

Research Article

Juridical Overview on the Inconsistency of Prohibition to be the Member of Political Parties for the Members of Public Institutions

Fajar Prima Julian^{1*}, Ratna Herawati²¹Master of Law Program, Faculty of Law, Universitas Diponegoro²Faculty of Law, Universitas Diponegoro

*primaafajar12@gmail.com

ABSTRACT

The creation of a justice in the life of the nation and state must be supported by regulations that do not conflict with other regulations. The prohibition to join a political party for administrators of public institutions is in conflict with higher regulations. The article is considered contrary to the principle of "Equality before the Law" when viewed from the aspect of equal concern put forward by Ronald Dworkin. The purpose of this research was to analyze the inconsistency of the prohibition article for members of public institutions to join political parties and to explain the legal implications for the public institutions when they do not comply with these regulations. The method used was normative juridical with descriptive analytical research specifications, and the type of the data were secondary data. The data analysis was conducted qualitatively. Political rights are part of the human rights owned by a person who should not be limited by discriminatory treatments. In fact, there are still restrictions on these political rights which are detrimental to a person from contributing to become the administrator of a public institution. The contents of conflicting articles cause the public institutions to have a crisis of law compliance, is actually a hierarchical harmony between laws and regulations in Indonesia.

Keywords: Inconsistency; Political parties; Public institutions.

A. INTRODUCTION

The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) Article 1 paragraph (3) states "Indonesia is a state of law". Through this understanding, it means that if the legal position in a country is very necessary, it can be the forerunner to the creation of law in society that is useful for providing a sense of security, comfort, and peace. The existence of a country is necessary, because it is aimed at creating a safe, peaceful and orderly society. The state of Indonesia also has tiered

regulations, ranging from higher regulations to lower regulations (Sagama, 2015).

In order to enforce norms and restore the function of the regulations themselves, in order to make the law a guide for community behavior to connect with each other, law enforcement efforts are very important in everyday life (Moho, 2019). The view of the law, not only limited to making rules, but the law must filter justice from an uncontrolled life, through deliberation, based on authoritative wisdom, and guided by methods that lead to order (Feigenson, 2014).

In his book entitled pure legal theory, Hans Kelsen argues that a legal norm is described in a tiered and multi-layered form. This means that a legal norm with a lower position must be based on a higher legal norm, a norm that has a high position, also based on the previous norm and its higher position. This description illustrates how important the meaning of hierarchy in a statutory regulation is. This hierarchical system is known as the norm level theory or commonly called *Stufenbautheorie* (Marzuki, 2020).

In the context of national and state life, long before the process of globalization took place in people's lives, pure legal theory had contributed to the fundamental contestation of legal formalism in the world and contemplated the unity and hierarchical structure of the legal order in a country and nation (Benda-Beckmann, & Turner, 2019).

Interpreting a hierarchy of laws and regulations, it cannot be separated from the legal principle which reads "*Lex Superior Derogat Legi Inferior*" which has the understanding that Regulations that have a higher position will override regulations that have a lower or lower position. Determining whether a norm has a higher position than other norms is not a difficult thing, because basically the rule of law has a written legal order that is structured hierarchically (Prayitno, 2017).

A legal norm will be said to be valid if the regulation is made and ratified by the competent institutions in this regard, therefore the hierarchical position in the laws and regulations in Indonesia has a vital position. Lower norms cannot conflict with higher norms, so as to create a tiered legal rule. In

addition, the hierarchy of a statutory regulation also contains rules containing orders and prohibitions, which become the rule of law in one country (Prasetyo, 2010).

Article 8 paragraph (5) of the Minister of Home Affairs Regulation Number 18 of 2018 concerning Village Community Institutions and Village Traditional Institutions states that administrators from public institutions are prohibited from being members of a political party. The content is concluded as a condition that must be fulfilled by the community if they want to become administrators of public institutions.

