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The Reasonableness Principles

The Argue of Indonesian Constitutional Court On Neutrality Civil Servants for Good Governance

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***Abstract*— The Reasonableness Principles related with proportion, balanced of rights, can seen in some Indonesian Constitutional Court Decision. This decision, make difference rights election of civil servants and the others profession. The Human Rights of civil servants disturbed by this decision. The Neutrality is for all profession, so its, the state realizes human rights. It is not only on human rights but also ethics. This doctrinal research will critic some Indonesian Constitutional Court Decision and compare with Osborne and Canada case and others country on neutrality. It will describe the neutrality perception now and build it in the future.**

Keywords—neutrality; civil servants; human rights; election; profession

I. INTRODUCTION

The neutrality of the government civil servants that will be elected in the election of regional leader is one of the problems arise in the realm of the application of law. This is evident in Constitutitional Court Decision Number 56/PUU-XII/ 2014 dated July 8, 2015, Decision Number 41/PUU-XII/2014 dated July 8, 2015, Decision Number 33/PUU-XII/ 2015 dated July 8, 2015, Decision Number 49/PUU-XIII/2015 dated July 9, 2015, Decision Number 46/PUU-XIII/ 2015 dated July 9, 2015, Decision Number 71/PUU-XIII/2015 dated July 8, 2015 and Decision Number 38/PUU-XIII/2015 dated July 8, 2015 2015. Above decisions deals with various regulations which are basically similar to the contents of Article 7 letter (t) of Law Number 8 Year 2015 Concerning Amendment to Law of Law Number 1 Year 2015 Concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2014 concerning the Election of Governor, Regent and Mayor. The contents of that article are:
Indonesian citizen who may be Candidate of Governor and Candidate of Vice Governor, Candidate of Regent and Deputy Regent, and Candidate of Mayor and Candidate of Vice Mayor shall fulfill. the following requirements: ..... (t) to resign as member of National Army, Indonesian National Police and civil servant since enrolling as a candidate.

The main of the article is on the right of civil servants who shall exercise the right to be elected. For that purpose, the individual civil servant must choose whether to remain a civil servant or to resign from civil servants to run for the Head of Region. This is also stated in Article 119 and Article 123 paragraph (3) Law No. 5 of 2014 on the State Civil Civil servants. The applicant originated from the civil servants, based its application in articles 27, 28D and 28I of The Indonesia Constitution 1945. These three articles are constitutional statement of protection for the right to a decent living, equal right before the law and the right not to be discriminated against. Especially when compared to members of parliements and senates who will nominate, which under Article 7 letter (s) of Law No. 8 of 2015 submit a notification letter to the leadership of the institution. The legal consequences of chapter 7 letters (s) and (t) are different.

The Court decides to amend the contents of article 7 letter (t) of Law Number 8 Year 2015. The withdrawal of civil servants from the time the candidate is determined to meet the requirements by the General Election Commission. In his reasoning, the Court is of the reasoning that the resignation of civil servants is not a form of discrimination against civil servants as argued by the applicant. This is what shows the problem of reasonablesness as one of the principles of good governance that has not been connected between the thinking between the applicant and the judge of the Court [1].

The procedure of applying this verdict is different from the content of the decision. On 14 July 2015 the General Elections Commission stipulates Article 4 Sub-Article s of the Regulation of the General Elections Commission on Amendment Regulation Number 9 Year 2015 on the Candidate of Governor and Vice Governor, Regent and Deputy Regent and or Mayor and Deputy Mayor. The article states that the terms of resignation as a member of the national army, national policies and civil servants can not be withdrawn since it is stipulated as a candidate. This rule adds to the complexity of rules that are not

regulated by the Constitutional Law and the Constitutional Court.

On July 22, 2015, the Minister of State Civil servants Empowerment issued Circular Letter Number B/2355/ M.PANRB/07/2015 on Civil Servants Neutrality and Prohibition on Use of Government Assets in Serial Regional Head Election. This circular came out to avoid conflict of interest in Regional Leader election.

Outside Indonesia, a similar case is also seen in the case of Osborne versus Canada On June 6, 1991. In this case by reason of the neutrality of public servants the restriction for civil servants to be elected was made in order to maintain the tradition of neutrality. The notion of unrestricted by Supreme Court of Canada judges is a notion of liberty. The judiciary of Canada does not prioritize liberty but promotes tradition.

Based on the exposure there is basic problem, Reasonableness Principles The Court's Reasoning on the Neutrality of State Civil Civil servants as the embodiment of Good Governance.

