

Implications of Bawaslu's Interpretation of the Constitutional Court Decision on the Eligibility of Former Convicts as Regional Head Candidates in Local Elections

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Abstract

The Constitutional Court, in Decision No. 56/PUU-XVII/2019, reviewed Article 7 paragraph (2) letter g of the Local Election Law, setting a five-year cut-off period for prospective regional head candidates who have been sentenced to five years in prison or more. The General Elections Commission (KPU) subsequently implemented this in Regulation 9 of 2020. However, instead of adhering to the Constitutional Court's (MK) decision and the regulation, the South Lampung General Election Supervisory Agency (Bawaslu) reinterpreted the provision stipulated in Decision No. 001/PS.REG/18.1803/IX/2020 approved a former convict previously declared Not Eligible (TMS) by the South Lampung KPU. This research examines the differing understandings of the eligibility of former convict candidates for regional head positions post the MK Decision No. 56/PUU-XVII/2019 by the South Lampung Bawaslu and its implications for the future conduct of Regional Head Elections. This normative legal study uses a case approach, focusing on MK Decision No. 56/PUU-XVII/2019 and Bawaslu Decision No. 001/PS.REG/18.1803/IX/2020. The findings reveal that the South Lampung Bawaslu misunderstood by reinterpreting the explicit provisions of Article 7 paragraph (2) letter g of the Local Election Law. This was exacerbated by using two conflicting methods of interpretation simultaneously. The implications of the South Lampung Bawaslu Decision could create legal uncertainty and the possibility of former corruption convicts slipping through as candidates, signifying a failure to ensure regional head candidates are honest, clean, and of high integrity.

Keywords: Bawaslu, regional head candidate, former convict, reinterpretation, Constitutional Court decision



Introduction

Former convicts running for publicly elected positions have often been challenged over time, reflected in the judicial reviews of candidacy requirements for regional heads brought before the Constitutional Court (MK).¹ The MK's Decision No. 56/PUU-XVII/2019 is the most recent before the 2020 Simultaneous Regional Head Elections (Pilkada), examining Article 7 paragraph (2) letter g of Law Number 10 of 2016 (Local Election Law), "(2) Candidates for Governor and Deputy Governor, Regent and Deputy Regent, as well as Mayor and Deputy Mayor as referred to in paragraph (1) must meet the following requirements:... g. never been a convict based on a court decision that has obtained legal force or for a former convict has openly and honestly disclosed to the public that they are a former convict."² This was tested against Article 18 paragraph (4), Article 22E paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD 1945).³

The MK declared Article 7 to be conditionally unconstitutional as long as it is not interpreted that former convicts sentenced to 5 (five) years or more in prison have surpassed a waiting period of 5 (five) years. As the supreme interpreter of the constitution⁴ The MK's decision is final and binding, meaning no further legal remedies are available.⁵ Therefore, for the decision's addressees, in this case, the General Election Commission (KPU), it is only necessary to implement the MK's

¹Based on the research, there are several related decisions, including Decision Number 14-17/PUU-V/2007, Decision Number 4/PUU-VII/2009, Decision Number 120/PUU-VII/2009, Decision Number 79/PUU-X/2012, Decision Number 42/PUU-XIII/2015, Decision Number 71/PUU-XIV/2016, and Decision Number 56/PUU-XVII/2019.

² President of the Republic of Indonesia, "Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Determination of Government Regulation in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Law" (Minister of Law and Human Rights of the Republic of Indonesia, July 1, 2016).

³ Mahkamah Konstitusi, "Putusan Mahkamah Konstitusi Nomor 56/PUU-XVII/2019" (2019).

⁴ Mahrus Ali, "Mahkamah Konstitusi dan Penafsiran Hukum yang Progresif" 7 Nomor 1 Februari 2010 (2010): 68.

⁵ M. Agus Maulidi, "Menyoal Kekuatan Eksekutorial Putusan Final dan Mengikat Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 2 (11 Juli 2019): 340, <https://doi.org/10.31078/jk1627>.

decision without further interpretation. MK decisions are erga omnes, effective from the moment they are pronounced in an open court session, although in practice, many MK decisions are yet to be executed.⁶

Although the General Election Supervisory Agency (Bawaslu) is not a direct addressee of the MK's Decision No. 56/PUU-XVII/2019, Bawaslu must adhere to the decision above in exercising its duties and authorities. Among its authorities, Bawaslu has the power to resolve disputes between local election participants and the KPU, one subject of which may be the KPU's decision regarding the nomination of a candidate pair as meeting the registration requirements or vice versa. In this regard, Bawaslu must have an understanding aligned with the KPU regarding the rules of engagement in nominating regional heads, which should refer to the General Election Commission Regulation (PKPU) concerning candidacy requirements.

