

Interpretation of the Limitation of the Right to be Elected for State Officials: An Analysis of the Ratio Decidendi of the Constitutional Court's Decision

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Abstract. *The political right to be elected within the Indonesian constitutional practice in the aftermath of the Constitutional Court decision has led to a shifted paradigm. This article seeks to answer two questions, namely: First, why is there a shift of paradigm related to the right to be elected in the Constitutional Court Decision Number 68/PUU-XX/2022, especially regarding state officials who are not obliged to resign from their positions when they opt to become presidential and/or vice presidential candidates? Second, what is the legal impact of the Constitutional Court Decision Number 68/PUU-XX/2022 on state officials whom previously were required to resign by law? This article is the result of a doctrinal legal research that uses a case study approach, by examining the Constitutional Court decisions as the primary material. The study of the Constitutional Court's decision was carried out to analyse the considerations of the Constitutional Court justices (ratio decidendi) in issuing the said decision. This article concludes that: First, there has indeed been a shift of paradigm shift in the Constitutional Court by relaxing the restrictions on the right to be elected for state officials. The Constitutional Court views that in today's constitutional developments, it is no longer relevant to distinguish between the requirements for resignation for both elected and appointed officials. The Constitutional Court readjusts the right to be elected on the grounds that qualified human resources are needed to fill certain political positions and the right to be elected cannot be reduced due to the aforementioned circumstance in order to mitigate the risk of posing a form of discrimination. The legal impact that arose in the aftermath of the Constitutional Court's decision leads to a difference in treatment for a number of state officials/other public officials, namely that there remains a requirement to resign should they wanted to participate in political contests.*

Keywords: *Right to be Elected, State Officials, Restrictions*

Abstrak. Hak untuk dipilih dalam praktik ketatanegaraan Indonesia, pasca putusan Mahkamah Konstitusi telah mengalami pergeseran paradigma. Artikel ini ingin menjawab dua pertanyaan yaitu: Pertama, mengapa terjadi perubahan paradigma berkaitan dengan hak dipilih dalam Putusan MK Nomor 68/PUU-XX/2022 khususnya mengenai pejabat negara yang tidak harus mundur dari jabatannya saat menjadi calon Presiden dan calon Wakil Presiden? Kedua, Apa dampak hukum dari Putusan MK Nomor 68/PUU-XX/2022 terhadap pejabat negara yang diharuskan mundur oleh undang-undang? Artikel ini merupakan hasil riset hukum doktrinal menggunakan pendekatan kasus yaitu dengan mengkaji putusan-putusan MK sebagai bahan utama. Pengkajian terhadap putusan MK tersebut dilakukan untuk menganalisis berkaitan dengan pertimbangan hakim MK (*ratio decidendi*) dalam mengeluarkan putusan. Artikel ini menyimpulkan bahwa: Pertama, telah terjadi perubahan paradigma MK dengan memperlonggar pembatasan hak untuk dipilih bagi pejabat negara atau pejabat publik. MK memandang bahwa dalam perkembangan ketatanegaraan hari ini sudah tidak relevan untuk membedakan syarat-syarat mengundurkan diri baik pejabat yang dipilih maupun pejabat yang diangkat. MK memperlonggar hak dipilih tersebut dengan alasan bahwa diperlukan SDM yang berkualitas untuk mengisi jabatan-jabatan politik dan menurut MK hak untuk dipilih tidak dapat dikurangi karena jika hal tersebut dilakukan merupakan bentuk diskriminasi. Dampak hukum yang timbul pasca putusan MK tersebut yaitu terdapat perbedaan perlakuan bagi sejumlah pejabat negara/pejabat publik lain yaitu masih adanya syarat mengundurkan diri jika ingin mengikuti kontestasi politik.

Kata Kunci: Hak Dipilih, Pejabat Negara, Pembatasan

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PENDAHULUAN

The Constitutional Court (MK) is an independent and impartial judicial body serves as the guardian and the sole interpreter of the Constitution, overseeing and regulating the democratic system, and serving as the guardian of the democratization process. MK also functions as the protector of the citizens' constitutional rights and of human rights.¹ As a state institution emerging from the reform era, MK has become the focal point of public expectations for improvements in law enforcement. Along with the Supreme Court (MA), MK constitutes one of Indonesia's holders of judicial power as provided for in Article 24C of the 1945 Constitution.² The constitutional function and role of MK in upholding political rights by providing protection for voters' rights in elections for citizens have significantly advanced within today's constitutional democratic system.³

The right to vote is an integral component of civil and political human rights. The right to vote, comprising both the right to cast a ballot and the right to be elected, is a fundamental aspect of human rights; therefore, measures must be ensured to guarantee its effective implementation. Restrictions on the right to vote are indeed permissible, provided that such limitations are designed to secure the appropriate recognition and respect for the rights and freedoms of others and are not discriminatory.

In this regard, several decisions by MK have been monumental and foundational in upholding the 1945 Constitution, commonly referred to as landmark decisions. One such monumental and fundamental decision is MK Decision No. 33/PUU-XIII/2015, which addresses the conflict of interest between regional head candidates and incumbents, as well as the requirement for resignation in Regional Head Elections (Pilkada).⁴ In Decision No. 33/PUU-XIII/2015⁵, MK partially granted the petition,

¹ Lailam Tanto, "Perbandingan Desain Pengujian Konstitusional Pada Mahkamah Konstitusi Federal Jerman Dan Indonesia," *Arena Hukum* 16, no. 28-03-2023 (2023), <https://doi.org/https://doi.org/10.21776/ub.arenahukum.2023.01602.4>, p.275.

² Sumadi Fadli Ahmad, "Independensi Mahkamah Kontitusi," *Jurnal Konstitusi* 8 Nomor 5, no. Oktober (2011)., p.3.

³ Yasin Rahman, "Hak Konstitusional Warga Negara Dalam Pemilu," *Jurnal Bawaslu Provinsi Kepulauan Riau* 4 Nomor 2, no. Desember (2022).,p.192.

⁴ Ni'matul Huda, *Kemunduran Demokrasi Pasca Reformasi*, Pertama (Yogyakarta: FH UII Press, 2021).44-47

⁵ This petition was filed by Adnan Purichta Ichsan, a member of DPRD of South Sulawesi representing the Golkar Party. Adnan objected to Article 7(r) and Article 7(s) of Law No. 8 of 2015, which amended Law No. 1 of

specifically regarding the interpretation of the phrase “does not have a conflict of interest” in the context of the qualifications for regional head candidates. This ruling affirms that the provision prohibiting regional head candidates who have blood relations or direct kinship (one generation upward, downward, or laterally) with the incumbent from participating in regional head elections is inconsistent with the 1945 Constitution and therefore lacks binding legal force. Furthermore, MK declared that members of the House of Representatives (DPR), the Regional Representative Council (DPD), and the Regional House of Representatives (DPRD) who wish to run for regional head must resign upon being officially designated as candidates by the Electoral Commission (KPU/KIP).

