

Governing the Requirement of Non-Former Convicted of Corruption for Prospective Candidate Member of Legislative in The 2019 General Election In Indonesia

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ABSTRACT : This research is purposed to determine how to govern the requirements of non-former convicted of corruption for prospective candidate member of legislative, in this case the House of Representatives (DPR) according to the relevant state institutions, namely the Legislator (DPR and the President), the Constitutional Court (MK), the General Election Commission (KPU), the Election Supervisory Body (Bawaslu), and the Supreme Court (MA) as well as how the legal considerations as their background. This research is a normative law research by reviewing legislation and decisions of the judge / court related to the requirement of non former convicted of corruption (former corruptor) in the nominating the members of the legislature, especially the House of Representatives. Governing the requirement of "non-former convicted of corruption" for prospective candidate member of DPR in the 2019 Election by the relevant state institutions are different. On the one hand, MA, the Legislators (DPR and the President), Bawaslu and MK basically allow the former convicted of corruption to nominate themselves as members of the DPR by complying certain requirements. Because the law shall not allow revoking any person's suffrage, except only provide restrictions that do not conflict with the 1945 Constitution. Whereas on the other hand, KPU regulates that political parties shall not propose any prospective candidate member of DPR from former convicted of corruption, in their efforts to realize a government that is clean and free of corruption, collusion and nepotism (KKN).

KEYWORDS -General Election Commission Regulation, Constitutional Court Decision, Supreme Court Decision, Prospective Candidate Member of Legislative

I. INTRODUCTION

1.1 Background

The general election is actually a tool for the people to determine their representatives who will determine the government they want.

Here, elections are the expression of democratic struggle (Seymour M. Lipset, 1963: 230) where the people determine who governs and what the people want the Government to do (Harris G. Warren, et. al., 1963: 67-68).

Harris G. Warren and his friends suggested that, "Elections are occasions when citizens choose their officials and decide what they want the government to do. In making these decisions, citizens determine what right they want to have and keep" (Harris G. Warren, et. al., 1963: *Ibid.*, 67)

Thus, the election will affect how the portrait of representative institutions formed in this case the House of Representatives (DPR). Then governing on the nomination requirements for DPR members in the election will in turn affect the figure of the elected DPR members.

DPR's image in Indonesia from an anti-corruption perspective still does not show anything to be proud of.

Up to 2017, the House of Representatives (DPR) is again considered to be the most corrupt institution by the public. From the Indonesian version of the 2017 Global Corruption Barometer (GCB) data published by Transparency International Indonesia (TII), there are 54% (fifty-four percent) of respondents who rated the DPR as the most corrupt institution. The Indonesian version of the 2017 GCB Survey was conducted by interviewing 1,000 respondents aged 18 years and over spread across 31 provinces (<https://www.rappler.com/indonesia/berita/163647-hasil-survei-transparency-international-indonesia-dpr-lembaga-terkorup>, accessed on 18 August 2018).

In the implementation of the 2019 General Elections, the General Election Commission (KPU) issued the General Election Commission Regulation Number 20 of 2018 concerning the Nominations of Members of the House of Representatives, Provincial Regional House of Representatives, and Regency/City Regional People's Representative Council (PKPU 20/2018).

Article 4 paragraph (3) PKPU 20/2018 states, *"In a democratic and open selection of prospective candidate as referred to in paragraph (2), do not include former convicted drug, sexual crimes against children, and corruption"*.

The provisions of Article 4 paragraph (3) of PKPU 20/2018 regulate political parties that will propose candidates for DPR members in order not to include former convicted of corruption in the 2019 elections.

Then the provisions relating to political parties that will nominate members of the DPR are regulated in Article 11 paragraph (1) letter d of PKPU 20/2018 which states, *"Documents on the requirements for nominating prospective candidate as referred to in Article 10 paragraph (1) shall be in the form of..... d. The integrity pact signed by the Leadership of Political Parties shall be in accordance with its level using the form Model B.3 "* While Appendix Model B.3 contains the Integrity Pact for Nominating Prospective Candidates Member of DPR/Provincial DPRD/Regency/City DPRD.

Regulations made by the KPU as above, on the one hand, can be seen as KPU efforts in realizing the election of DPR members as a result of the 2019 elections that must be clean and free of corruption, collusion, and nepotism (KKN). From the perspective of preventing and eradicating corruption, this KPU's step can be understood.

However, on the other hand, Law No. 7 of 2017 concerning General Elections (Law 7/2017) as the basis for the issuance of PKPU 20/2018 does not regulate restrictions or prohibitions for political parties from nominating former convicted of corruption members of the DPR so that the arrangements made by the KPU are considered as limiting the rights of citizens in terms of voting and being elected in elections.

The existence of legal facts as above has been used by former convicted of corruption to submit an appeal for the right to a judicial review of Article 4 paragraph (3), Article 11 paragraph (1) letter d, and Appendix Model B.3 KPU Regulation 20/2018 to the Supreme Court (MA).

And the Supreme Court (MA) through the Supreme Court Decision Number 46 P/HUM/2018 dated September 13, 2018 (MA Decision 46 P/HUM/2018) ruled Article 4 paragraph (3), Article 11 paragraph (1) letter d, and Appendix Model B.3 KPU regulation 20/2018 along the phrase "former convicted of corruption" is contrary to the higher laws and regulations and therefore has no binding legal force and is not generally applicable.

Based on the description above, the researcher is interested in researching, *"Governing the Requirement of Non-Former Convicted of Corruption for Prospective Candidate Member of Legislative In The 2019 General Election In Indonesia"*.

1.2 Formulation of the Problem

Based on the background above, the researcher formulated the research problem, namely: how to govern the requirement of non-former convicted of corruption for prospective candidate member of legislative (DPR) according to the relevant state institutions, namely the Legislator (DPR and the President), the Constitutional Court (MK), the General Election Commission (KPU), the Election Supervisory Body (Bawaslu), and the Supreme Court (MA) as well as how the legal considerations as their background?

