

*Research Article*

# Debating Political Rights: The Revocation of Former Convicts' Rights to Candidacy in Indonesian Elections

I Gede Widhiana Suarda \* 

*University of Jember, Indonesia*

Bayu Dwi Anggono 

*University of Jember, Indonesia*

Fendi Setyawan 

*University of Jember, Indonesia*

Vicko Taniady 

*University of Jember, Indonesia*

**ABSTRACT:** The purpose of this article is to analyze the revocation of the political right of former convicts to candidacy as public officials in the Indonesian context based on positive law and decisions of the Indonesian Constitutional Court. In addition, this article aims to conduct a comparative study analysis of the issue, namely, between the arrangements in Indonesia and those in the United States and Australia. In Indonesia, everyone has the right to stand as a candidate for public office, including former prisoners, with certain conditions in accordance with positive law. However, the matter of revoking the political rights of former convicts remains a matter of debate, especially before the General Election. The Constitutional Court affirmed that the political right of former convicts to hold elected public office must fulfill several requirements. The political rights of former convicts are still guaranteed, but there are certain limitations. In Australia and the United States, the political rights of former convicts are also maintained, but with exceptions for some instances, such as corruption or treason against the state. Looking at the existing debate, it is necessary to safeguard civil and political rights universally, while paying attention to the specific cases that underlie the prohibition on former convicts from running for public office.

**KEYWORDS:** Elections, Political Rights, Former Convicts.

\*Corresponding author, email: [igedewidhiana.suarda@unej.ac.id](mailto:igedewidhiana.suarda@unej.ac.id)

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## I. INTRODUCTION

This article examines the debate on the right of former convicts to hold office through electoral contestation in the Indonesian context. As is known, elections are the minimum requirement that must be carried out if a country mandates itself as a democracy.<sup>1</sup> Indonesia recognizes various kinds of elections, namely President/Vice Presidential Elections, Legislative Elections to elect members of the House of Representatives, Regional Representatives Council, Regional Representatives Council of the Republic of Indonesia, and Regional Head Elections (Governor, Regent, and/or Mayor) which of course must be carried out democratically on the basis of popular participation.<sup>2</sup> The perspective that an individual's participation is a crucial mechanism in an election represents a significant shift in public leadership.

Elections are closely related to aspects of human rights protection, such as the right to vote and to be elected, the right to freedom of expression, freedom of assembly, freedom of the press, freedom of religion and freedom from religion, and the freedom to choose one's occupation and life. Looking at these aspects, the discussion in this article is critical because the right to vote and to be elected is a human rights guarantee in a democratic state that should not be reduced by any element, including the law.<sup>3</sup> However, problems arise when the person running for office is a former convict. The problem is, can former convicts be candidates and hold elected public office? This is still a polemic in Indonesia and is not easy to answer simply.<sup>4</sup> The views of both experts and the general public are divided. Regarding the nomination of formerly convicted corruptors as legislative members, for example, public views are divided. The view that rejects formerly convicted corruptors from candidacy can be exemplified by the statement that:

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<sup>1</sup> Ruth Dassonneville et al, *Citizens Under Compulsory Voting: A Three-Country Study* (Cambridge: Cambridge University Press, 2023) at 3.

<sup>2</sup> See Devina Arifani, "The General Elections in Indonesia as the Application of the Concept of People's Sovereignty" (2022) 4:4 Law Development Journal at 532-534.

<sup>3</sup> Leli Tibaka & Rosdian, "The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia" (2017) 11:3 Fiat Justisia: Jurnal Ilmu Hukum at 283.

<sup>4</sup> Donal Fariz, "Pembatasan Hak Bagi Mantan Terpidana Korupsi Menjadi Calon Kepala Daerah" (2020) 17:2 Jurnal Konstitusi at 317.

"Parties should show their support for the eradication of corruption by dropping former[ly] corrupt legislative candidates and only supporting those who have a clean track record. Because candidates are a reflection of the party."<sup>5</sup>

Meanwhile, the view that the nomination is not a problem is evident from the following statement:

"... the existence of former corruption convict candidates does not violate any law."<sup>6</sup>

Starting from the existing debate, it is interesting to raise the issue of legal certainty regarding the political rights of former convicts to stand as a candidate for and hold public office. Moreover, the Constitutional Court of the Republic of Indonesia has ruled several times on the judicial review of several laws that regulate the limitations for former convicts as a condition for participating in elections for public office. What are the political rights of former convicts in terms of nominating themselves as elected officials? That is the issue of legal certainty that needs to be studied further. Political rights are a right granted to a person in accordance with their qualifications and capacity to choose a candidate, be elected, and hold a public office in a country where a person can nominate themselves in the General Election.<sup>7</sup> Political rights can also be defined as the right of a person to participate in managing the affairs of the state. In other words, participating in government by holding elected public office is the implementation of political rights.

Research regarding the revocation of the political rights of former convicts has been conducted several times. First, research conducted by Maria Silvya E. Wangga and colleagues with the title "Revocation of Political Rights of the Perpetrators of Criminal Acts of Corruption" examines and explains the revocation of political rights from those convicted of extraordinary crimes, namely corruption.<sup>8</sup> The results show that the revocation of political rights is an integral approach that is sustainable through non-penal policies. Second, research

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<sup>5</sup> Fitria Chusna Farisa & Krisiandi Krisiandi, "Pandangan dan Usulan Masyarakat tentang Caleg Eks Koruptor" (2018), online: *Kompas.com* <<https://nasional.kompas.com/read/2018/09/18/07414501/pandangan-dan-usulan-masyarakat-tentang-caleg-eks-koruptor?page=all>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Adrianus Bawamenewi, "Implementasi Hak Politik Warga Negara" (2019) 13:3 *Warta Dharmawangsa* at 43.

<sup>8</sup> Maria Silvya E Wangga, Pujiyono Pujiyono & Barda Nawawi Arief, "Revocation of Political Rights of The Perpetrators of Criminal Acts of Corruption" (2019) 4:2 *Journal of Indonesian Legal Studies* at 277.

conducted by Roni Efendi and colleagues titled “Indonesia’s Revocation of Political Rights: Criminal Perspectives Philosophy” examines philosophically the existence of criminal sanctions, revealing a debate between law enforcement and human rights.<sup>9</sup> Third, research conducted by Edi As'Adi with the title “Problematic Application of Criminal Revocation of Political Rights in Perspective of Corruption Law” explores the declaration of the United Nations Convention Against Corruption in relation to the Corruption Act.<sup>10</sup> The results of the research show that there is a debate over the imposition of punishment for revocation of political rights in relation to human rights, and a need for future legal political research that focuses more on the legal culture sub-system.