Following the MK's Decision No. 56/PUU-XVII/2019, the South Lampung Election Supervisory Agency (Bawaslu Lamsel), during the 2020 Local Elections, issued the Deliberative Dispute Decision Number 001/PS.REG/18.1803/IX/2020, which approved a former convict.⁷ This 143-page document instructed the South Lampung General Election Commission (KPU Lamsel) as the Respondent to establish the pair Hipni-Melin Haryani Wijaya (Hipni-Melin) as candidates for regent and deputy regent of South Lampung after they were previously declared Not Eligible (TMS) through the South Lampung KPU Decision Number 60/HK.03.1-Kpt/1801/KPU-Kab/IX/2020. Initially, the KPU Lamsel, basing its decision on General Election Commission Regulation Number 9 of 2020, stated that the prospective regent candidate of South Lampung, Melin, was a former

⁶ Dian Ayu Widya Ningrum, Al Khanif Al Khanif, dan Antikowati Antikowati, "Format Ideal Tindak Lanjut Putusan Mahkamah Konstitusi Untuk Mengefektifkan Asas Erga Omnes," *Jurnal Konstitusi* 19, no. 2 (2 Juni 2022): 339, <https://doi.org/10.31078/jk1924>.

⁷ Researchers from the Association for Elections and Democracy (Perludem) state that the decision of the Election Supervisory Board (Bawaslu) in South Lampung indicates the inconsistency of Bawaslu with the Constitutional Court (MK) ruling regarding the waiting period. "Disorot, Bawaslu Daerah Loloskan Mantan Koruptor meski Belum Penuhi Masa Tunggu Pidana," 25 Oktober 2020, <https://nasional.kompas.com/read/2020/10/25/18590151/disorot-bawaslu-daerah-loloskan-mantan-koruptor-meski-belum-penuhi-masa>.

convict who had not completed the 5 (five) year waiting period⁸ as stipulated in the MK Decision No. 56/PUU-XVII/2019. However, due to Article 144 paragraph (2) of Law Number 10 of 2016, which mandates the KPU to follow up on the Bawaslu's decision, the KPU Lamsel subsequently established Hipni-Melin as candidates through the South Lampung KPU Decision Number 66/HK.03.1-Kpt/1801/KPU-Kab/IX/2020.⁹

The difference between the Constitutional Court (MK) in its Decision No. 56/PUU-XVII/2019 and the South Lampung Election Supervisory Agency (Bawaslu Lamsel) in its Decision No. 001/PS.REG/18.1803/IX/2020 regarding former convicts running for regional head positions is striking, as both bodies interpreted the provision regarding former convicts sentenced to 5 (five) years in prison. Bawaslu Lamsel overstepped the MK decision, ignoring the constitutional positioning of the MK as the highest interpreter of the constitution, as previously mentioned. This means that the door is closed for reinterpretation by other institutions, including Bawaslu Lamsel, and the MK's decisions must be implemented. Even though, in practice, MK decisions have not been executed.¹⁰

Furthermore, the difference in interpretation can lead to legal uncertainty caused by dualism in interpreting the provisions regarding the eligibility of former convict candidates for regional head positions. The General Election Commission (KPU), as the addressee, will face confusion because if it implements the MK's Decision, there is a potential risk of it being overturned again by the Bawaslu. Conversely, if the KPU does not implement the Bawaslu's Decision, it could be subjected to an ethics hearing by the Election Organizer's Honorary Council (*Dewan Kehormatan Penyelenggara Pemilu - DKPP*).

To differentiate the focus of the issue in this article, it is necessary to discuss relevant previous studies. Upon review, it can be explained that studies on the Constitutional Court's (MK) Decision No. 56/PUU-XVII/2019 have so far

⁸ Bawaslu of South Lampung, "Decision Number: 001/PS.REG/18.1803/IX/2020." (2020).

⁹ Bawaslu of South Lampung.

¹⁰ Maulidi, "Menyoal Kekuatan Eksekutorial Putusan Final dan Mengikat Mahkamah Konstitusi."

concentrated mainly on the considerations of the MK, as discussed by Achmad Taufik in 2019; Ida Hasan et al., in 2020¹¹, shifts in MK's considerations by Donal Fariz in 2020,¹² and the implementation of MK's Decision No. 56/PUU-XVII/2019 by Adidarma and Firdaus in 2022.¹³ Studies also discuss the determination of waiting periods for former convicts, examining MK's Decision No. 132/PHP.BUP-XIX/2021 but not directly addressing MK's Decision No. 56/PUU-XVII/2019, such as those by Ismail and Hapsoro in 2022.¹⁴ This research differs from existing studies as it examines the MK's Decision from the perspective of MK and Bawaslu's interpretations, the differences between MK and Bawaslu's interpretations, and the implications of these differing interpretations for the conduct of future Regional Head Elections (Pilkada).

Based on the above discussion, it is evident that there is a lack of harmony between the Constitutional Court (MK) and the Bawaslu in interpreting the provisions regarding the eligibility of former convict candidates for regional head positions. Stemming from this, this article attempts to answer several formulated problems: (1) why is there a difference in understanding regarding the provisions for the eligibility of former convict candidates for regional head positions following the MK's Decision No. 56/PUU-XVII/2019 (2) what are the implications of Bawaslu Lamsel's different interpretation of the MK's Decision on the eligibility of former convict candidates for regional head positions for the future conduct of Regional Head Elections?

