

Legal Politics of Replacing the Regional Head Candidates with Status as Criminal Suspect

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ABSTRACT

Many regional head candidates who participated in the 2018 simultaneous regional elections were suspected of corruption and bribery cases. At least nine regional head candidates were caught in corruption and bribery cases. It certainly undermined the spirit of democracy in which regional head candidates who had been determined as criminal offenses still participated in the election stages. At the same time, they must focus on resolving legal problems. Current election law has not regulated the replacement mechanism for regional heads candidates suspected of criminal offenses. The authors proposed the idea of a replacement mechanism for regional head candidates later in a facultative manner, in which the final decision on replacement is returned to supporting parties. The law cannot imperatively prohibit regional head candidates who are suspects in criminal investigations from participating in the elections. They still have the right to be elected because revoking the right to vote and to be elected can only be done through a court decision. This paper used a normative legal research method with a conceptual approach and statute approach. The purpose of this paper is to design a replacement mechanism for regional head candidates with status as criminal suspects. Benchmarks for regional head candidates with suspect status can be replaced if they are suspected of committing a crime with a threat of imprisonment of 5 (five) years or more but not include negligence offenses (*culpa levis*) and political criminal offenses. A replacement mechanism is intended to ensure that the public gets a regional head candidate who is clean and not hampered by legal cases. This is also an integrity test of political parties and individual candidates in the public's eyes.

Keywords: regional head candidates, replacement, criminal suspect status.

1. INTRODUCTION

After the Reformation in 1998, the constitutional paradigm demanded a total change to the previous era's messy and corrupt government's administration system. This change began with the reorganization of the government's corruption handling system after 32 years of being collapsed by ingrained corrupt practices. Legal regulation was formed to handle the corruption problems, namely by Law Number 28 of 1999 concerning Administration of A State that Clean and Free from Corruption followed by Law Number 31 of 1999 concerning Eradication of Corruption which was later amended by Law Number 20 of 2001 concerning Amendments On Law Number 31 of 1999 concerning Eradication of Criminal Act of Corruption.

Considering declining public trust in the Police and Attorney General's Office related to the eradication of

corruption, an independent anti-corruption institution was finally born through Law Number 30 of 2002 concerning the Corruption Eradication Commission (KPK). In fact, the opposite was true; even though KPK has been established, corruption was increasingly down to earth, majority befell public officials and political figures. Data released by KPK on Mei 8th, 2021, showed that the total handling of corruption crimes from 2004-2021 consisted of 1429 cases preliminary investigations, 1145 cases full investigations, 981 prosecution cases, 831 *inkracht* (has permanent legal force) cases, and those executed reached 872 cases [1]. There were around 417 corruption cases that have risen in elected public positions with details of 274 House of Representatives and Regional House of Representatives members, 21 Governors, 122 Mayors-Vice Mayors/Regents-Vice Regents [2].

The Decision of The Constitutional Court Number 4/PUU-VII/2009 distinguishes public officials into three

categories, namely: (1) elected officials and appointed officials; (2) public positions in the executive sector that serve more and public positions in the legislative sector that channel the aspirations of the people; and (3) public officials because their duties require very high trust, such as judges and other law enforcement officials, as well as officials managing state finances.

An emergence of legislative candidates and regional head candidates who have been convicted to participating in general elections and regional elections have created various views regarding the rights of ex-convicts to public office [3]. The public urges the application of additional penalties for corrupt convicts by revoking their political rights (rights to vote and to be elected). Public pressure was met when the judges of TIPIKOR court (Indonesian Court for Corruption Crimes) began to apply additional sentences of revocation of the right to vote and be elected in their decisions on several cases of convicted corruption [4].