Looking at the previous research, the focus of the discussion is limited to the issue of former convicts charged with corruption, although it also touches on human rights issues. The focus of the debate is not on the position of all former convicts, but is limited to those convicted of corruption. In other words, there is a lack of discussion on the political rights of former convicts as a whole. This article will explore whether former convicts hold the same political rights as other citizens regarding candidacy for elected public office. The analysis is based on the arrangements in the Indonesian Election Law and the stance of the Indonesian Constitutional Court in several of its decisions. In addition, this article will comparatively examine the political rights of former convicts in elections in the United States and Australia.

Specifically, this article will address three related legal issues. Firstly, can former convicts be candidates for and hold elected positions based on Indonesian laws and regulations? Secondly, what is the Constitutional Court's stance on the political rights of former convicts to hold elected positions based on relevant Constitutional Court decisions? Third, what are the similarities and differences in the regulation of the rights of former convicts to contest elections in Indonesia, the United States, and Australia?

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<sup>9</sup> Roni Efendi, Aria Zurnetti & Sukmareni Sukmareni, “Indonesia’s Revocation of Political Rights: Criminal Perspectives Philosophy” (2023) 6:2 Nagari Law Review at 120.

<sup>10</sup> Edi As' Adi, “Problematic Application of Criminal Revocation of Political Rights in Perspective of Corruption Law” (2015) 15:2 Jurnal Dinamika Hukum at 231.

To answer these three legal issues, the research method used is the doctrinal research method. The legal materials used are primary legal materials, especially laws and regulations on elections, regional head elections, and related Constitutional Court Decisions. The proposed problem formulation will be analyzed using primary legal materials. In addition to primary legal materials, secondary legal materials are also used as analytical materials. Both materials are processed to build arguments on the formulation of the problems raised. Meanwhile, the approaches used are the statute approach, the conceptual approach, the case approach, and the comparative approach. The final result of the analysis is the conclusion and prescription of the proposed problem formulation.

## **II. REQUIREMENTS FOR CANDIDACY FOR PUBLIC OFFICE IN INDONESIAN REGULATIONS: A HISTORICAL AND POSITIVE LAW APPROACH**

The protection of political rights has been provided through international law, namely the International Covenant on Civil and Political Rights established by the United Nations General Assembly, which has been ratified by Indonesia through Law No. 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights.<sup>11</sup> Article 25 of Law No. 12 of 2005 states that every citizen shall have the rights and opportunities, without distinction of any kind as referred to in Article 2 and without undue limitations. The amended Indonesian Constitution also regulates several political rights of citizens. One of them is Article 28 D paragraph (3), which states that:

"Every citizen has the right to equal opportunity in government."

This political right is then further elaborated in several laws, such as Law No. 7/2017 on Elections (Election Law), Law No. 23/2014 on Local Government (Local Government Law), and Law No. 22/2014 on the Election of Governors, Regents, and Mayors (Regional Election Law).

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<sup>11</sup> Arif Oegrosoeno, "Undang-Undang Republik Indonesia Nomor 12 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights/ICCPR (Kovenan Internasional tentang Hak-Hak Sipil dan Politik)" (2021) 4:1 Indonesian Journal of International Law at 169.

However, these laws do not accommodate the political rights of all community groups. The law regulates the requirements for certain groups of people to obtain political rights. These groups are people who have the status of former convicts or former prisoners. In principle, there is no difference between the definitions of former convicts and former prisoners. This is because convicts and prisoners are people who have been sentenced by the court for committing certain criminal offences.<sup>12</sup> The only difference is the scope, where the scope of the prisoner is limited to a person sentenced to imprisonment by the court. Meanwhile, the scope of conviction is broader because it is not limited to the imposition of imprisonment only. A person can be sentenced to a fine, the death penalty, or imprisonment by the court. Thus, it can be said that an imprisoned person is a convicted person, while a convicted person is not necessarily an imprisoned person. In the context of this article, both terms will be used interchangeably. The keyword is the similarity of the position of a criminal who has been sentenced in the form of criminal sanctions by the court.

Historically, limitations on political rights for former convicts to hold public office were regulated through various laws and regulations that have since been revoked. For example, Article 12 letter g and Article 50 paragraph (1) letter g of Law No. 10 of 2008 on the General Election of Members of the House of Representatives, the House of Regional Representatives, and the Regional People's Representative Council; and Article 58 letter f of the old Regional Government Law, namely Law No. 32 of 2004 in conjunction with Law No. 12 of 2008, which states that one of the requirements to hold public office is:

"not having been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offence punishable by imprisonment of 5 (five) years or more."

In addition, Article 7 letter g and Law No. 8 of 2015 on the Amendment to the Election Law (Law on the Election of Governors, Regents and Mayors) also include the exact requirement for a candidate for regional head, namely:

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<sup>12</sup> Schwarz Rotinsulu, Nontje Rimbing & Rodrigo F Elias, "Tinjauan Yuridis Hak-Hak Narapidana Menurut Undang-Undang Nomor 12 Tahun 1995" (2023) 12:2 Lex Privatum at 7.

"never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offence punishable by imprisonment of 5 (five) years or more."

Furthermore, Article 45 paragraph (2) letter k of Law No. 8 of 2015 states:

"a statement of never having been sentenced to imprisonment based on a court decision that has obtained permanent legal force, for having committed a criminal offence punishable by imprisonment of 5 (five) years or more from the District Court whose jurisdiction covers the candidate's residence, as evidence for the fulfilment of the candidate requirements as referred to in Article 7 letter g."

From a normative perspective, a review of the current positive law shows the same regulations as the norms in some of the repealed laws, although they have been modified. The current positive law that regulates elections is Law No. 7/2017 on General Elections (Election Law). Article 240 paragraph (1) letter g of the Election Law states that one of the requirements for candidates for members of the DPR, Provincial DPRD, and Regency/City DPRD is:

"not having been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offence punishable by imprisonment of 5 (five) years or more, unless openly and honestly declaring to the public that the person concerned is a former convict."

