). In a state of law, it is actually the law that rules, not humans (Chouaibi et al., 2022). Law is understood as a hierarchical unity of legal norms culminating in the constitution (Muhammad & Long, 2021). This means that a state of law requires the supremacy of the constitution (Adem et al., 2020) (Nwagwu et al., 2022). The supremacy of the constitution in addition to being a consequence of the concept of the rule of law is also an implementation of democracy because the constitution is the highest form of social agreement (Zhi et al., 2022).

Elections are also not only related to the government's need for the legitimacy of its power but also as a means for the people to articulate their aspirations and interests in the life of the nation and state (Pennycook & Rand, 2021). The legality of ex-convicts as candidates who will participate in regional head elections and general elections is sensitively discussed (Nai, 2021) (Maynard, 2022). The good intentions of the election management body in producing the best candidates in the regional head elections and general elections must be supported (Diakopoulos & Johnson, 2021). This good faith must pay attention to the applicable sources of law for the purpose of law, namely justice, expediency and legal certainty (Araújo & Prior, 2021) (Meeks, 2022).

In April 2018 (Kernalegenn et al., 2023), the KPU as an election organizing body expressed its desire to prohibit former corruption convicts from becoming DPR and DPRD candidates (Saleh et al., 2021) (Meredith & Kronenberg, 2023). The pros and cons of this issue have emerged among election observers, political parties, academics and layers of society in Indonesia (Jones-Jang et al., 2021).

Based on the explanation above, the research problem formulation can be stated: What is the position of the rights of former prisoners in the contestation of regional head elections? And How to understand the legality of former prisoners in regional head elections and general elections?

RESEARCH METHODOLOGY

The research used in writing is normative juridical (Eka Aditya et al., 2023).. The sources of legal materials used in this research are primary legal materials and secondary legal materials (Wetzel et al., 2022). Primary materials used are legal science books (Maquibar et al., 2023). The types of approaches used in this research are legislative approaches, comparative legal research approaches, cases and legal analysis approaches (Wu et al., 2023). The data processing method used is the analysis method which is then outlined in descriptive analysis writing (Boklund et al., 2021).

RESULT AND DISCUSSION

One of the basic requirements for a democratic government is elections (Gaber & Fisher, 2022). Bingham Powell calls elections an instrument of democracy (Stewart

Fotheringham et al., 2021). More clearly Powell provides the argumentation behind his opinion: In political systems with many people, such as modern nations, government “by the people” must for the most part be indirect. The people participate primarily by choosing policymakers in competitive elections. Such elections are instruments of democracy to the degree that they give the people influence over policy making.

The inclusion of the implementation of elections as one of the indicators of a democratic state is inseparable from the shift in the practice of direct democracy to indirect/representative democracy (Urman et al., 2022). Therefore, it has become a commonly accepted practice by various countries - the exercise of popular sovereignty is carried out indirectly or through representatives (representative government). This representative democracy only became an ideal of political thought after two catastrophic events occurred. First, the anti-British revolution in North America that led to the birth of the new nation of the United States in 1776. Second, the French Revolution, 13 years later.

In this representative democracy, the presence of representative institutions / parliament becomes very important in order to become the bearer of the mandate to implement the sovereignty of the people in its development, not only members of parliament are deemed necessary and important to be directly elected by the people, but also executive institutions both at the center (president and vice president) and in the regions (head and deputy head of the region) (Engler et al., 2021). Therefore, it is not surprising that Article 22E paragraph (2) of the 1945 Constitution states, “General elections are held to elect members of the House of Representatives, the Regional Representatives Council, the President and Vice President and the Regional Representatives Council”. Meanwhile, the filling of the position of regional head is regulated in Article 18 paragraph (4) of the 1945 Constitution which reads, “Governors, Regents, and Mayors as heads of provincial, district, and city local governments are elected democratically, respectively”.