As the Minister of Home Affairs at that time, Tjahjo Kumolo was of the opinion that, even though he was not an ASN (State Civil Officer), neither the head of the RT nor the head of the RW could participate in active politics because structurally they were part of state institutions, then he also associated that RT and RW as a structural official at the Kelurahan (Village) government level (Kurnianto, 2018).

Public institutions are not actually mentioned and are not included in the government system. The system is formed through community consultations living in the local area in the context of community services determined by the Village. The existence of RT and RW stems from the existence of community institutions that live in villages and sub-districts, which ultimately understand the intent and purpose of the public institution itself, namely to establish a social control system, meaning a system of supervision from the community towards the behavior of its own members (Rauf, & Munaf, 2015)

According to the author, when looking back at the statements contained in the requirements for filling out the membership of these public institutions, there is an inconsistency in the phrase prohibiting joining political parties, which is contrary to Article 28 of the Constitution of the Republic of Indonesia Year 1945 which states that the independence of association and assembly, expressing thoughts verbally and in writing and so on is stipulated by law.

The above can also injure the political rights and democratic rights of the people themselves. The political rights in question are the rights contained in Article 43 of Law Number 39 of 1999 concerning Human Rights, which stipulates that every citizen has the right to be elected and to vote in general elections based on equal rights through direct, general, free, and independent voting, confidential, honest and fair in accordance with the provisions of the legislation.

Based on the above, various problems arise, including: how are the forms of regulatory inconsistency regarding the requirements for prohibiting joining political parties in the Minister of Home Affairs Regulation Number 18 of 2018 concerning Village Community Institutions and Village Traditional Institutions and what are the implications of the enactment of the Minister of Home Affairs Regulation Number 18 of 2018 concerning Village Community Institutions and Village Traditional Institutions against public institutions .

In several previous studies that have discussed the prohibition to become members of political parties in certain institutions, such as that conducted by Tedi Sudrajat and Sri Hartini with the

title "Legal Reconstruction on the Pattern of Handling Violations of the Neutrality Principle of Civil Servants". This study focuses on efforts to strengthen the role of the government in anticipating violations committed by civil servants in practical political activities (Sudrajat, & Hartini, 2017).

In the other studies, they were conducted by Arya Rahman Hakim and Hananto Widodo with the title "Effectiveness of Banning Political Party Members to Run for Chair of RT/RW in the City of Surabaya" (Hakim, & Widodo, 2017) and written by Erick Clark Sianipar and Isharyanto entitled "Analysis of the Prohibition of Political Party Membership for the Management of Neighborhood Units and Pillars of Citizens Viewed from the Perspective of Political Rights as Human Rights Principles" (Sianipar, & Isharyanto, 2020). These studies focused on the political rights of citizens as fundamental rights. However, these political rights cannot necessarily be used in any situation, as a matter of fact, there are also restrictions for certain reasons. Other research related to the implementation of the political rights of civilians in institutions is contained in the paper of Gabriel Blouin Genest and Sylvie Paquerot entitled "Environmental human rights as a battlefield: a grammar of political confrontation" (Genest, & Paquerot, 2016) and articles entitled "Using Practitioner Surveys To Measure Human Rights: The Human Rights Measurement Initiative's Civil And Political Rights Metrics" (Clay et al, 2020).

Overall, the research above only focuses on the ineffective implementation of regulations and the fulfillment of political rights for the community, while in this article discusses the legal implications due to

inconsistencies in regulations involving political rights for administrators of public institutions who are members of political parties. For this reason, it is very necessary to have an explanation of the impacts that occur, in order to ensure legal certainty in society.

B. RESEARCH METHOD

The approach method used in this study was a normative juridical approach, which is a legal research conducted by examining library materials or secondary data as the basis for research by conducting a search on regulations and literature related to the problems studied (Soekanto, & Mamudji, 2010).

The research specification used was descriptive-analytical by describing the applicable laws and regulations associated with legal theories and the practice of implementing positive law related to problems (Soekanto, & Mamudji, 2010).