Thus, former convicts are still allowed to become legislative candidates with the stipulation of openly and honestly admitting that they are former convicts. This means that the state will enable people to choose their representatives in parliament. If analyzed through the theory of double jeopardy punishment, as seen in the Constitutional Court Decision 42/PUU-XII/2015 and in terms of human rights, a person who has been sentenced and has carried out the sentence should not be given another sentence without being allowed to participate in government.<sup>13</sup>

On the other hand, if scrutinized, the Constitutional Court Decision 4/PUU-VI/2009 has affirmed that the legal norm that reads:

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<sup>13</sup> Alfian Widyatama & Isharyanto Isharyanto, "Quo Vadis Hak Politik Mantan Narapidana Pasca Putusan Mahkamah Konstitusi Nomor 42/PUU-XII/2015" (2020) 3:3 Res Publica: Jurnal Hukum Kebijakan Publik at 324.

"has never been sentenced to imprisonment based on a court decision that has permanent legal force for committing a criminal offence punishable by imprisonment of 5 (five) years or more"

contained in Article 12 letter g and Article 50 paragraph (1) letter g of Law 10/2008 and Article 58 letter f of Law 12/2008 is conditionally unconstitutional. These legal norms are unconstitutional if the following conditions are not met. First, the restriction does not apply to elected officials as long as they are not sentenced to additional punishment in the form of revocation of election rights by a court decision with permanent legal force. Second, it is limited to a period of 5 (five) years after the former convict has completed their prison sentence based on a court decision that has permanent legal force. Third, honesty or openness is required regarding the person's background as a former convict. Fourth, the person must not be a repeat offender. However, if condition number three has been fulfilled, the other conditions are waived because the person concerned has admitted to the public that they are a former convict. Therefore, the formulation of Article 240 paragraph (1) letter g of the Election Law has been adjusted to fit the decision of the Constitutional Court.

In relation to this formulation, what needs to be observed is the formulation of "the sentence is 5 years or more." The reference is to the formulation of criminal threats from each article used as the basis for prosecution. The reference is not to the severity of the punishment imposed by the court. For example, a person charged with Article 2 paragraph (1) of Law Number 31 Year 1999 on the Eradication of Corruption (Corruption Eradication Law) is included in the category of requirements as formulated in Article 240 paragraph (1) letter g of the Election Law because the threat of imprisonment in Article 2 paragraph (1) is a maximum of twenty years. This means that the threat of imprisonment in Article 2, paragraph (1) of the Corruption Eradication Law exceeds five years. Even though the court handed down a verdict of four years in prison, a person who runs for office still falls under the category of the formulation of Article 240 paragraph (1) letter g of the Election Law. This is a logical consequence of the formulation that states that the reference to the nomination requirements refers to the criminal threat, not to the actual verdict by the court.



In simple terms, it can be concluded that not all former convicts are restricted in their political rights to hold elected public office. The limitation is only for former convicts who commit criminal offences punishable by imprisonment of more than 5 years.<sup>14</sup> Criminal offences punishable with imprisonment of more than 5 years are considered serious criminal offences.<sup>15</sup> This generates the need for recognition from former convicts to the community as a form of responsibility to constituents who will participate in voting during elections.

### **III. THE CONSTITUTIONAL COURT'S POSITION ON THE REQUIREMENT FOR FORMER CONVICTS TO HOLD PUBLIC OFFICE: AN ANALYSIS OF CONSTITUTIONAL COURT DECISIONS**

The Constitutional Court, as one of the holders of judicial power in Indonesia and the guardian of the constitution, has a responsibility to protect the rights of every citizen as clearly stated in the constitution, especially the political rights of every citizen regarding elections (Article 24 of the Indonesian Constitution).<sup>16</sup> The Constitutional Court has four authorities and one obligation following the Constitution, one of which is to review laws against the Constitution (hereinafter referred to as Judicial Review).<sup>17</sup> Judicial Review has a vital role in the administration of a country. Judicial Review is an effort made by the judiciary to review legal decisions that have been made by the legislative, executive, and judicial powers in a system of checks and balances based on the separation of powers.<sup>18</sup> Judicial Review is also considered a special judicial mechanism; a political action by judges who have been elected through parliament and other

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<sup>14</sup> Arystha Nirwanto & Ratna Herawati, "Legal Analysis Regarding Ex-Convicts as Election Contestants Based on the Indonesian Constitutional Court Decision" (2022) 5:1 International Journal of Social Science And Human Research at 343.

<sup>15</sup> Rahmi Zilvia & Haryadi Haryadi, "Disparitas Pidana Terhadap Pelaku Kasus Tindak Pidana Penganiayaan" (2020) 1:1 PAMPAS: Journal of Criminal Law at 98.

<sup>16</sup> Satya Arinanto, "Constitutional Court in Indonesia" (2017) 26:5 Jurnal Hukum & Pembangunan at 387.

<sup>17</sup> Simon Butt, "The Function of Judicial Dissent in Indonesia's Constitutional Court" (2018) 4:1 Constitutional Review 1–26; Vera Wheni S Soemarwi, Yermia Wijaya & Arthuro Richie Gunawan, "The Absence of Constitutional Court's Decision Follow Up: Is it A Loss?" (2022) 19:3 Jurnal Konstitusi at 722.

<sup>18</sup> Muhammad Siddiq Armia, "Constitutional Courts and Judicial Review: Lesson Learned for Indonesia" (2017) 8:1 Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan at 123.

political institutions and have special abilities compared to the regular judiciary to declare that a law generated by the legislature is unconstitutional.<sup>19</sup>

The existence of the Constitutional Court is a logical consequence of the theory of constitutional supremacy, where the constitution is the supreme law in a state.<sup>20</sup> The constitution binds the actions taken by the state, which means that every action taken by the state must not contradict the constitution because the state is not in a position above the constitution. If this happens, then a constitutional complaint mechanism can be used, which is one of the leading powers of the Constitutional Court in various countries.<sup>21</sup> There are several known judicial review mechanisms, namely, formal and material testing.

Formal review (*formele toetsing*) is a review of a law that covers the process of its formation, but also includes aspects of the form of the law, as well as how it is enforced in society.<sup>22</sup> Formal review also covers procedural matters which relate to the legality of the competence of the institution that created the law.<sup>23</sup> On the other hand, material review relates to the existence of a conflict between a legal norm and another rule that has a higher position in terms of hierarchy, and also relates to the existence of special matters possessed by a generally applicable norm.<sup>24</sup> For example, based on the principle of “*lex specialis derogat legi generali*,” a legal norm contained in a special regulation may be declared valid, even though its content contradicts the general regulation. However, a norm can also be considered inapplicable if the material contained in the rule of law clearly contradicts the legal standards in higher regulations.