Laws on regional head elections and general elections must be able to quickly respond to changes in society. Laws on general and regional head elections tend to change because they are linked to political interests. Regional head elections and general elections without politics will not give birth to democracy (McKay & Tenove, 2021). Conversely, politics without local elections and general elections is not democracy. The making of laws up to the technical regulations for their implementation should pay attention to the behavior of the people who implement them and the legal culture so that they are understood and can be implemented properly and consciously by the community. This kind of law implementation will lead society to prosperity, justice, happiness and glory. In the development of the electoral organizing body, it tries to limit specifically the crime of corruption from participating as a candidate in the general election. Corruption is a barrier to the nation’s economic, social, political and cultural development. The spirit of Law No. 31 of 1999, Law No. 20 of 2001, and Law No. 30 of 2002 is inseparable from the spirit of the international world that sparked the Declaration of the 8 th International Conference Against Corruption on September 7-11, 1977 in Lima which sparked the eradication of corruption internationally. Indonesia ratified the United Nations Convention Against

Corruption (UNCAC) based on Resolution 58/4 dated October 31, 2003 as stipulated in Law Number 7 of 2006 concerning the Ratification of the 2003 United Nations Convention Against Corruption (Wang et al., 2022).

Similarly, the constitution commands that sovereignty is vested in the people and exercised according to the Constitution. Limiting the rights of Indonesian citizens with the status of ex-convicts who are part of the people as holders of sovereignty basically limits the rights of Indonesian citizens who want to vote and trust the ex-convicts. The provision should be left to the people as the holders of sovereignty to choose or not to choose the ex-convicts not by determining the requirements by the legislators. Efforts to limit political rights through the issuance of rules that are hierarchically lower can be understood as an effort that has good intentions to maintain the democratic process. However, democracy still requires respect for human rights (Jungheer & Schroeder, 2021).

Violation of human rights is a denial of the constitution so that violators can be held accountable. As the holder of the obligation to fulfill human rights, the state has three duties, among others, the state must respect, protect, and fulfill human rights.¹⁸ The conception of human rights in its development is closely tied to the conception of the rule of law. In a state of law, it is the law that rules, not humans. Law is understood as a hierarchical unity of legal norms culminating in the constitution. This means that a state of law requires the supremacy of the constitution. The supremacy of the constitution in addition to being a consequence of the concept of the rule of law is also an implementation of democracy because the constitution is the highest form of social agreement (Duncan J. Watts et al., 2021).

Every citizen who has committed a criminal offense, as long as he has carried out the sentence imposed on him, everything that was previously revoked will return / recover by itself. The remaining penalties that are not the result of a judge's decision but arise because of the wishes of a group of people, although prescriptively good, have essentially tyrannized the sense of justice of others. The remedy should have come about through an initial and complete thought before it was enacted. It could have been raised through amendments to Law Number 7 Year 2017 but it is very likely to be materially tested by a group of people or individuals who feel aggrieved by the changes to the law that will be enacted. This is because additional punishment has been imposed on someone who has finished serving their sentence. The imposition of punishment for a second time not based on a court decision is a violation of human rights.

General elections serve as a cornerstone of democracy. A truly integral election is characterized by several key factors. Firstly, it necessitates a profound respect for human rights and the adherence to international treaties pertaining to civil and political rights. Secondly, a robust framework of well-defined principles, standards, rights, and rules must guide the electoral process, ensuring transparency and accountability. Finally, the government bears the ultimate responsibility for upholding the rule of law, guaranteeing equal treatment for all citizens before the law, and ensuring that legislative and enforcement actions are impartial and in full compliance with human rights principles.

Everyone is equal before the law. Therefore, every citizen, including ex-convicts, as long as they have completed their sentence, they will have the same rights as other citizens, unless their political rights are revoked by a judge, even for a president and vice president. This will be different if the president and vice president have committed acts of treason against the state. Treason (aanslag) can be translated directly as an attack (criminal offense; crime) directed against a person (high position; head of state) or when attached to articles on state safety more in the sense of an attempt or effort (attempt or ondernemen) (Scheel, 2023). The meaning of the term makar refers to crimes against state security and crimes against friendly states and heads of friendly states and their representatives.

