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Reconstructing the Requirements for an Incumbent Candidacy to Achieve Fair dan Democratic Regional Elections: Merekonstruksi Persyaratan Pencalonan Petahana untuk Mewujudkan Pilkada yang Adil dan Demokratis

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Abstract

General Background: Regional elections play a crucial role in democratic governance, ensuring public participation in leadership selection. However, fair electoral competition is often challenged by the undue advantage of incumbent candidates. **Specific Background:** Indonesia's Law No. 10 of 2016 permits incumbent regional heads to take a leave of absence during elections rather than resigning, raising concerns about potential abuse of power. **Knowledge Gap:** While existing studies discuss election regulations, limited research has specifically examined the urgency of mandatory resignation for incumbents seeking re-election. **Aims:** This study evaluates the fairness of incumbent candidacy requirements and proposes legal reforms to prevent electoral manipulation. **Results:** The analysis reveals that the leave requirement is insufficient to prevent conflicts of interest, as incumbents retain influence over state resources, policies, and personnel. Comparative legal frameworks from other countries suggest that a resignation mandate can enhance electoral integrity. **Novelty:** This research uniquely emphasizes the necessity of reconstructing candidacy rules to include mandatory resignation, drawing on constitutional principles of fairness and equality. **Implications:** The findings advocate for legislative amendments to establish a resignation requirement for incumbents, thereby strengthening democratic processes and ensuring a more equitable electoral system.

Highlights:

- Incumbent Advantage: Allowing leave instead of resignation enables unfair use of state resources.
- Legal Reform Needed: Mandatory resignation ensures equal competition in elections.
- Democratic Integrity: Strengthening regulations prevents power abuse and promotes fairness.

Keywords: Regional Head, Elections, Incumbent Candidacy, Reconstruction

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Introduction

Elections is the process of choosing someone to fill a certain political position[1]. The political positions in question range from President and Vice President, Governor and Deputy Governor, Regent and Deputy Regent, Mayor and Deputy Mayor, Member of the House of Representatives (DPR), Regional House of Representatives (DPRD), Member of the Regional Representative Council (DPD), to Village Head [2].

Elections at the local level, namely regional head elections (Pemilukada) are the essence of people's democracy and must be built on the understanding of local communities to develop their regions by organizing themselves [3]. This spirit is of course accompanied by the hope and desire of the community to create a clean democratic atmosphere in their respective regions. For example, democracy and regional elections are interrelated, regional elections are a form of democracy, but democracy will be built with the participation of the community in choosing their leaders in accordance with the principles of justice [4].

The values of justice are currently still an unfinished discourse in the regional election process, especially regarding the requirements for the nomination of incumbent regional heads. The current status quo based on Law Number 10/2016 on the Second Amendment to Law No. 1/2015 on the Stipulation of Government Regulations in Lieu of Law Number 1/2014 on the Election of Governors, Regents and Mayors into Law (Law Number 10/2016) stipulates that incumbent regional heads and deputy regional heads who are running for election in the same region do not need to resign, but only take leave to conduct a campaign (Article 70 paragraph (3).

The question of whether or not the campaign leave regulations for incumbent regional heads should be retained arises from the provision that requires them to vacate their positions if they plan to run for re-election in the same region. In general, all regulations have advantages and disadvantages, and leave regulations are no exception, especially if they are related to the purpose of the election itself [5]. In contrast to the requirements for the nomination of DPR members, DPD members, and DPRD members who want to become regional heads or deputy regional heads are required to resign from their positions (Article 7 paragraph (2) letter s of Law Number 10/2016).

Although Article 7 paragraph (2) letter s of Law Number 10/2016 has been tested several times to the Constitutional Court (MK), starting from Constitutional Court Decision Number 45 / PUU-XV / 2017 to Constitutional Court Decision Number 22 / PUU-XVIII / 2020, the Constitutional Court remains consistent that legislative members who want to become regional heads or deputy regional heads must resign first, so in the latest decision the Constitutional Court rejected the Petitioners' petition in its entirety. In its legal considerations, the Constitutional Court was of the view that the resignation requirement was not solely formed due to the possibility of abuse of authority (detournement de pouvoir) of legislative members, but also regarding the responsibility and mandate given by the community who had elected the legislator..