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<sup>19</sup> Muhammad Zaky, “Perbandingan Judicial Review Mahkamah Konstitusi Indonesia Dengan Germany Federal Constitutional Court dan Implikasinya Secara Global” (2016) 11:1 *Transnasional-Jurnal Hubungan Internasional* at 28; Muhammad Iqbal Samsudin, “A Comparison of Judicial Review in Indonesian Constitutional Court and French Constitutional Council” (2022) 5:1 *Indonesian Comparative Law Review* at 31.

<sup>20</sup> Alon Harel & Adam Shinar, “Between judicial and legislative supremacy: A cautious defense of constrained judicial review” Silverchair (2012) 10:4 *International Journal of Constitutional Law* at 951.

<sup>21</sup> Tanto Lailam, Putri Anggia & Irwansyah Irwansyah, “The Proposal of Constitutional Complaint for the Indonesian Constitutional Court” (2022) 19:3 *Jurnal Konstitusi* at 698.

<sup>22</sup> Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-undang* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006) at 62.

<sup>23</sup> Jimly Asshiddiqie, *Pengujian Formil Undang-Undang Di Negara Hukum*, 1st ed (Jakarta: Konstitusi Press (Konpress), 2020) at 7.

<sup>24</sup> Badan Pengkajian MPR RI, *Pengujian Peraturan Perundang-Undangan Satu Atap di Mahkamah Konstitusi* (Jakarta: Badan Pengkajian MPR RI, 2017) at 229; Inna Junaenah, “Tafsir Konstitusional Pengujian Peraturan di Bawah Undang-Undang” (2016) 13:3 *Jurnal Konstitusi* at 503.

In this article, some of the Constitutional Court decisions to which we refer are the Constitutional Court's decisions in terms of judicial review. As a reaction to the restrictive rules on the political rights of former convicts set out in several laws, both those that have been repealed and those that are currently still in force, several parties have submitted requests for judicial review to the Constitutional Court. The Constitutional Court has issued several decisions about the political rights of former convicts. In an exploration of the Constitutional Court's decisions related to the limitation of political rights for former convicts, Nyoman Mas Aryani and Bagus Hermanto reviewed several Constitutional Court decisions that will be analyzed through the table below:<sup>25</sup>

**Table 1. Analysis of the Constitutional Court's Decision on Political Rights of Former convicts**

(Source: Author's Analysis of Constitutional Court Decision)

No.	Constitutional Court's Decision	Reasons and Decision
1.	Constitutional Court Decision Number 14-17/PUU-V/2007	The Applicant in Petition No. 14-17/PUU-V/2007 submitted a judicial review of five laws, including the Local Government Law, the Presidential and Vice-Presidential Elections Law, the Constitutional Court Law, the Supreme Court Law, and the Audit Board Law. Although the Court rejected the Applicant's petition, the Court's legal reasoning stated that the requirements that preclude former convicts from holding public office, as set out in the five laws, are in accordance with the constitution as long as they fulfil two specific conditions. These requirements are explained in more

<sup>25</sup> Nyoman Mas Aryani & Bagus Hermanto, "Justifikasi Hak Politik Mantan Narapidana: Perspektif Hak Asasi Manusia dan Perundang-Undangan" (2020) 17:2 Jurnal Konstitusi at 418-419.

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detail in the Court's legal reasoning, namely: it does not cover criminal offences that are considered minor (*culpa levis*), even though the sentence reaches 5 years or more, and it does not cover political crimes that are actually an expression of one's political views or attitudes that are protected in a democratic state of law. This confirms that crimes that are merely considered criminal offences due to political differences with the current regime do not fall into this category.

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| 2. | Constitutional Court Decision Number 15/PUU-VI/2008 | Petition No. 15/PUU-VI/2008 examines Article 50 paragraph (1) letter g of Law No. 10/2008 on the General Election of Members of the House of Representatives, Regional Representatives Council, and Regional Representatives Council. The Applicant argues that the exceptions recognised in Constitutional Court Decision Number 14-17/PUU-V/2007, namely those related to minor negligence and criminal offences for political reasons, which are used as the basis for determining certain moral standards, are unclear because no hypothesis can determine that former prisoners with a criminal sentence of under 5 years or because of their negligence in committing a criminal offence, meet certain moral standards |
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so that they are eligible to be elected in elections. The applicant also asserted that for a person who has completed serving a sentence, his/her right to vote must be restored by generally accepted principles, and the revocation of the right to be elected and the right to vote must be carried out by the court through a decision that has permanent legal force. This petition was rejected by the Constitutional Court by stating that Constitutional Court Decision Number 14-17/PUU-V/2007 *mutatis mutandis* applies to this petition.

The Court believed that there were no substantially new arguments in the arguments put forward by the applicant, and basically, the applicant was only repeating the expert testimony that had been submitted by the applicant in petition No. 14-17/PUU-V/2007 which had already been considered by the Court previously.

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| 3. | Constitutional Court Decision Number 4/PUU-VII/2009 | Petition No. 4/PUU-VII/2009 examined Article 12 letter g and Article 50 paragraph (1) letter g of Law No. 10/2008 on the General Election of Members of the DPR, DPD, and DPRD, as well as Article 58 letter f of Law No. 12/2008 on the Second Amendment to Law No. 32/2004 on Regional Government. The applicant argued that the formulation of these |
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articles was detrimental to the legal interests of the applicant, who wanted to participate formally in developing the country through the government. This petition was partially granted by the Constitutional Court by stating that the articles were conditionally contrary to the Indonesia Constitution, meaning that they did not have binding legal force as long as they did not fulfil certain conditions, namely:

- Does not apply to elected officials.
- Applicable for a limited period of only 5 years after the convicted person has finished serving his/her sentence.
- Exempted for former convicts who openly and honestly disclose to the public that they are former convicts.
- Does not involve repeat offenders.

The conditions in these articles cannot be generalised to all public offices, but only to elected officials, especially in relation to elections where the principle is to disenfranchise voters only on the grounds of incompetence, mental illness or impossibility.