In 2014, the MK received a petition from eight civil servants (PNS) in Jakarta who intended to run for regional head positions and seats in the DPD. The substantive issues under review were Article 119 and Article 123(3) of the State Civil Apparatus (ASN) Law, which require PNS to tender a written resignation upon registering as candidates for governor, regent, mayor, or DPD membership with the General Elections Commission (KPU). In MK Decision No. 41/PUU-XII/2014, MK partially granted the petition and ruled that Article 119 and Article 123(3) of the ASN Law are inconsistent with the 1945 Constitution. MK clarified that the resignation requirement for PNS should not be imposed at the time of candidate registration but rather should take effect when the individual is officially designated as a candidate for the elections for governor, regent, mayor, the Presidential/Vice Presidential elections, or the elections for seats in the DPR, DPD, and DPRD.⁶

In 2017, MK received a petition from Abdul Wahid, a member of DPRD of Riau Province. The petitioner objected to the inclusion of Article 7(2)(s) of Law No. 10 of 2016, which amended Law No. 1 of 2015 concerning the Ratification of Emergency Law No. 1 of 2014 on the Election of Governors, Regents, and Mayors. This provision

2015 concerning the ratification of Emergency Law No. 1 of 2014 on the Election of Governors, Regents, and Mayors. Article 7(r) governs the requirements for candidates for governor, vice governor, regent, vice regent, and mayor (including deputy mayor) by stipulating that they “must not have a conflict of interest with the incumbent.” Meanwhile, Article 7(s) establishes the obligation for members of DPRD to notify their leadership of their candidacy for governor, vice governor, regent, vice regent, and mayor (including deputy mayor)., *see*, MK RI, Putusan MK No. 33/PUU-XIII/2015 (2015). p.8.

⁶ *see*, MK RI, Putusan MK No 41/PUU-VII/2014 (2014)., p.34.

requires the petitioner to tender a written resignation as a member of DPRD of Riau Province upon being designated as an electoral candidate. As the petitioner, Abdul Wahid argued that the application of Article 7(2)(s) of Law No. 10 of 2016 resulted in discriminatory treatment, since his political opponents, who were incumbents⁷, were not obligated to resign upon being designated as candidates, but were only required to take unpaid leave. Abdul Wahid's petition, filed under Petition Number 45/PUU-XV/2017, was entirely rejected by MK.

Based on the foregoing explanation, if a member of DPR or DPRD wishes to run for governor, vice governor, regent, vice regent, mayor, or deputy mayor, they must submit a written resignation upon being designated as an electoral candidate. If a governor, vice governor, regent, vice regent, mayor, or deputy mayor intends to run for a seat in the DPR or DPRD, they are required to tender a written resignation once officially designated as an electoral candidate. Furthermore, if a PNS or ASN seeks to run for governor, vice governor, regent, vice regent, mayor, or deputy mayor, they must submit a written resignation upon being designated as an electoral candidate.

A different treatment applies when a PNS or ASN is appointed as a state official. In such cases, positions including—but not limited to—the following require the individual to be temporarily relieved from their duties without losing their PNS status: Chairman and Deputy Chairman of MK; Chairman, Deputy Chairman, and Members of the Supreme Audit Agency (BPK); Chairman, Deputy Chairman, and Members of the Judicial Commission (KY); Chairman and Deputy Chairman of the Corruption Eradication Commission (KPK); Ministers and officials of equivalent ministerial rank; and The Head of the Indonesian Representative Office Abroad, who holds the status of Ambassador Extraordinary and Plenipotentiary.⁸ State officials⁹ are

⁷ Riau Provincial Governor and Deputy Governor Election, three gubernatorial candidates who were still active as regional heads participated, namely: Arsyadjuliandi Rachman, who is currently serving as the Governor of Riau and is paired with Suyatno, the Regent of Rokan Hilir; and Syamsuar, who is currently serving as the Regent of Siak.,*see*, Tanjung Anwar Chaidir, “3 Kandidat Cagub Riau Semuanya Incumbent, Ini Petanya,” *News.Detik.Com* (Pekanbaru, 2018).

⁸ *see*, Article 123(3) of “Law No. 5 of 2014 on the State Civil Apparatus (ASN)” (2014).

⁹ The term “*pejabat negara*” represents a narrowing of the broader concept of “public office.” Literally, a public office refers to a public or general position—a position concerning the people as a whole—whereas “*pejabat negara*” is administratively defined in a restrictive manner as state officials in accordance to specific Government Regulations, due to its association with administrative entitlements such as financial allowances and protocol privileges.,*see*, Ardiansyah Denny, “Pencabutan Hak Untuk Memilih Dan Dipilih Bagi Terpidana Tindak Pidana Korupsi,” *Cakrawala Hukum* 8 (2017), p.142.

defined as the leaders and members of state institutions as stipulated in the 1945 Constitution of the Republic of Indonesia, in addition to those state officials explicitly defined by law.¹⁰ In accordance to Article 122 of Law No. 5 of 2014 concerning ASN, state officials include: The President and Vice President; The Speaker, Deputy Speaker, and Members of the People's Consultative Assembly (MPR); The Speaker, Deputy Speaker, and Members of DPR; The Speaker, Deputy Speaker, and Members of DPD; The Chief Justice, Deputy Chief Justices, and Associate Justices of MA, as well as the chairpersons, deputy chairpersons, and judges of all courts except for ad hoc judges; The Chairperson, Deputy Chairperson, and Members of MK; The Chairperson, Deputy Chairperson, and Members of KY; The Chairperson and Deputy Chairperson of KPK; Ministers and officials of ministerial rank; The Head of the Indonesian Representative Office Abroad, who holds the position of Ambassador Extraordinary and Plenipotentiary; Governors and Vice Governors; Regents/Mayors and Vice Regents/Deputy Mayors; and other state officials as determined by law.¹¹

The latest developments in constitutional affairs regarding state officials who wish to run for president or vice president are reflected in MK Decision No. 68/PUU-XX/2022.¹² In its decision, MK granted the applicant's petition, thereby ruling that ministers and ministerial-level officials are not required to resign if they are nominated by a political party or coalition of political parties participating in the general election as candidates for president or vice president, provided that they obtain the President's approval and are granted leave. This article seeks to address the constitutional issues, specifically the application of differing norms, by analyzing the *ratio decidendi* within these MK decisions. Furthermore, the study aims to provide an analysis of the legal implications of MK Decision No. 68/PUU-XX/2022 for state officials who are mandated to resign under the applicable laws in Indonesia.

¹⁰ see, Article 1, number 7 of "Law No. 9 of 2010 on Protocol" (2010).

¹¹ see, Article 122 of Law No. 5 of 2014 on ASN.