II. NEUTRALITY FOR GOOD GOVERNANCE AND PROMOTE HUMAN RIGHTS

Good Governance realization is based on the third task from the government to promote economic, social and other in accordance with the wishes of the Population [2]. The wishes of the population based on Rosseau's point of view.

Rosseau said, man is born free and everywhere he is in chains [3]. Rosseau also said that law is not born from the nature but convention. Family is the first natural relation, freedom is consequence from human nature. Freedom is theirs. No one can abuse it. giving up freedom means giving their human nature up. A child is bound to his father as long as he need him to survive.

Diversity, comparison, and owns to something expensive cause negative effects and quarrel. A quarrel which leads to war is not a part from foolishness but the imperfect society in natural condition.

Competence does not give privilege, but must, we just have to obey the legitimate competence. The sovereign is a result of all citizens acting collectively [4]. General will can naver be alienated. General will means common interest, and common interest is a group of personal interest

A. The Sovereign have right to decide which one is important, without obliterating the first convention, the natural right of man.

In Indonesia, this common interest is manifested in The Indonesia Constitution 1945. Article 24 Paragraph (1) The Indonesian Constitution 1945 stated that the judicial competence shall be independent and shall possess the competence to organise the judicature in order to enforce law and justice. The Constitutional Court as one of the top judiciary in Indonesia has the purpose of judicial competence and maintain mutual interests to create good governance. The Ministry of Administrative Reform mentions the paradigm of clean goverment and good governance is including efforts to put the government role more as a catalyst, regulator, directing facilitator, overseer and supervisor of governance delegation, human rights protection and democracy implemen-tation, income distribution and poverty reduction and administration legal certainty, openness, professionalism and accountability [6].

The protection of human rights is an inseparable approach of good governance [7]. One of that human rights is the right to be elected. This right to be elected is the first generation of rights that originally came from two major revolutions, the Declaration of Independence of Human Rights 1776 in the United States and the Glorious Revolution 1789 in France. Both of these revolutions prioritize the recognition, protection and guarantee of individual human rights, civil and political, that ultimately emerges the notion of liberalism [8]. Both declarations are inspired by the principles of natural rights and make these rights secular, rational, universal and individual, democratic and radical [9].

The state is an office-positioning organization(*ambtenorganisatie*). Position in this case means permanent job environment (*kring van vaste werkzaam-heden*) which is held and done for the sake of the state (*public interest*) [10]. Koentjoro Purbopranoto states that the task of government is not only the legislative executive or the implementer of the law (Maurice Duverger and Hans Kelsen); to analyze the will of the state (Jellineck); but also organizes the public interest (Kranenburg) [11].

The position is continuous while the acting changed. Position is persoon or legal subject which is a supporter of rights and obligations [12]. State officials may be civil servants or not [13]. The classical view which views a civil servant who holds the title of the country essentially establishes a civil-legal relationship with the state (*arbeidsvoorwaarden*) as the study of labor law. While the current legal relationship leads to *openbaredienst betrekking* or public service relations [14].

Civil servants and officials differ in terms of independence of competence. Civil servantss hold the authority of deconcentration while officials are functional decentralized groups that are not in higher competence [15]. In addition the civil servants based on Dutch Ambtenarenwet, existed

due to aaansteling or appointment, whereas officials existed because of represent or *vertegenwoodigence functie* [16].

Neutrality should be seen by lawmakers not partially. The intended position should enable all parties to become candidates for regional head. The main principles of the position of regional head that need to be formulated as a form of policy makers legislation. Procedures should not be regulated in law, so local election laws often change.

The exposure to these decisions shows that neutrality is always linked to political inequality, associated with professionals and owned by civil servants, national armies and national police as government civil servants. The above decisions show the reduction of opportunity through the rigid requirements of a profession. This is corroborated by history which assumes the ideal neutrality process occurs only in civil servants. But lawmakers escape to see that the rule of resign to run law means avoiding dual competence or dual office holding or dual mandate as applied in Hong Kong or Australia is the main pre-requisite of a regional head office so that the head of the region can perform professionally. Neutrality in Europe becomes common currency in European legal thinking so that the strangeness of the doctrine of neutrality in the main becomes unpredictable role [17].

There are 3 (three) key neutralities. First, neutrality favors less over more prescriptive regulation. Secondly, neutrality favors functional over traditional institutional regulation. Third, the pursuit of neutrality can support more activist approach and special rules [18].