Jimly Asshiddiqie said that political rights guaranteed in the Constitution of the Republic of Indonesia of 1945 include rights to associate, assemble and express opinions peacefully, right to vote and be elected in people representative institutions, and right to be appointed to public positions [5]. According to research by Indonesia Corruption Watch (ICW), out of a total of 576 corruption convictions up to 2017, only seven convictions imposed additional crimes in revoking voting and election rights as well as revocation of elective rights. The verdicts included Akil Mochtar, Djoko Susilo, Anas Urbaningrum, Lutfi Hasan Ishaq, Ratu Atut Chosiyah, and Dewi Yasin Limpo, and Rahmat Yasin. The political figure who had also been revoked of his right to vote and be elected was former Regional Representative Council (DPD) chairman Irman Gusman, who used his influence to get *Logistics Affairs Agency* (BULOG) to provide a quota distributing imported sugar to CV Semesta Jaya [6]. Sentencing to revoke the right to vote and be elected also befell former Chairman of Indonesia's House of Representatives, Setya Novanto, regarding the corruption of electronic identity cards and Yudi Widiana Adi in cases of road construction in Maluku and North Maluku [7].

Regional elections contestation, especially regional head candidates who were later determined to be criminal suspects in the regional head election process, need more attention. It is pretty reasonable because several candidates for regional heads, including governors, regents, and mayors who wanted to participate in the 2018 regional elections, had become suspects in corruption and bribery cases. At least, there were nine regional head candidates caught in corruption or bribery. It is, of course, very profoundly injurious to the spirit of regional autonomy and democracy where a candidate for a regional head who had been named a suspect in corruption or bribery was still allowed to participate in the regional election stages. Normatively, Law No. 10 of 2016 concerning the Second Amendment to the regional elections law has not regulated for

replacing regional head candidates who become criminal suspects during the regional election stage process.

Several elements of society had suggested that regional head candidates who were suspects of corruption or bribery, must be barred from participation in the regional elections. It was certainly not in line with Article 47 paragraph (5) of Law Number 8 of 2015 concerning Amendments to the Election Law which states that candidate pairs are canceled if their nominations are proven to have committed a criminal offense which is punishable by imprisonment of at least five years or more based on a court decision that has permanent legal force before the voting day. Especially regarding future regional elections contestation, it is necessary to find a way out to solve it. Of course, in this context, the regional head candidate who has a suspect status in any criminal case, not only in corruption or bribery, has the right to vote and be elected, which was still respected because the court has not revoked their rights through a final and legally binding decision.

The state must take concrete steps through its legal politics to create a regional head candidate with the integrity to lead provinces and districts/cities. The prohibition or cancellation of a candidate who has been declared a criminal suspect from participating in the stages of the regional elections cannot be made because it will violate the political rights of the suspect. In addition, the law cannot imperatively prohibit candidates for a regional head who become suspects from participating in the regional elections. The person concerned still has the right to be elected before deciding otherwise by a court decision. Therefore, the solution that must be sought is how a candidate replacement mechanism must be available. However, the authority to make replacements is fully returned to the bearers of the candidates, whether from political parties, coalitions of political parties, or individual candidates with precise mechanisms and parameters.

Based on the background above, this paper intended to present an offer of ideas to formulate a mechanism and parameters for replacing a candidate for a regional head who becomes a criminal suspect. Therefore, in this paper, two main problems were formulated: First, what were the parameters of regional head candidate replacement with status as criminal suspect?, Second, what was the design of regional head candidate replacement with status as a criminal suspect in the future?.

2. RESEARCH METHOD

This research used normative legal research. Normative legal research included several parts, including research on legal principles, legal systematic, legal synchronization level, comparative law, and legal history [8]. The approach used in this study included conceptual and statutory approaches [9]. The used legal materials consisted of primary, secondary and non-legal

materials. The primary legal materials consisted of the 1945 Constitution of the Republic of Indonesia, the regional elections Law, the General Election Commission (KPU) Regulation Number 3 of 2017, the General Election Commission Regulation Number 15 of 2017, the Decision of the Constitutional Court Number 4/PUU-VII/2009 and the Decision of the Constitutional Court Number 71/PUU-XIV/2016. Secondary legal materials were in the form of books, journals, and legal scientific papers. Non-legal materials were in the form of non-legal books and information accessed via the Internet.

