

Study on Ex-Corruption Convicts Become Legislative Candidates

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Abstract

This study discusses the prohibition of former corruption convicts from being candidates for legislative members, regulated in the General Election Commission Regulation Number 20 of 2018. However, the ban was overturned by the Supreme Court because it limited a person's political rights. This paper uses normative juridical research using a statutory approach, the legal materials: primary, secondary, tertiary, with library data collection techniques. The hypothesis is that the Supreme Court, in cancelling this decision, only pays attention to procedural matters without considering the principle of benefit and partiality to the people. This study also discusses the reasons and considerations of the Supreme Court in cancelling the ban on ex-corruption convicts from becoming legislative candidates that the General Elections Commission has formed with the spirit of creating elections with integrity.

Keywords

ex-corruption; convicts;
legislative; candidate



I. Introduction

Based on Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, "Indonesia is a country of law". As a state of law, every administration of government affair must be based on applicable law (*wetmatigheid van bestuur*) (HR, 2016). Why is it challenging to formulate laws? "Almost all law scholars provide different legal boundaries," according to Prof. Van Apeldoorn. Legal science writers in Indonesia also agree with Prof. Van Apeldoorn, like Prof. Sudiman Kartohadiprojo, S.H (Kansil, 2011). In social interaction in society, many legal relationships arise due to legal actions from legal subjects, and legal goals will be achieved if each legal subject gets their rights somewhat and carries out their obligations according to applicable legal rules.

The law that regulates the legal relationship between the government and citizens is State Administrative Law or civil law, depending on the nature and position of the government in carrying out the legal action (HR, 2016). One of the developments is the emergence of several independent state institutions or supporting state institutions which are further categorized as separate state institutions (separate from other powers). The institutions related to this research are the General Election Commission (KPU), the Corruption Eradication Commission (KPK), and the Supreme Court. Based on the regulations concerning Election Organizers, KPU has the authority to hold general elections that are permanent and independent. In November 2001, KPU changed to be very independent with the clause regulated in article 22E paragraph (5). The independence that is directly stated in the constitution is, of course, enjoyable, especially considering the discussions in the formulation of the clause (Mochtar, 2016).

As an independent institution in organizing elections, the General Elections Commission (KPU) has issued KPU Regulation (PKPU) number 20 of 2018 concerning the nomination of members of the DPR, Provincial DPRD, and Regency/Municipal DPRD

in the 2019 election. PKPU will guide the KPU to carry out the stages of nominating members of the DPR, Provincial DPRD and Regency/Municipal DPRD in the 2019 election. One of the points in the PKPU regulates the prohibition of ex-corruputors from running as legislative candidates. The rule is stated in Article 7, Paragraph 1 letter h (Lazuardi, 2018). However, the Supreme Court cancelled the regulation because it could examine the legislation under the law against the law (Undang-Undang Tentang Aparatur Sipil Negara, UU Nomor 5 Tahun 2004, 2004).

Based on Decision Number 46/HUM/2018, the Supreme Court judges: (2) Stating Article 4 paragraph 3, Article 11 paragraph 1 letter d, and Attachment Model B.3 of the Regulation of the General Election Commission of the Republic of Indonesia Number 20 of 2018 dated July 2, 2018, concerning the Nomination of Members of the People's Representative Council, Provincial Regional People's Representative Council, Provincial Council Regency/City Regional People's Representatives (State Gazette of the Republic of Indonesia Year 2018 Number 834) as long as the phrase "former convicts of corruption" is contrary to higher legislation, namely Law Number 7 of 2017 concerning General Elections in conjunction with Law Number 12 the Year 2011 concerning the Establishment of Legislation, therefore it has no binding legal force and is not generally applicable (Mahkamah Agung, n.d.).

II. Review of Literature

Hans Kelsen put forward his theory related to the level of legal norms (stufentheorie) that legal norms are tiered and layered in a hierarchical structure, where a lower norm applies, originates and is based on a higher norm, and so on until the norm that cannot be traced further and is hypothetical and fictitious, namely the basic norm (Grundnorm). Hans Nawiasky, one of Hans Kelsen's students, developed his teacher's theory and classified the legal norms into four groups: fundamental state norms, basic/basic rules of the state, "formal" laws, and implementing & autonomous rules.