In addition, to ensure that the people can critically assess the candidates they will vote for, a provision is needed that

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former convicts must openly explain to the public about the person background. This requirement aims to gain public trust, by ensuring that they are not repeat offenders and have gone through a process of adaptation back into society for at least 5 years after serving their imprisonment. The stipulation of a 5-year period for adaptation is in line with the five-year mechanism in Indonesia's General Elections, as well as consistent with the phrase 'threatened with imprisonment of 5 years or more' stated in the law.

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4. Constitutional Court Decision Number 120/PUU-VII/2009
- Petition No. 120/PUU-VII/2009 examined Article 58 letter f of Law No. 12/2008 on the Second Amendment to Law No. 32/2004 on Local Government. The petition was re-filed by H. Dirwan Mahmud, S.H., a candidate for Regent of South Bengkulu whose victory was annulled by Constitutional Court Decision No. 57/PHPU.D-VI/2008 based on this Article.

The Constitutional Court rejected this petition because the Article sought for review was final and binding, as decided in Petition No. 4/PUU-VII/2009. Constitutional Judge Achmad Sodiki stated that a re-vote could have been held before 24 March 2009, but did not happen due to costs. Constitutional

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Judge M. Arsyad Sanusi highlighted that the non-implementation of the Constitutional Court's decision was not the fault of the applicant, but rather a matter of implementing the law. He argued that the petition should have been granted in part.

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5. Constitutional Court Decision Number 42/PUU-XIII/2015 Petition No. 42/PUU-XIII/2015 examines Article 7 letter g and Article 45 paragraph (2) letter k of Law No. 8/2015 on the Amendment to Law No. 1/2015 on the Stipulation of Government Regulation in Lieu of Law No. 1/2014 on the Election of Governors, Regents, and Mayors. The article stipulates that regional head candidates must not have been sentenced to a criminal offence with a prison term of 5 years or more. The Constitutional Court partially granted the petition, stating that the article contradicted the Indonesian Constitution and was not conditionally binding except for former convicts who were open about their status.

Three constitutional judges had dissenting opinions. Constitutional Judge Maria Farida Indrati stated that the conditions set out in Constitutional Court Decision No. 4/PUU-VII/2009 should be followed, as has been done in other cases. Constitutional Judge I Dewa Gede Palguna and Constitutional

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Judge Suhartoyo argued that there was no fundamental constitutional reason for the Constitutional Court to change its stance, and the previous decision should be applied to this petition.

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6. Constitutional Court Decision Number 51/PUU-XIV/2016
- Petition No. 51/PUU-XIV/2016 challenged Article 67 paragraph (2) letter g of Law No. 11/2006 on the Governing of Aceh, which maintains the requirement of never having been imprisoned. Although this law applies specifically to Aceh, the applicant argued that the waivers imposed in Constitutional Court Decision No. 42/PUU-XIII/2015 do not apply in Aceh, creating a difference in legal treatment between Aceh and other provinces.

The Court granted the applicant's petition in its entirety, declaring that the Article a quo was conditionally contrary to the Indonesia Constitution, as long as there was no exception for former convicts who were open about their status. The Court followed the stance taken in Constitutional Court Decision No. 42/PUU-XIII/2015, although the laws under review were different, as the substance was the same regarding the requirement of never having been imprisoned to be a candidate for regional head.

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The dissenting opinion of three Constitutional Judges in Constitutional Court Decision No. 42/PUU-XIII/2015 also applies to this petition.

Petition No. 51/PUU-XIV/2016 examined Article 67 paragraph (2) letter g of Law No. 11/2006 on the Governing of Aceh, which stipulates the requirement of never having been imprisoned. The applicant argued that the waiver of the condition imposed in Constitutional Court Decision No. 42/PUU-XIII/2015 did not apply in Aceh, creating a difference in legal status.

The Constitutional Court accepted the applicant's petition in its entirety, declaring the article to be conditionally contrary to the Indonesia Constitution. The Court referred to Constitutional Court Decision No. 42/PUU-XIII/2015, even though the laws under review were different, because the substance was the same regarding the requirement of never having been imprisoned to become a candidate for regional head.

The dissenting opinions of the three Justices in Constitutional Court Decision No. 42/PUU-XIII/2015 also apply to this petition.

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7. Constitutional Court Decision Petition No. 71/PUU-XIV/2016 examined Article 7 paragraph (2) letter g of Law No. 10/2016 on the Second Amendment to Law No. 1/2015 on the Stipulation of Government Regulation in Lieu of Law No. 1/2014 on the Election of Governors, Regents, and Mayors. The petitioner stated that the article had expanded the scope of criminal offences, from being limited to criminal acts punishable with 5 years or more imprisonment, to all criminal offences, including minor ones, causing legal uncertainty and harming a person's constitutional right to be elected.

The Constitutional Court granted the petition partially, stating that the article was conditionally contrary to the Indonesia Constitution, with an exception for former convicts who were open about their status. The Constitutional Court stated that the law should not cover all types of criminal offences and punishments without a regulated minimum penalty, but that moral standards are still needed in filling public officialss. The Constitutional Court referred to Constitutional Court Decision No. 42/PUU-XIII/2015 and confirmed that the phrase about former convicts

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who are open about their status remains valid.

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The similarity between these various decisions of the Constitutional Court is the guarantee given by the Constitutional Court on the political rights of former convicts to be able to occupy elected office. Although there are requirements that are confirmed by the Constitutional Court, former convicts are in essence guaranteed the political rights to be able to hold elected office. The regulation of limitations to former convicts running for elected office has been corrected by the Constitutional Court. According to Satjipto Rahardjo, the Constitutional Court's decisions can be said to be progressive decisions.<sup>26</sup> In addition, through the Constitutional Court decisions analyzed here, it can be concluded that the Constitutional Court restored the rights of former convicts who had been restricted by the old Law (Law No. 10 of 2008 on Legislative General Elections, Law No. 32 of 2004 as revised by Law No. 12 of 2008 on Regional Government, and Law No. 8 of 2015 on Amendments to Law No. 1 of 2014 on the Election of Governors, Regents and Mayors into Law). This was also confirmed by Muhammad Anwar Tanjung and Retno Saraswati by concluding as follows:<sup>27</sup>

“Putusan Mahkamah Konstitusi menjamin hak konstitusional mantan narapidana untuk turut serta sebagai kandidat kepala daerah dan calon legislatif dalam pemilihan kepala daerah dan pemilihan umum. Putusan tersebut memberikan legalitas kepada mantan narapidana untuk menduduki jabatan-jabatan publik yang dipilih (elected officials) sepanjang tidak dijatuhi pidana tambahan berupa pencabutan hak pilih oleh putusan pengadilan yang telah mempunyai kekuatan hukum. Putusan Mahkamah Konstitusi ini wajib dimaknai sebagai sumber hukum yang bersifat final dan mengikat oleh penyelenggara pemilu yang bersifat mengatur bukan membatasi hak asasi manusia.”