3. FINDINGS AND DISCUSSION

3.1. *The Parameters for Regional Head Candidates Replacement with Status as Criminal Suspect*

A discourse regarding replacing a candidate for a regional head named a criminal suspect has actually been voiced since last 2018. It was because many regional head candidates were named as corruption or bribery suspects when contesting in the 2018 regional elections. At least nine regional head candidates contesting in the 2018 regional elections have been named corruption or bribery suspects by the KPK. The nine regional head candidates included Lampung Governor Candidate, Mustafa, NTT Governor Candidate (Marianus Sae), Southeast Sulawesi Governor Candidate (Asrun), North Maluku Governor Candidate (Ahmad Hidayat Mus), Subang Regent Candidate (Imas Aryunningsih), Jombang Regent Candidate (Nyono Suharli Wihandoko), Tulungagung Regent Candidate (Syahri Mulyo), and Malang Mayor Candidates (Mochamad Anton and Yaqud Ananda) [10].

Nine regional head candidates with suspected status became contestants for the 2018 regional elections. Two of them still received the highest votes in the election results in their respective regions. Syahri Mulyo, paired with Maryoto Bhirowo, won 61.1% of the votes in Tulungagung regent election. Meanwhile, in North Maluku, Ahmad Hidayat Mus and Rival Umar outperformed three other rivals with 31.91% of the votes. However, Ahmad Hidayat Mus's hopes of being sworn in ran aground after the Constitutional Court finally ordered a re-vote in six villages, putting him in second place in the final vote [11].

Regional election law, which has been amended three times to date, has not regulated the mechanism for replacing candidates for regional heads involved in criminal acts. Candidates replacement can only be made if the regional head candidate is permanently unable to attend. Based on the regional elections law, which was later strengthened in Article 78 paragraph (1) of General Election Commission Regulation Number 15 of 2017,

prospective candidate replacement can be carried out by a political party or a coalition of political parties or individual candidates if it is declared not meeting health requirements, permanent absence, or being subject to criminal based on a court decision that has permanent legal force. Meanwhile, what is meant by permanent absence is based on the provisions of Article 78 paragraph (2) of General Election Commission Regulation Number 15 of 2017, which covers the condition of passing away or being unable to carry out duties permanently. Reimbursement may be made up to the verification stage of the candidate's requirements or before the candidate's determination. Meanwhile, the reasons for permanent absence and being sentenced to a criminal offense based on a court decision with permanent legal force can be carried out up to the verification stage of the candidate's requirements before the determination of the pair of candidates or since the determination of the pair of candidates up to 30 days before the election.

Criminal offense suspect status carried by the regional head candidates does not directly result in their candidacy being canceled halfway through. There are mechanisms and conditions for the General Election Commission before canceling the nomination of candidates for the regional head. It can be seen in the provisions of Article 90 of General Election Commission Regulation Number 15 of 2017 concerning Nominations for Governor and Vice Governor, Regent and Vice Regent, and/or Mayor and Vice Mayor elections, that there are seven things that can cause the cancellation of regional head nominations.

Seven things that can cause the cancellation of a regional head nomination based on the regional elections law, namely, **first**, the pair of candidates and/or their campaign team are proven promising and/or giving money or other materials to influence voters. **Second**, the pair of candidates is proven to have committed a punishable criminal act by imprisonment for a minimum of five years or more. **Third**, the pair of candidates is proven to have received and/or provided rewards in the nomination process. **Fourth**, the pair of candidates are proven to have campaigned in print or electronic media. **Fifth**, for incumbent candidates, change their positions from six months before the date of determination of the pair of candidates until the end of the term of office. **Sixth**, using the authority, programs, and activities of the regional government for election activities from 6 (six) months before being appointed as a pair of candidates until the determination of the elected candidate for the incumbent candidate. **Seventh**, candidates do not submit a campaign leave letter for incumbent candidates [12].

