
The Legal Ratio of the Five-Year Waiting Period for Ex-Convicts to Fulfill the Requirements as a Candidate for Regional Head in Indonesia

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Abstract

This study aimed to determine the legal ratios of the five-year waiting period for ex-convicts to become candidates for regional heads and the initial five-year waiting period from the end of imprisonment in Indonesia. Case and conceptual approaches were used and legal materials analyzed by describing several constitutional court decisions. Furthermore, these materials were analyzed theoretically as a follow-up to finding rational-legal rules. The results showed that the five-year waiting period for ex-convicts to qualify as candidates for regional heads to eliminate social labeling and the importance of the waiting period is calculated from the end of serving the correctional period, including parole. Therefore, the requirement for exconvicts to wait for five years to qualify as regional head candidates should be stated in the law. The right time to start calculating the status as an ex-convict is when all prison terms are finished.

Keywords: Ex-Convicts; Regional Heads; Correctional

1. Introduction

Law with imperative provisions (Hart 1994; Putra et al. 2021) should not be taken for granted because its formation is bound by philosophical, sociological, and juridical considerations (Soeprapto 2007). The institutionalized laws will not cause resistance to the participants regulated based on philosophical and sociological considerations (Ali 2015). There is a passive suffrage limitation for ex-convicts through the Constitutional Court Decision No. 56/PUU-VII/2019 to wait for five years to qualify as regional head candidates, starting from the completion of serving a prison term. From a crime sentence to a maximum imprisonment of five years, it is necessary to examine the legal ratio or the philosophical and sociological considerations, hence the Constitutional Court then issues various decision with such restrictions.

Fariz (2020) reviewed Constitutional Court Decision No. 56/PUU-VII/2019 and stated that ex-convicts are given a five-year gap limit before becoming regional head candidates to create quality democracy. Restrictions on the rights of ex-corruption convicts to become regional head candidates with certain conditions are considered corruption prevention (Maya and Jatiningsih 2021). In line with this, Taufik (2019) examined Constitutional Court Decision No. 56/PUU-VII/2019 and stated that a five-year waiting period for ex-convicts to fulfill the requirements as regional head candidates are based on the Constitutional Court Decision No. 4/PUU-VII/2009. This adaptation period follows the five-year mechanism in Indonesia's General Elections for Legislative Members, President, Vice-President, and Regional and Deputy Regional Heads.

Muzayanah and Saputra (2020) also examined Constitutional Court Decision No. 56/PUU-VII/2019 by citing its considerations about the reasons for a five-year gap period for ex-convicts to qualify as regional head candidates. The waiting period is essential for correction and evaluation before candidacy in the regional head election. This ensures that democracy is not filled by ex-convicts with criminal records.

The three studies only repeated the legal considerations of the Constitutional Court in its decision. In contrast, this study does not describe the Constitutional Court's legal ratio in determining the restriction requirements for ex-convicts to qualify as regional head candidates. The legal ratio does not pay attention to the punishment and criminology theories.

Tanjung and Saraswati (2018) reviewed the ex-convicts' political rights, but it was related to the first and second material tests of the ex-convicts' requirements as regional head candidates at the Constitutional Court. The material

tests are the Constitutional Court Decision No. 4/PUU-VII/2009 and the Constitutional Court Decision No. 1417/PUU-V/2007.

Satyawasana and Firdausy (2019) investigated the fifth judicial review in the Constitutional Court Decision No. 71/PUU-XIV/2016 on the ex-convicts' political rights. This decision is a judicial review of probationary convicts, as the Constitutional Court redefined the conditions referred to ex-convicts sentenced for five years. Moreover, Firdausy disagreed with the Constitutional Court's considerations because an ex-convict's candidacy for regional head could harm the local community's democracy. It cannot shift candidates with the potential to commit crimes and violate the law in the Regional Election competition.

Based on the Constitutional Court Decision No. 56/PUU-VII/2019 referring to the Constitutional Court Decision No. 4/PUU-VII/2009 between the requirements to declare oneself an ex-convict and wait for five years to apply, the consideration is ambiguous. This is because the conditions seem alternative in the Constitutional Court Decision No. 4/PUU-VII/2009. According to the Constitutional Court Decision No. 56/PUU-VII/2019 concerning the need for a five-year gap period for ex-convicts, regional heads do not need to wait for five years gap but announce their status and repeat the crime. This reason necessitates legal reasoning with a criminal theory approach to realize philosophical and sociological objectives. Therefore, this study aimed to determine the legal ratio between the five-year gap period and the right time for ex-convicts to qualify as regional head candidates.