¹¹ Achmad Taufik, "Kedudukan Mantan Narapidana dalam Mengikuti Pilkada Pasca Putusan Mahkamah Konstitusi Nomor 56/PUU-XVII/2019," *Jurnal Yustitia* 20, no. 2 (2 Januari 2020), <https://doi.org/10.53712/yustitia.v20i2.694>; Ida Hasan dan M. Holy One N. Singadimedja, "Memahami Argumentasi Mahkamah Konstitusi tentang Hal Politik Mantan Terpidana dalam Pemilihan Kepala Daerah (Studi Kasus Putusan Mahkamah Konstitusi Nomor 56/PUU-XVII/2019)," *Jurnal Muhakkamah* 5, no. 2 (30 November 2020): 150–68.

¹² Donal Fariz, "Pembatasan Hak Bagi Mantan Terpidana Korupsi Menjadi Calon Kepala Daerah," *Jurnal Konstitusi* 17, no. 2 (19 Agustus 2020): 309–29, <https://doi.org/10.31078/jk1724>.

¹³ Caka Adidarma dan Sunny Ummul Firdaus, "Implementasi Putusan Mahkamah Konstitusi Nomor 56/Puu-Xvii/2019 Bagi Calon Kepala Daerah Berstatus Mantan Terpidana Korupsi Dipilih Kembali Dalam Pemilihan Kepala Daerah Tahun 2020," *Res Publica: Jurnal Hukum Kebijakan Publik* 6, no. 2 (30 Desember 2022): 135–52, <https://doi.org/10.20961/respublica.v6i2.57540>.

¹⁴ Ismail Ismail dan Fakhris Lutfianto Hapsoro, "Penegasan Penentuan Jeda Waktu Bagi Mantan Terpidana dalam Pencalonan Kepala Daerah," *Jurnal Yudisial* 15, no. 1 (5 Desember 2022): 47, <https://doi.org/10.29123/jy.v15i1.482>.

Research Method

This study is a normative legal research that utilizes a case approach (case approach) to address existing legal issues. As a doctrinal legal research, the primary legal materials used include the Constitutional Court (MK) Decision No. 56/PUU-XVII/2019 and the South Lampung Election Supervisory Agency (Bawaslu Lamsel) Decision 001/PS.REG/18.1803/IX/2020. The secondary legal materials comprise books, journals, and research findings used to elucidate the primary legal materials. An analysis of the available legal materials is then conducted normatively and qualitatively to find answers to the differences in interpretation between the MK and Bawaslu and their implications for the conduct of Regional Head Elections (Pilkada).

The Constitutional Court's Interpretative Method in Decisions Regarding the Eligibility of Former Convict Candidates for Regional Head Positions

Sudikno Mertokusumo, A. Pitlo, Achmad Ali, and Yudha Bakti, as cited by Jimly Asshidiqie, suggest that there are at least 11 (eleven) methods of legal interpretation: Grammatical Interpretation, Historical Interpretation, Systematic Interpretation, Sociological or Theological Interpretation, Comparative Interpretation, Futuristic Interpretation, Restrictive Interpretation, Extensive Interpretation, Authentic Interpretation, Interdisciplinary Interpretation, and Multidisciplinary Interpretation.¹⁵

Judges can perform legal interpretation in their rulings and should not be taken out of the context of the decision. Decisions issued by the Constitutional Court (MK) represent the interpretations of the MK judges¹⁶, and their content constitutes binding interpretations of the provisions of the 1945 Constitution as

¹⁵ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid I* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006), 185–86.

¹⁶ Nur Mila Hayya, Rosmini , dan Harry Setya Nugraha, “Constitutionality of Replacing Judges Mid-Term and Its Implications on the Independence of the Constitutional Court, Indonesia,” *As-Siyasi: Journal of Constitutional Law* 3, no. 2 (14 Desember 2023): 155–75, <https://doi.org/10.24042/as-siyasi.v3i2.18683>.

related to the case at hand.¹⁷ The Deliberative Council of the South Lampung Election Supervisory Agency (Bawaslu Lamsel) can also be equated to a panel of judges, arguing that Bawaslu exercises quasi-judicial functions in resolving disputes. Thus, both MK's and Bawaslu Lamsel's Decisions embody and contain judicial interpretations. For both, the method of interpretation used can be identified. The difference in decisions regarding the eligibility of former convict candidates for regional head positions begins with differences in interpretative methods.

The Constitutional Court (MK) is a judicial authority, alongside the Supreme Court (MA), with the power to conduct judicial reviews or examine laws (UU) against the 1945 Constitution. As clearly stated in Article 24C paragraph (1) of the 1945 Constitution: "The Constitutional Court has the authority to adjudicate at the first and final level, with decisions that are final and binding, to examine laws against the Constitution..."¹⁸

Examining laws against the 1945 Constitution is a control mechanism over legal norms created by two branches of power, the legislative and the executive. Several mechanisms are known for controlling norms, including political mechanisms termed legislative review or legislative control and legal control (judicial).¹⁹ These norm control mechanisms are implemented to ensure that laws do not contradict the norms of the 1945 Constitution. The norms in question are abstract, not concrete, individual and casuistic norms that originate from applying a particular law.²⁰

The Constitutional Court's (MK) Decision No. 56/PUU-XVII/2019 originated from a judicial review case filed by the Indonesian Corruption Watch

¹⁷ Ahmad Ahmad dkk., "TAFSIR KONSTITUSI: Studi Putusan Mahkamah Konstitusi Tentang Hak Menguasai Negara Atas Sumber Daya Alam Dalam Prespektif Demokrasi Ekonomi" (s3, Universitas Muhammadiyah Surakarta, 2020), 18–19, <http://eprints.ums.ac.id/88056/>.