The legal facts of the Constitutional Court have provided constitutional space for former prisoners including corruption²³ to become legislative candidates in regional and general elections. Despite the rejection of the democracy and election observers to the concerns of former prisoners participating in the contestation of the 2019 general elections. Article 240 paragraph (1) letter (g) of Law Number 7/2017 on General Elections states that the requirements for candidates for members of the DPR, provincial DPRD, and district / city DPRD have never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offense punishable by imprisonment of 5 years or more, unless they openly and honestly declare to the public that they are former convicts. In this article, former convicts (regardless of the type of crime) are guaranteed to be able to participate in general elections as candidates for members of the DPR, provincial DPRD, and district / city DPRD unless there is a judge's decision that reduces / revokes the political rights of convicts (Yan et al., 2021).

Obligations between individuals in society, divide authority and regulate how to solve legal problems and maintain legal certainty .(Based on the explanation and information from the House of Representatives of the Republic of Indonesia (DPR RI), the background of the emergence of the provision of the requirement “never 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 (five) years or more”, in the general election to elect members of the DPR, DPD, provincial DPRD, and regency / city DPRD, and elect regional heads and deputy regional heads, as well as elect the president and vice president who are democratically elected based on the principles of direct, general, free, secret, honest and fair are as follows:

1. General elections (elections) that are carried out based on the principles of direct, general, free, secret, honest, and fair are expected to be able to attract good leaders and have high leadership integrity and become role models and generate trust in the people they lead. In the implementation of general elections, it is necessary to establish the criteria and requirements of a good candidate and have high integrity as a leader on whose shoulders is placed the responsibility of managing the state and government, so that the best children of the nation can be obtained who will become role models for the people they lead, which in turn will create a clean and good government system (Clean and Good Governance) to provide a basis for public trust in their leaders.
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2. The provision on “not having 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 (five) years or more”, is a standard requirement of morality measures determined in various laws related to the appointment or dismissal of a person from a certain position, especially public positions, as also regulated in several laws, for example:
 - a. Article 6 of Law No. 23/2003 on the General Election of the President and Vice President reads, “Candidates for President and Vice President must fulfill the requirements:
 - b. t. has never been sentenced to imprisonment based on a court decision that has permanent legal force for committing a criminal offense punishable by 5 (five) years or more imprisonment.
 - c. Article 11 of Law Number 11 Year 2007 on the Implementation of Elections which reads, “The requirements to become a candidate member of the KPU, Provincial KPU, or Regency / City KPU are: A. never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offense punishable by imprisonment of 5 (five) years or more.
 - d. Article 16 of Law Number 24 of 2003 concerning the Constitutional Court which reads, “To be appointed as a constitutional judge, a candidate must meet the following requirements: d. never be sentenced to imprisonment based on a court decision that has permanent legal force for committing a criminal offense punishable by imprisonment of 5 (five) years or more.
 3. These requirements are reasonable, considering that a person who occupies a certain position in a government or other public official is in place must be a figure who can provide a good example / role model for the community, therefore a figure is needed who has never committed a disgraceful act according to the law, in the sense that he has committed an act / criminal offense. The threat of a criminal sentence of 5 (five) years or more in criminal law is categorized as a criminal offense.
 4. In addition, the requirement of never being 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 (five) years or more, is intended so that a candidate for elected public officials will not come from a person who has a less commendable background because he has committed a criminal offense so that he is sentenced to a severe criminal sentence of more than 5 (five) years, so that the integrity of his personality is maintained because he has the full trust of the community and does not raise doubts for the community about his capacity and capability in government.
 5. The provision of these conditions is also intended as a preventive effort for a person who intends to run for state officials in the future to always maintain his behavior and actions from reprehensible acts that could result in criminalization for him, especially in the midst of the state of most Indonesian people who still hold
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primordialism values where only good and trusted people can be used as role models and role models. The provision of never being sentenced to imprisonment of 5 (five) years or more also aims to ensure that state institutions are led by people who are clean both in personality and “track record”, which is a demand of the reform era that has long envisioned the creation of “Good Corporate Governance” through the best people elected.