II. MATERIAL AND METHODS

2.1 Type of Research

Research is a normative legal research using literature study or secondary data (Soekanto and Mamudji, 2004: 13). The nature of this research is descriptive research aimed at describing the characteristics of certain circumstances (Soekanto, 1982: 49, 53, and 96; Arikunto, 1993: 309; Widodo and Mukhtar, 2000: 15), in this case describing the regulations on the requirements of not a former convicted of corruption for prospective of legislative member candidates in this case the House of Representatives (DPR) according to the relevant state institutions, namely the Legislator (DPR and the President), the Constitutional Court (MK), the General Election Commission (KPU), and the Supreme Court (MA) as well as the legal considerations as their background.

2.2 Research Materials or Data

Research uses secondary data sources, mainly including Law Number 7 Year 2017 concerning General Elections (Law 7/2017); General Election Commission Regulation Number 20 of 2018 concerning Nominations of Members of the House of Representatives, Provincial Regional House of Representatives, and Regency/City Regional House of Representatives (PKPU 20/2018); and Supreme Court Decision Number 46 P/HUM/2018 dated September 13, 2018 (MA Decision 46 P/HUM/2018). By linking it to the Constitutional Court Decision Number 14-17/PUU-V/2007 dated December 11, 2007 (MK Decision 14-17/PUU-V/2007), Constitutional Court Decision Number 4/PUU-VII/2009 dated March 24, 2009 (MK Decision 4/PUU-VII/2009), Decision of the Constitutional Court Number 120/PUU-VII/2009 dated April 20, 2010 (MK Decision 120/PUU-VII/2009), and Decision of the Constitutional Court Number 42/PUU-XIII/2015 dated July 9, 2015 (MK Decision 42/PUU-XIII/2015).

2.3 Technique of Data Collection

Because it uses secondary data sources, the technique of data collection is done through library research.

2.4 Research Data Analysis

Research data were analyzed qualitatively. Secondary data are collected, categorized, and interpreted to answer research problems (Sumardjono, 1989: 24). Namely to answer how to govern the requirement of non-former convicted of corruption for prospective candidate member of legislative (DPR) according to the relevant state institutions, namely the Legislator (DPR and the President), the Constitutional Court (MK), the General Election Commission (KPU), the Election Supervisory Body (Bawaslu), and the Supreme Court (MA) as well as the legal considerations as their background.

III. RESULTS

3.1 Governing the Requirement of Non-Former Convicted of Corruption According to Decision of the Constitutional Court Number 14-17/PUU-V/2007 dated December 11, 2007

Decision of the Constitutional Court Number 14-17/PUU-V/2007 dated December 11, 2007 (MK Decision 14-17/PUU-V/2007) is an answer to the existence of a judicial review of Article 6 letter t of Law Number 23 of 2003 concerning Elections General President and Vice President (Presidential Election Law), Article 16 Paragraph (1) letter d of Law Number 24 Year 2003 concerning the Constitutional Court (MK Law), Article 7 Paragraph (2) letter d of Law Number 5 of 2004 concerning Amendments On Law Number 14 of 1985 concerning the Supreme Court (MA Law), Article 58 letter f of Law Number 32 of 2004 concerning Regional Government (Regional Government Law), and Article 13 letter g of Law Number 15 of 2006 concerning the Examining Board Finance (BPK Law) which regulates the terms of the condition "has never been sentenced to imprisonment based on a court decision that has permanent legal force because of a criminal offense threatened with imprisonment of 5 (five) years or more."

The Constitutional Court's verdict is actually to reject the petition of the petitioners. The petitioner requested that the provisions of the terms "have never been sentenced to imprisonment based on a court decision that has permanent legal force for committing an offense threatened with imprisonment of 5 (five)

years or more" as stipulated in Article 6 letter t of the Presidential Election Law, Article 16 Paragraph (1) letter d of the Constitutional Court Law, Article 7 Paragraph (2) letter d of the MA Law, Article 58 letter f of the Regional Government Law, and Article 13 letter g of the BPK Law are declared contrary to the 1945 Constitution.

The Constitutional Court in its legal considerations concluded that the provision requiring "never been sentenced to imprisonment based on a court decision that has permanent legal force for committing an offense threatened with imprisonment of 5 (five) years or more" can only be applied to someone because it is proven by intentionally committing a criminal act with a penalty of five years or more (p. 131). But it does not include criminal offenses due to minor negligence (*culpa levis*), even though the criminal threat is 5 (five) years or more (p. 132).

According to the MK the formulation of Article 6 letter t of the Presidential Election Law, Article 16 Paragraph (1) letter d of the MK Law, Article 7 Paragraph (2) letter d of the MA Law, Article 58 letter f of the Regional Government Law, Article 13 letter g of the BPK Law also does not cover political crimes. Because, if it includes political crimes, it will cause discrimination against one's political views and this is contrary to the 1945 Constitution, as was the ruling of the Constitutional Court Number 011-017/PUU-I/2003.

MK formulated political crimes as being limited to acts that were actually expressions of political views or attitudes (*politieke overtuiging*) guaranteed in a democratic rule of law, but in positive law they were formulated as criminal acts because they differed from the political views of those in power. In fact, universally political crime in this sense is not including the notion of crime in general (pp. 131-132).

Furthermore, MK stated that the resolution of the problem as expected by the aquo Petitioner was more appropriate through a legislative review process by the legislators (p. 133).

MK also believes that given the specificities of character in certain public offices, not all public positions can be determined by using the formulation of norms that are general. Therefore, according to MK, it is necessary to differentiate the requirements between:

- a. *Public positions elected (elected officials) with appointed (appointed officials).*
- b. *Public positions in the executive field that are more serving nature with public positions in the legislative field that are channeling people's aspirations.*
- c. *Public positions for their duties require a very high level of trust, such as judges and other law enforcement officials and officials who manage state finances with other positions.* (pp. 133-134)

MK finally concluded that the provisions of the terms "have never been sentenced to imprisonment based on a court decision that has permanent legal force due to a criminal offense threatened with imprisonment of 5 (five) years or more", as stipulated in Article 6 letter t of the Presidential Election Law, Article 16 Paragraph (1) letter d of the Constitutional Court Law, Article 7 Paragraph (2) letter d of the MA Law, Article 58 letter f of the Regional Government Law, Article 13 letter g of the BPK Law does not conflict with the 1945 Constitution, as long as the provisions referred to do not include criminal offenses born due to minor negligence (*culpa levis*) and criminal offenses due to certain political reasons and by considering the nature of certain positions that require different requirements.