¹² The applicant in this case is Partai Garda Perubahan Indonesia (Partai Garuda), which has filed a judicial review of Article 170(1) of Law No. 7 of 2017 on General Elections. The applicant contends that, as a non-parliamentary party, it has legal standing to bring the petition, and that the formulation of "state official" in Article 170(1) results in differential treatment of state officials—specifically, a minister or ministerial-level official who, if nominated by a political party as a candidate for president or vice president, is required to resign from their position., see, MK RI, Putusan MK Nomor 68/PUU-XX/2022 (2022), p.6-9.

This article presents a significant difference that has yet to be addressed by other researchers, specifically regarding the restriction on the right to be elected for state officials following MK Decision No. 68/PUU-XX/2022. The most outstanding feature is that this article analyzes the *ratio decidendi* of that MK decision in adjudicating the petition. Moreover, this study will also relate it to other MK decisions with similar subject matter – namely, those of restrictions on the right to be elected. While Khairul Fahmi’s article did examine MK decisions on voting rights,¹³ since that research was conducted in 2019, it did not include or analyze the latest decision, namely MK Decision No. 68/PUU-XX/2022.

RESEARCH METHODOLOGY

This research is doctrinal in nature and adopts a case study approach, namely by examining MK decisions as the primary material for analyzing the MK’s reasoning (*ratio decidendi*) on constitutional issues related to restrictions on the right to be elected. The decisions selected for analysis include MK Decision No. 41/PUU-XII/2014, MK Decision No. 33/PUU-XIII/2015, MK Decision No. 45/PUU-XV/2017, and MK Decision No. 68/PUU-XX/2022. In addition to the case study approach, the analysis employs both a statutory approach and a conceptual approach.

RESEARCH FINDINGS AND DISCUSSION

Paradigm Shift in MK Decisions Concerning the Right to be Elected

As a product of society’s evolutionary dialectics, law must continuously evolve following the prevailing era. The law, once deemed an inevitable certainty, is gradually being set aside and replaced by legal frameworks that are more relevant to specific times.¹⁴

¹³ Khairul Fahmi, “Pergeseran Pembatasan Hak Pilih Dalam Regulasi Pemilu Dan Pilkada (The Shift of the Limitation and Local Elections Regulations),” *Jurnal Konstitusi* 14, no. 4 (2017): <http://ejournal.mahkamahkonstitusi.go.id/index.php/jk>. Rayendra Erwin Moeslimin Singaraju, “Establishment Of A General Election Court System In Indonesia”, *Prophetic Law Review*, 4(1) (2022): 48–69. <https://doi.org/10.20885/PLR.vol4.iss1.art3>

¹⁴ Suadi Amran, *Filsafat Hukum: Refleksi Filsafat Pancasila, Hak Asasi Manusia Dan Etika*, 1st ed. (Jakarta: Prenadamedia Group, 2019), p. 63.

This dedicated focus on fundamentally reflecting upon science and its societal impact has given rise to the philosophy of science as an independent branch of philosophy, complete with its leading figures and distinct schools of thought. Each school gives rise to a doctrine of science (*wetenschapsleer*), formulating the criteria that a theory or intellectual activity must fulfill to qualify as scientific.¹⁵ One significant perspective that has influenced legal studies—and is particularly relevant for reflecting on legal science—is the paradigm shift¹⁶ introduced by Thomas Kuhn.

A paradigm is a foundational basis or pattern of thought that underlies the interpretative understanding of an individual or a collective group of people, regarding the entire corpus of knowledge, including the theories they have mastered. The term originates from classical Greek, *paradeigma*, which originally carried the philosophical meaning of “pattern or model of thinking.”¹⁷

The connection between Thomas Kuhn’s scientific paradigm and this MK decision lies in the evolutionary dialectic experienced by the MK justices regarding the restriction of the right to be elected, as the law continuously evolves with the passage of time. Furthermore, in human rights studies, the right to vote (both the right to vote and to be elected) is classified as a first-generation human right, often referred to as Civil and Political Rights. Civil and political rights are those rights possessed by every citizen when engaging with a state that holds power; they encompass the individual rights of citizens within a country as well as political rights, such as equality before the law and the absence of discrimination in one’s status as a citizen or legal subject. Vierdag categorizes civil and political rights as negative rights, since their realization depends on a passive stance, requiring one simply to be free from constraints.¹⁸

¹⁵ Arief Sidharta Bernard, *Refleksi Tentang Struktur Ilmu Hukum*, Ketiga (Bandung: Mandar Maju, 2009), p.84.

¹⁶ The concept of a paradigm shift fosters a collective awareness that scholars of scientific knowledge cannot perpetually operate within an entrenched notion of “objectivity” that merely functions as a mere continuation along a strictly linear progression. Scientific scholars and researchers inherently possess an instinctual subjectivity that drives them to move innovatively in search of and to uncover new approaches.,see.,Wignjosoebroto Soetandyo, *Pergeseran Paradigma Dalam Kajian-Kajian Sosial Dan Hukum* (Malang: Setara Press, 2013), p. 11.

¹⁷ Wignjosoebroto Soetandyo, p.8-9.

¹⁸ Gara Na Wayan I Dharma, “Analisis Yuridis Pencabutan Hak Memilih Dan Dipilih Sebagai Pidana Tambahan Dalam Perspektif Perlindungan Hak Asasi Manusia Pada Putusan Ratu Atut Chosiyah,” *Udayana Master Law Journal* 5 (2016), p.136-137.

Jimly Asshidiqqie states that the group of political rights guaranteed by the 1945 Constitution includes the right to associate, the right to assemble, and the right to express opinions; the right to vote and be elected for people's representation; as well as the right to be appointed to public office. The phrasing used in the law is "the right to vote" and "the right to be elected," implying that these rights can be separated and are not necessarily a single, inseparable entity.¹⁹ The term "political rights" is used to describe the rights granted by law to every individual in order to attain, seize, or secure power, status, and wealth beneficial to them. These political rights are exercised, among other means, through general elections. General elections serve as a medium for channeling citizens' political rights, whether by voting, being elected, participating in political organizations, or directly engaging in electoral campaigns.²⁰ Consequently, the state has an obligation to protect these rights so that they may be enjoyed and exercised. In this context, the state's role is more passive, meaning that it must ensure that no other party infringes upon these rights, or at the very least, it should facilitate the exercise of these rights in such a way that all citizens have equal access in exercising them.²¹

One frequently cited classification of the generations of human rights is based on the perspective of Karel Vasak, a legal scholar from France. According to him, first-generation rights guarantee a sphere of freedom in which the individual alone has the authority to determine one's own destiny. These rights, therefore, require the absence of interference from external parties (whether by the state or other social forces) in regard to the individual's sovereignty. In other words, the realization of first-generation rights is highly dependent on the absence or minimal presence of state intervention. Consequently, the state must not assume an active (positive) role, as doing so would result in violations of these rights and freedoms.²²

¹⁹ Hamdi Syaibatul Baumi, "Efektifitas Hukum Pencabutan Hak Dipilih Terhadap Koruptor Dalam Pemberantasan Korupsi," *Lex Renaissance* 3, no. Juli (2018), p.255.