6. Although the Constitution guarantees constitutional rights for citizens, especially in politics and government as stipulated in Article 27 Paragraph (1), Article 28D Paragraph (3) and Article 28I Paragraph (2) of the 1945 Constitution, the guarantee is basic and universal, meaning that it applies to anyone in the same status in the sense of being flawless according to the law. This is understood because the applicability of these articles is also constitutionally limited, namely based on Article 28J Paragraph (2) which reads, “In exercising his rights and freedoms, every person shall be subject to the restrictions stipulated by law for the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society”. Thus, restrictions on people who hold public office must be clean people and not ex-convicts are the right of the state or government to regulate and this is not contrary to the constitution and democracy;
7. Strictly speaking, public office requires that the people to be elected are competent, qualified and have good morals, therefore the public must know the candidates for public officials.

Thus, the restriction for candidates for public officials, namely never being 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 (five) years or more, is a form of protection of the public interest by the state. Second, the existence of requirements for Candidates for Members of the DPR, DPD, and DPRD as well as candidates for regional heads and deputy regional heads and candidates for President and vice president, is the authority of the legislator (the House of Representatives and the President) to determine certain requirements, including the requirements of certain moral standards (moral ethics) in accordance with the needs that are demanded for the public office concerned, and therefore it is an open policy choice (open legal policy); Third, the guarantee for each person is universal and applies to anyone, meaning that it is not only for those who have a record of reproach or who have never committed a reprehensible act. It is clear that this provision is in line with the provisions of Article 28J Paragraph (2) of the 1945 Constitution, which reads, “In exercising his rights and freedoms, every person shall be subject to restrictions established by law for the sole purpose of ensuring recognition and respect for the rights and freedoms of others and to meet just demands in accordance with moral considerations, religious values, security, and public order in a democratic society.”

KPU as the election organizer issues technical regulations for the nomination of regional head and legislative candidates. Bawaslu has the authority in terms of monitoring

candidates who will contest and implementing related regulations. Election organizers must be able to utilize their authority. The technical regulations must contain provisions that implement the law and judicial decisions. KPU can issue technical provisions in the form of:

1. Provisions on the obligations that must be carried out before and after the determination of candidates for regional heads and legislative candidates who have the status of former prisoners along with sanctions if they do not carry out the provisions openly and honestly to the public about the status of former prisoners.
2. Conduct socialization about regional head candidates and legislative candidates who participate in the contestation, including candidates with ex-convict status;
3. Conduct political education to voters to find out the vision, mission and background of regional head candidates and legislative candidates who are contesting.

Efforts that can be made by Bawaslu as a supervisory institution for organizing elections are:

1. Supervise the implementation of technical regulations relating to regional candidates and legislative candidates who are ex-convicts;
2. Oversee the conditions that must be met by candidates with ex-convict status;
3. Impose sanctions on both the KPU and regional candidates and legislative candidates who are ex-convicts if they violate the provisions of the law.

For former convicts who will participate as candidates for members of the DPR, provincial DPRD and district/city DPRD, they are required to openly and honestly disclose to the public that they are former convicts as in the law a quo. The interpretation of the law a quo must be interpreted as a requirement that must be carried out and fulfilled before being determined as a candidate and after being determined as a candidate for members of the DPR, provincial DPRD and district / city DPRD. This must be done concretely by prospective members of the DPR, provincial DPRD and DPRD who are former convicts. Concretely means not only fulfilling the procedural but substantially must be fulfilled. The sincerity of declaring himself as a former prisoner must be reflected in the vision and mission campaign concerned. Honest means not lying, telling the truth. Open can be understood as not closed and not kept secret.

In addition, during the campaign period, the General Election Commission (KPU) makes announcements in regional or national print media and the KPU website at all levels about candidates for DPR, provincial DPRD and regency/city DPRD who are former prisoners in their regions every day during the campaign period. This announcement task can be carried out by the election organizer according to the level at which the ex-convict is registered as a candidate for DPR, provincial DPRD and regency/city DPRD. This can be done by the KPU because it has sufficient funds sourced from the state revenue and expenditure budget. The presence of the election supervisory body in supervising this process is very important. The absence of supervision makes the process weak. This is done as an effort to fulfill the provisions as required by law and to fulfill the public's sense of justice and eliminate prejudice against the organization of elections that will be and/or are being carried out.