According to Hans Nawiasky, the contents of the state's fundamental norms are the basis for the formation of a constitution or fundamental law of a country (Staatsverfassung), including the norms for changing them. The legal norms that fall under the Basic Rules of the State/State Basic Rules (Staatsgrundgesetz) are the formell Gesetz or translated by law ('formal'). In Indonesia, the term formell Gesetz or formele wetten should only be translated into law without adding the word 'formal' because if formell gesetz is translated as 'formal law', it does not match the mention of the types of laws and regulations in Indonesia. There are still many books and experts who translate the terms 'wet in formele zin' and 'wet in materiele zin' literally as 'laws in the formal sense' and 'laws in the material sense' without looking at the meanings contained. Therein, and the legal system in force in Indonesia. These implementing and autonomous regulations are regulations that are located under the law and function to carry out the provisions in the law. Implementing regulations are sourced from delegation authority, while autonomous regulations are sourced from attribution authority.

In the system of legal norms of the Republic of Indonesia, Pancasila is the State Fundamental Norm which is the highest legal norm, and then successively followed by the Body of the 1945 Constitution, MPR Decrees and the Unwritten Basic Law or also called the Constitutional Convention as the Basic Rules of the State/ Basic State Rules (Staatsgrundgesetz), Laws (Formell Gesetz) and Implementing Regulations and Autonomous Regulations (Verordnung & Autonome Satzung) (Indrati, 2018).

From the birth of the Republic of Indonesia with the Proclamation of its independence until the enactment of the Constitution of the United States of Indonesia, the Provisional Constitution of 1950, the 1945 Constitution, and the Amendment to the 1945 Constitution, the issue of the hierarchy of laws has never been regulated explicitly. The 1945 Constitution is valid for the first period (between August 1945 to 1949). In the second period, it applies (July 5, 1959, to October 19 1999), and the third period applies, namely since the First Amendment to the 1945 Constitution on October 19, 1999, until today, this regulation only stipulates three types of regulations, which are called Laws, Government Regulations in Lieu of Laws (PERPU), and Government Regulations (Indrati, 2018).

The General Election Commission is a state institution that organizes general elections in Indonesia, which includes the General Elections for Members of the DPR/DPD/DPRD, the General Elections for the President and Vice President, and the General Elections for Regional Heads and Deputy Regional Heads. The General Election Commission cannot be equated with other state institutions whose authority is determined and granted by the 1945 Constitution (Asshidiqie, 2006).

The formation of the General Election Commission (KPU) is the fastest form of restoration in terms of the independence of post-New Order general election organizers. The KPU's independent leaflet was opened during the 1999 General Election for the first time. Through MPR decree Number XIV/MPR/1998, the first general election in the reform period was held on June 7 1999. Although the President is still the founder of the General Election Commission (KPU), his membership is comprehensive because it involves all political parties participating in the election and the government. International standards of election management always refer to the existence of an implementing body that is impartial and independent from certain governments and influences. This is intended because the election implementation machines are decision-makers and implementers that can influence the election results. Therefore, in line with the third amendment to the 1945 Constitution, which was agreed upon on November 9, 2001, the KPU became very independent with the clause regulated in Article 22E paragraph (5).

The Commission's duties are:

- a. Planning programs, budgets and setting schedules
- b. Prepare work procedures for KPU, Provincial KPU, Regency/Municipal KPU, PPK, PPS, KPPS, PPLN, AND KPPSLN
- c. Drafting KPU regulations for each stage of the election
- d. Coordinate, organize, control and monitor all stages of the election
- e. Receive voter list from Provincial KPU
- f. Updating voter data based on the latest election data by taking into account the population data prepared and submitted by the government and setting it up as a voter list
- g. Make an official report and certificate of the recapitulation of vote counting results and must submit it to the witnesses of Election Contestants and Bawaslu
- h. Announce the candidates for DPR members, DPD members, and the selected candidate pairs and make the news.
- i. Immediately follow up on Bawaslu's decision on findings and reports of alleged election violations or disputes