2. Results

A case approach examined several Constitutional Court decisions on reviewing the requirements for ex-convicts on regional head candidacy. The approach also analyzed Constitutional Court decisions on disputes over the regional head election results. Additionally, a conceptual approach discussed legal theories related to the convicts' rights and obligations through literature or legal reasoning.

The primary legal materials in this study covered Law No. 10 of 2016 concerning the Election of Governors, Regents, and Mayors, particularly last amendment through Law No. 6/2020, Constitutional Court Decision No. 56/PUU-XVII/2019, Constitutional Court Decision No. 42/PUU-XIII/2015, Constitutional Court Decision No. 71/PUU-XIV/2016, and Constitutional Court Decision No. 4/PUU-VII/2009. The secondary legal materials contained literature on regional head election and penitentiary laws. Moreover, library research obtained legal materials by searching statutory regulations, court decisions, books, journals, and articles related to the problems examined.

The legal materials were analyzed by outlining the constitutional court decisions on examining the requirements for ex-convicts on the regional head candidacy based on syllogistic reasoning.

3. Analysis and Discussion

3.1. Legal Ratio of Five Year Gap for Ex-Convicts to Qualify As Regional Head Candidates

The Constitutional Court decision No. 56/PUU-XVII/2019 concerning the requirements for ex-convicts on the regional head candidacy in Article 7 paragraph 2 letter g of the Law on the Election of Governors, Regents, and Mayor's shifts the requirements in the Constitutional Court Decision No. 4/PUU-VII/2009. The requirements are that ex-convicts sentenced to 5 years imprisonment cannot immediately announce their status as ex-convicts. They should wait for five years, starting from completing serving a prison sentence until the day of regional head candidate registration.

The previous two Constitutional Court decisions were the Constitutional Court Decision No. 42/PUU-XIII/2015 and No. 71/PUU-XIV/2016. Based on these two decisions, the ex-convicts qualified as regional head candidates by simply announcing their status. This requirement has been shifted by the Constitutional Court to wait five years from the end of serving a sentence to announce the status as an ex-convict. The two previously alternative conditions were changed to cumulative, where ex-convicts must wait five years and announce their status to qualify as regional head candidates. Based on the legal ratio of Constitutional Court Decision No. 42/PUU-XIII/2015 and No. 71/PUU-XIV/2016, exconvicts registering as regional head candidates should announce their status. According to the Constitutional Court, the voter has a right to determine a candidate's cleanliness, honesty, and integrity as an ex-convict. These two decisions explicitly refute the legal ratio in the Constitutional Court Decision No. 4/PUU-VII/2009.

The legal ratio has shifted the conditions for ex-convicts to qualify as regional head candidates as a cumulative requirement from the Constitutional Court Decision No. 4/PUU-VII/2009 to No. 56/PUU-XVII/2019. In this decision, ex-convicts should wait five years and announce their status based on empirical facts.

Announcing the ex-convict status cannot fully present a clean, honest, and integrity leader. Several empirical facts prove that ex-convicts elected as regional heads and announced their status to the public honestly and openly usually repeat the crime.

The legal ratio built by the Constitutional Court in Decision No. 56/PUU-XVII/2019 has three fundamental weaknesses. First, changes in legal considerations based on empirical facts have made the Constitutional Court the legislator. It has a role in the law formation, including deciding on the conditions for ex-convicts on regional head candidacy. However, the processes mostly use a historical than a sociological approach, changing the meaning because of an empirical perspective. This makes the Constitutional Court more of a legislative than a judicial institution. Regardless of the debate, this institution often plays the role of judicial activism, no longer as a judicial restraint (Faiz 2016).

Second, empirical facts show that many ex-convicts repeat criminal acts, a legal consideration neglected when the candidate is only clean, honest, and has integrity. The ex-convict candidates repeating the crimes are subjected to revocation and not a limitation of political rights for life (Zimmermann 2019).

Third, all decisions in assessing the requirements for ex-convicts on regional head candidacy are based on the punishment philosophy in the Correctional Law. It is stated that convicts who have finished serving their sentence have gone through correction efforts, regret their actions, have become good people, and obey the law. Furthermore, they uphold religious, moral, security, and orderly values and play an active role in development. This philosophy cannot be overturned, and the ex-convicts must wait five years to qualify as regional head candidates to avoid repeating the crime. After serving the punishment period, the ex-convicts have the right to register as regional head candidates. The phrase "plays an active role again in development" implies eligibility to register as a regional head candidate after serving the punishment period without the need to wait five years. Therefore, the sanction of limiting political rights with five years of waiting times makes no sense because ex-convicts become criminals again.