Translation:

“The decision of the Constitutional Court guarantees the constitutional rights of former convicts to participate as candidates for regional heads and legislative candidates in regional head elections and general elections. The decision provides legality to former convicts to occupy elected offices as long as they are not

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<sup>26</sup> Qur'ani Dewi Kusumawardani, “Hukum Progresif Dan Perkembangan Teknologi Kecerdasan Buatan” (2019) 5:1 *Veritas et Justitia* at 167-168.

<sup>27</sup> Muhammad Anwar Tanjung & Retno Saraswati, “Demokrasi dan Legalitas Mantan Narapidana dalam Pemilihan Kepala Daerah dan Pemilihan Umum” (2018) 25:2 *Jurnal Hukum IUS QUIA IUSTUM* at 397.

sentenced to additional punishment in the form of revocation of voting rights by a court decision that has the force of law. The Constitutional Court's decision must be interpreted as a final and binding source of law by election organisers that regulates rather than restricts human rights.”

However, there are also differences between these various decisions. A review of the Court's decisions shows that there are three clusters in terms of the requirements set by the Court for the nomination of legislative members and regional heads. The first cluster is the Constitutional Court's decision that requires former convicts to be able to be a candidate for election if they have committed a criminal offence of *culpa levis* (due to minor negligence), even though it is punishable by five years or more and the formulation of the article does not cover the issue of political crimes. The existence of this requirement can be seen in Constitutional Court Decision Number 14-17/PUU-V/2007 and Constitutional Court Decision Number 15/PUU-VI/2008.

The second cluster is the Constitutional Court Decision which states that former convicts cannot be a candidate for elected office, with a limitation period of up to five years after the convict finishes serving his/her sentence. Exceptions are given for former convicts who openly and honestly disclose their status to the public and are not recidivists or repeat offenders. The formulation of these requirements can be seen in Constitutional Court Decision Number 4/PUU-VII/2009 and Constitutional Court Decision Number 120/PUU-VII/2009. Regarding Constitutional Court Decision Number 4/PUU-VII/2009, Nyoman Mas Aryani and Bagus Hermanto stated that the decision was one of the landmark decisions for the Constitutional Court. Meanwhile, the third cluster requires that the former convicts must openly and honestly state to the public that they are a former convict. This requirement can be seen in Constitutional Court Decision Number 42/PUU-XIII/2015, Constitutional Court Decision Number 51/PUU-XIV/2016, and Constitutional Court Decision Number 71/PUU-XIV/2016.<sup>28</sup>

In addition to the various Constitutional Court decisions and their implications, there is also a Constitutional Court Decision related to a judicial review of Article

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<sup>28</sup> Kholifatul Maghfiroh, Lita Tyesta Alw & Retno Saraswati, “Perkembangan Putusan Mahkamah Konstitusi Mengenai Pencalonan Mantan Narapidana Sebagai Anggota DPR, DPD Dan DPRD Serta Sebagai Kepala Daerah Dan Wakil Kepala Daerah” (2018) 7:2 Diponegoro Law Journal at 104.

7 paragraph (2) letter g of Law Number 10/2016 on the Second Amendment to Law Number 1/2015 on the Stipulation of Perppu Number 1/2014 on the Election of Governors, Regents, and Mayors into Law (Law No. 10/2016). Article 7 paragraph (2) letter g of Law No. 10/2016 which states that candidates for Governor and Deputy Governor, candidates for Regent and Deputy Regent, and candidates for Mayor and Deputy Mayor as referred to in paragraph (1) must fulfil the following requirements:

...(g) ‘has never been convicted based on a court decision that has obtained permanent legal force or for former convicts has openly and honestly disclosed to the public that the person concerned is a former convict.’”

The applicants request that Article 7 paragraph (2) letter g of Law No. 10/2016 be declared unconstitutional and legally binding to the extent that it is not interpreted to mean:

“tidak pernah sebagai terpidana berdasarkan putusan pengadilan yang telah memperoleh kekuatan hukum tetap karena melakukan tindak pidana yang diancam dengan pidana penjara 5 (lima) tahun atau lebih, kecuali terhadap terpidana yang melakukan tindak pidana kealpaan dan tindak pidana politik dalam pengertian suatu perbuatan yang dinyatakan sebagai tindak pidana dalam hukum positif hanya karena pelakunya mempunyai pandangan politik yang berbeda dengan rezim yang sedang berkuasa, tidak dijatuhi pidana tambahan berupa pencabutan hak pilih oleh putusan pengadilan yang telah mempunyai kekuatan hukum tetap, bagi mantan terpidana telah melewati jangka waktu 10 (sepuluh) tahun setelah mantan terpidana selesai menjalani pidana penjara berdasarkan putusan pengadilan yang telah mempunyai kekuatan hukum tetap, jujur atau terbuka mengenai latar belakang jati dirinya sebagai mantan terpidana, dan bukan sebagai pelaku kejahatan yang berulang-ulang.”

Translation:

“has never been convicted based on a court decision that has obtained permanent legal force for committing a criminal offence punishable with imprisonment of 5 (five) years or more, except for convicts who commit criminal offences of negligence and political offences in the sense of an act that is declared as a criminal offence in positive law only because the perpetrator has a political view that is different from the regime that is currently in power, not sentenced to additional punishment in the form of revocation of electoral rights by a court decision that has permanent legal force, for former convicts has passed a period of 10 (ten) years after the former convict has finished serving their imprisonment based on a court

decision that has permanent legal force, honest or open about their background as a former convict, and not as a repeat offender.”

