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Application of the concept of justice as fairness in limiting the voting rights of former convicts to run for elected public officials

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Abstract---Restrictions on the voting rights of former convicts to run for public officials who are introduced to the conditions to be able to run for public officials can be said to be rights restrictions. These restrictions are very decisive for a citizen to be elected. This study is intended to dissect the legal considerations of the Constitutional Court related to the application of the concept of justice as fairness if the Constitutional Court is faced with the issue of protecting the individual rights of former convicts and protecting the rights of citizens collectively to obtain a leader who is clean and with integrity. The concept of justice as fairness is one of the methods used by the Constitutional Court in examining, adjudicating and deciding this case. This research approach is carried out using a comparison between the decisions of the Constitutional Court in deciding the norms of the same article, namely the requirement "never have been sentenced to prison" for someone who wants to run for an elected public official.

Keywords---justice as fairness, limitation rights, former convicts.

Introduction

Democracy is an important issue in modern society today, there is almost no country in the world that does not adhere to a democratic system, even if the country is led by a corrupt and tyrannical government, of course the nomenclature used is different such as liberal democracy, democracy guided

democracy, Pancasila democracy, social democracy and so on (Zoelva, 2002; Hasibuan, 2022). Every modern democracy carries out general elections, but not all elections can be said to be democratic (Santoso, 2006). One aspect or indicator of a democratic election is the protection of the right to be elected and the right to vote without discrimination in any form and by anyone. However, in Indonesia the right to be elected and the right to vote is not an absolute right, this right can be limited by the constitution and the regulations under it. Related to this research, is this limitation a form of injustice to a person's right to run for public office? Before going any further, the writer would like to first describe what justice is.

Next St. Thomas Aquinas (1225-127) examines in more depth the theories of commutative, distributive justice and legal justice (*justicia legalis*). Commutative justice is justice that is concerned with balanced exchanges between individuals, meaning that the balance in question is equality of position as human beings regardless of social status. Distributive justice is justice that has to do with public affairs in relation to state obligations to citizens or the people. It can be said that this justice puts more pressure on the state to provide equal opportunities and access to all citizens. Legal justice is justice that has to do with issues that have been regulated in the laws and regulations of a country. The main theme of legal justice is how to achieve justice through the rule of law (Santoso, 2006). The same thing as the saying *lex Uno Ore Omnes Aloquitur*, the meaning of this proverb is that everyone is treated equally before the law, simply put, the law handles all with the same mouth or voice (Rani, 2020).

Terminologically, the right to vote and the right to be elected can be found in laws relating to elections. while the definition of the right to be elected is used implicitly only, which can be interpreted to mean "the right to nominate oneself". However, the term "the right to be elected can be found in the decisions of the Constitutional Court (Constitutional Court Decision Number 11-017PUU-I/2003 concerning Judicial Review of Law Number 12 of 2003) (Constitutional Court Decision Number 4PUU-VII/2009 concerning Judicial Review of Law Number 10 of 2008). Not explicitly mentioning the phrase "suffrage" is a citizen's right in the Constitution does not mean that the right to vote is not part of human rights or constitutional rights guaranteed in the 1945 Constitution. Further, this can be seen in several Constitutional Court Decisions. which states that the right to vote is a constitutional right of citizens, of which can be seen in Decision Number 011-017PUU-I/2003 concerning the Review of Law Number 12 of 2003 concerning General Elections for Members of DPR, DPD and DPRD, in its Decision the Constitutional Court stated that The constitutional right of citizens to vote and be elected (right to vote and right to be a candidate) is a right guaranteed by the constitution. That is, the Constitutional Court in interpreting Article 27 paragraph (1) of the 1945 Constitution in its decision affirms that the right to vote is a constitutional right of citizens.

Every right including human rights always has limitations, where individual rights end when other personal rights exist (Taufik, 2018). This has also been regulated in the 1945 Constitution paragraph (2), where in exercising the rights or freedoms everyone is subject to the restrictions set by law solely to ensure the recognition and respect for the rights and freedoms of others and to fulfill the

demands imposed by the law. fair in accordance with considerations of morals, religious values, security and public order.

In Indonesia, the application of the concept of justice as fairness has not been fully implemented or adopted, especially in the exercise of the authority of the Constitutional Court in judicial review. The shift in the establishment of the Constitutional Court in providing limits or differentiating rights for former convicts to run for elected public officials is an indicator that the Constitutional Court does not elaborate on the principle of justice as fairness in formulating its legal considerations (Kostogryzov, 2019; Qabrati, 2020; Habibi, 2018).