The most appropriate legal ratio for ex-convicts' argumentation to qualify as regional head candidates with five years waiting period after completing their sentence is based on insufficient education and guidance in correctional institutions and immediately acceptable to the public.

In socio-historical studies, the conception of correctional was first initiated by Sahardjo (Gunakaya 1988). It aimed to return ex-convicts to society as human beings with good personalities and well-known conceptions in the term reintegration (Hamzah and Silalahi 2021). However, this concept has not yet been fully accepted by the community. Public perception of ex-convicts is not affected by the correctional institution's success in its educational and coaching functions against the inadequate infrastructure and overcapacity of the correctional facilities.

People still view ex-convicts as criminals, even after undergoing the correctional stage. Criminology studies consider this phenomenon bad and stigmatization or labeling the absence of opportunities for ex-convicts to repent or reform. The label corners ex-convicts and criminals remain criminals forever (Frank 2013).

The five years is given for ex-convicts to show themselves in society as human beings that would not repeat their crimes. The word "given a chance" means the person concerned still has to undergo social re-integration and resocialization. Reintegration is usually accomplished during the correctional period but is considered insufficient because the social labeling of criminals cannot be easily erased only by completing the prison term.

Many consider the right to vote a basic political right that should not be reduced because it is a gift from the state or related to the state's interests (Munthe and Dewi 2020). Political rights are covered in the right to freedom as basic or original besides the right to life and property first popularized by John Locke (Marzuki 2008).

The right to vote cannot be immediately adopted as things that could be restricted to mainstream active suffrage based on empirical facts that degrade passive suffrage for reasons of benefit. Active suffrage should be prioritized to identify regional head officials with integrity, meaning they are submitted through the election mechanism and a selection process.

Passive voting rights are limited by prioritizing the benefits of active suffrage holders because they are not fundamental. They cannot be explained in a living legal framework but are placed as laws applicable at that time without undergoing institutionalization.

The recent Constitutional Court, which has often made itself into judicial activism to create new norms, requires no changes in declaring the validity of conditional unconstitutional laws (Butt 2012). Sometimes, rationality is acceptable, provided the protected rights are related to the three fundamental rights to life, freedom, and property.

Ronald Dworkin's (Berger 1996) opinion is often used in reviving norms to guard the constitutional rights of citizens but does not explicitly apply to all rights related to the interests of the state. The right to vote could be granted for exconvicts that want to occupy a position (right to be elected) with the prerequisite of a five-year gap period from the end of serving a sentence. Although some benefits are prioritized for voters to elect a leader that wants to fight for people's welfare, the restrictions should be legitimized through a law revision. The law should not contradict each other, where ex-convicts are prohibited, but the verse or explanation has exceptions. It should state that ex-convicts previously sentenced to five years in prison need to wait five years after completing their sentence to qualify as regional head candidates.

3.2. Legal Ratio for Calculating Initial Five-Year Waiting Time since Finishing Sentence Period

This second issue provides a clear explanation of the ambiguity in the dispute over the results of the regional head election of Boven Digoel Regency at the Constitutional Court. Yusak Yaluwo, an ex-convict regent candidate, was disqualified by the Constitutional Court, though he was among the candidates with the most votes. Consequently, the Regency and Provincial General Election Commissions (KPU) were suspended by the Decision of the Election Organizing Honorary Council. The chairman of the General Election Commissions, Hasyim Asya'ri, was also suspected by the police because he was considered an obstruction to selecting a regional head candidate.

Polemic and different views emerged between the Indonesian General Election Commissions (KPU) and the Election Supervisory Agency (Bawaslu) regarding fulfilling the conditions for ex-convicts as candidates for officials electable through general elections. It was a latent conflict that did not only occur in implementing regional head elections. In the 2019 election, the KPU and Bawaslu had different attitudes regarding the qualifications for ex-convicts to be appointed as candidates for members of the National Parliament, Regional Representative Council, and Regional Parliament.