²⁰ Adrianus Bawamenewi, "Implementasi Hak Politik Warga Negara," *Jurnal Warta Dharmawangsa* 13, no. 3 (2019): 43. p. 43

²¹ Janedjri M Gaffar, "Peran Putusan Mahkamah Konstitusi Dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu," *Jurnal Konstitusi* 10, no. 1 (2013). p. 12

²² Rhona K.M. Smith et al., *Hukum Hak Asasi Manusia* (Yogyakarta: usat Studi Hak Asasi Manusia Universitas Islam Indonesia (PUSHAM UII), 2008).

The exercise of civil and political rights is, among other means, carried out through fair general elections, which serve as the manifestation of the people's will – the basis for governmental authority. Without a truly valid justification, the rights to vote and to be elected in the electoral process must not be infringed upon.²³ Therefore, the International Covenant on Civil and Political Rights (ICCPR), as promulgated by the United Nations, regulates the right to vote in Article 25 of the Covenant on Civil and Political Rights²⁴:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- c. To have access, on general terms of equality, to public service in his country.*

Article 43(1) of Law No. 39 of 1999 on Human Rights stipulates that: *“Every citizen has the right to be elected and to vote in a general election based on equal rights, through voting that is direct, universal, free, secret, honest, and fair (luber dan jujur) under the provisions of the law.”*

Citizens' right to participate in elections is referred to as the right to vote, which comprises both the active right to vote (the right to cast a ballot) and the passive right to be elected.²⁵ The right to vote – whether in exercising one's vote or in being elected in the electoral process – is one of the essential elements in the evolution of democracy and serves as evidence of the existence and sovereignty of the people in governance. Thus, the right to vote means that citizens have the authority to elect representatives and to be elected as representatives in a representative body through democratic

²³ Irfan Nur Rachman, “Politik Hukum Pengaturan Right to Vote and Right to Be Candidate Dalam Undang-Undang Pasca Putusan Mahkamah Konstitusi,” *Jurnal Konstitusi* 10, no. 2 (2016): 311, <https://doi.org/10.31078/jk1026>.

²⁴ United Nations, “International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI)” (n.d.).

²⁵ C.ST. Kansil, *Hukum Tata Pemerintahan Indonesia* (Jakarta: Ghalia Indonesia, 1985).

elections.²⁶ In essence, the right to vote (both the active and passive components) is a fundamental prerequisite for any state that practices modern constitutional democracy. This is in line with Dieter Nohlen's assertion that *"The right to vote, along with freedom of expression, assembly, association, and press, is one of the fundamental requirements of modern constitutional democracy."*²⁷

According to Khairul Fahmi, as both a means and a measure of the implementation of popular sovereignty, the essence of general elections is the recognition of every citizen's right to vote and to be elected. Every citizen has an equal (fair) opportunity to participate by presenting themselves as candidates for DPR, DPD, the President and Vice President, DPRD, and for regional head positions. Furthermore, each citizen also possesses the same right and opportunity to freely determine their choices in the electoral process.²⁸

The right to be elected (i.e., to stand as a candidate) in Indonesian constitutional practice has experienced a paradigm shift, especially as reflected in various MK decisions. In this context, several of the MK's rulings have consistently reaffirmed their stance and determined that PNS are required to resign when they wish to participate in electoral contests for certain political positions.

This phenomenon can be observed in MK Decision No. 45/PUU-VIII/2010,²⁹ MK Decision No. 12/PUU-XI/2013,³⁰ and MK Decision No. 41/PUU-XII/2014. In these decisions, the MK consistently affirmed that if PNS wish to stand as candidates for political offices through elections, they must resign from their positions. The reasoning cited by MK in all these decisions pertains to the restrictions on the rights of PNS, which are inherent in the regulations governing governmental bureaucracy.³¹

²⁶ Hilmi Ardani Nasution and Marwandianto Marwandianto, "Memilih Dan Dipilih, Hak Politik Penyandang Disabilitas Dalam Kontestasi Pemilihan Umum: Studi Daerah Istimewa Yogyakarta," *Jurnal HAM* 10, no. 2 (2019): 161, <https://doi.org/10.30641/ham.2019.10.161-178>.

²⁷ Tony Yuri Rahmanto, "Calon Tunggal Dalam Perspektif Hak Memilih Dan Dipilih Di Provinsi Banten," *Jurnal HAM* 9, no. 2 (2018), <https://doi.org/10.30641/ham.2018.9.103-120>. p. 108

²⁸ Khairul Fahmi, "Menelusuri Konsep Keadilan Pemilihan Umum Menurut UUD 1945," *Jurnal Cita Hukum* 4, no. 2 (2016), <https://doi.org/10.15408/jch.v4i2.4098>.

²⁹ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 45/PUU-VIII/2010" (2010).

³⁰ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 12/PUU-XI/2013" (2013).

³¹ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 41/PUU-XII/2014" (2014).

“...When an individual chooses to become a PNS, they bind themselves to the regulations governing governmental bureaucracy. Consequently, when registering to run as a candidate for a political office contested through a general election – in this case, as a candidate for DPD – the law may prescribe conditions that, among other things, can restrict their rights as a PNS in accordance with the current political system and constitutional order. From the standpoint of obligation, the requirement for PNS to resign should not be interpreted as a limitation of human rights because no rights are diminished in this context; rather, it is a legal consequence of their own decision to enter the arena of political candidacy. In complying with bureaucratic governmental regulations, they must resign from their PNS position. According to MK, regardless of which of these two perspectives is applied in the *a quo* case, the legal obligation for PNS to resign in order to run for the DPD does not constitute a violation of constitutional rights.”

The MK’s perspective in its reasoning reveals that the interpretation was conducted in a systematic manner (*systematische interpretatie, dogmatische interpretatie*), meaning that the interpretation takes into account other legal documents. When interpreting a provision of a law, identical provisions – and even more so, a guiding principle – from other regulations must also be used as references.³² In other words, no legal regulation can be interpreted as if it stands alone; it must always be understood in relation to other regulations.³³ This approach is evident in the *ratio decidendi* of the decision, which emphasizes a PNS’s choice to participate in a regional head election contest. According to the *ratio decidendi*, once an individual officially becomes PNS, the laws governing PNS profession apply – this includes the bureaucratic regulations that require the resignation of a PNS. This requirement is what the MK refers to as a “legal consequence.”