Therefore, this study will discuss the application or use of the concept of justice as fairness in legal considerations when the Court is faced with limiting the rights of former convicts. Where, there are two constitutional interests that must be protected, individual constitutional interests (the elect) and the collective interests of citizens (voters). The Constitutional Court has repeatedly tested the norms of the articles related to the condition "never have been sentenced to prison". The author will analyze the legal considerations of the Constitutional Court, so that legal considerations can be found on the decisions of the Constitutional Court that use or apply the principle of justice as fairness.

Formulation of the problem

Indonesia is a country that adheres to the idea of democracy, with the characteristics of diversity in various matters, religion, culture, social and customs. In the context of diversity and pluralism, in principle, the community has understood the concept of fairness. The need for the concept of fairness is very important, especially regarding the constitutional rights of citizens. The formulation of the problem in this research focuses more on how to apply the concept of fairness in Restricting the Voting Rights of Former Convicts to Run for Elected Public Officials. Especially related to the legal considerations of the Constitutional Court whether the tendency of the Constitutional Court to provide protection to former convicts or the protection of the rights of citizens collectively to obtain leaders who are clean and with integrity.

Literature Review

The principles of justice are chosen in a state of ignorance. This is to ensure that no one benefits or is disadvantaged in the choice of principles resulting in natural probabilities or contingencies of social situations, because all are equally situated and no one is able to design a principle which is particularly conditional. Because with the original position situation, everyone's relations become symmetrical, so the initial situation is fair between individuals as moral persons, namely as rational beings with their goals and abilities to recognize a sense of justice (Taufik, 2018). In this phase, everyone who is in the original position does not know the attributes that can make them make compromising considerations to maximize their personal or group interests (Sunaryo, 2022). The idea of the default position becomes the best tool to condition everyone to submit the fairest proposal or agreement (Sunaryo, 2022).

At least, Rawls gave birth to the concept of the original position with a few notes (Hasanuddin, 2018): first, the original position is a necessary precondition for the implementation of justice as fairness. However, Rawls does not see the original position as something real, but rather as an imaginary initial condition. Rawls emphasizes that this original position is purely hypothetical (Hasanuddin, 2018; Parnami, 2019).

Second, everyone who participates in the formulation of the principles of justice must actually enter into an ideal situation, Rawls believes that not everyone can enter into the original position. Only certain people can enter into this hypothetical situation, namely those who have the ability to reason in accordance with formal standards in the world of science. To realize the original position where the agreement can be taken fairly, it is characterized by three main things which are its characteristics, that is (Ujan, 2001):

1. A veil of ignorance;
2. There is a representation of the moral person concept in the original position;
3. The "maximin" strategy is applied in choosing the first principles of justice.

To explain the "maximin" strategy, Rawls is simply explained by using a table of advantages and disadvantages (Ujan, 2001).

Table 1. John Rawls Advantages and Disadvantages Table

Decision (D)	Situation (C)		
	C1	C2	C3
D1	-7	8	12
D2	-8	7	14
D3	5	6	8

Table 1 represents the advantages and disadvantages in situations that are not strategy games. Nobody plays against the decision maker; each person is actually faced with a number of possible situations. Certain situations that may occur do not depend on the choices made by a person or the steps he has shown long ago (Ujan, 2001). The profit and loss table presented by Rawls is simply depicted in a table of numbers listed showing the value of money (in hundreds of dollars) in comparison with a certain initial situation, gain or loss depends on individual decisions (Ujan, 2001). Therefore, it appears that decisions D1 and D2 each offer higher benefits than decisions D3. However, these two decisions cannot guarantee minimum benefits for people in the most disadvantaged situations. That is, in the original position, rational parties who are in the veil of knowledge will prefer the D3 alternative. Because, only this choice guarantees its minimum interest. The choice will be made on the basis of the belief that in choosing they are only driven by the only motivation, namely the need for primary values (Fahmi, 2019).