On the other hand, after the Constitutional Court's decision, the legality of ex-convicts to compete as candidates for regional heads and legislative candidates lies with political parties. The constitutional process that can be carried out is the political party filter process. Political parties actually create a quality and modern democracy that has never been thought of except to emerge from political parties. The progress and decline of a country's democracy is in the hands of political parties.

Political parties have the opportunity to nominate clean candidates with good track records. The nomination of members of the DPR, provincial DPRD and district/city DPRD is part of political recruitment. Political parties can conduct political education to their members. Political parties can build political schools to create party cadres with integrity and professionalism. This is done so that the party cadres have a good value in the community so that they are worthy of competing. Political parties become confident to nominate candidates for the DPR, provincial DPRD and regency/city DPRD because they are free from legal problems. This certainly benefits the voting public because political parties have succeeded in presenting candidates with integrity and free from legal problems. The measure of the success of modern political parties in conducting political education is if many party members have the selling power so that they are confident to nominate their members so that they can reap the votes and obtain the majority of legislative seats.

Efforts to build democracy through democratic elections require the joint efforts of all parties. Law enforcement officials, in this case judges as the bastion of justice, have a very large role. The provisions and rules of law governing the means of upholding law and justice must be well organized, correct and certain. Discretion is not allowed to conflict with the general principles of good governance, especially the principle of prohibition of abuse of authority and the principle of prohibition of arbitrariness. It must also not be contrary to the public interest.

The fulfillment of the rights of ex-convicts to participate in politics must fulfill the conditions that have been regulated in positive law in Indonesia. For example, an ex-convict to participate in elections is regulated in article 240 paragraph 1 letter (g) of law number 7 of 2017 concerning general elections, it is explained that "no one has been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offense punishable by imprisonment of 5 (five) years or more, unless openly and honestly disclosing to the public that he is a former convict.

If referring to the Constitutional Court Decision No. 56 / PUU-XVII / 2019 which cites the Constitutional Court Decision No. 4 / PUU-VII / 2009 which basically is: after the former convict has finished serving his prison sentence based on a court decision that has permanent legal force. Then actually there should be a 5 (five) year gap to participate in the election and honestly or openly announce about his background as a former convict; The choice of a period of 5 (five) years for adaptation corresponds to the five-year mechanism in General Elections (Pemilu) in Indonesia, both Elections for Legislative Members, Elections for President and Vice President, and Elections for Regional Heads and Deputy Regional Heads.

CONCLUSION

The Constitutional Court's decision guarantees the constitutional right of ex-convicts to participate as candidates for regional heads and legislative candidates in regional and general elections. The decision provides legality to ex-convicts to occupy elected public positions (elected officials) as long as they are not sentenced to additional punishment in the form of revocation of voting rights by a court decision that has the force of law. This Constitutional Court decision must be interpreted as a final and binding source of law by election organizers that regulates rather than limits human rights.

Ex-convicts have the right to participate in local elections, in accordance with democratic principles that emphasize inclusion and equal opportunity for all citizens. However, many regulations restrict this right, creating challenges for ex-prisoners to actively engage in politics. For ex-convicts to participate in political contestation, administrative requirements include that the person concerned has completed serving a prison sentence based on a court decision that has obtained permanent legal force; explaining that the candidate openly and honestly discloses to the public as a former convict; and an announcement published in local or national mass media. The material of the regulation must include strict sanctions for ex-convicts who do not fulfill the provisions in the regulation both pre- and post-determination as regional heads and candidates for members of the DPR, provincial DPRD and district / city DPRD. Bawaslu as an election supervisory institution must oversee the nomination process for regional heads and legislative candidates in accordance with applicable laws and regulations. The party is the main determinant of the success of organizing elections and democratic regional head elections.

There is a need to revise the regulations governing the participation of ex-convicts in local elections. This includes removing disproportionate restrictions and providing clarity on their rights, so that more ex-convicts can contribute to politics. The government and civil society organizations should develop empowerment programs for ex-prisoners, which include political training, legal awareness, and anti-stigma campaigns. Thus, ex-convicts can be more prepared and confident to participate in the contestation of regional and general elections.

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