The concept of limitations as described above is based on the notion of a democratic rule-of-law state oriented toward the implementation of good governance, aiming to foster changes in behavioral norms that integrate public service relationships within civil service law. The limitation of political rights for PNS may be tolerated, provided it ensures the recognition and respect of the rights and freedoms of others and meets

³² Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid I* (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, 2006). p. 292

³³ Firna Novi Anggoro, “Penyalahgunaan Wewenang Oleh Pegawai Negeri Sipil (Ratio Legis Pasal 36 Peraturan Pemerintah Nomor 94 Tahun 2021 Tentang Disiplin Pegawai Negeri Sipil),” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 2 (2022), <https://doi.org/10.33331/rechtsvinding.v11i2.936>. p. 936

just demands in line with moral, security, and public order considerations in a democratic society.³⁴ The limitation of human rights, as examined within human rights discourse, can be observed in the Universal Declaration of Human Rights (UDHR). Article 29, paragraph (2) of the UDHR stipulates that:³⁵

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

If one parses the MK's perspective, it becomes evident that MK distinguishes between elected positions and appointed positions. Theoretically, Jimly Asshiddiqie differentiates two models of filling governmental positions: those appointed through elections (elected public officials) and those appointed without elections (non-elected public officials). Typically, positions filled through an electoral process are classified as political offices, whereas positions filled via appointment are considered administrative offices.³⁶ In other words, if PNS wishes to hold an elected office, they are required to resign from their civil service position. According to MK, this does not constitute discrimination. MK substantiates its view by adopting a human rights perspective that acknowledges rights may be subject to limitations, as further illustrated in its reasoning:³⁷

Based on MK Decision No. 132/PUU-VII/2009 dated December 29, 2009, the Court essentially held that, based on the original intent of the framers of the 1945 Constitution, all human rights listed in Chapter XA of the 1945 Constitution may be subject to limitations (see Article 28J, paragraph (2) of the 1945 Constitution) as the concluding provision for all regulations governing human rights in Chapter XA of the 1945 Constitution. Based on systematic interpretation (systematische interpretatie), the human rights stipulated in Articles 28A through 28I of the 1945 Constitution are subject to the limitations set out in Article 28J, paragraph (2) of the 1945 Constitution. The systematic arrangement of human rights in the 1945 Constitution is consistent with the

³⁴ Tedi Sudrajat and Agus Mulya Karsona, "Menyoal Makna Netralitas Pegawai Negeri Sipil Dalam Undang-Undang Nomor 5 Tahun 2014 Tentang Aparatur Sipil Negara," *Jurnal Media Hukum* 23, no. 1 (2016), <https://doi.org/10.18196/jmh.2015.0070.87-94>. p. 93

³⁵ "Universal Declaration of Human Rights" (n.d.).

³⁶ Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia* (Jakarta: PT Bhuna Ilmu Popular, 2007). p. 745

³⁷ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, Putusan Mahkamah Konstitusi Nomor 41/PUU-XII/2014.

systematic arrangement found in the Universal Declaration of Human Rights, which similarly places the provision on limiting human rights as a concluding article – namely, Article 29, paragraph (2), which states: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

Based on these considerations, the MK establishes the basis for its argument that human rights have two dimensions: derogable rights and non-derogable rights. Non-derogable rights are absolute rights that the state cannot diminish, even in states of emergency. In contrast, derogable rights are those that may be limited or curtailed by the state.³⁸ In this context, MK, in its reasoning, classifies the right to vote, which comprises both the right to be elected and the right to vote, as falling into the category of human rights that may be limited. This is evident from the following reasoning provided by MK:³⁹

Although every citizen has the right to vote and to be elected in a democratic general election, this does not negate the right of the state or lawmakers to impose restrictions through legislation, so long as those restrictions do not conflict with the principles enshrined in the 1945 Constitution. Similarly, restrictions on the exercise of civil and political rights – in this case, the right to be elected as a member of the DPD – are permissible under the same conditions;

In line with and grounded upon the arguments outlined above, MK, in its reasoning in this decision, has also imposed a resignation requirement for members of the the Indonesian National Army (TNI) and the Indonesian National Police (Polri) if they wish to contest political positions. This can be seen in the following reasoning:

Considering the legal reasoning set forth in the two MK decisions mentioned above, it is evident that the provisions of the Law requiring the resignation of PNS, as well as members of the TNI and Polri, if they wish to run for political or public office that is filled through an electoral process – including, in this case, candidacies for regional head or vice-regional head – are, according to the Court, not inconsistent with the 1945 Constitution.

³⁸ Pusat Penelitian and Pengelolaan Perpustakaan, *Pengaturan Hak Kebebasan Berpendapat Dalam Konstitusi*, 2021.

³⁹ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, Putusan Mahkamah Konstitusi Nomor 41/PUU-XII/2014.

The MK also restricts the right to be elected for Members of the DPR, DPD, and DPRD who intend to participate in an electoral contest. According to MK, this measure is meant to satisfy the requirements for legal certainty and fair treatment. This is evident from the following reasoning:⁴⁰

... the question arises as to why the same requirement does not apply to members of the DPR, DPD, and DPRD. Therefore, in order to ensure proportionality and to fulfill the demands of fair legal certainty, both PNS and members of the DPR, DPD, and DPRD must be equally required to resign if they wish to run for a public or political office that is filled through an electoral process (i.e., elected officials). However, to further satisfy the demands of fair legal certainty, this resignation requirement is not to be executed at the time of registration but rather when the individual has been officially declared a candidate by the election organizers. This is done by making a declaration stating that once they are officially designated as a candidate for a public or political office (filled via election), they must submit an irrevocable resignation statement at the time of registration, which takes effect immediately upon being officially declared as a candidate.

Restrictions on the right to be elected are also applied to officials or employees of state-owned enterprises (BUMN/BUMD). According to the reasoning in the MK's decision, the same provisions from the previous rulings also apply to officials/employees of BUMN/BUMD because their professions are directly related to national interests. This reasoning can be seen in the following excerpt:⁴¹

According to the MK, the same reasoning applies in this context. An individual's position or status at BUMN/BUMD is also a matter of professional choice and is directly linked to national interests in the pursuit of public welfare. Consequently, it is inherently tied to the framework of governmental bureaucracy, even though such enterprises have been established as private legal entities with their assets separated from those of the state. Therefore, if an official or employee of a state-owned enterprise were allowed, at any time and without conditions, to leave their role in order to pursue a political position, the state or government would suffer losses, just as would be the case if the same were permitted PNS, members of the TNI, or members of the Polri;

Based on the range of various considerations set out in the above MK decisions, it can be concluded that MK imposes restrictions on human rights, particularly concerning the right to be elected for public officials. The arguments in MK's reasoning can be summarized into at least two points, namely: *First*, MK grounds its reasoning on the

⁴⁰ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia. Putusan MK Nomor 41/PUU-XII/2014

⁴¹ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 33/PUU-XIII/2015" (2015).

concept that human rights are derogable, which means that the right to be elected is not granted unfettered. In this context, lawmakers are permitted to set certain limits in the law to regulate the right to be elected for public/state officials. In other words, human rights can be restricted by law, but such restrictions must be explicitly stated in a limited manner.⁴² Restrictions on political rights are permissible as long as they adhere to the principles and legal provisions in force. The limitation of rights in the electoral sector is aimed at creating a quality democracy.⁴³

Second, MK's reasoning also concerns the differentiation between categories of positions, which are divided into those filled through elections and those appointed. In short, if an appointed official wishes to participate in a political contest conducted through an electoral process, then they are required to resign.