In China, the regulation on the neutrality of the civil servants was passed in 2009. The US Hatch Act of 1939 attaches neutrality to civil servants. Its application takes place in Taiwan and Hong Kong. This application differs from western thinking on neutrality. Western thinking implies neutrality enforced in order to depoliticize the bureaucracy. Its thinking influences policy and partisan. The Taiwanese model focuses on partisan neutrality that focuses on administrative neutrality compared to political neutrality.

The relationship between civil servants and politics is a delicate one and it is well known that the formal dichotomy between the political and administrative branch is to a certain extent artificial. The separation between civil servants and politics is considered a necessity, but the facts show a more complex condition which shows the political pressure on civil servants and political play in administration [19]. This relationship will make the civil servant not to be neutral when he is elected to another position.

The Power does not give the right, we are only obligated to obey the legitimate competence \endash The sovereign is the manifestation of the common will [21]. The will of the public is always straight and tends to prioritize the public interest. The will of the public is different from the will of all. The common will means common interests, while the will of all people is a collection of personal will [22]. This is what needs to be observed in classifying neutrality.

The Neutrality is value. Cooper stated public administration ethics, a shift from value neutrality to commitment to some form a professional ethics [2] As the value emerging from ethics then its existence is related to the obedience of the perpetrator. Ethics is a philosophical investigation of the field that concerns the human duties of good and bad. What is good and bad is called moral [3] This reasoning is the same as Dworkin's thinking, Moral comes from comprehensive reflection, we have earned the right to live by them [8] The neutrality that limits freedom must reflect the common interest not the collection of personal will. This is what Amartya Sen calls a substantive freedom, the freedom that occurs when a member of society enjoys it [26].

III. REASONABLENESS PRINCIPLES THE COURT'S REASONING ON THE NEUTRALITY

Reasonableness Principles The Court's reasoning on the Neutrality of the State Civil Civil servants as the embodiment of Good Governance is defined as part of the legality principle of Decision Number 56 / PUU-XII / 2014 dated July 8, 2015 that is based on Decision Number 41/ PUU-XII / 2014 on July 8, 2015, the reasonableness of principles is not implemented because of the exclusion of justice. In Decision Number 33/PUU-XIII/2015 dated July 8, 2015, that is used by Decision Number 71/PUU-XIII/2015 dated July 8, 2015, Decision Number 38/PUU-XIII/2015 dated July 8, 2015, Decision Number 49/ PUU-XIII/2015 dated July 9, 2015, Decision Number 46/PUU-XIII/2015 dated July 9, 2015 and Decision Number 49/PUU-XIII/2015 Dated July 9, 2015. the reasonableness of principles is implemented but it is not optimalize.

The Reasoning of the Court number (3.13) of Decision Number 41/PUU-XII/ 2014 dated July 8, 2015 claim that civil servants have binding themselves to the provisions of government bureaucracy is true for civil servants as an civil servants who must comply with employment agreements, company rules and work regulations. Beside that, The reasoning of the Court (3.16)

make meaning of Article 119 and 123 paragraph (3) of Law Number 5 Year 2014 has provided legal certainty but ignores the aspect of justice. Civil servants, members of parliament, members of the senat and members of parliament must be required to resign since it was formally designated as a candidate. So the court's decision is to grant some. The reasoning of the Court (3.16) is the meaning of Article 119 and 123 paragraph (3) of Law Number 5 Year 2014 has provided legal certainty but ignoring the justice aspect is true.

However, the implications of such a rule that raises the norm that civil servants, members of parliament, senates must be required to resign since being formally designated as candidates is a leap in the logic of thinking. As if justice belongs to a certain group of civil servants, members of parliament, members of the senates and members of parliament, so they are to be arranged. Whereas society should also be arranged to give a broad meaning on neutrality. The Court should be able to do legal renewal because it is still a part of the principal issue of the petition as mentioned in Article 45A of Law Number 8 Year 2011 Concerning Amendment to Law Number 24 Year 2003 Concerning the Constitutional Court, because the violation is the principle of constitutionalism which puts forward equality before the law. This means that reasonableness principles are not implemented.