The analysis was qualitative and did not emphasize the quantity of data but its quality. The sources of data in this article were in the form of tracing documents on laws and regulations, books, legal journals, opinions of experts regarding the prohibition of being a member of a political party for public institutions to explain the problems in this research.

C. RESULTS AND DISCUSSION

1. Forms of inconsistency of the regulations regarding the requirements for being prohibited from joining political parties in the Regulation of the Minister of Home Affairs Number 18 of 2018 concerning Urban Village

Community Institutions and Traditional Village Institutions

a. The Concept of Political Rights Based on the 1945 Constitution of the Republic of Indonesia

Positive law is a law guided by the State of the Republic of Indonesia in promoting the right to vote and to be elected. The phrase is also part of Human Rights (HAM) in which these rights bind between political rights and the rights used by a person to occupy positions and positions within the scope of government and non-government. Human rights related to political rights are also contained in Article 43 paragraph (1) of Law Number 39 of 1999 concerning Human Rights (Badruzaman, 2019).

Every citizen is also free to choose and have their own political beliefs. It also concerns the freedom of citizens to establish political parties, non-governmental organizations, or other organizations, which aim to assist the administration of government in protecting, enforcing, and promoting human rights in accordance with the provisions of the applicable laws and regulations (Selian, & Melina, 2018).

Observing the above, in fact the 1945 Constitution of the Republic of Indonesia has fulfilled its responsibility to guarantee the independence of its citizens in the form of freedom to organize, join certain communities, form associations, and express opinions in public. Parts of these words can be translated into someone's interest to join as a member of a political party organization.

According to the constructivist theory of human rights at the level of political construction which includes the concept of law, politics, and social

structures that require renewal, because rights in general are justifications for interpretation and are implemented as basic rights that arise from history and are built by themselves through social contexts (Ashri, 2018). This can also be related to a person's basic right to choose a political party or non-party organization according to his belief.

Article 31 of Law Number 2 of 2008 on Political Parties states that political parties must conduct political education for the community with the aim of increasing awareness of the rights and obligations of the community in the life of society, nation and state.

The statement above requires political parties to cooperate and synergize with the community to realize programs that intersect with the welfare of the community itself. This is what causes many members of political parties to serve or become community leaders both in villages and sub-districts (Zahrotunimah, Yunus, Susilowati, 2018). The role carried out in becoming a community leader, in empowering and implementing community activities in the smallest scope of the government wheel, is the responsibility of the organization of public institutions.

Community institutions are community organizations that are social in nature, democratically formed based on the initiative of the village head/lurah and the local community. The formation of community institutions itself aims to place institutional functions in the community, as partners of the Village and Sub-District Governments in increasing community participation, in terms of empowering the local community for the development process and administration of the wheels of government in the Village and Sub-district (Rauf, & Munaf, 2015).

When viewed from the philosophical basis of the formation of community institutions, it cannot be separated from the obligations of the provincial government and at the district or city level which are always required to fulfill the basic rights of a citizen. On this occasion the government acts as a servant to the community (public service). Matters concerning the right to public services must be felt by the people, without exception, because this is in line with Article 18 of the 1945 Constitution of the Republic of Indonesia which has provided a constitutional basis for the implementation of public services in the era of regional autonomy (Putra, 2017).

Based on the description above, the author argues that political rights are basic rights that every citizen has to be free to vote and be elected, to join communities, organizations, and associations according to their wishes, and in exercising their political rights a person cannot be disturbed or restricted by anything, as long as it is not against the law. This also includes when a person becomes a member of a political party and wishes to become an administrator of a community institution in the Kelurahan or village.