¹⁸ "Undang-Undang Dasar" (1945).

¹⁹ Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia Dalam Putusan Mahkamah Konstitusi* (Yogyakarta: FH UII Press, 2011), 23–24.

²⁰ Mohammad Mahrus Ali, "Konstitusionalitas dan Legalitas Norma dalam Pengujian Undang-Undang Terhadap Undang-Undang Dasar 1945," *Jurnal Konstitusi* 12, no. 1 (20 Mei 2016): 172, <https://doi.org/10.31078/jk12110>.

(ICW) and the Association for Elections and Democracy (Perludem) to examine Article 7 paragraph (2) letter g of the Local Election Law (UU Pilkada), or the provision regarding eligibility criteria for former convict candidates. The article in question states.²¹ The article in question states, “Candidates for Governor and Deputy Governor, Candidates for Regent and Deputy Regent, as well as Candidates for Mayor and Deputy Mayor as referred to in paragraph (1) must meet the following requirements: ...g. never been a convict based on a court decision that has obtained legal force or for former convicts has openly and honestly disclosed to the public that they are a former convict”.²²

Article 7 paragraph (2) letter g of the Local Election Law (UU Pilkada) was tested against three articles of the 1945 Constitution of the Republic of Indonesia (UUD 1945), namely Article 18 paragraph (4) which states, “The Governor, Regent, and Mayor each as the head of the provincial, regency, and city governments are elected democratically”, Article 22E paragraph (1) which says, “General elections are held directly, publicly, freely, and secretly, honestly, and fairly every five years”, and Article 28D paragraph (1) which asserts, “Every person has the right to recognition, guarantees, protection, and fair legal certainty as well as equal treatment before the law”.

The Constitutional Court (MK) subsequently partially granted the petitioners' request and declared Article 7 paragraph (2) letter g of Law Number 10 of 2016 to be in contradiction with the 1945 Constitution of the Republic of Indonesia (UUD 1945). Essentially, regional head candidates who wish to register, if they are former convicts sentenced to imprisonment of 5 (five) years or more, must have "...passed a period of 5 (five) years after the former convict has completed serving their prison sentence based on a court decision that has obtained legal force."

²¹ Mahkamah Konstitusi, “56/PUU-XVII/2019” (2019).

²² President of the Republic of Indonesia, "Law Number 10 Year 2016 on the Second Amendment to Law Number 1 Year 2015 on the Stipulation of Government Regulation in Lieu of Law Number 1 Year 2014 on the Election of Governors, Regents and Mayors into Law."

The subsequent point to understand is what exactly was the Constitutional Court's (MK) interpretation of the provisions for the eligibility of former convict candidates as outlined in Article 7 paragraph (2) letter g of the Local Election Law (UU Pilkada), which was misunderstood by the South Lampung Election Supervisory Agency (Bawaslu Lamsel) in resolving Dispute Number 001/PS.REG/18.1803/IX/2020?

In its Decision No. 56/PUU-XVII/2019, the Constitutional Court (MK) cited several of its previous opinions in resolving cases examining the norm “never been sentenced to imprisonment based on a court decision that has obtained legal force for committing a criminal act threatened with imprisonment of 5 (five) years or more”. The MK's stance can be found in Decision No. 14-17/PUU-V/2007, Decision No. 4/PUU-VII/2009, Decision No. 120/PUU-VII/2009, and Decision No. 79/PUU-X/2012. Essentially, the MK determined it to be conditionally unconstitutional, establishing the conditions: a. not applicable to elected public officials; b. limited to 5 (five) years after the former convict has completed serving their prison sentence based on a court decision that has obtained legal force; c. honesty or openness about their background as a former convict; d. not being a repeat offender.²³ The principle of the MK in this decision is to apply strict criteria for regional head candidates, as it is expected that those who participate in the contest have adequate character and competence, personality traits and integrity, honesty, responsibility, social sensitivity, spiritual values in life, and respect for others.

Over time, the Constitutional Court (MK) has also changed its opinion on its unconstitutionality, shifting from cumulative to alternative conditions. The shift to alternative conditions for former convicts has led to, or at least empirically resulted in, situations where former convicts choose to announce their status as ex-convicts and then become *recidivists*, caught again committing criminal acts. The MK believes it is essential to provide sufficient time for prospective candidates to adapt, which is helpful to prove that they have changed for the better. In the same

²³ Mahkamah Konstitusi, 56/PUU-XVII/2019.

vein, from the voter's perspective, the waiting period can be beneficial for building confidence that the prospective candidate will not repeat actions that could undermine the essence of clean, honest, and integral leadership. Without providing time to wait, it has been proven that regional head candidates fall back into disreputable behaviour, committing criminal acts.