If this is the case, then the principles of fairness and equality for everyone to run for regional heads will be neglected. Because both the incumbent regional head or deputy regional head and legislative members are both political positions elected by the people, so the potential for abuse of authority of the incumbent regional head or deputy regional head also has the potential to occur. Thus, it is necessary to reconstruct the requirements for the nomination of regional heads and deputy regional heads of incumbent regions, considering that guarantees of justice and equality have been regulated in Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

Since regional elections are a manifestation of democracy, the principles and values of democracy must be included in their implementation, the need to reconstruct the nomination requirements for incumbent regional heads and deputy regional heads cannot be separated from the idea that regional elections are always associated with the main framework, namely the principles of democracy and the rule of law. On the other hand, the framework of the rule of law guarantees human rights in regional elections [6]. This guarantee of human rights is one of the most important and central elements of the rule of law doctrine [7]. The spirit of human rights guarantees is then contained in the Constitution as a *staatsfundamentalnorm* that also upholds democracy.

Based on the description above, the novelty offered in this research is that there has been no research that specifically examines the urgency of the resignation of incumbent regional heads when they will run for re-election in the same region. This can be seen from several previous studies such as: 1) Budiarto's research (2014) entitled “A Study of Article 29 of Government Regulation Number 29 of 2014 regarding the Resignation of Regional Heads Running for President and Vice President Candidates”; 2) Ghafur and Wardhana's research (2017) entitled “Problematics of Campaign Leave Arrangements for Incumbent Regional Heads in the Election of Regional Heads and Deputy Regional Heads in Indonesia”; and 3) Juanda's research (2020) with the title “Legal Construction of Mandatory Leave for Incumbent Regional Heads Based on the Constitutional Court Decision Number 60/PUU-XIV/2016”. Of the three studies, it can be seen that the scope of the study has not touched on the urgency of regulating the resignation requirements of incumbent regional heads. Therefore, the author is interested in conducting a study by raising the title “Reconstructing the Requirements for an Incumbent Candidacy to Achieve Fair dan Democratic Regional Elections”.

Method

The method applied in writing this article is normative legal research using statutory, conceptual, and case approaches. This normative legal method is used because the law is viewed prescriptively, namely examining the law based on the values of justice, legal objectives, legal concepts, the validity of legal rules and legal norms [8]. To support this normative legal study, a statutory technique is used to parse the legal requirements and reasons for the necessity to reconstruct the terms of

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nomination of incumbent regional leaders, specifically by regulating the requirement of resignation rather than merely departure. Meanwhile, the conceptual approach will be supported by notions and principles of the rule of law and democracy. The case technique is used to evaluate many examples or practices of legal application, particularly the misuse of authority by incumbent regional heads during the implementation of regional elections.

Result and Discussion

A. Problems with Incumbent Regional Head Candidacy Requirements: Urge to Resign?

A rule of law must accommodate the idea of equality before the law, as has been emphasized by many jurists such as Stalbach, Dicey, Scheltema, etc [9]. The importance of the principle of equality before the law is due to the fact that humans basically need a life with equal treatment to achieve a sense of justice for their human rights.

Furthermore, the 1945 Constitution also adopts this philosophy (state of law). It is affirmed in Article 1 paragraph (3) that "*Indonesia adalah negara yang berdasarkan atas hukum*", and Articles 28A-J further elaborate on the characteristics of a state of law (guarantees to human rights). In other words, any law or action that discriminates against citizens can be classified as a serious violation of the constitutional principles of the 1945 Constitution. When compared with the regulation of other state officials running for election, the principle of inequality (difference) before the law is found. This difference can be found in the requirements for the nomination of legislative members who will run for regional head, with the requirements for the nomination of incumbent regional heads. Legislative members who will run for regional head are required to resign from their positions, while incumbent regional head candidates are not. Several countries, including Taiwan, Australia, and the United States can be used as comparisons in terms of election practices related to incumbents.