The filling of positions and membership of community organizations is more open and voluntary. Someone who is considered capable and competent, will continue to be trusted by the community to be elected as the administrator of a public institution, whether it is the head of the RT or the head of the RW. As a community that lives together and side by side with each other, of course it will prioritize the principle of mutual cooperation and deliberation for consensus to determine the leader in its territory.

b. Forms of Inconsistency in the Regulations Regarding the Requirements to be Administrators of Public institutions

The inconsistencies that occur in the implementation of this regulation can be seen from the function and position of public institutions for the local community. The administrators of public institutions have a position that will not be separated administratively in the community so that these institutions always have a structural relationship with the *kelurahan* (village government) under the auspices of the Ministry of Home Affairs.

As explained in the sub-discussion above, political rights are closely related to a person's desire to choose an organization in accordance with his beliefs. This cannot be felt by someone who wants to be a member of a public institution, but is already a member of a political party.

To become a community institution administrator, one must fulfill all the requirements as stated in Article 8 paragraph (5) of the Minister of Home Affairs Regulation Number 18 of 2018 concerning Village Community Institutions and Village Traditional Institutions, which states that a community institution administrator is prohibited from holding concurrent positions at the institution. Other community members and are prohibited from being members of political parties.

The Minister of Home Affairs at the time, Tjahjo Kumolo, emphasized that currently the ranks of local governments, from the Regional Secretary to the administrators of public institutions, were prohibited from engaging in politics and mobilizing masses to elect certain pairs of presidential and vice-

presidential candidates. The opinion of Tjahjo Kumolo reiterated that the management of public institutions is a direct part of state institutions so that neutrality is needed, especially during the holding of general elections so that this further strengthens the implementation of the prohibition (Chotimah, Widodo, & Handayani, 2019).

Observing the structural accountability of public institutions, which in this case assists the duties of the Village Head and Lurah who are still under the auspices of the Ministry of Home Affairs, but if someone who serves as the administrator of the public institution is not bound by an agency or unit that is not allowed to join a party politics, won't be a problem. According to the author, the provisions regarding the requirements to become administrators of the community institutions have limited a person's political rights to assemble, associate, and determine the organization according to his beliefs.

The provisions regarding these requirements are also contrary to the legal principle of "Equality Before The Law". Ronald Dworkin interprets this principle, with the meaning of full justice with the support of two other principles. First, the law must show equal concern for everyone who is under its control. Second, there is respect for the right of every person to determine himself on how to make his life more meaningful (Marzuki, 2020).

According to the author, when viewed from the aspect of equal concern put forward by Ronald Dworkin, this form of requirement does not yet indicate the existence of this principle. This is because the sound in this requirement contains a prohibition against someone who wishes to advance

his local area, but is unable to join the political party. Through the previous author's explanation, this public institution management position is not an agency that is directly related to the government such as the TNI/POLRI (Indonesian Armed Forces/ Indonesian National Police) and the State Civil Officer (ASN).

The second aspect concerns the form of respect for the right of each person to make his own choices to make his life meaningful. This requirement also does not show a sense of fairness and benefit for the administrators of public institutions who have already joined political parties.

On the other hand, this requirement also indirectly contradicts the regulations above. Article 28 of the 1945 Constitution of the Republic of Indonesia which contains the freedom of association and assembly, expressing thoughts verbally and in writing and also Article 24 of Law Number 39 of 1999 concerning Human Rights, which affirms that if the community or community group has the right to form a party organization politics, non-governmental organizations and are required to be able to play a role in the running of government.

Forms of actualization of government regulations regarding protection, empowerment, guidance, service, security, and order in the general public, need to include community institutions. Programs run by the government will not be channeled properly and correctly without the support and active involvement of the management of community institutions. Therefore, the role of the management of community institutions as an intermediary between the government and the community in the kelurahan/village is very important.

2. Implications of the enactment of the Regulation of the Minister of Home Affairs Number 18 of 2018 concerning Village Community Institutions and Village Traditional Institutions on Community Institutions

a. Juridical Implications

Basically the purpose of the establishment of the law is not merely to protect and guarantee the interests of a few people in power, but also to guarantee the interests of all citizens (Aswandi, & Roisah, 2019).