Referring to the Decision of the Constitutional Court 14-17/PUU-V/2007, the requirement "non-former convicted of corruption" for prospective candidate member of DPR has not been explicitly regulated. This is known from the interpretation of the Court which states, "by considering the nature of certain positions that require different requirements".

However, when viewed from the type of criminal act, outside the nature of his position, the requirement does not contradict the 1945 Constitution because corruption is not born due to minor negligence (*culpa levis*) and is not a criminal offense due to political reasons.

3.2 Governing the Requirement of Non-Former Convicted of Corruption According to Decision of the Constitutional Court Number 4/PUU-VII/2009 dated March 24, 2009

Decision of the Constitutional Court Number 4/PUU-VII/2009 dated March 24, 2009 (MK Decision 4/PUU-VII/2009) is a decision in the case of petition for Judicial Review of Article 12 letter g and Article 50 paragraph (1) letter g of Law Number 10 2008 concerning General Elections for Members of the People's

Legislative Assembly, Regional Representatives Council, and Regional People's Representative Council (Law 10/2008) and Article 58 letter f of Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Government Regions (Law 12/2008), regarding the requirements to become candidates for members of the DPR, DPD, and DPRD, as well as regional heads and deputy regional heads, that is *"never been sentenced to prison based on a court decision that has permanent legal force due to a criminal offense sentenced to imprisonment for 5 (five) years or more"*.

In MK Decision 4/PUU-VII/2009, MK considered the Decision of the Constitutional Court 14-17/PUU-V/2007 (MK Decision 14-17/PUU-V/2007) that the enactment of legal norms containing the requirements could not be generalized to all public positions. According to MK in the legal consideration of MK Decision 4/PUU-VII/2009, the requirements are not enforced only for elected public positions (p. 78).

MK gives a reason because it is related to the general election (Election) universally adhered to the principle that the abolition of the right to vote is only due to considerations of inadequacy for example because of age (still under the age permitted by the Election Law) and mental illness, and impossibility for example because their voting rights have been revoked by a court decision that has permanent legal force, as in Court Decision Number 11-17/PUU-I/2003 dated February 24, 2004 (p. 78).

Thus, MK through MK Decision 4/PUU-VII/2009 interprets more detail the purpose of the previous decision in this case MK Decision 14-17/PUU-V/2007 that regarding elected public offices cannot be limited with the condition *"no has 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"*.

In other words, through MK Decision 4/PUU-VII/2009, MK has interpreted that the requirement does not apply to elected officials. In addition to what has been affirmed in MK Decision 14-17/PUU-V/2007 that the aforementioned conditions do not apply to criminal offenses born due to minor negligence (*culpa levis*) and criminal offenses due to political reasons.

Furthermore, MK reiterated the legal considerations of MK Decision 14-17/PUU-V/2007 for elected public offices which stated, *"it is not entirely left to the people without any conditions at all and solely on the basis of the reason is that the people will carry all the risks of their choices"*.

Based on legal considerations in MK Decision 14-17/PUU-V/2007, MK stated in the legal considerations of MK Decision 4/PUU-VII/2009 that, ... *"there is a provision that for candidates who have been convicted of a crime with the threat of imprisonment of 5 (five) years or more must explain openly to the public about their true identity and not cover up or hide their background"*. (p. 79)

In addition, the opinion of the Court in MK Decision 4/PUU-VII/2009 states, so as not to reduce the people's trust as referred to in MK Decision 14-17/PUU-V/2007, it also needs to be required that the person concerned is not a repeat offender repeated and has been through the process of adaptation back to the community for at least 5 (five) years after the relevant prisoner has been imposed by a court that has permanent legal force. The provision of a term of 5 (five) years, according to MK, is for adaptation in accordance with the five-year mechanism in General Elections (Elections) in Indonesia, both Legislative Member Elections, Presidential and Vice Presidential Elections, and Regional Head Elections and Regional Head Elections. Also corresponds to the phrase *"threatened with imprisonment of 5 (five) years or more"* (p. 79).

Through MK Decision 4/PUU-VII/2009, MK is of the opinion that the legal norm that reads *"never been sentenced to imprisonment based on a court decision that has permanent legal force for committing a crime that is punishable by imprisonment for 5 (five) years or more"* listed in Article 12 letter g and Article 50 paragraph (1) letter g of Law 10/2008 and Article 58 letter f of Law 12/2008 are conditionally unconstitutional legal norms.

According to MK, the legal norm is unconstitutional if the following conditions are not met:

1. Applies not to elected public offices (elected officials) as long as additional crimes are not imposed in the form of revocation of voting rights by a court decision that has permanent legal force;
2. Limited validity for a period of 5 (five) years after the former convicted has finished serving a prison sentence based on a court decision that has permanent legal force;
3. Honesty or openness regarding his background as a former convict;
4. Not as a perpetrator of recurring crimes. (p. 80)

Finally, MK in its decision stated that Article 12 letter g and Article 50 paragraph (1) letter g of Law 10/2008 and Article 58 letter f of Law 12/2008 contradicted conditionally (*conditionallyunconstitutional*)with the 1945 Constitution of the Republic of Indonesia (UD 1945) and states Article 12 letter g and Article 50 paragraph (1) letter g of Law 10/2008 and Article 58 letter f of Law 12/2008 do not have binding legal force insofar as they do not meet the following requirements: (i) does not apply to public positions that are elected (elected officials); (ii) limited period of time for only 5 (five) years since the convicted person has finished his sentence; (iii) exempt for ex-convicts who openly and honestly tells the public that he is a former convict; (iv) not as a perpetrator of recurring crimes.

From MK Decision 4/PUU-VII/2009, it can be concluded that the terms of non-former convicted of corruption for prospective candidate memberof DPR are contradictory conditionally (conditionallyunconstitutional)to the 1945 Constitution and therefore do not have binding legal force.