The Commission's powers are:

1. Establish the working procedures of KPU, Provincial KPU, Regency/Municipal KPU, PPK, PPS, KPPS, PPLN, AND KPPSLN
2. Establish KPU regulations for each stage of the election
3. Determining election participants
4. To stipulate and announce the results of the recapitulation of the vote count at the national level based on the results of the recapitulation of the vote count at the Provincial KPU for the election of President and Vice President and for the election of members of the DPR as well as the results of the recapitulation of the vote count at each Provincial KPU for the election of DPD members by making an official report on the vote count and vote count certificate.
5. Issue the KPU's decision to ratify the election results and announce them
6. To determine and announce the acquisition of the number of seats for DPR members, Provincial DPRD members and Regency/Municipal DPRD members for each political party participating in the election for DPR members, Provincial DPRD members and Regency/Municipal DPRD members
7. Setting standards and needs for procurement and distribution of equipment
8. Establishing Provincial KPU, Regency/Municipal KPU, and PPLN
9. Appoint, foster and dismiss members of the Provincial KPU, Regency/Municipal KPU, and PPLN
10. Imposing administrative sanctions and temporarily disabling Provincial KPU members, Regency/Municipal KPU members, PPLN members, KPPSLN members, and KPU Secretariat General who have taken actions that resulted in disruption of the ongoing election implementation stages based on Bawaslu decisions and provisions of the legislation
11. Establish a public accounting firm to audit campaign funds and publish reports on donations to election campaign funds; and
12. Carry out other authorities in the administration of elections by the provisions of the legislation

Meanwhile, the Commission's obligations are:

- a) Carry out all stages of holding elections promptly
- b) Treating election participants fairly and equally
- c) Convey all information on the implementation of elections to the public
- d) Reporting accountability for the use of the budget per the provisions of the legislation
- e) Manage, maintain and care for archives/documents as well as carry out their depreciation based on archive retention schedules compiled by KPU and government agencies that organize national archive affairs or what is called the National Archives of the Republic of Indonesia
- f) Manage KPU inventory items by the provisions of the legislation
- g) Submit periodic reports regarding the stages of holding elections to the President and DPR with a copy to Bawaslu
- h) Make news of every KPU plenary meeting signed by the chairman and members of the KPU
- i) Submit a report on the implementation of the election to the President and the DPR with a copy to the Bawaslu no later than 30 (thirty) days after taking the official oath/promise
- j) Implementing Bawaslu decisions regarding sanctions for administrative violations and electoral process disputes
- k) Providing data on election results nationally

- l) Updating and maintaining voter data on an ongoing basis by paying attention to population data following the provisions of the legislation. Implement DKPP's decision
- m) Carry out other obligations under the provisions of the legislation (Undang-Undang Tentang Pemilihan Umum, UU Nomor 7 Tahun 2017, 2017).

The Supreme Court (abbreviated as MA) is a high state institution in the Indonesian constitutional system that is the holder of judicial power and the Constitutional Court and is free from the influence of other branches of power. The Supreme Court oversees the judiciary in the general court environment, the religious court environment, the military court environment and the state administrative court environment. The authority of the Supreme Court is more clearly regulated in Law Number 4 of 2004 concerning Judicial Power in article 11, which contains the following: 1) The Supreme Court is the highest state court of the four judicial circles, as referred to in Article 10 paragraph (2). 2) The Supreme Court has the authority to a. adjudicate at the level of cassation against decisions given at the last level by courts in all judicial circles under the Supreme Court; b. examine the legislation under the law against the law; c. other powers granted by law. 3) The statement that the laws and regulations are not valid due to the examination, as referred to in paragraph (2) letter b, can be taken either in an examination at the cassation level or based on a direct application to the Supreme Court. 4) The Supreme Court carries out the highest supervision over the courts' actions within the judiciary under it based on the provisions of the law (Padi, 2015).