The primary values consist of: (1) fundamental freedoms; (2) Freedom of movement as well as freedom of choice of work; (3) powers and prerogatives or positions or positions that demand responsibility; (4) income and property; (5) social basis for self-esteem (Fahmi, 2019). For John Rawls, the effort to distribute

rights and obligations in a balanced manner with the aim that everyone in society in terms of benefits gets the same benefits, while in terms of responsibility they both bear the same real burden (Ujan, 2001). Andre Ata Ujan explains Jhon Rawls's conception of justice, there are two principles of justice based on Rawls's concept: 1. Everyone must have the same right to the broadest basic liberties, as broad as the same freedoms for all (the principle of fairness). 2. Social and economic inequalities should be regulated in such a way that: a. It is expected to provide benefits to everyone; b. All positions and positions are open to everyone. Meanwhile, Herry Priyono (1993) also explains John Rawls's conception of justice, namely:

1. The principle of the greatest equal liberty includes:
 - a. Freedom to play a role in political life (voting rights/suffrage rights, the right to be elected, and so on);
 - b. Freedom of speech;
 - c. Freedom of belief;
 - d. Freedom to be yourself;
 - e. Right to maintain private property.
2. The second principle consists of two parts at once, namely the principle of difference (the different principle) and the principle of fair equality of opportunity (the principle of fair equality of opportunity). The principle of difference states that the existence of social and economic differences must be arranged in such a way that it can provide the greatest/best benefits to the less fortunate.

When applied to make a legal policy, the author simply describes it in the form of Table 2

Table 2. Legal Policies of K1, K2, K3 and K4

Legal policy	Ex-convict/Picker/society		
	Ex-convict	Picker	Society
K1	8	-9	-4
K2	-7	3	2
K3	-6	9	8
K4	1	3	6

Source: Author, compiled based on the maximin theory of John Rawls

Table 2 described legal policies which consist of K1, K2, K3 and K4 are types of policies, there are 3 groups or groups, namely: individuals (former convicts), voters and the community collectively who are directly affected by these policies. born policy.

1. The K1 policy: generates a maximum profit of 8 for individuals, but causes a maximum loss of -9 for the voter group and -4 for the community collectively.
2. K2 policy: incurs maximum loss for individuals of -7, generates benefits for voter groups 3 and 2 for community groups collectively.

3. OSH policy: inflicting maximum losses for individuals of -6, causing maximum benefits for voter groups of 9 and collective community groups of 8.
4. K4 policy: generates maximum benefits for individual groups of 1, and generates maximum benefits for voter groups of 3 and collective community groups of 6.

Of the four policies, if they are based on the theory/strategy of Maximin Rawls, the policy that must be taken by the legislators or the Constitutional Court is the K4 policy, because the benefits are the same with different profit portions. This K4 policy choice is the right choice compared to choosing other policies where these other policy options provide maximum losses to certain groups. The legislators or the Constitutional Court can use this strategy if they meet 3 constitutional interests in which the three interests must not be removed or eliminated. If it is applied to limiting the rights of former convicts, it can be elaborated that, the right of former convicts to run for elected public officials is still given with various conditions that must be met, meanwhile, the rights of voters and the community collectively to get a clean leader, integrity and quality are also met.

The maximin strategy itself is a perspective that is essentially not to achieve the maximum profit, but minimizes the risk for members of the relatively weak group, in other words, maximin is a legal decision-making tool that favors the weakest group (Wibowo, 2019). The question will arise, which of the three groups is the weakest? According to the author, the majority group is not necessarily the strongest group, the majority group may be strong in quantity but weak in quality, namely knowledge, capital, and access. Thus, the author in this case agrees that the weakest group is the community collectively who become voters who will carry the risk of their choice.

Research Methods

So, this type of research is doctrinal research. In terms of its nature, this research is a descriptive research, which is a study that describes something in terms of a certain space and time. From the point of view of form, this legal research is of the type of prescriptive research, namely research that aims to provide an overview or formulation of the problem according to the existing circumstances/facts (Wibowo, 2019).

Result & Discussion

Talking about democracy must be based on the rule of law as stated in the 1945 Constitution, the will of the people is the main thing in democracy, which means that there must be a variety of community participation in making decisions. Laws are not made to guarantee the interests of individuals alone, but to ensure the interests of all citizens (Eddyono, 2015). Therefore, to safeguard these interests, the Constitutional Court in Indonesia was established as a judicial institution authorized to enforce law and justice. The Constitutional Court is one of the judicial bodies that has the authority to conduct a judicial review where the decision is final to decide whether a law is in line with the constitution (Omara,

2017). In carrying out the authority of the Constitutional Court, according to Roscoe Pound (1972), in adjudicating a case according to law, there are 3 (three) steps that must be taken:

1. Finding the law, determining which one will be applied among the many rules in the legal system, or if none of them can be applied, reaching a rule for that case (which may or may not be used as a rule for another case afterward) based on the material that already exists in some way indicated by the legal system;
2. Interpreting the rules chosen or determined in this way, namely determining their meaning as when the rules were formed and with respect to their intended extent;
3. Applying to the case being faced the rules found and interpreted.