This is because the positions of DPR members are not appointed officials, but rather elected public positions (elected officials). According to MK Decision *a quo* that the prohibition of former convicted of corruption in nominating DPR members does not apply to elected officials, as long as they do not receive additional criminal sanctions in the form of revocation of their right to vote by court decisions that have permanent legal force.

3.3 Governing the Requirement of Non-Former Convicted of Corruption According to Decision of the Constitutional Court Number 120/PUU-VII/2009 dated April 20, 2010

Decision of the Constitutional Court Number 120/PUU-VII/2009 dated April 20, 2010 (MK Decision 120/PUU-VII/2009) is a decision in the case for petition for Judicial Review of Article 58 letter f and letter h of Law Number 32 of 2004 concerning Regional Government as has been amended lastly with Law Number 12 Year 2008 concerning Second Amendment to Law Number 32 Year 2004 concerning Regional Government (Law 32/2004 as amended lastly with Law 12/2008).

Article 58 letter f of Law 32/2004 reads, "*Never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing an offense threatened with imprisonment for a maximum of 5 (five) years or more*". While Article 58 letter h Law 32/2004 which requires candidates for regional heads must "*know the area and be known by the people in their area*".

Decision of the Constitutional Court Number 120/PUU-VII/2009 dated April 20, 2010 (MK Decision 120/PUU-VII/2009) reinforces the Constitutional Court Decision Number 4/PUU-VII/2009 (MK Decision 4/PUU-VII/2009).

This can be seen from the opinion of MK Decision 120/PUU-VII/2009 which states:

"Whereas the requirement for a regional head candidate which has been given a new interpretation by the Court in Decision Number 4/PUU-VII/2009 dated March 24, 2009, is solely an administrative requirement. Therefore, starting from March 24, 2009, the legal regime of Article 58 letter f of Law 32/2004 as amended lastly with Law 12/2008 as the sound and meaning of the original text ended, and instead since then throughout the entire jurisdiction of the Republic of Indonesia new interpretation of Article 58 letter f of Law 32/2004 as amended the latest by Law 12/2008 on ex-convicts who may become regional head candidates according to Court Decision Number 14-17/PUU-V/2007 dated 11 December 2007 juncto Court Decision Number 4/PUU-VII/2009 dated March 24, 2009. The new norm that was born because of the new interpretation is erga omnes;"(Decision of the Constitutional Court 120/PUU-VII/2009 p. 77)

The Court has considered the constitutionality of Article 58 letter f of Law 32/2004 as lastly amended by Law 12/2008. According to the Constitutionality Court Article 58 letter f of Law 32/2004 as amended most recently by Law 12/2008 is final and binding, that is, it remains constitutional as long as interpreted as Decision of the Constitutional Court 4/PUU-VII/2009 (pp. 78-79).

Whereas related to the testing of Article 58 letter h of Law 32/2004 which requires candidates for regional heads must "*know their regions and be known by the people in their regions*", the Court is of the opinion that is reasonable and rational. The formulation of the article *a quo*, according to the Court, is actually

needed to prevent the emergence of imposed regional head candidates and deputy regional heads who are not known by the community in their area such as when the practice of regional head election during the enactment of Law Number 5 of 1974 concerning Government Principles in the Regions (p. 80).

Article 58 letter h of Law 32/2004 which requires candidates for regional heads must "*know their regions and be known by the people in their regions*", according to the Court, is also not a matter of constitutionality of norms But rather as a policy choice from the legislators (p. 80).

The Court finally decided that the Petitioners' petition was not acceptable as long as Article 58 letter f of Law 32/2004 was amended lastly with Law 12/2008 and stated rejecting the petition of the Petitioner as long as Article 58 letter h of Law 32/2004 as amended the latest by Law 12/2008.

As has been stated above that the Constitutional Court Decision 120/PUU-VII/2009 (MK Decision 120/PUU-VII/2009) reinforces the Decision of the Constitutional Court 4/PUU-VII/2009 (MK Decision 4/PUU-VII/2009). Then referring to MK Decision 120/PUU-VII/2009 related to the requirement not to be a former convicted of corruption in nominating a member of the House of Representatives, it cannot be enforced because it contradicts the 1945 Constitution.

This is because DPR members are not appointed officials but elected positions. For elected public offices, in accordance with the Decision of the Constitutional Court 4/PUU-VII/2009 (MK Decision 4/PUU-VII/2009), the aforementioned requirements cannot be enforced as long as there is no additional criminal offense in the form of revocation of voting rights by a court decision that has permanent legal force.

3.4 Governing the Requirement of Non-Former Convicted of Corruption According to Decision of the Constitutional Court Number 42/PUU-XIII/2015 dated July 9, 2015

Decision of the Constitutional Court Number 42/PUU-XIII/2015 dated July 9, 2015 (MK Decision 42/PUU-XIII/2015) is a decision in the case of Judicial Review Article 7 letter g and Article 45 paragraph (2) letter k of Law Number 8 Year 2015 concerning Amendment to Law Number 1 of 2015 concerning Establishment of Government Regulation in Lieu of Law Number 1 of 2014 concerning Election of Governors, Regents and Mayors (Law 8/2015).

Article 7 letter g of Law 8/2015 stipulates, "*a prison sentence has never been imposed based on a court decision that has obtained permanent legal force for committing an offense threatened with imprisonment of 5 (five) years or more*".

Whereas Article 45 paragraph (2) letter k of Law 8/2015 reads, "*Required documents as referred to in paragraph (1) include: ... (k) a statement has never been sentenced to prison based on a court decision that has obtained permanent legal force, for committing a criminal offense threatened with imprisonment of 5 (five) years or more from the District Court whose jurisdiction covers the candidate's residence, as proof of fulfillment of the candidate requirements as referred to in Article 7 letter g*".

Article 7 letter g and Article 45 paragraph (2) letter k of Law 8/2015 basically regulates the requirements to become a regional head who has never been sentenced to prison based on a court decision that has permanent legal force because he committed a crime that is threatened with a 5 (five) prison sentence) years or more.