The Election Commission Regulations (PKPU) for the candidacy of legislative members, which reduced the political rights of ex-convicts, was revised in the 2019 election. This was because several candidates declared ineligible to apply for a judicial review at the Supreme Court were granted. Bawaslu won the interpretation of the requirements for ex-convict candidates for legislative members but did not win in implementing the 2020 regional head elections. The interpretation entailed restrictions on ex-convict regional head candidates to wait for a five-year gap, starting from the end of serving a sentence. Moreover, KPU's interpretation obtained confirmation through a decision on the dispute over election results for regent and deputy regent of Boven Digoel Regency. The case is not about a judicial review of the regional head election law. Conversely, the Constitutional Court considers the correct interpretation of when ex-convicts finish serving their sentence.

The ratio of the initial count of completing a sentencing period has multiple interpretations, especially in the view of the Bawaslu. First, based on the conditions for ex-convict regional head candidates in Article 7 paragraph 2 (g) of Law Number 10 of 2016 concerning the Election of Governors, Regents, and Mayors: "Candidates for Governors, Regents, Mayors, and their Deputies referred to in paragraph (1), should have never been convicts based on court decisions with permanent legal force, or ex-convicts that have openly and honestly stated their status to the public."

This provision should be read as an integral part of Article 7 paragraph 2 (g) of Law No. 8 of 2015: "Candidates for Governors, Regents, Mayors, and their Deputies referred to in paragraph (1), should have never been sentenced to imprisonment based on a court decision with permanent legal force for committing a crime punishable by imprisonment of five years or more."

Bawaslu interpreted that having served imprisonment means the sentence is not included in the parole period because the law on the election of governors, regents, and mayors mentions prison. Article 1, number 7 of Law No. 12 of 1995 concerning corrections stated: "A convict is a criminal who has served a sentence of loss of independence in a correctional institution." The phrase "lost independence" implies being imprisoned after not being imprisoned or already in a parole period. In this case, the five years for ex-convicts to qualify as regional head candidates during the registration period are calculated.

Second, the Fatwa of the Supreme Court in letter No. 30/Tuada.Pid/IX/2015 reads: "An ex-convict, though sentenced, does not necessarily serve a sentence in prison. He has the convict status but does not need to serve a sentence in prison, while he should have served a sentence in prison."

The term ex-convict is used in the Constitutional Court decision and by Bawaslu. It implies that someone already released on parole and is no longer serving a sentence in prison is an ex-convict. In these circumstances, calculating the completion of the prison term starts from serving and not the completion of the parole period. During the evidence trial at the Constitutional Court in a dispute over the results of the regional head election for the Boven Digoel Regency, the Director-General of Corrections and a criminal law expert, Chairul Huda, was presented in line with Bawaslu's opinion.

KPU has only one reason that the sentence period for ex-convicts is calculated after finishing the parole period based on Article 7 paragraph 2 letter g of Law No. 10 of 2015. It is meant by "ex-convicts" are people with no criminal or administrative relationship with the minister of government affairs in law and human rights, except for ex-convicts of drug dealers and sexual crimes against children." Moreover, Bawaslu stated that the article's explanation has also been canceled in the Constitutional Court Decision No.: 71/PUU-XIV/2016.

The Constitutional Court Decision No. 132/PHP.BUP-XIX/2021 concerns the dispute over the election results for the regent and deputy regent of the Boven Digoel Regency. The legal considerations section stated: "Therefore, through this decision, the Court should also reaffirm that "after serving imprisonment" referred to in the Constitutional Court Decision No. 56/PUU-XVII/2019 is a convict that has served his sentence following the court decision. For a convict

serving a criminal period inside the correctional institution and on parole, this is only related to the technicalities for serving the sentence. Therefore, the legal status is still convicts even for those given parole and no longer in a correctional institution. For convicts sentenced to probation but not serving a sentence in a correctional institution, the status remains convicts until the probationary period expires as ordered by the judge."

At the implementation level, the Constitutional Court decision is correct but weak in philosophical reasoning, especially regarding punishment, and wrong in using the term ex-convicts. Therefore, the following legal ratio was described to make the initial ratio for calculating ex-convicts qualify as regional head candidates within a five-year waiting period.

FIRST, the correct term for someone that has finished serving imprisonment in connection with Article 7 paragraph 2 (g) of the Law on the Election of Governors, Regents, and Mayors is ex-convict, not ex-prisoners. The term ex-convicts have been used in the Law on the Election of Governors, Regents, and Mayors. Furthermore, the Constitutional Court also uses the term ex-convicts in seven material trials regarding the requirements for ex-convicts in the regional head candidacy. In Article 10, paragraphs 1 and 2 of the Correctional Law that: (1) Convicts in Correctional Institution should be registered. The registration referred to in paragraph (1) changes the status of the convicts to prisoners. As an integral part, Article 1, number 6 of the Correctional Law also states, "A convict is someone convicted based on a court decision with a permanent legal force."

