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## **Constitutionality of KPU members prohibited to be management of community organizations. A Study of the Constitutional Court Decision Number 31 / PUU-XVI/2018**

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**Abstract.** This research is a scientific activity that seeks to obtain a solution to a problem related to the prohibition of KPU (General Election Commission) members from being administrators of community organizations. This research is a normative legal research. The Court, in its ruling, decided it was unacceptable. And in accordance with the provisions of Article 60 of the Law of the Constitutional Court on the content of paragraphs, articles, and/or parts of laws that have been tested, a re-examination cannot be requested unless the content in the 1945 Constitution of the Republic of Indonesia which is used as the basis for testing is different. Therefore, regarding the provisions of Article 21 paragraph (1) letter k which is declared to be an *open legal policy*, it must be amended the article through a revision of the legislation.

**Keywords.** constitutionality; management; election

### **Introduction**

One of the most important phenomena after the amendment to the 1945 Constitution (CRI 1945) is the emergence of independent state institutions in the Indonesian state administration system. As an answer to the inevitability of the increasing need for the state to serve its citizens. (Lumbantoruan, 2020) This is an important step in the development of the democratic process by incorporating provisions on general elections into the 1945 Constitution, which previously were only regulated in the Decree of the People's Consultative Assembly. Provisions regarding general elections are regulated in Article 22E of the 1945 Constitution of the Republic of Indonesia (CRI 1945 New).

As a follow-up to the provisions of Article 22E of the 1945 Constitution of the Republic of Indonesia, Law of the Republic of Indonesia Number 7 of 2017 concerning General Elections (UU No. 7-2017), which according to the general provisions of Article 1 point 8, the General Election Commission (KPU) is General Election Organizing Institutions that are national, permanent, and independent, in carrying out general elections. (Soelistyo, 2019)

The realize the integrity of KPU (General Election Commission) members in carrying out their duties, Article 21 of Law No. 7-2017 regulates the requirements to become members of KPU, Provincial KPU (General Election Commission), and Regency/Municipal KPU (General Election Commission). One of the conditions that became controversial and resulted in legal action to the Constitutional Court was the provision of Article 21 paragraph (1) letter k "willing

to resign from the management of community organizations that are legal entities and not legal entities if they have been elected to become members of the KPU, Provincial KPU, and Regency/Municipal KPU” because it’s deemed to have injured and contradicted the principles of human rights as formulated in Article 4 paragraph (1), Article 24 paragraph (1) of the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights (Law No. 39-1999), and Article 20 of the United Nations General Declaration of Human Rights in 1948, which states that this basic right is the obligation of the state to provide the widest and fairest protection.(Méndez Reátegui & Sumar Albuja, 2020)

In addition to being against the principles of human rights, it’s also contrary to Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia (CRI 1945) which states that "Everyone has the right to freedom of association, assembly and expression". Restrictions on the freedom to associate and assemble and express opinions through social organization instruments just because they occupy certain positions are a form of denial of universally applicable human rights principles.(Demin, 2020)

These conditions are the new norm in the 2017 general election law, where the previous law never stipulates a prohibition on being the administrator of social organizations, both legal and non-legal for general election organizers. The provisions of this article invite criticism because it’s seen that there is discriminatory treatment against general election organizers whose human rights are limited, even though being a member of a community organization that isn’t affiliated with a political party is a human right that must be respected and protected by anyone.

With the ban on holding concurrent positions as administrators of community organizations, Purwakarta KPU (General Election Commission) chairman Deni Ahmad Haidar chose to resign, because he wasn’t allowed to organize. Deni chose to continue to lead the West Java Ansor Youth Movement.(*Pilih Ansor, Ketua KPU Purwakarta Mundur*, n.d.)

Restrictions and prohibitions on KPU (General Election Commission) members include acts of discrimination against citizens who hold certain positions. Because not all state institutions that are equal to the KPU (General Election Commission) get the same treatment as stated in the provisions of the law. If the prohibition on being a member of a community organization is only a concern over independence and a concern about a conflict of interest, it’s not basic and shouldn’t be stated in the general election law.