III. Research Method

The research conducted is a literature study (normative research) concerning the laws and regulations in Indonesia. The place for this research is at the National University and will take place from October 2019 - to January 2020.

IV. Results and Discussion

Based on the Supreme Court Decision Number 46 P/HUM/2018, the General Elections Commission (from now on referred to as KPU) stated that their basis for making KPU Regulation Number 20 of 2018 was a statutory order and attached to their duties and authorities. . The authority referred to in this case is the attribution authority, where the KPU is authorized to formulate and stipulate KPU Regulations for each stage of the election. Regarding the attribution authority granted, it is also regulated in Law Number 7 of 2017 concerning Elections in article 75, where to organize an election, the KPU forms a KPU Regulation and KPU Decree, with the KPU Regulation Number 20 of 2018, the KPU has carried out the orders of the Laws and Regulations.

As for the things that have been done in issuing this KPU Regulation, the KPU has implemented appropriate mechanisms by first preparing strategic issues, conducting internal discussions, conducting public tests with political parties, consolidating and consulting with members of the House of Representatives (DPR) and The government, represented by the Ministry of Home Affairs, also conducts discussions with legal experts in their respective fields related to the election, formulates a final draft with the approval of all KPU members, and signed by the Chairperson of the KPU, and requested for an invitation by the Ministry of Law and Human Rights. Regarding the primary reason for the KPU to prohibit ex-convicts of corruption, it can be juxtaposed with the Theory of Authority, Attribution, in the formation of laws and regulations (attribute van

wetgevingsbevoegdheid), which is the granting of authority to form laws and regulations given by Grondwet (Basic Law) or wet (Law) to a state/government institution. This authority is inherent and can be exercised on its initiative at any time required, by the limits given (Indrati, 2018).

In connection with one of the articles that prohibit former Corruption Convicts from registering as candidates for legislative members in the KPU Regulation, in the Supreme Court Decision Number 46 P/HUM/2018, the KPU explained that the philosophy related to the prohibition was that corruption, collusion and nepotism had damaged joints of the life of the nation and state from then until now. The KPU built this spirit by issuing regulations to prohibit ex-corruption convicts from becoming candidates for legislative members. Another less important thing is the desire to create a country free from corruption, collusion, and nepotism. This can be realized by selecting a track record to see if it is worthy of being a state administrator or people's representative. The sociological foundation that is trying to be built is that many bad records have been built related to corruption, collusion and nepotism in the people's representative institutions, both at the central and regional. This is clear evidence that corruption, collusion and nepotism have firm roots among officials and state administrators, with many council members involved in these corrupt practices.

The legal basis for the prohibition against former corruption convicts was initiated by Law Number 7 of 2017 concerning General Elections and Law Number 28 of 1999 concerning State Organizers that are Clean and Free from Corruption, Collusion and Nepotism. This method of interpretation also produces an understanding of the word "betrayal of the state", where corruption by the KPU is equated with betraying the state and is also another serious crime. Another interpretation in Article 2 of Law Number 28 Year 9, number 7 explains that state administrators who are free from corruption, collusion and nepotism, include state officials in high state institutions, which are currently: the President and Vice President and the House of Representatives. This also applies to the same conditions that the President and Vice President must be clean and never betray the state. The same applies to candidates for members of the DPR.

What is interpreted explicitly, and is that to realize a fair election with integrity, a ban is needed so that the public can vote for a clean candidate? In this case, the KPU protects the public's right to get representatives who are free from corruption and with integrity. Looking at the various reasons associated with the Theory of Interpretation that the author uses, including:

- a. Grammatical interpretation, namely the way of interpretation based on the sound of the provisions of the law, by referring to the meaning of words concerning each other in sentences used by law; what is adopted is merely the meaning of words according to grammar or according to habits, namely the meaning in everyday use.
- b. Systematic Interpretation, (dogmatic) interpretation looking at the structure related to the sounds of other articles both in that law and with other laws. For example, the 'principle of monogamy' mentioned in article 27 of the Civil Code becomes articles 34, 60, 64, 86, Civil Code and 279 Civil Code.
- c. Extensive Interpretation, giving an interpretation by limiting (narrowing) the meaning of the words in the regulation. For example, 'loss' does not include 'intangible' losses such as illness, disability, Etc. (Kansil, 2011).