Once someone in a correctional institution is a prisoner, is still in prison, or has been released on parole, he should finish his prison term be considered an ex-prisoner. Based on Article 10, paragraph 2 of the Correctional Law, someone in prison cannot be called an ex-convict. When that reason is used, someone in prison or is still a prisoner may register as a regional head candidate, though this is impossible.

SECOND, it is confusing to separate the term prison in the correctional conception to determine the legal ratio when someone finishes serving a sentence because prisons have been reduced in terms of correctional. The reduction of this term could be traced in Sahardjo's speech at the awarding of the Honoris Causa Doctoral Degree in legal science at UI on July 5, 1963: "...Under the banyan tree, we have set out to serve as counselors for officers in treating prisoners. We formulated the purpose of imprisonment besides causing the pain because their freedom of movement is dismissed. It guides the convicts to repentance and educates them to become useful members of society. In short, the purpose of imprisonment is CORRECTIONAL...."

The term prison explains correctional facilities and the stages a prisoner should undergo. It is not a debate on losing freedom because the prisoner is already on parole. Therefore, the five-year waiting time for the registration of regional head candidates means completing serving a correctional period.

The correctional is inseparable from absolute and relative sentencing philosophy (Petersilia and Reitz 2012). As a sanction to provide a deterrent effect of imprisonment, causing the loss of freedom, a sentence in a correctional institution is implemented to completion and rehabilitation periods in parole. Imprisonment through the correctional institution adopts the combined punishment theory recognized by criminal law experts, including (Sianturi 1996; Bambang 1986; Harsono 1995; Prakoso 1988; Lamintang 1984; Hiariej 2014; Wortley 2002). It is a solution in discussing the completion of serving a prison term. Therefore, there is no basis for separating the interpretations of prisoners in prison status and prisoners in a conditional release. This is because those in prison or released on parole are still in a state of imprisonment. Subsequently, the number of prisoners and prison sentences cannot be equal because the state does not adhere to a single philosophy of retributive punishment. The state adheres to the philosophy of rehabilitative, reintegration, and resocialization punishment (Rochaeti and Maryani 2020), (Sumpter et al. 2021).

THIRD, nothing is wrong with the definition of ex-convicts and ex-prisoners in the Fatwa of the Supreme Court in letter Number 30/Tuada.Pid/IX/2015. There are ex-convicts sentenced but have not served a sentence in prison, meaning they are considered convicts but do not need to serve a sentence in prison. However, this does not mean those are no longer imprisoned and undergoing parole. When a person is sentenced to probation, he may never serve a sentence in prison. In another situation, it is unnecessary for someone sentenced to a convict to serve in prison because his detention period has been cut short through investigation, prosecution, and trial. The case is different for ex-prisoners because they served their sentences in prison. Based on the Fatwa of the Supreme Court, a prisoner is a convict serving in prison, including parole, and becomes an ex-prisoner after completing the correctional period.

FOURTH, the Constitutional Court Decision Number 42/PUU-XIII/2015 cites the definition of the correctional system in the Correctional Law, "ex-convicts could actively play a role in development." This legally implies that the exconvicts have received coaching and guidance to become human beings that realize their mistakes, improve themselves, do not repeat criminal acts, and are accepted again by the community (Packer 1968). The prerequisite for exconvicts to be active is completing the imprisonment and rehabilitation periods, including parole. Therefore it is impossible to be an ex-convict without completing all the correctional stages required.

4. Conclusions and Suggestions

The legal ratio regarding the five-year waiting time for ex-convicts to qualify as regional head candidates makes the individual concerned about eliminating social stigmatization or labeling them criminals. Therefore, the candidate concerned as an ex-convict is elected easily by extending the reintegration and resocialization period. The legal ratio is calculated after completing the correctional period, including parole, because the individual concerned undergoes imprisonment and self-improvement in Correctional Institution.

Restrictions on the right to be elected for ex-convicts required to wait for a five-year gap should be stated in the Law on the Election of Governors, Regents, and Mayors. The Constitutional Court decision is insufficient because the limitation on these rights originates from rights related to the state's interests. The Law on the Election of Governors, Regents, and Mayors, should use the term correctional regarding the requirements for ex-convicts in the regional head candidacy to avoid bias. The ex-convicts threatened with imprisonment for five years have passed a five-year gap period from completing their correctional period until the day of registration of regional head candidates.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The authors declare no conflict of interest.

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