For instance, some states in the United States have Resign-to-law laws, which require officials who plan to run for election to resign from office. One such state is Florida, where at Paragraph 99.012 the Florida state law states that: "No officer may qualify as a candidate for another public office, whether state, district, county or municipal, if the terms or any part thereof run concurrently with each other, without resigning from the office he or she presently holds". This means that it is not permissible for an employee in the state of Florida to run for election at either the municipal, state or federal level before he or she has formally resigned (see also Article 38-296 of the Arizona State Statutes/Constitution).

The problem faced regarding the status quo of the incumbent regional head nomination requirement which is only a leave of absence as stipulated in Article 70 paragraph (2) of Law No. 10/2016 is that it is vulnerable to abuse of authority. This can be seen in several examples of Disputes over the Results of the General Elections of Regional Heads and Deputy Regional Heads (PHPKADA) that entered the Constitutional Court, namely Case No.69/PHPU.D-XI/2013 related to fraud committed by the success team of incumbent Sjahrazad Masdar-As'at Malik in the Lumajang Regency Regional Head Election. Then Case No. 27/PHP.KOT-XVI/2018 in the case of Disputing the Results of the 2018 Bekasi Mayor Election, there was a violation committed by Paslon Number 1 who was the incumbent, namely the existence of a structured systematic and massive movement (TSM) in the form of mobilizing the state civil apparatus by the Bekasi City Secretary. As well as in Case No. 21/PHP.KOT-XIX/2021 related to voter mobilization to win the Incumbent Candidate in the Dispute over the Election Results of the Mayor and Deputy Mayor of Banjarmasin City.

The examples above show that there is a need for reconstruction of the requirements for the nomination of incumbent regional heads, namely the mandatory resignation. The closest and most logical example to describe the legal reasoning for the need for incumbent regional heads to resign in elections is to reflect on legislative members. The logic built in Constitutional Court Decision No. 22/PUU-XVIII/2020 which examines Article 7 paragraph (2) letter s of Law No. 10/2016 should also be a consideration for the legal politics of regional head candidacy. Given the nature of their authority, a regional head or deputy regional head has considerable potential to use their position to gain unfair advantage from other parties by violating the law if they do not resign during the campaign period.

As Immanuel Kant said, "the rule of law must refer to the spirit of justice". If a country has certain attributes of justice, then it can be considered a state of law [10]. In other words, the principle of justice refers to the seriousness of the principle of the rule of law as stated in Article 1 paragraph (3) and is more fully discussed in Article 28H paragraph (2) of the 1945 Constitution. Even in the Oxford Dictionary, "justice" is defined as "the quality of being fair and reasonable" [11], which means justice is the quality of acting fairly and reasonably. Then the Cambrige Dictionary defines justice as something that is "the condition of being morally or fairly" [12], which means that justice is something that is morally right and puts things in their place. The word fair also means "signifies a sense of moral rectitude and fairness in that things should be where they ought to be". [13]. Therefore, justice requires the government to treat all people fairly, uphold balance, and have the moral authority to regulate objects in the right context. [14], it is widely recognized in the literature that the essence of law is justice, "there is no good law without justice". [15].

The description of the concept of justice above, if it is related to the nomination requirements for incumbent regional heads and other officials such as legislative members, shows the principle of injustice, because both regional heads and legislative members are political officials elected by the people. Even with regard to the requirement for the resignation of legislative members, in principle, the legislative power does not have a bureaucratic network that can be drawn as part of the winning strategy. However, to avoid potential abuse of authority, members of the legislature are still required to resign from their positions when they want to run in the regional elections. Thus when compared to the relationship between the institutional structure and authority that exists in the legislative body, it is far from the potential that exists in the body of regional heads and deputy regional heads. Because an incumbent regional head has access to policies, budgets, and human resources (HR).

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Given that the regional head is the Staff Supervisory Officer in the region, has programs, and controls the administrative area, the potential for abuse of authority (*detournement de pouvoir)* is greater for the incumbent regional head who is running for re-election.