The requirement to become a regional head candidate has reverted to the cumulative condition stipulated in the Constitutional Court (MK) Decision No. 4/PUU-VII/2009, currently regulated in Article 7 paragraph (2) letter g of Law Number 10 of 2016. The MK deems it necessary to restore the true meaning of the Regional Head Elections (Pilkada), which is to produce leaders with the quality and integrity to hold public office while simultaneously not eliminating the right to be elected for citizens actively participating in governance. The dilemma between fulfilling the constitutional rights of individual citizens and the collective constitutional rights of the community has been resolved in favour of the latter. The consideration is that the ultimate goal of democracy through Pilkada is to elect a government capable of providing exemplary service to the community. So, how long is the waiting period deemed sufficient by the MK? In this matter, the MK still considers Decision No. 4/PUU-VII/2009, which, in its considerations, chose 5 (5) years for adaptation, aligning with the five-year cycle mechanism in Elections and Pilkada.

In its Decision No. 56/PUU-XVII/2019, the Constitutional Court (MK) employed the theological or sociological method of interpretation. Theological or sociological understanding is a method that focuses on the intent and purpose of specific provisions within a law being interpreted.²⁴ The naming of this interpretation method as “theological or sociological” stems from the approach of understanding the intent and purpose behind the enactment of the law, which

²⁴ Rama Agusta, “Bagja: Bawaslu Tangani Sengketa Adminitrasi Pemilu Lebih Banyak Ketimbang MK,” 2019, <https://bawaslu.go.id/en/berita/bagja-bawaslu-tangani-sengketa-adminitrasi-pemilu-lebih-banyak-ketimbang-mk>.

fundamentally aims at societal objectives. This is what leads to this method of interpretation, also referred to as sociological interpretation.²⁵

The Constitutional Court's (MK) interpretation in Decision No. 56/PUU-XVII/2019 employed the theological or sociological method regarding the provisions for former convicts running for regional head positions. Previously, the MK's changes in opinion in its decisions related to the criteria for former convicts have occurred over time, certainly considering sociological facts. The criteria for former convicts who run as elected public officials have shifted from cumulative, alternative, and finally reverted to cumulative conditions.

When interpreting Article 7 paragraph (2) letter g of the Local Election Law (UU Pilkada), the Constitutional Court (MK) was confronted with two constitutional interests: first, the interest of every citizen to elect and be elected; second, the broader societal interest in having leaders with integrity. The MK then opted to prioritize the community's interests over the rights of individual citizens.:

"[3.14]...the true essence of democracy does not solely lie in fulfilling the condition 'whoever receives the most votes from the people has the right to govern', but more importantly in the ultimate goal to be achieved, which is the presence of a government capable of providing good public services to the community, thereby enabling the realization of welfare. Therefore, in the democratic process, before arriving at the issue of 'whoever receives the most votes from the people has the right to govern', inherently, there is an essential element that must first be resolved, namely 'who meets the qualifications or requirements and is thus worthy to be contested in order to gain the majority support of the people'..."

After interpreting the goal of democracy in line with societal objectives as outlined in the theological or sociological method of interpretation, the Constitutional Court (MK) decided that former convicts aspiring to become regional heads must wait for 5 (five) years after completing their prison sentence. This interpretation by the MK aligns with its decision in MK Decision No. 4/PUU-VII/2009, which mandates a 5-year waiting period, allowing the prospective

²⁵ E. Fernando M. Manullang, "Penafsiran Teleologis/Sosiologis, Penafsiran Purposive dan Aharon Barak: Suatu Refleksi Kritis," *VeJ* 5, no. 2 (2019): 262–63.

regional head candidates to adapt to society while aligning with the five-year cycle mechanism of regional head elections.

Interpretation by the South Lampung Election Supervisory Agency (Bawaslu Lamsel) of the Eligibility Provisions for Former Convict Candidates for Regional Head Positions

The prospective candidates for Regent and Deputy Regent of South Lampung, Hipni-Melin, filed a dispute resolution request with the South Lampung Election Supervisory Agency (Bawaslu Lamsel), registered under number 001/PS.REG/18.1803/IX/2020. The request was made to contest the decision of the South Lampung General Election Commission (KPU Lamsel) No. 60/HK.03.1-Kpt/1801/KPU-Kab/IX/2020, which declared Hipni-Melin as Not Meeting the Requirements (TMS) for candidacy as regent and deputy regent of South Lampung. This was because Melin had previously violated Article 263 paragraph (2)²⁶ juncto Article 55 paragraph (1) the first clause of the Criminal Code (KUHP) juncto Article 64 paragraph (1) KUHP, which is punishable by five years or more, and was subsequently sentenced to 8 (eight) months in prison with an 18 (eighteen) month probation period.

The South Lampung General Election Commission (KPU Lamsel) concluded that the prospective candidate Melin had not fulfilled the 5 (five) year period as a former convict at the time of registration, having completed only 4 (four) years and 10 (ten) months, counted from the end of her sentence on August 25, 2016. She would only complete 5 (five) years on August 25, 2021. However, according to the Petitioner, the KPU Lamsel erred in applying Article 4 paragraph (1) letter f and Article 4 paragraph (2a) of PKPU Number 9 of 2020 because the Petitioner was given a probationary sentence, which is not included in the article above. The South Lampung Election Supervisory Agency (Bawaslu Lamsel), in its dispute resolution decision, granted the Petitioner's request and ordered the KPU

²⁶ R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Bogor: Politeia, 1993), 195.