The regional elections law has clearly stated things that could result in the disqualification of a regional head candidate, but a few types of disqualification or cancellation are not based on law, and open up the possibility for candidates to immediately lose the election. Regional elections law does not close

opportunity about disqualification that is not based on law. Besides disqualifying candidates, it also contains legal remedies that can be taken if a disqualification is not based on law. Such legal remedies can be made through the State Administrative High Court and the Supreme Court after administrative efforts at the General Election Supervisory Board [13].

The normative provisions in the regional election law and the General Election Commission Regulations show no room for replacing candidates for a regional head named criminal suspects. It is undoubtedly the irony of democracy, especially since the 2015 regional election; some regional head candidates were caught in criminal cases, especially corruption. As a consequence of adopting the rule of law, Indonesia certainly respects the principle of the presumption of innocence of an act before a court decision has permanent legal force. However, regional head candidates caught in legal cases and have the status of suspects have lost their moral legitimacy to become leaders in the eyes of their people.[12] On the other hand, the current regional elections law prohibits regent candidates from resigning. Prospective regional heads who resign will be subject to a maximum imprisonment of 60 months and a maximum fine of Rp. 50 billion. The impact of the legal vacuum related to the mechanism for replacing candidates with criminal suspect status, instead of being presented with a clean candidate leader and not being held hostage by a legal case, the public as voters are presented with a potential criminal with a tie [14].

To solve problems related to the mechanism for replacing a regional head candidate with the suspect status, it is necessary first to determine the parameters related to the criminal act. These parameters are used as the basis of whether a regional head candidate with a criminal offense suspect status can be replaced or not. The benchmark for criminal acts that can be used as the basis for replacing the regional head candidate with the status of a suspect can refer to Verdict number two of the Decision of the Constitutional Court Number 71/PUU-XIV/2016.

Verdict number two of the Decision of the Constitutional Court Number 71/PUU-XIV/2016, in essence, states that Article 7 paragraph (2) letter g of Law Number 10 of 2016 concerning the Second Amendment to the regional election law is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force conditionally as long as the phrase:

"There has never been a convict based on a court decision that has obtained permanent legal force in the norms of the quo law is not interpreted as never as a convict based on a court decision that has obtained permanent legal force for committing a criminal act punishable by imprisonment of five years or more, except for the convict who commits a crime of negligence and a political crime in the sense of an act which is declared a criminal offense

in positive law only because the perpetrator has a different political view from the regime in power."

The Decision of the Constitutional Court Number 71/ PUU-XIV/2016, which reconstructs Article 7 paragraph (2) letter g Law Number 10 the Year 2016 concerning the Second Amendment to the Election Law, is actually related to the nomination requirements regional heads. At this time, where there is a legal vacuum regarding the mechanism for replacing a candidate for the regional head with the status of a suspect and what kind of criminal offense criteria is suspected, the most rational way is to refer to Verdict number two of the Decision of the Constitutional Court Number 71/PUU-XIV/2016 to be used as a parameter.

Legal politics for the future regional elections, if there is a candidate for a regional head who is declared a criminal suspect punishable by imprisonment of five years or more, except for the convict who has committed a crime of negligence and a political crime, the candidate concerned can be replaced. Suppose a regional head candidate becomes a suspect in a minor criminal act, in that case, there is no urgency for the bearers, namely political parties or coalitions of political parties and individual candidates, to make replacements. The period for the candidates replacement can be made after the candidates registration, namely up to 30 days before the voting day. Then, the bearer of the candidates can propose a replacement.

In addition, the limit on the number of times a bearer can replace a candidate is equally important. The existence of a replacement mechanism does not then make political parties or coalitions of political parties, and individual candidates replace them with people who have a history far worse than those who were replaced. Therefore, the opportunity to replace a candidate who has the status of a suspect must be limited to one replacement. If a replacement candidate is later determined to be a suspect, the bearer will no longer have the opportunity to replace unless the person concerned is permanently unable.