Although to avoid conflicts of interest, incumbent candidates are required to undergo leave as stipulated in Article 70 paragraph (2) of Law Number 10/2016.:

"(2) Gubernur dan Wakil Gubernur, Bupati dan Wakil Bupati, Walikota dan Wakil Walikota, pejabat negara lainnya, serta pejabat daerah dapat ikut dalam kampanye dengan mengajukan izin kampanye sesuai dengan ketentuan peraturan perundang-undangan".

The leave provisions as stated in Article 70 paragraph (2) and paragraph (3) of the Law a quo above still leave legal problems, because although it has been regulated that there is a prohibition on using facilities related to their position in Article 70 paragraph (3), this does not close the gap for abuse of authority. Especially after the issuance of Constitutional Court Decision No. 65 / PUU-XXI / 2023 which allows campaigns in educational places and government facilities provided that they get permission from the person in charge of the place in question and are present without election campaign attributes, this has the potential to open space for abuse of authority considering that the regional head is the Staff Supervisory Officer in the region.

As Personnel Supervisory Officials in the regions, the potential for abuse of authority in the implementation of campaigns in government facilities and educational places is related to access to justice in running campaigns. The requirement stipulated in Constitutional Court Decision No. 65/PUU-XXI/2023 to be able to run a campaign in government facilities and educational places is "obtaining permission from the person in charge of the place in question". If it is related to the candidacy of the incumbent regional head, then this requirement has the potential to be utilized by the incumbent regional head due to the power relationship of the regional head as the Personnel Supervisory Officer in the region. This condition will lead to issues of justice, because in the campaign, justice is very important and must be upheld. Justice is the basis for healthy competition, namely "playing on the same field". Through fairness, friction and conflict between supporters and between candidates can be avoided. However, the allowance of campaigns in educational institutions and government facilities in Constitutional Court Decision No. 65/PUU-XXI/2023 has the potential to be more favorable to regional head candidates who come from incumbents. In other words, access to campaigning becomes unfair for other candidate pairs because of the potential conflict of interest between the party in charge of the government facility and the candidate pair from the incumbent..

The intersection of authority that has the potential to be abused shows that the obligation to leave during the election process is not enough. In practice, incumbents who "abuse of power" often conduct covert campaigns. It is usually done in project inaugurations, such as when the opening of a mosque or the inauguration of a church, incumbents will often come [16]. This practice has become commonplace since local elections were held directly. This condition can be categorized as an indirect campaign, activities such as the disbursement of social assistance funds and disguised campaigns are a form of "abuse of power" in a soft way.

In the power relationship as the Civil Service Officer in the region, regional head candidates from incumbents can suppress the State Civil Servants (ASN) within the scope of their government, use APBD funds for socialization and winning campaign teams, as well as campaigning outside the predetermined schedule or stealing the start to avoid the provisions of Article 70 paragraph (3) of Law Number 10/2016. Based on the reality of each democratic party, it does not rule out the possibility of new motives in the face of simultaneous regional elections that will be data. The incumbents utilize ASNs who have a direct dependence on their position after the election and it is a dilemma for every ASN ahead of the election.

Although the neutrality of ASN is guaranteed by Law Number 20 of 2023 concerning the State Civil Servants (ASN Law), Law Number 7 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2022 concerning Amendments to Law Number 7 of 2017 concerning General Elections into Law (Election Law), as well as the laws and regulations under it, it should be noted that the meaning of "neutrality and intervention" does not always mean direct intervention or influence when the regional head is active in his/her position. It is because indirect impacts, which include concerns about losing money, being fired, not being appointed, or not being re-elected, are just as important as direct influences. These concerns have a significant impact on ASN's impartiality and their ability to ensure ASN's neutrality in carrying out their duties and obligations.