The court ruled that Article 7 letter g of Law 8/2015 contradicted conditionally (*conditionally unconstitutional*) with the 1945 Constitution of the Republic of Indonesia (UD 1945) as long as it was not exempted from ex-convicts who openly and honestly told the public that they were ex-convicts and stated Article 7 letter g of Law 8/2015 does not have binding legal force conditionally as long as it is not meant to be exempted for ex-convicts who openly and honestly state to the public that they are ex-convicted.

Then the Court stated that the Elucidation of Article 7 letter g of Law 8/2015 contradicted the 1945 Constitution and stated that the Elucidation of Article 7 letter g of Law 8/2015 did not have binding legal force. Furthermore, the Court stated that Article 45 paragraph (2) letter k of Law 8/2015 contradicted the 1945 Constitution and stated Article 45 paragraph (2) letter k of Law 8/2015 did not have binding legal force.

The Court before passing the verdict had considered the provisions of Article 7 letter g of Law 8/2015 which stipulated, "*Never been sentenced to prison based on a court decision that has obtained permanent legal*

force for committing an offense threatened with imprisonment of 5 (five) years or more ", is a form of reduction of the right to honor, which can be equated with the criminal revocation of certain rights (p. 68).

According to the Court, revocation of a person's suffrage can only be carried out with a judge's ruling as additional punishment. The law cannot revoke a person's suffrage, but only gives restrictions that do not conflict with the 1945 Constitution, which in Article 28J paragraph (2) of the 1945 Constitution states that restrictions can be imposed solely to guarantee the recognition and respect for the rights and the freedom of others and to meet fair demands in accordance with moral considerations, religious values, security and public order in a democratic society (p. 68).

According to the Court, Law 8/2015 actually accommodated the Decision of the Constitutional Court 4/PUU-VII/2009 dated March 24, 2009, but that matter was not regulated in the norm of Article 7 letter g but rather stipulated in the Explanation of Article 7 letter g of the Law a quo, so that between Article 7 letter g with the explanation of Article 7 letter g there is a conflict, that is the norm Article 7 letter g prohibits ex-convicts from becoming governor candidates, regent candidates, and mayor candidates, but the Elucidation of Article 7 letter g allows ex-convicted to become a candidate for governor, candidate for regent, and candidate for mayor (p. 71).

According to the Court, Article 7 letter g of Law 8/2015 must be interpreted in accordance with the Decision of the Constitutional Court 4/PUU-VII/2009 (MK Decision 4/PUU-VII/2009), dated March 24, 2009 and makes the Elucidation of Article 7 letter g of Law 8/2015 become part of the norms of Article 7 letter g of Law 8/2015, so that there is no conflict between the norm and the explanation (p. 71).

In the legal consideration of the Decision of the Constitutional Court 42/PUU-XIII/2015 (MK Decision 42/PUU-XIII/2015), the Court stated that referring to the two decisions of the Court, namely the Decision of the Constitutional Court 4/PUU-VII/2009 dated March 24, 2009 (MK Decision 4/PUU-VII/2009) and the Decision of the MK 120/PUU-VII/2009 dated April 20 2010 (MK Decision 120/PUU-VII/2009), then the norm "*was never sentenced to imprisonment based on a court decision that has permanent legal force for committing an offense threatened with imprisonment of 5 (five) years or more*" provided for in other applicable laws must be interpreted in accordance with interpretation as referred to in Court Decision Number 4/PUU-VII/2009, dated March 24, 2009 (MK Decision 4/PUU-VII/2009), namely:

1. *Does not apply to elected public positions;*
2. *Applies a limited period of time only for 5 (five) years since the convicted person completes his sentence;*
3. *is exempt for ex-convicts who openly and honestly tells the public that they are ex-convicted;*
4. *Not as a perpetrator of recurring crimes.* (vide MK Decision 42/PUU-XIII/2015 dated July 9, 2015 pp. 70-71)

In MK Decision 42/PUU-XIII/2015, the Court also made clear that the condition "*applies for a limited period of time only for 5 (five) years since the convicted person has finished serving his sentence*". According to the Court, the five-year period is a reasonable time as proof of the ex-convicted that have behaved well and did not repeat the criminal offenses as the purpose of the penalties regulated in Law Number 12 of 1995 concerning Correctional Facilities (p. 72). A former convicted who has repented, according to the Court, is not appropriate if given another sentence by the Law as determined in Article 7 letter g of Law 8/2015 (p. 72).

Whereas regarding the conditions "*exempted for ex-convicted who openly and honestly told the public that the former convicts concerned*", according to the Court, it was intended that the public could know that the candidate pair to be chosen had been convicted (p. 72).

The Court gave further consideration, that someone who was open and honest told the public that the person concerned was a former convict, then the conditions regarding "*a limited period of time only for 5 (five) years since the convicted person finished serving his sentence*" and the condition "*not as a criminal repeatedly*" from the ruling of the Constitutional Court Decision 4/PUU-VII/2009, it is no longer needed, because the person concerned has boldly acknowledged his status as a former convicted.

Accordingly, according to the Court, when a former prisoner completes his prison term and announces openly and honestly that he is a former convicted, then the person can nominate himself to be a governor,

regent, and mayor or nominate himself in a public or political position which is filled through election (elected officials). (p. 72)

However, if the ex-convict does not inform the public that the person concerned is a former convicted, the condition applies *"five years after the convicted has finished serving his sentence"*. (p. 72)

Based on the description above, based on the Decision of the Constitutional Court 42/PUU-XIII/2015 (MK Decision 42/PUU-XIII/2015), the requirement of "non-former convicted of corruption" for prospective candidate member of DPR must be excluded, or in other words a former convicted of corruption can nominate themselves as a candidate for DPR members, as long as he is concerned told the public that he was a former convicted.

3.5 Governing the Requirement of Non-Former Convicted of Corruption According to the Legislator (DPR and the President) in Law Number 7 of 2017 concerning General Elections

Governing the requirements of non-former convicted of corruption for prospective candidate member of DPR by the Legislator, namely the House of Representatives (DPR) together with the President, are regulated in Law Number 7 of 2017 concerning General Elections (Law 7/2017) in Article 240 paragraph (1) letter g.