The current juridical norm concludes that the rules for public institutions are in the PERMENDAGRI order which regulates Village Community Institutions and Village Customs. When viewed through the basic consensus for the formation of its authority, there are 2 (two) types of well-known legal doctrines, namely legal norms made through attribution of the formation of legislation and the second is through the delegation route for the formation of laws and regulations.

According to the author, there are at least 2 (two) aspects of the position that can explain the position of the Minister of Home Affairs Regulation which has been ratified, prior to the enactment of Law 12 of 2011. The first aspect relates to the Ministerial Regulation which was formed because of an order from the norm that higher, and it is a major requirement as a statutory regulation. Second, the Ministerial Regulation that has been formed does not originate from a higher order of legislation (on the basis of authority), it is qualified as a Policy Rule.

Since the enactment of Law Number 12 of 2011 concerning the Establishment of Legislations,

Ministerial Regulations established before the date of the promulgation of Law Number 12 of 2011 concerning the Establishment of Legislations, are adjusted to the type of regulation regarding the old laws and regulations. The consequence that will occur is that when the Supreme Court makes the ministerial regulation its object of examination, basically only the first category can be subject to testing against the applicable ministerial regulation.

It is fitting for Indonesia to have regularity and continuity between regulations with one another, this is to minimize events that result in injustice before the law. The prohibition of a person who has joined as a member of a political party to become an administrator of a public institution is a form of limitation of human rights in the realm of his political rights.

The legal basis is materially related to the disorderly behavior of the community which results in the promulgation of laws and regulations that cannot guarantee legal certainty. As regulated through Article 28 D paragraph (1) of the 1945 Constitution which states that everyone has the right to recognition, protection guarantees, and fair legal certainty and equal treatment before the law (Aedi, 2013).

The form of the prohibition on joining political party membership for administrators of public institutions is fairly ineffective, when viewed from the perspective of the legal effectiveness theory proposed by Soerjono Soekanto. This can be proven by the implementation of laws and regulations that are balanced and in line with the value of obedience and obedience from the community to the applicable

rules. Besides talking about law enforcement officers or legal experts who make policies, a high compliance value is one aspect of the functioning of a legal system (Azzahra, 2020).

Looking at the five factors presented by Soerjono Soekanto, the factors of legal norms that apply in society can make this ministerial regulation less effective, have a direct impact on the public institutions themselves. The legal norm factor in question is related to the existence of the legal norm itself, in this case the legal norm is required to be hierarchically connected and not intersect with other regulations. Conflicting regulations will result in confusion and uncertainty regarding legal certainty in the community. This is also often referred to as the disharmony of regulations, which results in disharmony of a statutory regulation so as to create overlapping powers of the regulations (Wardhani, 2018).

At the time of the occurrence of these conditions, the position of public institutions as objects of ministerial regulations also experienced a crisis of legal compliance. This is because the institution consists of community leaders who are also members of different political parties, therefore making the community the goal of legal order must also be followed by legal understanding of the community.

For people who wish to become administrators of public institutions, but are unable to fulfill the requirements to be prohibited from joining a political party, and this is believed to be a discriminatory requirement because it has limited a person's political

rights, they can apply for a judicial review right to the Supreme Court.

The above is in accordance with the competence of the Supreme Court in exercising the right to judicial review, which is stated in Article 1 point 2 of the Regulation of the Supreme Court Number 1 of 2011, which states that written legal rules are binding on the general public under the law, (Sudarsono, 2017). Another legal basis that explains the competence of the Supreme Court is authorized to conduct a judicial review of legislation under the law against the law, lies in Article 24A paragraph (1) of the 1945 Constitution, Article 20 paragraph (2) letter b of the Law Judicial Power, and Article 31 paragraph (1) of the Supreme Court Law.

b. Non-Juridical Implications

As explained in sub-discussion letter a, when people feel that their political rights have been limited by the requirements to become administrators of public institutions, they can apply for the right to a judicial review to the Supreme Court. This is of course guided by the basic rules which state that these requirements are discriminatory against a person's political rights.