Lamsel to appoint Hipni-Melin as the candidate for Regent and Deputy Regent of South Lampung for the year 2020.

In interpreting the provisions regarding the eligibility of former convict candidates for regional head positions, the first step taken by the South Lampung Election Supervisory Agency (Bawaslu Lamsel) was to interpret the 1945 Constitution of the Republic of Indonesia (UUD 1945). Bawaslu Lamsel emphasized that as a country adhering to a democracy founded on law, Indonesia guarantees the protection and respect of Human Rights (HAM). The provision referred to is Article 28D paragraph (3) of the UUD 1945 states, "Every citizen has the right to equal opportunity in government". In the context of Elections, the right to be elected is a Human Right but classified as a Relative Human Right, meaning it can be limited. Article 28J paragraph (2) of the UUD 1945 states:

“In exercising their rights and freedoms, every individual must adhere to the limitations established by law, with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others, and to meet fair demands in accordance with moral considerations, religious values, security, and public order in a democratic society.”

In addition to the provisions in the 1945 Constitution, the Election Supervisory Board of South Lampung (Bawaslu Lamsel) also refers to Article 35, paragraph (1) of the Criminal Code (Kitab Undang-Undang Hukum Pidana or KUHP). Within the KUHP, the restriction of the right to nominate oneself is possible through two options: legislation and a judicial decision. Decision Number 56/PUU-XVII/2019 of the Constitutional Court (Mahkamah Konstitusi or MK) is also considered by Bawaslu Lamsel about the stipulation that the deadline imposed on candidates for regional heads is 5 (five) years to allow candidates to adopt the five-year mechanism of regional head elections.

According to Bawaslu of South Lampung, when former convicts apply for candidacy, they must not have been convicted by a final court decision for a criminal offence punishable by imprisonment of 5 (five) years or more, except for those who are former convicts due to negligence and political crimes. Or for former convicts who have passed 5 (five) years after completing their prison sentence. A person is considered a former convict by Bawaslu Lamsel if they have completed

their prison sentence and are no longer serving a term of deprivation of liberty in a Penitentiary Institution (Lapas). Therefore, the provision “having passed a period of 5 (five) years after completing the prison sentence based on a court decision that has obtained legal force,” as contained in General Election Commission Regulation Number 9 of 2020, should not be interpreted or understood as anything other than imprisonment or physical detention.

Bawaslu Lamsel, in interpreting the provisions for the eligibility of former convict candidates, employed two methods of interpretation: systematic interpretation and restrictive interpretation. Systematic interpretation is a method of interpreting a law as part of the entire legal system.²⁷ The first thing interpreted by Bawaslu Lamsel was the provision regarding limitations on citizens' participation in governance.

In its considerations regarding the eligibility provisions for former convict candidates for regional head positions, Bawaslu Lamsel referred to Article 28D paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which guarantees the human rights of every Indonesian citizen to have equal opportunities in governance:

“Legal Opinion of the Council 15...a...1) The equality of rights about the Legal Standing of Every Citizen in the Context of Nationhood and Statehood, as stipulated in Article 28D paragraph (3) of the 1945 Constitution of the Republic of Indonesia, states “that Every Citizen has the right to equal opportunities in Governance”.

However, according to Bawaslu Lamsel, the right to equal opportunities can also be limited, based on Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Continuing its interpretation of the limitation of the right to be elected and to elect in the effort to fill elected public positions (official elected), Bawaslu Lamsel refers to Article 35 paragraph (1) number 3 of the Criminal Code (KUHP):

“Legal Opinion of the Council...15...b. that in relation to the restriction of the Right to Elect and be Elected in Elected Public Positions (official elected), it is possible for a convict to be imposed with an additional

²⁷ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid I*, 285.

criminal sanction through a judge's decision to "revoke the right to elect and be elected in elections conducted according to general rules," as regulated in Article 35 paragraph (1) number 3 of the Criminal Code (KUHP). Therefore, the restriction of rights, according to both the 1945 Constitution of the Republic of Indonesia and the KUHP, can only be done in two ways: through "Law" as per Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia and through additional penalties given by the Judge through their decision as per Article 35 paragraph (1) number 3 of the KUHP....”²⁸

The Deliberative Council also cited a Fatwa (legal opinion) from the Supreme Court in Letter Number 30/Tuaka.Pid/IX/2015, which differentiates the definitions of 'Terpidana' (convict) and 'Narapidana' (prisoner):

“Legal Opinion of the Council...15...e...states that a Former Convict, even though sentenced to imprisonment, may not necessarily serve their sentence in a Correctional Institution (LAPAS). For instance, someone sentenced to 6 (six) months in prison with a 1 (one) year probation period would be classified as a Convict but does not need to serve their sentence in LAPAS”.

Not only utilizing systematic interpretation, as previously mentioned, Bawaslu Lamsel also employed restrictive interpretation. Restrictive interpretation is a method of interpretation that involves limiting the interpretation to the specific, defined meaning of words.²⁹ An example of restrictive interpretation is the term "neighbour" in Article 666 of the Civil Code (KUHPperdata), which states, "Anyone who finds that the branches of their neighbour's tree overhang their property has the right to demand that these branches be cut." Using restrictive interpretation, the term "neighbour" in Article 666 KUHPperdata must refer to the house owner adjacent to someone's residence. This means restrictive interpretation has limited the scope so that a person living next to someone's property but not owning the house, perhaps only renting, would not fall under the provision of Article 666 KUHPperdata.