It is hoped that the precise boundaries and parameters of criminal acts that can be used as the basis for replacing a candidate for the regional head with the status of a suspect are expected to make the people more aware that it is not only suspects in corruption cases who should be replaced. The people also have the right to get candidates for regional leaders who are clean and do not have the potential to be caught in other criminal cases apart from corruption. It is in line with the objective of the general election, which is to produce dedicated bearers of the people who are willing and able to serve the people in a fair and balanced manner [15]. From the perspective of the general election objectives, it can be said that the election objective is the regional head election that is following the people's choice and can create the welfare of the regional people. With sovereignty in the people's hands, general elections function to produce quality representatives of the people

who are tied to the interests of the people who have elected them (not merely political interests) [16].

Maintaining quality regional elections will bring up candidates for regional leaders with quality and integrity under the people's aspirations in the region. The people's desire so that regional elections are followed by contestants for regional head candidates who are clean and not held hostage by legal cases is necessary. There are several benchmarks to justify whether the regional elections are qualified or *vice versa*. Arbi Sanit explains that the development of general elections is measured based on the essential objectives, operational objectives, and processes [15]. It shows that improving the quality of general elections is judged according to the degree of closeness of the objectives and processes to democratic principles. Therefore, the quality of the regional elections depends on the actual objectives, operational objectives, and the election process itself [16].

3.2. Design for Regional Head Candidates Replacement with Status as Criminal Suspect

Talking about designing a mechanism in formulating a policy, of course, cannot be separated from legal politics. Legal politics is a legal policy that will be or has been implemented nationally by the Government of Indonesia, which includes: first, legal development, which focuses on making and updating legal materials so that they are following the needs; second, the implementation of existing legal provisions including the affirmation of institutional functions and development of law enforcers [17]. Based on this definition, it shows that legal politics includes the process of making and implementing laws that can show the nature and direction in which the law will be built and enforced [18]. At this point, the law cannot only be viewed as imperative articles or necessities that are *das Sollen* in nature but must be seen as a subsystem which in reality (*das Sein*) is not impossible to be determined by politics [18].

The legal politics of replacing a candidate for the regional head with the status of a criminal suspect must have a clear and measurable mechanism design. The design for replacing a candidate with the status of a suspect can be made from the date of the determination of the pair of candidates up to 30 days before the voting day. For candidates regional heads designated as criminal suspects within less than 30 days before voting day, political parties, coalitions of political parties, or individual candidates cannot nominate replacement candidates.

Replacement of candidates can be done by changing the position of: a. the Governor candidate, Regent candidate, or Mayor candidate to become Vice Governor candidate, Vice Regent candidate, or Vice Mayor candidate; or b. a Vice Governor candidate, Vice Regent candidate, or Vice Mayor candidate to become a

candidate for Governor, Regent, or Mayor. The opportunity to replace a candidate who has the status of a suspect must have a limit of one replacement. Suppose a substitute candidate is determined to be a suspect in the future. In that case, the bearer will no longer have the opportunity to replace unless the person concerned is permanently unable. The candidate replacement is intended to the public to get a candidate for a clean regional head and is not held hostage by legal cases and a test of the integrity of political parties and individual candidates in the public's eyes.

The limited opportunity to replace a candidate with suspect status once is in line with the provisions of Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that in exercising their rights and freedoms, everyone must be subject only to some restrictions stipulated by law, whose purpose is solely to ensure proper recognition and respect of rights and freedoms of others and to fulfill just conditions of morality, order and the general welfare in a democratic society.

Indeed, the replacement mechanism cannot be interpreted as revoking the right to be elected as a regional head candidate who is a criminal suspect. Regional head candidates who become suspects still have the right to vote and be elected until there is a court verdict. However, the public also has the right to get candidates for regional leaders who are credible and with integrity. The replacement mechanism of the candidates for the regional heads that the authors propose is facultative, in which the final decision on the replacement was returned to those who submitted the candidate for election. This mechanism ensured that the regional elections were observed by candidates who had no disgraceful behavior, and candidates who had become suspects can focus on resolving their legal problems.