In response to this problem, several people submitted a judicial review of Article 21 paragraph (1) letter k of Law No. 7-2017 to the Constitutional Court, including Miftah Farid, Member of the KPU (General Election Commission) Kabupaten Karawang, West Java for the 2013-2018 Period and A. Wahab Suneth, Head of Membership and Cadreship of the Central Executive/Laznah Tanfidziyah Syarikat Islam, as applicant I and Petitioner II in the case Number 31/PUU-XVI/2018 in the reason for the application number 26 states :

"That the principle of independence and impartiality of the general election organizers doesn’t lie in the involvement of the organizers in a community organization, but in the commitment of the general election organizers to the oath of office and the code of ethics. Anyone who organizes general elections, whether they are administrators of community organizations or not, if they don’t adhere to the oath of office and the code of ethics as guidelines in carrying out their duties and obligations, they are definitely not independent and impartial. According to the Petitioner, the purpose and function of community organizations in a democratic country isn’t only the embodiment of human rights, but also social and community organizations which are one of the important pillars in a democratic country”.

This means that community organization isn't a cause of low independence and a hindrance to the implementation of the KPU's (General Election Commission) obligations. Actually, it's more about commitment and firmness in holding the code of ethics for general election organizers. Integrity is more important to be used as a guide in carrying out the mandate of the state. Moreover, community organizations that are clearly not affiliated with political parties or participants in the general election, are certainly not related to the main tasks of organizing the general election. In fact, mass organizations are an important pillar of democratic development which has been touted for the progress of democracy.

The research question is how the legal considerations of the Constitutional Court to decide on the petition for judicial review of Article 21 paragraph (1) letter k of Law No. 7-2017 which relates to the requirements for KPU (General Election Commission) members as general election organizers who are prohibited from concurrently serving as administrators of community organizations ?

### **Research Methods**

This research is a scientific activity that seeks to obtain a solution to a problem related to the prohibition of KPU (General Election Commission) members from being administrators of community organizations. This research is a normative legal research.(Pratidina & Michael, 2019)

### **Discussion**

#### **General Election**

One of the constitutional changes that is seen as an important step in the development of the democratic process is the inclusion of provisions on general elections into the 1945 Constitution of the Republic of Indonesia, which previously was only regulated through a Decree of the People's Consultative Assembly.(Nazriyah, 2017) In a democratic country, general elections are one of the main pillars of an accumulation of people's will, elections are also a democratic procedure for choosing leaders.(Soelistyo, 2019)

Through the general election, the people choose their representatives, then these people's representatives are entrusted with the mandate of the people's sovereignty to take care of the country. According to Gaffar, general elections are the main means of realizing democracy in a country. The substance of the general election is the delivery of people's votes to form representative institutions and government as state administrators.(“PERTANGGUNGJAWABAN PIDANA BAGI PELAKU TINDAK PIDANA PEMILIHAN UMUM MENURUT UNDANG-UNDANG NOMOR 7 TAHUN 2017,” 2020) The people's voice is manifested in the form of voting rights, namely the right to choose representatives from various existing candidates.

General elections as a means of implementing sovereignty which according to Article 1 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia are in the hands of the people and carried out according to the Constitution. Implementing this sovereignty for the people is by determining or participating in determining certain state policies that can be carried out at any time according to certain procedures. The procedures in question are 1. The distribution of people's sovereignty through *representative democracy* or a system that is *indirect democracy*. 2. Distribution of *direct democracy*. Democracy in Indonesia has progressed very rapidly, for example in terms of freedom, belief, opinion, or assembly.(Lacey, 2019)

### **General Election Commission (KPU)**

Article 22E paragraph (5) of the 1945 Constitution of the Republic of Indonesia stipulates that General Elections shall be held by General Election Commission which is national, permanent and independent. The General Election Commission carries out its duties continuously, meaning that even though its membership is limited by a certain term of office and is free from the influence of any party, it's accompanied by transparency and clear accountability in accordance with the laws and regulations.

The existence of a general election organizing body is explicitly stated in Article 22E of the 1945 Constitution of the Republic of Indonesia, its position as a general election organizer that is national, permanent and independent, inevitably becomes important, and its existence is guaranteed and protected constitutionally in the 1945 Constitution a state that is said to be constitutionally important or a state institution that has *constitutional importance*, regardless of whether it is explicitly regulated or not in the 1945 Constitution of the Republic of Indonesia.(Riyanto et al., 2020)

The General Election Commission has indeed substantially regulated its independence, institutions and bureaucracy in serving the public must also be independent, and not become political partisans. Efforts to bring in an independent and politically neutral bureaucracy are intended to avoid any abuse of power over the bureaucracy. In terms of being the administrator of a community organization, it's not an act that violates power. Because community organizations aren't political organizations.