In another decision, MK also considered when an individual is required to resign from their position when they wish to participate in a contestation. MK stated that such resignation is effective from the moment the individual is officially designated as a candidate. This can be seen in the following reasoning:⁴⁴

Clearly, in the context of the a quo petition, a PNS or a member of the TNI, the Polri, or an official/employee of BUMN/BUMD who intends to run for the position of regional head or deputy regional head is required to resign as a PNS (or as a member of the TNI, the Polri, or an official/employee of BUMN/BUMD) only after being officially designated as a candidate for regional head or deputy regional head. The Court's reasoning is that it would be disproportionate, and therefore unfair, if a PNS (or a member of the TNI, the Polri, or an official/employee of BUMN/BUMD) were required to resign from their position or office as a PNS (or as a member of the TNI, the Polri, or an official/employee of BUMN/BUMD) upon registering as a candidate for regional head or deputy regional head, while that person has not necessarily passed the verification to be officially designated as a candidate for regional head or deputy regional head.

An alternative argument regarding the limitation of human rights for public/state officials who wish to participate in political contestation can be seen in MK Decision No. 45/PUU-XV/2017. In this decision, MK actually loosened the requirement by not

⁴² Warih Anjari, "Pencabutan Hak Politik Terpidana Korupsi Dalam Perspektif Hak Asasi Manusia," *Jurnal Yudisial* 8, no. 1 (2015), <https://doi.org/http://dx.doi.org/10.29123/jy.v8i1.37>.p. 26

⁴³ Donal Fariz, "Pembatasan Hak Bagi Mantan Terpidana Korupsi Menjadi Calon Kepala Daerah," *Jurnal Konstitusi* 17, no. 2 (August 19, 2020), <https://doi.org/10.31078/jk1724>. p. 326

⁴⁴ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, Putusan Mahkamah Konstitusi Nomor 33/PUU-XIII/2015. Putusan MK No. 33/PUU-XIII/2015

mandating that public officials – in this case, incumbent regional heads – resign if they wish to run for re-election, but instead only requiring them to take unpaid leave from state duties. This can be seen in the following excerpt:⁴⁵

In Decision No. 17/PUU-VIII/2008, dated August 4, 2008, the Court stated that for someone elected as a regional head, the law has granted the right to serve a term of five years. Thus, if the incumbent is dismissed, it will result in a regional head who wishes to run for the position in the next term losing their constitutional right to hold the office for the full five-year term.

Based on both of those MK decisions, the Court explicitly stated that candidates for regional head positions who are incumbent regional heads do not have to resign but only need to apply for leave without pay, whereas candidates for regional head positions who are members of the DPR, DPD, and DPRD must submit a resignation letter once they are designated as participants in the regional head election. Therefore, according to the Court, the applicant's argument that members of the DPR, DPD, and DPRD do not have to step down is not supported by law.

Based on the above MK considerations, it can be seen that MK no longer uses the argument that human rights can be restricted. In those considerations, MK instead relies on the argument of upholding the constitutional right of incumbent officials, namely the right to hold office for a full five-year term. However, when compared to the members of the DPR, DPD, and DPRD who are required to step down, in fact, both regional heads and members of the DPR, DPD, and DPRD share the similarity of being political positions obtained through elections and having a five-year term.

The next decision is MK Decision No. 68/PUU-XX/2022. Interestingly, in its legal reasoning (*ratio decidendi*), MK stated that there is a substantive similarity between this petition and the previous decisions as outlined above.⁴⁶

...The Court found that there is a substantive similarity in the applicability of the norm related to the phrase "state official" as used in the above MK decisions concerning running for regional head and deputy regional head. Therefore, in the a quo petition, the Court's legal reasoning regarding the constitutionality of Article 170 paragraph (1) of Law No. 7/2017 cannot be separated from the legal reasoning of the aforementioned MK decisions.

⁴⁵ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 45/PUU-XV/2017" (2017).

⁴⁶ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 68/PUU-XX/2022" (2022).

MK, in its legal reasoning, also stated that differentiating the resignation requirements for public/state officials is no longer relevant.⁴⁷

...The Court no longer distinguishes between the electoral regime and the election of regional heads, thus differentiating the resignation requirements for public/state officials, whether appointed or elected, is no longer relevant to be applied in the current context, because filling the aforementioned political positions requires quality candidates from various elements and potentials of Indonesia's human resources.

Based on the MK's legal reasoning, it is evident that MK has relaxed the requirements for state officials in exercising their right to be elected. While previously, some MK decisions restricted the electoral rights of state officials by requiring them to resign once they were officially designated as candidates, MK Decision No. 68/PUU-XX/2022 simplified and relaxed those requirements.

This form of relaxation can also be seen from the MK's reasoning, which states that the constitutional rights of citizens to have the opportunity to be elected as well as to vote should not be diminished. In other words, MK's view is that the right to be elected is a human right categorized as a non-derogable right. This can be seen from the following considerations:⁴⁸

Furthermore, regarding this matter, according to the Court, from the perspective of a citizen who holds a certain office, that individual inherently possesses a constitutional right as a citizen to be elected and to vote, as long as such rights are not revoked by law or a court decision. Therefore, regardless of whether a state official holds a position because the nature of the office is based on election or appointment, their constitutional right to have the opportunity to be elected and to vote should not be diminished.

More explicitly, MK also refutes arguments relating to concerns about the lack of neutrality if state officials do not resign from their positions. While many parties worry that one of the main causes of power abuse by state officials, including ministers, is conflicts of interest,⁴⁹ MK instead argues that such concerns are not commensurate with protecting the constitutional rights of the official concerned. In fact, even if a resignation requirement exists, according to MK, it constitutes a

⁴⁷ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia. Putusan MK No. 68/PUU-XX/2022

⁴⁸ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia. Putusan MK No. 68/PUU-XX/2022

⁴⁹ Ahmad Zaini et al., "Presidential Nominations from Active Cabinet Ministers: A Delicate Balance between the Interpretation of Constitutional Court Decisions and Political Interests," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 6, no. 2 (2023), <https://doi.org/10.24090/volksgeist.v6i2.9355>. p. 290

restriction on the fulfillment of constitutional rights and represents discrimination.