Article 240 paragraph (1) letter g of Law 7/2017 states, *"Prospective candidates member of DPR, provincial DPRD and regency/city DPRD are Indonesian citizens and must meet the following requirements: g. never been sentenced to prison based on a court decision that has obtained permanent legal force for committing an offense threatened with imprisonment of 5 (five) years or more, unless openly and honestly telling the public that he was a former convicted"*. In the explanation of Article 240 paragraph (1) letter g of Law 7/2017 stated *"Sufficiently clear"*.

Law 7/2017 was passed on August 15, 2017 and promulgated on August 16, 2017. This means that after the Constitutional Court Decision 42/PUU-XIII/2015 dated July 9, 2015 (MK Decision 42/PUU-XIII/2015).

As already stated, one of the decisions of the Constitutional Court 42 / PUU-XIII/2015 (MK Decision 42/PUU-XIII/2015) is that Article 7 letter g of Law 8/2015 as unconstitutionally conditionally with the 1945 Constitution of the Republic of Indonesia (1945 Constitution) as long as it is not meant to be excluded for former convicted who openly and honestly told the public that he was a former convicted and states that Article 7 letter g of Law 8/2015 does not have binding legal force as long as it is not meant to be excluded for former convicted who openly and honestly told the public that he was a former convicted.

Article 7 letter g of Law 8/2015 stipulates that candidates for governors, regents and mayors who will register must meet the requirements, *"a prison sentence has never been imposed based on a court decision that has obtained permanent legal force because of a criminal offense threatened with imprisonment 5 (five) years or more"*.

The Court has interpreted the provisions of Article 7 letter g of Law 8/2015 as conditionally unconstitutional with the 1945 Constitution as long as it is not meant to be excluded for former convicted who openly and honestly told the public that he was a former convicted

Thus, if the prospective of candidate for Governor, Regent and Mayor is a former convicted, but openly and honestly tells the public that he is a former convicted, then he can nominate himself in a public or political position which is filled by election (elected officials).

MK Decision 42/PUU-XIII/2015 was accommodated and adapted in the requirements of prospective candidate member of legislative, in this case the requirements for prospective candidate member of DPR, provincial DPRD and regency/city DPRD, as stated in Article 240 paragraph (1) letter g of Law 7/2017.

Prospective candidate member of DPR who have been sentenced to prison based on a court decision that has obtained permanent legal force for committing a crime threatened with imprisonment of 5 (five) years or more including in this case are former convicted of corruption, according to the provisions of Article 240 paragraph (1) letter g of Law 7/2017 can register themselves, with the conditions concerned openly and honestly state to the public that the person concerned is a former convicted.

3.6 Governing the Requirement of Non-Former Convicted of Corruption According to Regulation of the General Election Commission Number 20 of 2018 concerning Nominations of Members of the House of Representatives, Provincial House of Representatives, and Regency/City Regional House of Representatives

The General Election Commission (KPU) issued a General Election Commission Regulation Number 20 of 2018 concerning the Nomination of Members of the House of Representatives, Provincial Regional Representatives Council, and Regency/City Regional People's Representative Council (PKPU 20/2018) as the basis for the nomination process for members of the House of Representatives People's (DPR), Provincial Regional People's Representative Council (Provincial DPRD), and Regency/City Regional People's Representative Council (Regency/City DPRD).

In Article 4 paragraph (3) PKPU 20/2018 states, *"In a democratic and open selection prospective candidates as referred to in paragraph (2), do not include former convicted drug, sexual crimes against children, and corruption."*

Furthermore, the KPU regulates the provisions of Article 11 paragraph (1) letter d PKPU 20/2018 which states, *"Documents on the requirements for nominating prospective candidates as referred to in Article 10 paragraph (1) are in the form of ... d. The integrity pact signed by the Leadership of Political Parties is in accordance with its level using the form Model B.3"*.

KPU in preparing PKPU 20/2018 includes the provisions of Article 4 paragraph (3) and Article 11 paragraph (1) letter d PKPU 20/2018 based on Law Number 7 of 2017 concerning General Elections (Law 7/2017).

On the other hand, there are provisions in Article 240 paragraph (1) letter g of Law Number 7 of 2017 concerning General Elections (Law 7/2017) stating, *"Prospective candidate member of DPR, provincial DPRD and regency/city DPRD are Indonesian citizens and must meet the following requirements: g. never been sentenced to prison based on a court decision that has obtained permanent legal force for committing an offense threatened with imprisonment of 5 (five) years or more, unless openly and honestly telling the public that he was a former convicted"*.

The provisions of Article 240 paragraph (1) letter g of Law 7/2017 regulates prospective candidate member of DPR who have been sentenced to prison based on a court decision that has obtained permanent legal force for committing an offense threatened with imprisonment of 5 (five) years or more, including in this case a former convicted of corruption, can register himself, with the condition concerned openly and honestly told the public that he was a former convicted.

Whereas the provisions of Article 4 paragraph (3) and Article 11 paragraph (1) letter d of PKPU 20/2018 regulate the political parties do not include former convicted of corruption, other than former convicted drug and sexual crimes against children. So, according to the provisions of Article 4 paragraph (3) and Article 11 paragraph (1) letter d PKPU 20/2018 that a former convicted of corruption cannot be submitted as prospective candidate member of DPR.

KPU Chairman Arief Budiman stated the reasons for former corruptors to nominate themselves as members of Parliament in the 2019 elections. According to him, *"Our elections must be more qualified. The candidates must also be more qualified,"* Arief said in the Parliament Building, Jakarta, Monday, April 9, 2018 (<https://nasional.kompas.com/read/2018/04/09/20330431/larang-eks-napi-korupsi-jadi-caleg-kpu-ingin-pemilu-lebih-dipercaya>, accessed on 12 August 2019). He continued, *"If the candidates displayed are qualified, the election is trusted, yes, of course public participation will increase"*. (*Ibid.*)

KPU Commissioner Wahyu Setiawan stated that the initial basis of the KPU forbidding former corruptors from nominating legislators was the Law on Clean and KKN Free (Corruption, Collusion, and Nepotism) Law (Law Number 28 Year 1999 concerning Clean and Free State Corruption Organizers, Collusion, and Nepotism, *researchers*) according to him, the formation of a government - consisting of the legislative and executive - starts from the election. Electing the president, members of the DPR, and DPRD, according to him, is part of the government.