The following describes the application of the concept of fairness in legal considerations of the Constitutional Court in Indonesia when faced with the constitutionality test of article norms related to 2 (two) constitutional interests, namely the protection of the constitutional rights of former convicts with the protection of the rights of citizens collectively to obtain leaders with integrity. In legal considerations, the Constitutional Court's decision will look more inclined towards which direction, is it more inclined to provide protection for the rights of former convicts or more inclined to protect the rights of citizens collectively to get a leader who is clean and with integrity?

Some of the decisions that the author adopted in this study include: Court Decision Number 14-17 /PUU-V/2007, Constitutional Court Decision Number 4/PUU-VII/2009, Court Decision Number No. 42/PUU-XIII/2015, and Constitutional Court Decision Number 56/PUU-XVII/2019. The application of the theory of justice as fairness is a reasoning that is in accordance with these three interests. In practice, the development of the application of the theory of justice as fairness in the Constitutional Court itself tends to fluctuate, sometimes the Court is more likely to provide protection to the rights of individuals or former convicts as stated in the Constitutional Court Decision Number 42/PUU-XIII/2015, where the Court only requires openly and honestly state the to the public that he is a former convict and not a repeat offender. Based on the legal argument that has been built, the former convict has already served a prison sentence so that he is considered clean. Of course, this empirically can be refuted with the argument that prisons in Indonesia as institutions for fostering prisoners cannot be said to be professional in carrying out their authority, such as the case of luxury cells for corrupt convicts, free entry and exit of prisoners from prisons by bribing correctional officers.

Then what principles or concepts can resolve conflicts of interest between the individual interests of citizens (former convicts) and the constitutional interests of citizens cumulatively. The answer to this is the principle of justice based on Pancasila. The basic values contained in Pancasila are sourced or extracted from the culture and experience of our nation, even though our nation contains various patterns of pluralism and the diverse experiences of the formulators of Pancasila and the 1945 Constitution who also have the nature of pluralism and diversity of experience. formulate the five basic values contained in society into a common

ideology, namely Pancasila. In Pancasila already contained the value of justice as fairness.

Conclusion

The conditions for being able to run for public office can be said to be rights restrictions. These restrictions are very decisive for a citizen to be elected. The Constitutional Court in exercising its authority to examine the law against the 1945 Constitution is faced with two choices between providing constitutional protection for individual citizens, namely former convicts by providing constitutional protection of citizens collectively to obtain leaders who are clean and with integrity and how the Constitutional Court can play a role as a guardian of democracy. integrity. The Constitutional Court must be able to find a balance between the three interests.

The Constitutional Court in essence has used the principle of justice as fairness, this can be seen from its legal considerations that do not limit the right of former convicts to run for public office by providing the condition that the former convict announces to the public his identity is a former convict. According to the author, the Constitutional Court in deciding a norm is not only based on the conflict between article norms and the constitution but also looks at the values that develop in society. So, it can be said that the Constitutional Court guarantees and recognizes the customary law that exists in society (living law).

The limitation of voting rights against former convicts as outlined in the terms of candidacy in the election norm regulation is something that must still be maintained by reformulating the standards of value or morality in each of the positions to be occupied, so that these conditions become rational. and does not violate the individual rights of former convicts and also does not violate the constitutional interests of citizens who have the right to vote to elect leaders who are clean and with integrity.

However, negating or abolishing the right of former convicts for life to run for elected public officials is also a form of tyranny. From a criminal perspective, limiting the right to run for public office is an additional punishment, while the main punishment is to serve the criminal law. Likewise, from a religious perspective, God alone is Forgiving, why don't we as fellow living beings forgive each other. In this context, it is necessary to apply the concept of justice as fairness so that two constitutional interests are accommodated, so as to create a balance between the protection of the rights of individuals (former convicts) and the protection of the rights of voting citizens to obtain leaders who are clean, with integrity and with quality.

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