The use of restrictive interpretation by Bawaslu Lamsel is evident in their interpretation of the phrase “having completed the prison sentence,” as formulated

²⁸ Bawaslu of South Lampung, Decision Number: 001/PS.REG/18.1803/IX/2020.

²⁹ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, 1 ed. (Jakarta: Rajawali Pers, 2016), 233.

by the Constitutional Court (MK) in Decision No. 56/PUU-XVII/2019 and subsequently incorporated by the General Election Commission (KPU) into Article 4 paragraph (2a) of KPU Regulation No. 9 of 2020. According to Bawaslu Lamsel, the phrase “having completed the prison sentence” is interpreted as follows:

“The Legal Opinion of the Assembly...16...is that the phrase "Imprisonment" in the provision "has elapsed 5 (five) years after completing Imprisonment based on a court decision that has obtained legal force" as regulated in the Regulation on Candidate Nomination aforesaid cannot be construed or interpreted other than as "Imprisonment" or "Custodial Sentence...”

Bawaslu Lamsel has defined the term “having passed a period of 5 (five) years after completing the prison sentence” as strictly referring to imprisonment or physical detention. Therefore, according to Bawaslu Lamsel, the prospective deputy regent candidate Melin, although sentenced to 8 (eight) months in prison, only underwent an 18 (eighteen) month probation period and therefore cannot be classified as a former prisoner:

“Legal Opinion of the Council...18...The Deliberative Council opines that although a prison sentence of 8 (eight) months was imposed on the PETITIONER, Hj. Melin Haryani Wijaya, S.E., M.M., this sentence was never served, and thus the status of a prisoner was never applied. This is because the individual did not commit any punishable act during the 18 (eighteen) month probationary period.”

Using two or more interpretive methods simultaneously in determining the law in a single case and decision is possible. However, it is essential to note that interpretations should not be applied to the same legal provision, as this may lead to ambiguity or even create contradictions. This applies to systematic interpretation and restrictive interpretation. Bawaslu Lamsel referred to the fatwa in the Supreme Court Letter Number 30/Tuaka in the dispute resolution case.Pid/IX/2015 regarding the definition of 'Terpidana' (convict) and 'Narapidana' (prisoner), which essentially states that a convict, even after being sentenced, may not necessarily serve their sentence in a Correctional Institution (Lapas) but may undergo a probation period. Nonetheless, such an individual still retains the status of a convict. Based on this interpretation, the prospective Deputy Regent candidate Melin, who was sentenced

to 8 (eight) months in prison but did not serve time in Lapas and only underwent an 18 (eighteen) month probationary period, is categorized as a convict, or after completing the sentence, as a former convict.

Conversely, by applying restrictive interpretation to the phrase “having completed the prison sentence,” Bawaslu Lamsel interprets this to mean imprisonment or physical detention. Therefore, the petitioner Melin, who did not undergo physical detention, cannot be categorized within the phrase “having completed the prison sentence.” Using these two interpretative methods creates ambiguity: the systematic interpretation concludes that Melin is a former convict, whereas the restrictive interpretation suggests that Melin does not fall under the provision of having completed a prison sentence. This dichotomy in interpretation leads to conflicting conclusions about Melin's eligibility as a candidate.

Implications of Reinterpreting the MK's Decision by Bawaslu on the Eligibility of Former Convict Candidates for Regional Head Positions

The intended addressee of the Constitutional Court's (MK) Decision No. 56/PUU-XVII/2019 is not Bawaslu but rather the General Election Commission (KPU). The reasoning is that Article 7 paragraph (2) letter g pertains to candidate eligibility requirements, the processing and verification of which are conducted by the KPU. The waiting period for convicts sentenced to imprisonment of 5 (five) years or more has been accommodated in KPU Regulation No. 9 of 2020. Similarly, in terms of the technical-implementation aspects of registering prospective regent and deputy regent candidate pairs, the South Lampung KPU (KPU Lamsel) adhered to KPU Regulation No. 9 of 2020 and, indirectly, to the MK's Decision No. 56/PUU-XVII/2019.

Despite this, the role and position of Bawaslu in dispute resolution processes are equally crucial. Bawaslu is empowered to resolve disputes between election participants or between participants and the Provincial or District/City KPU, with decisions that the KPU must implement. While the KPU makes decisions following KPU Regulations (PKPU), Bawaslu still has the liberty to interpret. Fundamentally, the South Lampung KPU (KPU Lamsel) and Bawaslu Lamsel should consistently

understand and spirit in implementing the MK's decisions. Theoretically, reinterpretation of the MK's decisions, especially regarding the waiting period for prospective, former convict candidates facing a sentence of 5 (five) years or more, should not occur. The nature of the MK's decisions is final and binding, and the MK is the highest interpreter of the Constitution. In the context of the MK's decision interpreting Article 7 paragraph (2) letter g about Article 18 paragraph (4), Article 22E paragraph (1), and Article 28D paragraph (1) of the Constitution.