The Constitutional Court itself actually through Decision Number 57/PUU-XI/2013 has argued that, "both regional heads and deputy regional heads, civil servants, members of the Indonesian National Army (TNI), and members of the Indonesian National Police (Polri) are positions that need to be required to resign if they want to participate as candidates for members of the DPR, DPD, or DPRD, with different reasons, but the point is that these positions intersect with the authority that is carried out, which has the potential to be misused, thus reducing the value of fairness in the general election to be followed, and potentially also disrupting the performance of their position if the person concerned does not resign.".

The Constitutional Court Decision Number 57/PUU-XI/2013 then became the basis for Article 182 letter k and Article 240 paragraph (1) letter k of Law No. 7 Year 2017 jo. Law Number 7 of 2023 which stipulates that regional heads and deputy regional heads who register as candidates for legislative members at the DPR RI, provincial DPRD, district / city DPRD, and DPD levels must resign from their positions. So in his position as an incumbent regional head, the requirement for resignation from office should not only be when he wants to run for the legislature, but also when running for re-election as regional head. From a human rights perspective, the resignation requirement is a consequence of his personal decision to

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participate in an election for political office; therefore, the resignation requirement does not conflict with or diminish his human rights..

B. The Concept of Filling Vacancies Due to Reconstruction of Incumbent Regional Head Candidacy Requirements in Legislation

Based on the discussion above, it is found that the concept of reconstruction of the terms of nomination of incumbent regional heads in Indonesian legislation must be directed no longer to the concept of leave, but resignation. In the event of the resignation of the incumbent regional head, several options that can be applied are:

a. Acting Task Force (PLT)

PLT is led by the deputy governor, deputy regent, and deputy mayor, in the event that the governor, regent, and mayor of a region are temporarily absent; the legal basis for PLT is found in Articles 65 and 66 of Law Number 23 of 2014 on Regional Government (UU Pemda).

b. Temporary Acting (PJS)

Based on the Regulation of the Minister of Home Affairs (Permendagri) Number 74 of 2016 concerning Leave Outside State Dependence for Governors and Deputy Governors, Regents and Deputy Regents, and Mayors and Deputy Mayors, the term PLT in Permendagri Number 74 of 2016 changed to PJS based on Permendagri Number 1 of 2018 concerning Amendments to Permendagri Number 74 of 2016 so that there is a distinction between campaign leave and temporary disability. The term PJS comes from Article 70 of Law Number 10/2016. Where incumbent regional head and deputy regional head pairs who are running for re-election are required to take leave during the campaign period.

c. Acting (PJ)

Article 201 of Law Number 10/2016 defines the term “PJ”. High-ranking Madya Officials fill the position of regional head as PJ until the next regional head is inaugurated, provided that the term of office of the regional head has ended and is not on campaign leave.

In the context of reconstructing the nomination requirements for the incumbent regional head, the ideal concept of filling vacant positions is through PJS and PJ. First, the concept of PJS, if only the incumbent regional head is running in the election contest, then ideally he should be replaced by the deputy regional head concerned. This is based on the legitimacy that the deputy regional head is a person who is directly elected by the people and understands the ongoing government programs and policies, so that the implementation of functions and authorities is expected to continue to run optimally even though the regional head concerned has resigned from his position.

The presence of the deputy regional head as PJS was formulated from the beginning to replace the incumbent regional head who was running in the regional election, but the concept of replacing the regional head was intended for the position of regional head who was on leave as a result of the participation of the regional head in the regional election. However, whether on leave or quitting, the PJS as a substitute for the regional head in carrying out its functions and authority has no significant effect, because the regional head who is replaced cannot be involved in governance. Therefore, departing from the similarity of concepts in the exercise of functions and authority by the PJS, namely both when the regional head on leave resigns, ideally the regional head who is running again in the Regional Election must resign to avoid potential abuse of authority.

State institutions (staatsorganen, staatsambten) cannot perform their functions effectively unless they have officials (ambtsdrager). The officials of these state institutions are one of the key components of constitutional law [17]. Whilst the filling of state positions by LGUs in the regional sphere is very important, the LGU in exercising its authority must be limited even though it conceptually replaces the definitive regional head. In order to prevent abuse of power, violations of formal and substantive law in the broadest sense, and arbitrary actions, government authority must be used sparingly in carrying out its roles, responsibilities and duties [18]. Likewise, the authority of the PJS regional head needs to be limited.