In relation to the petition, the Constitutional Court has given its decision in Constitutional Court Decision No. 56/PUU-XVII/2019 which was announced in the Plenary Session of the Constitutional Court on 11 December 2019. In consideration of the Constitutional Court Decision No. 56/PUU-XVII/2019, the Court affirmed as follows (pages 58 and 59):

“Bahwa Putusan Mahkamah Konstitusi Nomor 42/PUU-XIII/2015 dan Putusan Mahkamah Konstitusi Nomor 71/PUU-XIV/2016 telah bergeser dari rumusan yang bersifat kumulatif menjadi rumusan yang bersifat alternatif. Pergeseran demikian mengakibatkan longgarnya syarat yang harus dipenuhi untuk mendapatkan pemimpin yang bersih, jujur, dan berintegritas sebagaimana yang telah ditegaskan dalam pertimbangan hukum Putusan Mahkamah Konstitusi Nomor 4/PUU-VII/2009 dan putusan-putusan sebelumnya yang bersifat kumulatif. Sebab apabila syarat-syarat tersebut bersifat alternatif maka dapat dipastikan pilihan yang akan dilakukan oleh mantan terpidana adalah secara terbuka dan jujur mengemukakan kepada publik bahwa yang bersangkutan adalah mantan terpidana. Demikian halnya dalam Putusan Mahkamah Konstitusi Nomor 71/PUU-XIV/2016 yang pada pokoknya hanya memberikan pengecualian terhadap tindak pidana yang bersifat kealpaan ringan (*culpa levis*) dan tindak pidana karena alasan perbedaan pandangan politik.”

Translation:

“Constitutional Court Decision Number 42/PUU-XIII/2015 and Constitutional Court Decision Number 71/PUU-XIV/2016 have shifted from a cumulative formulation to an alternative formulation. Such a shift has resulted in the loosening of the requirements that must be fulfilled to obtain leaders who are clean, honest, and have integrity as has been confirmed in the legal considerations of Constitutional Court Decision Number 4/PUU-VII/2009 and previous decisions which are cumulative. If these requirements are alternative, it is certain that former convicts will make the choice to openly and honestly disclose to the public that the person concerned is a former convict. This is also the case in Constitutional Court Decision Number 71/PUU-XIV/2016, which basically only provides exceptions to criminal offences that are mild negligence (*culpa levis*) and criminal offences due to differences in political views.”

As of the time of writing, the Constitutional Court Decision No. 56/PUU-XVII/2019 is the latest Constitutional Court Decision related to the political

rights of former convicts to hold elected office. The Constitutional Court's decision shows that the Constitutional Court's view remains the same in principle, which is to guarantee the political rights of former convicts to be able to be a candidate for and hold elected public office, as has also been decided in various previous Constitutional Court Decisions. The distinction lies in how the requirements are interpreted. Constitutional Court Decisions No. 42/PUU-XIII/2015 and No. 71/PUU-XIV/2016 indicate that the requirements for former convicts to run for and hold public office are alternative in nature. This means that meeting any one of the requirements is sufficient. In contrast, Constitutional Court Decision No. 56/PUU-XVII/2019 adopts a cumulative approach. It explicitly requires that all conditions be fulfilled simultaneously before a former convict can be considered eligible as a candidate. This cumulative nature is underscored by the use of the conjunction "and" in the wording of the decision. Thus, the legal interpretation has evolved from an alternative to a cumulative standard, reflecting a shift in the Court's stance over time. The requirements for former convicts who want to be a candidate for regional head, as stated by the Constitutional Court in Constitutional Court Decision No. 56/PUU-XVII/2019, are as follows:

- “1. has never been convicted based on a court decision that has obtained permanent legal force for committing a criminal offence punishable with imprisonment of 5 (five) years or more, except for convicts who commit criminal offences of negligence and political offences in the sense of an act that is declared as a criminal offence in positive law only because the perpetrator has a political view that is different from the current regime;
2. for former convicts, has passed a period of 5 (five) years after the former convicts has finished serving their imprisonment based on a court decision that has permanent legal force and honestly or openly announces their background as a former convicts; and
3. not as a recidivist offender.”

It is stated in several of the verdicts described above that they are conditional unconstitutional. In the Procedural Law of the Constitutional Court, the term is newly recognised by granting the applicant's request conditionally or granting with exceptions or with certain notes.<sup>29</sup> However, in this context, constitutional

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<sup>29</sup> Ilhamdi Putra & Khairul Fahmi, “Karakteristik Ne Bis In Idem dan Unsurnya dalam Hukum Acara Mahkamah Konstitusi” (2021) 18:2 Jurnal Konstitusi at 356.



judges must provide logical reasons as *ratio decidendi* which are also contained in the legal considerations of the decision. The implementation of the decision, which also contains legal reasoning, directly becomes the main reason for the binding substance of the decision as an integral part of the decision court.

On the other hand, regulations declared conditionally unconstitutional also have weaknesses which in this case must be immediately corrected through the process of amendment of the law that has been reviewed by the Constitutional Court.<sup>30</sup> This is a consequence where the articles that have been granted contrary to the constitution on a conditional basis, if not immediately addressed by the legislators together with the government, will create new polemics. Thus, the latest Constitutional Court Decision in 2019, as previously described, shows that the requirements for former convicts to hold elected public officials have been restored and realigned with the 'breadth' of Constitutional Court Decision No. 4/PUU-VII/2009. In this regard, it is also interesting to quote Mudzakir's statement during his expert testimony at the Constitutional Court hearing. In his statement in point c, Mudzakir stated that:

“the applicability of criminal sanctions for violators of criminal law norms is limited in its validity period and must go through a court decision that has permanent legal force, be it the main criminal sanctions or additional criminal sanctions.”

Thus, the authority to revoke the political rights of a person, including a former convict, is the right of the court. Administrative legal norms are not justified in revoking a person's political rights, especially when revoked without clear limitations. The limitation of administrative legal norms is limited to determining requirements, for example, conviction status itself, and does not include the determination of a person as a convicted person. This can only be determined through a court decision.

#### **IV. FORMER CONVICTED PERSONS' ELECTORAL RIGHTS IN THE UNITED STATES AND AUSTRALIA**

Comparative analysis is very important in order to find out how the regulation and implementation of the right of former convicts to hold elected public office

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<sup>30</sup> Pusat Studi Konstitusi FH Andalas, “Perkembangan Pengujian Perundang-Undangan di Mahkamah Konstitusi” *jurnalkonstitusi.mkri.id* (2016) 7:6 *Jurnal Konstitusi* at 148.

in Indonesia compares to other countries. The countries chosen for comparison, the United States and Australia, have been recognised as democratic countries. The comparative study aims to find similarities and differences in the regulation regarding the candidacy of former convicts for elected public office as well as the implementation of these regulations. The following section will explain the regulations and their application in the United States and Australia.