Thus according to Wahyu, starting from upstream there must be concrete efforts to prioritize the spirit of a clean and KKN-free government. The KPU also encourages the creation of elections with integrity that

have 3 minimum requirements: organizers with integrity, participants with integrity, and voters with integrity. He asked a reflective question, "How could a former convicted of corruption - someone who had injured the people's mandate, still be given the opportunity to become a member of the DPR and DPRD?" (<https://kumparan.com/@kumparannews/adu-tafsir-kpu-dan-bawaslu-soal-caleg-koruptor-1536547891615529154>, accessed on 12 August 2019).

Previously, KPU Commissioner Wahyu Setiawan at the KPU office on April 17, 2018 stated that there were two alternatives to pour out a ban on former prisoners of corruption from becoming candidates for the 2019 election. The first option was a direct ban set forth in the draft PKPU. Meanwhile, the second option is given to political parties participating in the election. Political parties, he said, would be banned from recruiting ex-convicted to become candidates. According to him, only the mechanism is different, but substantially the same (<https://nasional.tempo.co/read/1102506/tarik-ulur-larangan-kpu-soal-eks-napi-korupsi-jadi-caleg/full&view=ok>, accessed 12 August 2019).

KPU in Article 4 paragraph (3) and Article 11 paragraph (1) letter d of PKPU 20/2018 chose to regulate political parties not to propose (prohibit) prospective candidate member of DPR in the 2019 Election.

3.7 Governing the Requirement of Non-Former Convicted of Corruption According to the Election Supervisory Body (Bawaslu)

The Election Supervisory Body (Bawaslu) as conveyed by its Commissioner Rahmat Bagja that the provisions of Article 4 paragraph (3) and Article 11 paragraph (1) letter d of PKPU 20/2018 which regulates that political parties do not include former convicted of corruption contradicts Article 240 paragraph (1) letter g of Law 7/2017. Because according to him, the provisions of Article 240 paragraph (1) letter g of Law 7/2017 allow ex-convicts with a sentence of five years or more to go forward as legislative candidates, as long as they publicly announce their status as ex-convicts.

Bawaslu, he continued, also adheres to Decision of the Constitutional Court Number 4/PUU-VII/2009 dated March 24, 2009 (MK Decision 4/PUU-VII/2009) which stipulates that the revocation of political rights is constitutional, but remains within certain limits. The matter where the revocation is only valid for five years since the convict has finished serving his sentence. Furthermore, ex-convicts can occupy public office through elections, not through appointment.

That argument, according to Bagja, made Bawaslu pass 12 former convicted of corruptions as candidates for the legislature (<https://kumparan.com/@kumparannews/adu-tafsir-kpu-dan-bawaslu-soal-caleg-koruptor-1536547891615529154>, accessed on 12 August 2019).

According to Bagja, Bawaslu has the right to settle disputes including in this connection resolving legal collision disputes between *dassollen* (theoretical legal facts) and *das sein* (law as a fact that develops in society) because, in Bawaslu's view, PKPU 20/2018 in one of its articles is problematic (*Ibid.*).

Regarding the requirements of non-former convicted of corruption for prospective candidate member of DPR in the 2019 General Election as stipulated in Article 4 paragraph (3) and Article 11 paragraph (1) letter d of PKPU 20/2018, Bawaslu has a very clear attitude rejecting it. Because Bawaslu considers Article 4 paragraph (3) and Article 11 paragraph (1) letter d of PKPU 20/2018 to contradict Article 240 paragraph (1) letter g of Law 7/2017 and the Constitutional Court's Decision (MK Decision).

3.8 Governing the Requirement of Non-Former Convicted of Corruption According to Decision of the Supreme Court Number 46 P / HUM / 2018 dated September 13, 2018

General Election Commission Regulation Number 20 of 2018 concerning Nominations of Members of the House of Representatives, Provincial Regional House of Representatives, and Regency/City Regional House of Representatives (PKPU 20/2018) specifically regulating the prohibition of non-former convicted of corruption (ex-corruptors) of running as legislative members (DPR) was questioned by former convicted of corruption to the Supreme Court (MA).

The former convicted of corruption filed an objection to the material judicial review of Article 4 paragraph (3), Article 11 paragraph (1) letter d, and Appendix Model B.3 the Integrity Pact for

Nominating Prospective of Candidates for Members of DPR/Provincial DPRD/Regency/City DPRD, Regulation KPU 20/2018 to the Supreme Court (MA).

Through the Supreme Court Decision Number 46 P/HUM/2018 dated September 13, 2018 (MA Decision 46 P/HUM/2018), the Supreme Court (MA) ruled Article 4 paragraph (3), Article 11 paragraph (1) letter d, and Appendix Model B.3 KPU regulation 20/2018 along the phrase "former convicted of corruption" is contrary to the higher laws, namely Law Number 7 of 2017 concerning General Elections (Law 7/2017) in conjunction with Law Number 12 of 2011 concerning Establishment Laws and Regulations (Law 12/2011), therefore do not have binding legal force and are not generally applicable.

According to MA Decision 46 P/HUM/2018 in its legal considerations, the norms regulated in Article 4 paragraph (3) of KPU Regulation 20/2018 are in conflict with Article 240 paragraph (1) letter g of Law Number 7 of 2017 concerning General Elections (Law 7/2017) (p. 71).

Article 240 paragraph (1) letter g of Law 7/2017 states, "*Prospective candidate members of DPR, provincial DPRD and regency/city DPRD are Indonesian citizens and must meet the following requirements: g. never been sentenced to prison based on a court decision that has obtained permanent legal force for committing an offense threatened with imprisonment of 5 (five) years or more, unless openly and honestly telling the public that he was a former convicted*".

The Supreme Court (MA) further believes that from the provisions of Article 240 paragraph (1) letter g of Law 7/2017 there are no norms or rules prohibiting running for Former Convicted of Corruption as listed in Article 4 paragraph (3), Article 11 paragraph (1) letter d and Appendix Model B.3 the Integrity Pact for the Nominating Prospective Candidate Member of DPR/Provincial DPRD/Regency/City DPRD, KPU Regulation 20/2018.