It can be said to use systematic interpretation because in interpreting Law Number 7 of 2017 concerning the Implementation of General Elections, it is also associated with Law Number 28 of 1999 concerning Election Organizers that are Clean and Free from

Corruption, Collusion and Nepotism. However, in reading article by article, the related to the prohibition of ex-convicts of corruption also applies a detailed and obvious grammatical or grammatical interpretation. Moreover, to perfect the interpretation, an extensive interpretation is also carried out where there are restrictions on every word used in each article to produce an interpretation to prohibit former corruption convicts.

Legal Considerations of Supreme Court Decisions

In its decision, the Supreme Court thinks that the KPU Regulation related to the prohibition of ex-corruption convicts from becoming legislative candidates has contradicted the political rights possessed by every citizen, where every citizen has the right to be elected and vote. This is regulated in Law Number 39 of 1999 concerning Human Rights (HAM). However, if there are other political restrictions, they can be stipulated in the law. The prohibition is also contrary to Law Number 7 of 2017 concerning General Elections, where those who are not allowed to nominate themselves are those who have been threatened with imprisonment for five years or more based on a permanent court decision. So that the prohibition carried out in KPU Regulation Number 20 of 2018 has limited a person's political rights, which means that it also violates human rights. With this in mind, the Supreme Court thinks that the KPU has made provisions that are not ordered by the above laws and regulations. The regulations have also been inconsistent and conflicted or did not meet the principles of the formation of laws and regulations.

Looking at the opinion of the Supreme Court and its legal considerations, it seems that it is not following the laws and regulations because based on the reasons for the violation of political rights, which are closely related to human rights violations, it is not very appropriate if it is examined the purpose of the prohibition regulation for ex-corruption convicts itself is to protect the rights of citizens who will vote. The point here is that before being elected by the community, the KPU as the election organizer, must first ensure that the candidates chosen have integrity as people's representatives. Where here, the rights of citizens are protected by a strict selection process in nomination so that the community chooses members of the council candidates who have nothing to do with the betrayal of the state.

Another inappropriate thing is that the law was not ordered to do so regarding the prohibition because we need to look again at the attribution authority given by the law to the KPU. If the existing authority is not perfect, then the decision based on that authority is not valid according to law. Therefore, the notion of attribution and delegation is a tool to help check whether an agency is authorized or not in carrying out public actions. In the rule of law concept, for the attribution and delegation of authority to make decisions, it must be based on a formal law if the decision provides obligations above the citizens (society) (Wiratno, 2013).

Besides that, in making the KPU regulations, the KPU uses an interpretive method, wherein reading the legal rules is allowed and can be justified. Where the KPU, in this case, has a high enthusiasm for determining candidates with integrity by clearly and in detail interpreting Law Number 7 of 2017 concerning General Elections and then interpreting it by prohibiting ex-corruption convicts from becoming candidates for legislative members. So, it can be seen that the Supreme Court has indeed complied with the existing procedural rules but has neglected things that are beneficial to the people to create or elect representatives of the people who have a clean track record without being associated with corruption.

V. Conclusion

The basis for the prohibition of ex-corruption convicts related to the nomination of legislative members carried out by the General Election Commission can be justified by looking at the attributive authority granted by Law Number 7 of 2017 concerning General Elections to the General Elections Commission to make regulations on the stages of the election and related to the prohibition. This is justified because the General Elections Commission uses an interpretive method in forming regulations related to the prohibition, which is also based on the spirit of a country free of corruption carried out by state officials.

The legal considerations carried out by the Supreme Court in deciding this judicial review are only guided by procedural matters without regard to the principle of benefit to the people, where what must be protected is the rights of citizens rather than the rights of former corrupt convicts in the interpretation of the General Election Commission.

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