Membership independence is an institutional mirror. There is only one member of the general election organizer who isn't neutral, not independent or not independent, then the bet is the good name of the institution. However, this doesn't mean that KPU members must have limited human rights and must also receive the same treatment as citizens. Because it's clear that Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law.

That the guarantee of association and assembly are basic human rights guaranteed by the 1945 Constitution of the Republic of Indonesia. The guarantee of association and assembly has been explicitly formulated in Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that "Everyone has the right to freedom of association, assembly and issuing opinions".

According to the Petitioners, these basic rights are an obligation for the state to provide the widest and fairest protection possible.(O'Donnell & Talbot-Jones, 2017)v Provisions to resign from the management of civil society organizations that are legal entities and not legal entities, for elected KPU members, also injure and conflict with human rights principles as formulated in Article 4, Article 24 paragraph (1) of Law No. 39-1999, and Article 20 of the 1948 United Nations General Declaration of Human Rights.

### **Requirements for candidates for KPU, Provincial KPU, or Regency/Municipal KPU members**

One of the requirements to become a KPU General Election Commission member is regulated in Article 21 paragraph (1) letter k: "willing to resign from the management of a social organization that is a legal entity and isn't a legal entity if it has been elected as a member of the KPU General Election Commission, Provincial KPU, and Regency/Municipal KPU" as proposed in the judicial review to the Constitutional Court because it is considered contrary to Article 28D paragraph (1) and Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The presence of the Constitutional Court is to affirm the rule of law and



the sovereignty of the people. The rule of law and the sovereignty of the people are two sides of the principle of constitutionalism.(Salia, 2017)

The provisions of these conditions have changed from the previous general election organizers Law Number 22 of 2007, Law Number 11 of 2015, all of which are laws concerning the administration of general elections, none of which regulates the prohibition of KPU members holding concurrent positions as administrators of community organizations. What is prohibited isn't being a member of a political party and being able to work full time.(Hammar, 2017)

In the lawsuit that was submitted for judicial review to the Constitutional Court, the government provided an explanation regarding the said article, as follows:

“Thus, the provisions in Article 21 paragraph (1) letter k of the Election Law are intended so that the independence of the general election organizers can be maintained because this is needed to be used as the basis for a neutral attitude and may free themselves from the confines *conflicts of interest*. The independence of the general election organizers is a prerequisite for the realization of a neutral attitude and is a guarantee for the rule of law and justice. The independence of election organizers is formulated as freedom from various influences, which come from outside the election organizers, including the influence of community organizations, either as interventions that affect directly or indirectly, or in the form of persuasion, pressure, coercion, threats or countermeasures because of political interests or the interests of certain social organizations. So it's appropriate to regulate the *a quo* article which requires resignation from community organizations in the event that they are elected as members of KPU, Provincial KPU, and Regency/Municipal KPU.”

The Constitutional Court considers that in fact there has been an inconsistency between the *posita* and *petitum* of the Petitioners. In the *posita* on page 24 number 27 the Petitioners stated that the Court should provide an interpretation related to the *a quo* norm, namely that it must be interpreted as "resigning from the daily management of social organizations", but in the *Petitum* section number 3 requesting that Article *a quo* be declared contrary to the 1945 Constitution of the Republic of Indonesia and hasn't binding legal force, so that it's not clear what the Petitioners really want to be decided by the Constitutional Court. Because there is a difference between such a *posita* and a *petitum*, the Court declares the petition of the Petitioners to be vague. So in conclusion, the Court concludes that the principal petition of the Petitioners against Article 21 paragraph (1) letter k, is declared vague, so that the Court's decision declares that it cannot be accepted.

### **Conclusion**

Based on the description above, it can be concluded that the material test proposed by the applicant is vague, because “there is a difference between *posita* and *petitum*. Because there is an inconsistency between the *posita* and *petitum* of the Petitioners. In the *posita*, the Petitioners stated that the Court should provide an interpretation related to the *a quo* norm, namely that it must be interpreted as "resigning from the daily management of social organizations", but in the *Petitum* section it requested that Article *a quo* be declared contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force, so that it becomes unclear what the Petitioners really want”.

The Court, in it's ruling, decided it was unacceptable. And in accordance with the provisions of Article 60 of the Law of the Constitutional Court on the content of paragraphs, articles, and/or parts of laws that have been tested, a re-examination cannot be requested unless the content in the 1945 Constitution of the Republic of Indonesia which is used as the basis for

testing is different. Therefore, regarding the provisions of Article 21 paragraph (1) letter k which is declared to be an *open legal policy*, it must be amended the article through a revision of the legislation.

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