Given that the PJS regional head is not the official (definitive) regional head, the limitation of authority is very important [19]. In carrying out the duties and authorities as a substitute for the definitive regional head, the deputy regional head, or in this case also called the PJS regional head, is responsible and obliged to submit a report on the implementation of duties to the Minister of Home Affairs. Certain authorities of the definitive regional head, such as discussing draft regional regulations, signing regional regulations, and filling vacancies, cannot necessarily be exercised by the PJS regional head without written approval from the Minister of Home Affairs (Reflecting on the provisions of Article 9 Paragraph (2) Permendagri Number 1/2018).

Second, the concept of PJ, this concept is ideally applied if the regional head and deputy regional head are running in the regional election simultaneously, then the vacant position is filled by a middle-ranking official. Although the concept of filling the position of regional head through PJ is actually intended when the regional head concerned has expired but the elected regional head (new regional head) has not yet been inaugurated, the concept of filling the PJ regional head is not contrary to the concept of a democratic state of law.

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In Permendagri Number 4 of 2023 concerning Acting Governors, Acting Regents, and Acting Mayors, the provisions for the appointment of PJs already reflect the participatory principle. For example, in the case of the appointment of the PJ governor, three people each are proposed by the minister and the DPRD, then the authority to appoint the PJ governor is in the hands of the President based on the results of the discussion of the Minister of Home Affairs together with other ministries/non-ministerial government agencies.

Thus, the reconstruction of the nomination requirements for incumbent regional heads, which initially used a leave mechanism to resign in Indonesian legal politics, can certainly be answered with the two concepts above. Andrei Marmor in An Institutional Conception of Authority states that: 'Practical authorities typically operate in institutional practices, rarely in social practices that have not become institutionalised to some degree. The reason is that practical authorities are constituted by superpowers that must be granted by a fairly complex set of interlocking norms', which means that because practices of authority are constituted by superpowers that must be granted by a fairly complex set of interlocking norms, these practices are most often found in institutionalised practices and very rarely in social practices that have not become institutionalised to some degree [20]. In this context, the comparison of the leave mechanism with the resignation of the regional head is related to the authority that is quite complex in regional government institutions, so that the potential for abuse of authority in the leave mechanism is to be answered by re-regulating the requirements for the nomination of regional heads through the resignation mechanism. The implications of vacancies due to the resignation of incumbent regional heads in the regional elections can actually be answered with the two concepts of filling vacancies that have been described above. The two concepts above are what the author considers the most ideal to answer concerns over the potential for policy stagnation if the regional head resigns to participate in the Regional Election.

Conclusion

In practice, incumbents who 'abuse of power' often conduct covert campaigns. It is usually done in the inauguration of projects, and others. In the power relationship as the Personnel Supervisory Official in the region, regional head candidates who come from incumbents can suppress the State Civil Servants(ASN) within the scope of their government, use Regional Revenue and Expenditure Budget (APBD) funds for socialisation and winning campaign teams, and campaign outside the predetermined schedule or steal the start to avoid the provisions of Article 70 paragraph (3) of Law No. 10/2016. The potential for abuse of authority is the reason why regional head candidates who come from incumbents should resign from their positions. In other words, a regional head or deputy regional head has a significant opportunity to abuse his/her authority to win the election and it is against the concept of the rule of law if he/she does not resign during the campaign.

There are two concepts that can be offered to fill the vacancy in office as a result of the resignation of the regional head in his position when advancing in the implementation of the Regional Election, namely through PJS and PJ. If only the regional head is advancing in the contestation of the Regional Election, then the one who replaces him is the deputy regional head or called PJS. Both concepts have strong legitimacy, both PJS are people who are involved as representatives of regional heads during the course of government and are elected by the people, while PJ regional heads in the appointment process are carried out in an open and participatory manner, namely in addition to involving the Minister of Home Affairs but also involving the DPR as representatives of the people.

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