These considerations can be seen from the following excerpt:⁵⁰

That, from the perspective of concerns that holding office by an official nominated as President or Vice President will affect his or her neutrality and thereby require resignation, according to the Court, is not proportionate to the protection of the constitutional rights possessed by the concerned official. Moreover, in obtaining that office, the official in question endures a long career journey, and it may well be that this point represents the true pinnacle of his or her career. Therefore, without having to resign, the professional maturity of the official can still be utilized in contributing to the development of the nation and state, even if the official loses in the contest for President and Vice President. Furthermore, the different treatment imposed on ministers or ministerial-level officials, as state officials required to resign pursuant to Article 170 paragraph (1) of Law No. 7/2017 when nominated as President or Vice President, results in restrictions on the fulfillment of constitutional rights. According to the Court, such restrictions and differentiation also constitute a form of discrimination against political parties when they nominate their best cadres as candidates for President or Vice President. Moreover, this could impair the constitutional rights of political parties by subjecting them to discriminatory treatment as guaranteed and protected by Article 28I paragraph (2) of the 1945 Constitution.

The MK essentially places the right to be elected and to vote as nearly unlimited. For the right to vote and be elected should not be restricted even for the purpose of creating an election that can produce political leadership with integrity and without moral defects. In other words, the right to vote, which was originally confined within a narrow scope of limitation, has been freely shifted to a point of limitation with a broader spectrum—that is, restrictions may only be imposed solely on the grounds of incapacity.⁵¹

The change in paradigm regarding the MK's stance demonstrates that MK can change previous decisions, as affirmed in MK Decision No. 24/PUU-XVII/2019, which in one of its considerations stated that:⁵²

“Considering that, both doctrinally and in practice, in the constitutional review of laws, a change in the Court's stance is not something without basis. Such a

⁵⁰ Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, Putusan Mahkamah Konstitusi Nomor 68/PUU-XX/2022. Putusan MK No. 68/PUU-XX/2022

⁵¹ Fahmi, “Pergeseran Pembatasan Hak Pilih Dalam Regulasi Pemilu Dan Pilkada (The Shift of the Limitation and Local Elections Regulations).”

⁵² Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, “Putusan Mahkamah Konstitusi No. 24/PUU-XVII/2019” (2019).

change is indeed a common occurrence. Even, for instance, in the United States, which follows the common law tradition and strictly applies the principle of precedent, *stare decisis*, or *res judicata*, it has become common practice for the courts—especially the United States Supreme Court (which also functions as a Constitutional Court)—to change its stance on matters related to the constitution.”

Doctrinally, this paradigm shift is based on the doctrine of the living constitution, which means that MK has an obligation to explore, follow, and understand the values that are alive within society. The constitution possesses a dynamic meaning, which is a product of non-originalist thought. Non-originalism is one of the interpretative approaches, alongside originalism. Adherents of non-originalism argue that the principle of interpretation, which seeks to determine the meaning of the Constitution based on the conditions at the time, targets not only the text but also the interpreter who observes the situation at that moment.⁵³ This is reflected in the MK’s reasoning that it no longer distinguishes between the electoral regime and the regional head elections, so the resignation requirement for public or state officials, whether appointed or elected, is considered no longer relevant to apply in the current context. Based on the range of MK decisions that have been outlined along with the considerations of the MK’s judges in those decisions, the following table compares the differences and paradigm shifts in the reasoning of the MK decisions. These MK decisions are: MK Decision No. 45/PUU-VIII/2010, MK Decision No. 12/PUU-XI/2013, MK Decision No. 41/PUU-XII/2014, MK Decision No. 33/PUU-XIII/2015, MK Decision No. 45/PUU-XV/2017, and MK Decision No. 68/PUU-XX/2022.

Table 1. Paradigm Shift on the Restriction of the Right to be Elected for State Officials in MK Decisions

| MK Decision Number | Subject | Decision Conclusions | MK Considerations |
|--------------------|---------|----------------------|-------------------|
|--------------------|---------|----------------------|-------------------|

⁵³ Oly Viana Agustine, “Keberlakuan Yurisprudensi Pada Kewenangan Pengujian Undang-Undang Dalam Putusan Mahkamah Konstitusi,” *Jurnal Konstitusi* 15, no. 3 (2018): 642, <https://doi.org/10.31078/jk1539>. p. 659-670. Nimatul Huda, Dodik Setiawan Nur Heriyanto, and Allan Fatchan Gani Wardhana “The Urgency of the Constitutional Preview of Law on the Ratification of International Treaty by the Constitutional Court in Indonesia,” *Helikon* 7, no. 12 (December 2021): e08529, [https://www.cell.com/helikon/fulltext/S2405-8440\(21\)01989-7](https://www.cell.com/helikon/fulltext/S2405-8440(21)01989-7).

| | | | |
|---|-----|--|--|
| MK Decision No. 45/PUU- VIII/2010 | PNS | Must resign | <ul style="list-style-type: none"> - Restrictions on human rights are permitted, - Legal consequences arise from one's own decision to enter the arena of political office elections |
| MK Decision No. 12/PUU-XI/2013 | PNS | Must resign | <ul style="list-style-type: none"> - Restrictions on human rights are permitted, - Legal consequences arise from one's own decision to enter the arena of political office elections |
| MK Decision No. 41/PUU- XII/2014 | PNS | A written resignation as a PNS should not be submitted upon registering as a candidate; rather, it should be submitted only once the individual has been declared a candidate for the election by the KPU. | <ul style="list-style-type: none"> - Restrictions on human rights are permitted, - Legal consequences arise from one's own decision to enter the arena of political office elections, - Ignoring the fairness aspect if mandatory resignation is required before officially becoming a candidate. - There is a consideration that members of the DPR, members of the DPD, and members of the |

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|----------------------------------|--|--|---|
| | | | DPRD must all be required to resign if they intend to run for office. |
| MK Decision No. 33/PUU-XIII/2015 | Members of DPR, DPD, and members of DPRD | It is required to make a declaration stating that once officially designated by the election organizer as a candidate for regional head or candidate for deputy regional head, the individual concerned shall issue an irrevocable resignation letter. | <ul style="list-style-type: none"> - It is considered disproportionate (and therefore unfair) if one does not resign - The responsibility and trust that have been bestowed by society - There is a consideration that requires that PNS or members of the TNI, members of the Polri, or officials/employees of BUMN/BUMD who intend to run for regional head or deputy regional head must resign as PNS (or as members of the TNI, members of the Polri, or officials/employees of BUMN/BUMD) once they have been officially designated as candidates |
| MK Decision No. 45/PUU-XV/2017 | Incumbent Regional Head | Not required to resign, only take leave without state benefits. | Fulfills the constitutional right of incumbent officials, namely the right to hold office |

| | | | |
|--------------------------------|--|---|--|
| | | | for a full five-year term. |
| MK Decision No. 68/PUU-XX/2022 | Minister or ministerial-level official | Not required to resign, only take leave without state benefits. | <ul style="list-style-type: none"> - No longer differentiating between the electoral regime and the election of regional heads, making it irrelevant to distinguish the resignation requirements for public/ state officials, whether appointed or elected, in the current context. - To fill these political positions, qualified candidates from diverse segments and the potential of Indonesia's human resources are needed - Their constitutional right to the opportunity to be elected or to vote must not be diminished - According to MK, if there is a resignation requirement, it constitutes a form of restriction on the fulfillment of constitutional rights |

| | | | |
|--|--|--|---------------------------------|
| | | | and is a form of discrimination |
|--|--|--|---------------------------------|