Although the intention of the KPU is that political parties do not include former convicted of corruption, drug dealers, and sexual crimes against children, according to MA, this essentially limits the political rights of someone who will run for prospective of Legislative Candidates in the General Election (p. 72).

In addition, according to MA, the KPU provisions above also contradict Article 12 letter d of Law Number 12 of 2011 concerning the Formation of Laws and Regulations (Law 12/2011) which determines, "*regulations under the law contain material for carrying out the law laws as they should*". The KPU, in the judgment of MA, has made provisions not mandated by the laws and regulations above (p. 72).

MA is of the opinion that Article 4 paragraph (3), Article 11 paragraph (1) letter d and Appendix Model B.3 of KPU Regulation 20/2018 are not in line with, conflict with, or do not meet the principles of establishing good legislation, as stated described in Law 12/2011 (p. 72).

MA agreed that the nomination of legislative members must come from clean figures and never have a track record of integrity flaws. However, according to him, the regulation on limiting the political rights of a citizen must be included in the law, not regulated in the statutory provisions under the law in casu KPU Regulation 20/2018 (p. 73).

According to the MA Article 4 paragraph (3), Article 11 paragraph (1) letter d and Appendix to Model B.3 which regulates the political rights of citizens, is a new legal norm that is not regulated in the higher statutory regulations in this case the Law 7/2017 so as such is contrary to Law 7/2017 and Law 12/2011 (p. 73).

IV. CONCLUSION

Governing the requirement of "non-former convicted of corruption" for prospective candidate member of legislative in this case the House of Representatives (DPR) in the 2019 General Election by the relevant state institutions, namely the Constitutional Court (MK), the Legislator (DPR and the President), the General Election Commission (KPU), the Election Supervisory Body (Bawaslu), and the Supreme Court (MA) there are differences.

On the one hand, MK, the Legislator (DPR and the President), Bawaslu and MA basically allowed former convicted of corruption to nominate themselves as members of the DPR by meeting certain requirements. Whereas on the other hand, the KPU regulates that political parties do not nominate prospective of DPR member candidates from former convicted of corruption.

The Constitutional Court (MK) through its decisions, in principle states that the requirement of non-former convicted of corruption for prospective candidate member of DPR as contrary to the constitution (the 1945 Constitution) because it is considered as revoking one's voting rights. According to the Court, the law cannot revoke a person's suffrage, but only gives restrictions that do not conflict with the 1945 Constitution.

The Constitutional Court Decisions are MK Decision 14-17/PUU-V/2007, MK Decision 4/PUU-VII/2009, MK Decision 120/PUU-VII/2009, and MK Decision 42/PUU-XIII/2015.

Even through the Decision of the Constitutional Court 42/PUU-XIII/2015 (MK Decision 42/PUU-XIII/2015), the requirement of non-former convicted of corruption for prospective candidate member of DPR must be excluded or in other words, a former convicted of corruption can nominate himself as a prospective candidate member of DPR, as long as the person concerned tells the public that the person concerned is former convicted. Not having to wait for a period of 5 (five) years since the convicted person has finished his sentence and although as a perpetrator of recurring crimes, as previously required by MK Decision 4/PUU-VII/2009 and MK Decision 120/PUU-VII/2009.

The Legislator(DPR and the President)stipulated the terms of non-former convicted of corruption for prospective candidate member of DPR in the 2019 Election in the provisions of Article 7 letter g of Law 8/2015. This provision accommodates and adapts MK Decision 42/PUU-XIII/2015.

The General Election Commission (KPU) regulates the requirements of non-former convicted of corruption for prospective candidate member of DPR in the 2019 Elections in contrast to the Constitutional Court Decisions and the Legislator (DPR and the President).

In the provisions of Article 4 paragraph (3) and Article 11 paragraph (1) letter d of PKPU 20/2018, the KPU regulates political parties so that they do not propose prospective candidate member of DPR from former convicted of corruption. According to the KPU, this was done in an effort to create a government that is clean and free of corruption, collusion and nepotism (KKN), as mandated by Law Number 28 of 1999 concerning State Administrators who are Clean and Free of Corruption, Collusion and Nepotism (Law 28/1999).

The Election Supervisory Board (Bawaslu) does not approve of the steps taken by the KPU. Bawaslu is of the view that the provisions of Article 4 paragraph (3) and Article 11 paragraph (1) letter d of PKPU 20/2018 are contradictory to Article 240 paragraph (1) letter g of Law 7/2017 and the existing Constitutional Court Decisions (MK Decision).

Then, the Supreme Court (MA) states Article 4 paragraph (3), Article 11 paragraph (1) letter d, and Appendix Model B.3 KPU Regulation 20/2018 as long as the phrase "former convicted of corruption" is contrary to more statutory regulations high, namely Law 7/2017) in conjunction with Law 12/2011, therefore it does not have binding legal force and is not generally applicable. According to the Supreme Court, the KPU has made provisions not instructed by the laws and regulations above. The KPU is also considered to have limited the political rights of someone who, according to the Supreme Court, must be contained in the law, not regulated in statutory provisions under the law *in casu* KPU Regulation 20/2018.

V. Acknowledgements

This research was funded by the Directorate of Research and Community Service Directorate General of Research and Technology Strengthening Ministry of Research, Technology and Higher Education through the Beginner Lecturer Research (PDP) scheme for the 2018-2019 budgets in accordance with Research Contract Number: 226/A5/SPKP/LPPM/UNPAM/III/2019.

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- [15] Constitutional Court Decision Number 4/PUU-VII/2009 dated March 24, 2009 (MK Decision 4/PUU-VII/2009)
- [16] Decision of the Constitutional Court Number 120/PUU-VII/2009 dated April 20, 2010 (MK Decision 120/PUU-VII/2009)
- [17] Decision of the Constitutional Court Number 42/PUU-XIII/2015 dated July 9, 2015 (MK Decision 42/PUU-XIII/2015)
- [18] Supreme Court Decision Number 46 P/HUM/2018 dated September 13, 2018 (MA Decision 46 P/HUM/2018)