The design of replacing a candidate for the regional head with the status of a suspect emphasizes the excellent faith that political parties, coalitions of political parties, and individual candidates will replace candidates if they encounter legal problems. In the 2018 regional elections, only two of nine regional head candidates won the election while being suspects in a criminal investigations. In terms of electoral politics, the determination of a regional head candidate is undoubtedly more detrimental to the candidate pairs and the political parties that carry them. Therefore, even without a clause on the obligation to replace or disqualify a regional head candidate with the status of a criminal suspect, political parties, coalitions of political parties, and individuals tend to make replacements because detrimental for them in the election.

A procedure and mechanism for reimbursement for candidates who are permanently unable or convicted based on court decisions that have permanent legal force as stipulated in Articles 54 and 54A of the Election Law and Articles 82 and 83 of General Election Commission

Regulation Number 3 of 2017 are expected to be adopted and applied to prospective regional heads with suspect status. For a pair of candidates proposed by a political party, the candidate replacement must obtain the approval of the leadership of a political party or coalition of mid-level political parties as outlined in the decision of political parties or their coalitions. For individual candidates, candidate replacement can be carried out by prior consultation between pairs of candidates to determine who the successor is.

At the verification process stage for a candidate replacement, the General Election Commission is given no later than three days from the receipt of the proposal letter for the candidate or substitute pair of candidates. The General Election Commission submits the verification results in writing to political parties' leadership or coalitions and the candidate or substitute pair of candidates no later than one day after being declared to have met or not fulfilling the requirements. The General Election Commission determines the substituted pair of candidates within seven days from receiving the proposal letter for the candidate or substitute pair of candidates.

The authors propose at the verification stage of a candidate replacement a public test is added. Public testing is carried out by an independent team formed by the Provincial General Election Commission or Regency/Municipal General Election Commission by involving academics, community leaders, and administrators. It is to ensure prospective successors' competence and integrity. Verification process from the previous one was no later than three days from the receipt of the proposal letter for the candidate or substitute pair of candidates needs to be increased to no later than five days to give the panel time to examine and explore the competence and capability of the replacement candidate

The design is for the verification stage of replacing a candidate for being a criminal suspect only and replacing a permanently unable candidate or sentenced to a court based on a legally binding court decision. The design estuary that the author proposed regarding replacing a candidate for the regional head with the status of a criminal suspect is a change to the regional elections law. Amendments to the regional election law must be carried out to ensure that the mechanism for replacing a candidate for the regional head with the status of a suspect is accommodated in it.

4. CONCLUSION

Parameters for replacing candidates for a regional head with suspect status and criteria for suspected crimes can refer to Verdict number Two of the Decision of the Constitutional Court Number 71/PUU-XIV/2016. Suppose a candidate for the regional head is declared a suspect in a criminal act punishable by imprisonment of five years or more, except for a convict who has

committed a crime of negligence and a political crime. In that case, the candidate concerned may be replaced.

The design for replacing a candidate with a suspect status can be made from the date of the determination of the pair of candidates up to 30 days before voting day. Candidates for regional heads designated as criminal suspects within less than 30 days before voting day, political parties, coalitions of political parties, or individual candidates cannot nominate replacement candidates. The replacement of a candidate with suspect status is limited to one replacement. Suppose a substitute candidate is determined to be a suspect in the future. In that case, the bearer will no longer have the opportunity to replace unless the person concerned is permanently unable.

The design at the verification stage of potential successors is to add a public test. Public testing is carried out by an independent team formed by the Provincial General Election Commission or Regency/Municipal General Election Commission by involving academics, community leaders, and administrators. It is to ensure prospective successors' competence and integrity. The verification process from the previous one is no later than three days from the receipt of the proposal letter for the candidate or substitute pair of candidates needs to be increased to no later than five days to give panel time to examine and explore the competence and capability of the replacement candidate. The verification stage design of replacing a candidate who is a suspect in a criminal act and a candidate who is permanently unable to continue or is sentenced to a court decision with permanent legal force. Therefore, the revision of regional elections law must be carried out immediately, especially by regulating the replacement mechanism of regional head candidate with status as a criminal suspect.

AUTHORS' CONTRIBUTIONS

All authors on this paper are main contributors. The four authors have the same contribution in making paper.

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