Legal Impact of the MK Decision No. 68/PUU-XX/2022

The existence of MK is extremely important in a democratic rule-of-law state. As a guardian of democracy, MK faces highly dynamic empirical issues. MK is fully aware that the right to be elected and the right to vote are fundamental human rights of citizens. Through its decisions, MK has played a role in protecting the right to be elected in both general elections and regional head elections.⁵⁴

MK Decision No. 68/PUU-XX/2022 has changed MK's perspective regarding the right to be elected for state officials as well as public officials. At least, through this decision, several shifts in perspective can be identified that will serve as benchmarks for analyzing its impact on the availability of the right to be elected for state officials or other public officials, which had previously been subject to certain restrictions. These perspectives of MK are as follows: *First*, at present, based on the developments in constitutional governance, it is no longer relevant to distinguish the resignation requirements for public/state officials, whether appointed or elected. Such a consideration has opened the opportunity for state officials and other public officials, whether elected or appointed, to avoid certain restrictions that are inconsistent with MK Decision No. 68/PUU-XX/2022. *Second*, the availability of qualified human resources is one of MK's considerations for not mandating a resignation when seeking nomination for office. In other words, the role of public or state officials should not be constrained by a mandatory resignation requirement. For example, a public official who is an ASN should not have to resign simply for running as a candidate for regional head. *Third*, in Decision No. 68/PUU-XX/2022, MK does not differentiate the constitutional rights of citizens by stating that their constitutional right to the opportunity to be elected and to vote must not be diminished. If a resignation

⁵⁴ Agusniwan Etra, "Peran Mahkamah Konstitusi Dalam Perlindungan Hak Pilih Dalam Negara Hukum Demokratis," *Jurnal Konstitusi* 19, no. 2 (June 2, 2022), <https://doi.org/10.31078/jk19210>. p. 500

requirement exists, then, according to MK, it constitutes a restriction on the fulfillment of constitutional rights and is a form of discrimination.

This should also apply to other public/ state officials who have been required to resign until now. For example, consider the existence of ASN. Based on Article 122 of Law No. 5 of 2014 on ASN, state officials are: President and Vice President; Chairman, Vice Chairman, and Members of the MPR; Chairman, Vice Chairman, and Members of the DPR; Chairman, Vice Chairman, and Members of the DPD; Chairman, Vice Chairman, Deputy Chairman, and Chief Justice of MA, as well as Chairman, Vice Chairman, and judges in all judicial bodies except ad hoc judges; Chairman, Vice Chairman, and Members of MK; Chairman, Vice Chairman, and Members of KY; Chairman and Vice Chairman of KPK; Ministers and ministerial-level officials; heads of Indonesian representations abroad who serve as Extraordinary and Plenipotentiary Ambassadors; Governors and Vice Governors; Regents/Mayors and Deputy Regents/Deputy Mayors; and other state officials as stipulated by law.

MK Decision No. 68/PUU-XX/2022 has resulted in that a minister or state official of ministerial rank is not required to resign if nominated by a political party participating in the elections or a coalition of political parties as a candidate for president or vice president, provided that the minister or ministerial-level state official obtains approval and a leave permit from the President.

The legal impact arising after MK Decision No. 68/PUU-XX/2022 includes the continued existence of differential (discriminatory) treatment for a number of state/public officials—such as governors/vice governors, regents/deputy regents, and mayors/vice mayors—who, when running for election as members of DPR or DPRD, are required to submit a written resignation statement as soon as they are declared as election participants. The same condition also applies to ASN from PNS who run or are nominated for President and Vice President; Speakers, Deputy Speakers, and Members of DPR; Speakers, Deputy Speakers, and Members of the DPD; governors and vice governors; as well as regents/mayors and deputy regents/vice mayors, who are likewise required to submit a written resignation upon being declared as election participants.

A member of DPR or DPRD who wishes to run for governor/vice governor, regent/vice regent, or mayor/vice mayor is required to submit a written resignation statement from the moment they are designated as an election candidate. Likewise, a governor/vice governor, regent/vice regent, or mayor/vice mayor who intends to run for a seat in the DPR/DPRD must submit a written resignation statement from the moment they are designated as an election candidate. In addition, if a PNS or ASN wishes to run for governor/vice governor, regent/vice regent, or mayor/vice mayor, they too are required to submit a written resignation statement from the moment they are designated as an election candidate.

The above facts contradict Article 27, paragraph (2) of the 1945 Constitution, which states: “All citizens shall have equal standing in the law and government and must uphold that law and government without exception.” The existence of the right to obtain equal standing in law and government means that the law is only meaningful if it guarantees equality – especially equality before the law and government. The law must be capable of ensuring that all members of society are treated according to objective and equal standards.

A member of the DPR/DPRD, a governor/vice governor, a regent/vice regent, a mayor/vice mayor, or a PNS who wishes to develop themselves both individually and collectively to become a state servant or community servant – and who, in this context, is either nominated or becomes a candidate for DPR/DPRD, for governor/vice governor, for regent/vice regent, or for mayor/vice mayor through a direct, general, free, and secret electoral process – is explicitly guaranteed this right under Article 28C of the 1945 Constitution. This Article states, “every person shall have the right to advance himself in pursuing his rights collectively to build society, the nation, and the state.”

CONCLUSION

Following MK Decision No. 68/PUU-XX/2022, there has been a paradigm shift reflected in the judges’ considerations that essentially relaxes the restrictions on the right to be elected for state or public officials. This is because MK considers that in the

evolution of modern state governance, it is no longer relevant to differentiate the resignation requirements for both elected and appointed officials. MK further relaxes this right on the grounds that high-quality human resources are necessary to fill political positions and affirms that the right to be elected cannot be diminished, as doing so would constitute a form of discrimination.

The legal impact arising after MK Decision No. 68/PUU-XX/2022 includes, among other things, the continued differential (discriminatory) treatment of certain state or public officials even to this day. There still exist laws and regulations that impose limitations or require resignation for those wishing to participate in political contests. Therefore, lawmakers should conduct a thorough evaluation of the regulations that restrict the right to be elected, taking into account the *ratio decidendi* of MK Decision.

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