The Ministerial Regulation as the source of the regulations on public institutions stipulates a requirement for a member of the management of a public institution not to be allowed to join a political party. This requirement is not in line with the ideals of the Indonesian nation's national law which comes from the state foundation, namely Pancasila.

Seeing the rules that are discriminatory to one's political rights, the incompatibility of one regulation with the regulations above it makes the

implementation of this ministerial regulation ineffective in society. This view explains that human rights, which view rights not only as supporters of radical ethical individualism, but more important to promote the common good in the life of the state (McCrudden, 2008). Based on this, the community involvement factor with its culture also has an important role in supervising the implementation of the law in society.

The law can be said to function in society, if the community has met the qualifications of obedience and compliance with the application of law in society. The qualification is described as a culture that contains the main lines of normative provisions that must be done and what should not be done when dealing with other people (Hakim, & Widodo, 2017).

Basically, this regulation regulates widely on non-governmental organizations within the kelurahan and village scope, therefore the makers of the regulation must also look at the aspects and norms that live in the community. The legal obligation will be easily accepted and implemented by the community, if the regulation also accommodates a person's basic rights. Between the rights and obligations of a person has a balanced position and must be fulfilled so as to be able to create a law that is just for the community (Putri, & Arifin, 2018).

In general, the election and determination of the management of community institutions still uses the method of deliberation to reach consensus, this aims to accommodate the opinions and suggestions of all the people present at the time of this election.

Someone who is good at communicating, often expresses his opinion in deliberation, sometimes is a person who has long followed social organizations in society, including organizations in the political field. As a cadre of a political party, it is not surprising that this person always has the desire to be actively involved in decision-making in deliberative meetings in the RT and RW circles.

“Citizen Participation is at the heart of democracy. Indeed, democracy is unthinkable without the ability of citizens to participate freely in the governing process”. Seeing this statement from Sidney Verba explains how important public or community participation is in democracy, or in other words, it explains that participation is the most crucial substance in democracy. Therefore, the participation of the community is placed as the main condition in building democracy (Idil, & Elly, 2018).

In relation to the implementation of participatory democracy, the community has the right to participate in the administration of government, so that in each such implementation it is necessary to have a form of community participation which is the implementation of democratic values. To facilitate public participation in government administration, it can be done through the media of community organizations (Bader, 2014). Indeed, with the participation of the community in the implementation of community empowerment through community institutions, it will be able to accommodate many things and the interests of the community (Pamuji et al, 2018).

Based on this statement, the conclusions can be drawn regarding the close relationship between a member of a political party and social institutions. Someone who is trusted to be a public figure, besides having a leadership spirit and high social awareness, someone also likes to organize so that he is able to communicate and express opinions well. Many people who are elected to be the administrators of these social institutions are the cadres of one of the political parties, with experience in organizing in political parties considered capable of being a voice representative by the people in the relevant area.

As mentioned above, the implementation of the ministerial regulation cannot be carried out properly, given the requirements to become a member of a social institution which is considered discriminatory against a person's political rights. The ministerial regulation was never used as a reference in the process of selecting community institution administrators, each region only referred to regional regulations, while still using the principle of deliberation to reach consensus to achieve election results. The positive thing that can be seen from this event is the process of polling and selecting names which are a manifestation of the smallest democracy in the village and village environment.

D. CONCLUSION

Political rights are basic rights owned by every citizen to be free to join communities, organizations, and associations according to their wishes, and in exercising their political rights the person cannot be disturbed or restricted by anything. In fact, there are

still regulations that are discriminatory against a person's political rights because they are unable to meet the requirements not to join a political party to become the administrator of a public institution.

Community institutions as objects of this ministerial regulation are experiencing a crisis of legal compliance due to the disharmony of these laws and regulations with the higher regulations. In line with this statement, the process of selecting the administrators of community institutions is still through deliberation to reach consensus so that it is still possible for the community to play an important role in determining their own representatives without being guided by this ministerial regulation.

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