In the execution phase, the Constitutional Court's (MK) decisions often face challenges. Many addressees fail to fully implement the MK's decisions, either by reviving norms declared unconstitutional by the MK or through court decisions within the Supreme Court's jurisdiction.³⁰ According to research conducted by Tri Sulistyowati and the team, from 2003 to 2018, there were many instances of non-compliance. A total of 24 (twenty-four) decisions were not complied with at all, while 6 (six) decisions were partially complied with. Meanwhile, of the remaining decisions granted by the MK in the same time frame, 59 decisions were fully complied with, and the compliance status of 20 decisions remains unknown.³¹

The widespread failure of addressees to fully or partially fulfil the MK's decisions does not legitimize non-compliance or justify ignoring the MK's decisions. On the contrary, such an attitude reflects a lack of moral and legal awareness on the part of the decision addressees. According to Widayati, as mandated by the 1945 Constitution, the MK serves as the interpreter of laws and a judicial institution or executor of judicial power.³² Objectively, it can be assessed

³⁰ Novendri M. Nggilu, "Menggagas Sanksi atas Tindakan Constitution Disobedience terhadap Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 1 (1 April 2019): 43, <https://doi.org/10.31078/jk1613>.

³¹ Tri Sulistyowati, M. Imam Nasef, dan Ali Ridho, "Constitutional Compliance atas Putusan Mahkamah Konstitusi oleh Lembaga-Lembaga Negara" (Pusat Penelitian dan Pengkajian Perkara dan Pengelolaan Perpustakaan, 2019).

³² Widayati Widayati, "Problem Ketidakpatuhan Terhadap Putusan Mahkamah Konstitusi Tentang Pengujian Undang-Undang," *Jurnal Pembaharuan Hukum* 4, no. 1 (15 April 2017): 12–13, <https://doi.org/10.26532/jph.v4i1.1634>.

that the MK has contributed significantly to improving legal regulations since its establishment.³³

Regarding the Bawaslu Lamsel dispute decision, there are two main implications following its resolution: First, legal uncertainty arises. In future Regional Head Elections (Pilkada), the KPU will face confusion because steadfast adherence to the norms of KPU Regulations, which are the outcome of MK's decisions, could potentially be overturned by Bawaslu, given that Bawaslu also interprets the eligibility criteria for former convict regional head candidates.

Second, a former convict sentenced to 5 (five) years or more could potentially pass through and participate in the Pilkada because they did not serve prison time and only underwent probation. This possibility is significant because Bawaslu's dispute decisions are binding for the KPU to implement. If this occurs, it is certainly not in line with the MK's Decision No. 56/PUU-XVII/2019, which aimed to set a moral standard for regional head candidates. The priority should be to ensure the selection of leaders with quality and integrity.

Conclusion

Based on the description above, it can be concluded that the differing interpretations by the Election Supervisory Board of South Lampung (Bawaslu Lamsel) are reflected in the Bawaslu Lamsel assembly, which reinterprets the norms of Article 7 letter g of the Regional Election Law (Undang-Undang Pemilihan Kepala Daerah or UU Pilkada) that have been decided by the Constitutional Court (Mahkamah Konstitusi or MK). The divergence widens as the MK and Bawaslu Lamsel employ different methods of interpretation. The MK interprets using theological or sociological methods, while Bawaslu Lamsel uses systematic and restrictive interpretation methods. The confusion becomes more apparent due to the use of these two methods by Bawaslu Lamsel, as it leads to contradictions. The systematic interpretation concludes that Melin is a former

³³ Sucahyono Sucahyono, "Erga Omnes Terhadap Putusan Mahkamah Konstitusi Dalam Perspektif Pembentukan Peraturan Perundang-Undangan," *SALAM: Jurnal Sosial dan Budaya Syar-i* 6, no. 4 (15 Desember 2019): 331–42, <https://doi.org/10.15408/sjsbs.v6i4.13707>.

convict, requiring a waiting period of 5 (five) years after completing the prison sentence. In contrast, the restrictive interpretation method concludes the opposite.

The divergence in interpretation leads to legal uncertainty. This legal uncertainty may impact the Regional Election Commission (Komisi Pemilihan Umum or KPU), particularly if the KPU continues to adhere to the KPU Regulation in line with Constitutional Court Decision Number 56/PUU-XVII/2019, which is at risk of being annulled by Bawaslu through a similar interpretation outlined in the dispute resolution decision. However, if implemented contrarily, the KPU, as the addressee of Constitutional Court Decision Number 56/PUU-XVII/2019, may be deemed non-compliant with the MK decision.

Moreover, society may end up with poor leadership. Former convicts who have committed crimes punishable by imprisonment for 5 (five) years or more but did not serve time in prison due to probation will be eligible to participate in the Regional Election. This situation will distance the public from obtaining leaders with integrity and quality, as desired by the MK as the guardian of the constitution, as stipulated in its decision.

Authors' Contributions

A.S., as the main author of this article, was responsible for research activities, such as data collection, presentation, and writing the report and manuscript. D.L.S, the co-authors of this article, contributed to this research by collecting data and writing the report with the main author.

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