The right to be elected is part of Human Rights. This provision is stipulated in article 28D paragraph (3) of The Indonesian Constitution 1945. The article states "Every citizen shall have equal opportunity in government". Article 21 Paragraph (1) of the Universal Declaration of Human Rights of 1948 states, "Moreover, the right to be elected is described in Article 25 of the International Convention On Civil and Political Rights which have been ratified into Law Number 11 Year 2005. The contents of the article are, every citizen has the right and opportunity, without distinction as referred to in article 2 and without reasonable restriction to (among others) elect and be elected at an honest periodic elections with universal and equal suffrage and exercised by secret ballot which guarantees freedom voters expressed their wish. The right to be elected is a fundamental right which, therefore, restrictions are permitted under article 28J of The Indonesia Constitution, but it is not allowed to remove the right due to such restrictions. In such cases there are no rights that are eliminated but restrictions on the rights which are permitted by law. Proportional restrictions that are not comparable with the restrictions of other professions that cause injustice to be restored by law through various regulations that provide equality in each profession. This view is administrative in terms of partisan view as it is in Taiwan which focuses on partisan neutrality which focuses on administrative neutrality as opposed to political neutrality [27].

The Decision Number 33/PUU-XIII/2015 On July 8, 2015 stipulates Decision number 45/PUU-VIII/2010 dated May 1, 2012 which is then referred to Decision Number 12/PUU-XI/2013 dated April 9, 2013 hereafter referred to in Decision Number 41/PUU-XII/2014 dated July 8, 2014, as the basis that when a person has become a civil servant he has bind himself in the provisions governing the government bureaucracy, so that the law can determine conditions that can limit his rights as civil servant with a political system.

The Court's reasoning on the number (3.20), shows when a person has become a civil servants then he has bind themself. In this case the ratio used by the tribunal is based on the administrative scholarship of the country which explains that civil servantss and officials differ in terms of independence of their authority. The Civil servants hold the authority of deconcentration while officials are a decentralized group. In addition, the employment law relationship leads to *openbaredienstbetrekking.*

The arguments shows that the reasonableness of principles is not applied in the requirements of the candidate for regional head of region. Civil servant is different from the official in terms of function and competences related to the position. Both of these professions have equal rights and opportunities to be elected or to occupy specific positions based on competence.

Lawmakers use reverse logic or *argumentum ad verecundiam* in regulating the requirements for civil servants, National Army, Indonesian National Police, officials expecially members of parliements both national and local, and senates [28]. The reverse logic is to categorize the registrant, not to provide criteria for the position of the regional head. What is expected of the regional head profession should be the main objective of establishing this law, and when legislators are unable to do this the court provides a solution. Because basically has violated the principle of equality before the law as stipulated in The Indonesian Constitution 1945.

There are not good for embodied *good governance*. Beside of that argue, The Court Reasonings become base of Decision Number 71/PUU-XIII/2015 dated July 8, 2015 and Decision Number 38/PUU-XIII/2015 dated July 8, 2015
Decision Number 49/PUU-XIII/2015 On July 9, 2015, and Decision Number 46/PUU-XIII/2015 On July 9, 2015.

Now, The neutrality become proportion and fair. Article 343 and article 345 Goverment Regulation Number 11 Year 2017 On Civil Servants Management says that civil servants get temporarily dismissed when required to be member of election. Beside that, Article 184 (k,l,m) and 240 (k,l,m) Law Number 7 Years 2017 On General Election, declares civil servants, armies, policies, public officials must resign when they are member of general election, futhermore public accountant, notary, lawyer can not practice when it related with state financial. But its make *intantiating*, like Hart says, many regulation to regulate many proffesion, thats not good law [29]. The neutrality must require the official not the person, Furthermore, the neutrality must fair for all proffesion, thats mean forbiding dual mandat.

IV. CONCLUSION

Reasonableness Principles The Court's reasoning on the Neutrality of the State Civil Civil servants as the embodiment of Good Governance is defined as part of the legality principle of Decision Number 56/ PUU-XII/2014 dated July 8, 2015 that is based on Decision Number 41/PUU-XII/ 2014 on July 8, 2015, the reasonableness of principles is not implemented because of the exclusion of justice. In Decision Number 33/PUU-XIII/2015 dated July 8, 2015, that is used by Decision Number 71 /PUU-XIII/2015 dated July 8, 2015, Decision Number Number 38/PUU-XIII/ 2015 dated July 8, 2015, Decision Number 49/PUU-XIII/2015 dated July 9, 2015, Decision Number 46/PUU-XIII/ 2015 dated July 9, 2015 and Decision Number 49/PUU-XIII/2015 Dated July 9, 2015. The reasonableness of principles is implemented but it is not optimalize.

The neutrality in Indonesia should require the official not the person, Furthermore, the neutrality should fair for all proffesion, thats mean forbiding dual mandat. So The Law Number 7 Years 2017 On General Election and Goverment Regulation Number 11 Year 2017 On Civil Servants Management must be amandment. And Justice of Constitutional Court must evaluate the value that want to be manifested, that is legal certain or equality before the law.

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