### *A. The United States*

The United States is one of the countries that has long mandated itself as a democracy and has become one of the main references for countries in the world in terms of democratic practice.<sup>31</sup> Problems are created, however, if it cannot be properly maintained as a democracy. An example of such a problem could be seen during the Presidential election between Joseph Biden and Donald Trump, during which massive chaos was created by Trump supporters who stormed the Capitol building.<sup>32</sup> Each electoral system in each country in the world is unique because it is adjusted to the system of government, the form of state, and to the existing social conditions. The United States recognises the existence of several elections, namely presidential and vice-presidential elections, legislative elections, state elections, and elections for the position of governor and regional heads such as regents and mayors.<sup>33</sup>

The United States has 50 states because it is a constitutional federal republic, meaning that the government also exists in the district form.<sup>34</sup> The relationship between the central government and the states uses a federation system. The federal government operates within the principle of checks and balances which also divides the branches of power into three. First, the executive power is led by a President and Vice President and has a number of rights, one of which is the power to veto bills that have been submitted by the legislature before becoming

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<sup>31</sup> Samuel P Huntington, "Will More Countries Become Democratic?" JSTOR (1984) 99:2 Political Science Quarterly at 193.

<sup>32</sup> BBC News Indonesia, "Foto-foto penyerbuan Gedung Capitol oleh pendukung Trump", United States (2021), online: <<https://www.bbc.com/indonesia/dunia-55569113>>.

<sup>33</sup> Arnold Barnett & Arnaud Sarfati, "The Polls and the U.S. Presidential Election in 2020 .... and 2024" (2023) 10:1 Statistics and Public Policy at 1; Stephen D Clark & Nik Lomax, "Linguistic and semantic factors in government e-petitions: A comparison between the United Kingdom and the United States of America" (2020) 37:4 Government Information Quarterly at 1-2.

<sup>34</sup> Timothy J Conlan, "The Changing Politics of American Federalism" JSTOR (2017) 49:3 State & Local Government Review at 170-171.

law.<sup>35</sup> Second, the legislative power has a bicameral system, where Congress is divided into the Senate and the House of Representatives, which have the authority to draft laws, declare war, approve treaties, etc.<sup>36</sup> Third, the judicial power is under the authority of the Supreme Court and several lower federal courts.<sup>37</sup> As this article is concerned with the electoral system and the right of former convicts to be candidates in elections, the focus of discussion in this case is on these two issues. However, the electoral system in the United States must first be understood in general.

Elections in the United States are usually held in even-numbered years in some federal territories as well as most states. However, in the United States, states are also allowed to regulate their elections in odd years. Unlike Indonesia, elections in the United States are not held simultaneously. The election of the President is held every four years, while the House of Representatives, which consists of 435 members from districts within the state, has a two-year term. The Senate consists of 100 members, with each state electing two senators for a six-year term. Members of the House of Representatives and the Senate together form Congress, which has several broad powers in the United States.

The election of members of Congress is an important matter for citizens in the United States. As a logical consequence of the district representation system, states with larger populations can have more seats in the House of Representatives. On the other hand, the Senate was also formed to reflect the interests of the states. Regardless of population, each state's senate is represented by two senators so that the political influence is as great as that of states with larger territories.<sup>38</sup> The requirements to become a member of the House of Representatives as contained in the constitution, among others: 25 years old, living in the United States for at least 7 years, and being a legal representative of the state he or she represents in Congress (Article 1 Section 2 the United States Constitution).<sup>39</sup> There are also several requirements for becoming a member of the Senate, including: 30 years old, living in the United States for at least 9 years,

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<sup>35</sup> USAGov, "Branches of the U.S. government" (2024), online: <<https://www.usa.gov/branches-of-government>>.

<sup>36</sup> See in the Article 1 Section 1 the United States Constitution.

<sup>37</sup> Lawrence O Gostin, "Judicial Power and Influence on Population Health" (2023) 101:1 *Milbank Q* at 701.

<sup>38</sup> Steven L Taylor, "Electoral Systems in Context: United States" in Erik S Herron, Robert J Pekkanen & Matthew S Shugart, eds, *The Oxford Handbook of Electoral Systems* (Oxford University Press, 2018) at 725.

<sup>39</sup> *Ibid.*

being a legitimate representative of the state he or she represents (Article 1 Section 3 the United States Constitution). The 14th Amendment to the United States Constitution lists criminal offences that disqualify someone from candidacy. Senatorial candidates cannot be nominated or run for senator if they are involved in rebellion or helping the enemies of the United States, as these actions constitute treason against the state, which is considered a serious crime.<sup>40</sup>

Meanwhile, restrictions on candidacy for State Governor vary. The 50 states have their own basic requirements in the laws related to elections due to regional autonomy, meaning that the rules in several regions differ and cannot be equated with one another. Some regulations that vary between states include the timing, candidate requirements, and technical implementation. Additionally, at the county, district, or city level, a regent or mayor can also be elected; however, similar to Indonesia, not all cities have a mayor.<sup>41</sup> In regard to the main study in this discussion, restrictions on the electoral candidacy of former convicts, there does not appear to be a formal restriction contained in the constitution for the election of members of the legislature, as in Indonesia. As long as candidates do not commit rebellion and/or betrayal against the state as stipulated in the constitution, the democratic rights to stand for election is guaranteed. It is beyond the scope of this article to analyze the election of legislators and state leaders because of the variance in regulations. As far as the author has studied, it turns out that in both of the major United States parties, namely the Republican Party and the Democratic Party, there have been candidates for legislative elections who have criminal records.<sup>42</sup>

When examined further about the qualifications or requirements given in several states and the constitution, a criminal record does not generally present a problem for candidacy, but it also depends on the electoral regulations in each state. For example, the state of Texas requires legislative and executive candidates for the region to not have a criminal record that can be categorised as serious, such as

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<sup>40</sup> Myles Lynch, "Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment" COinS (2021) 30:1 William & Mary Bill of Rights Journal at 153.

<sup>41</sup> Liputan6com, "Begini Pilkada di Amerika Serikat" (2015), online: <<https://www.liputan6.com/global/read/2385584/begini-pilkada-di-amerika-serikat>>.

<sup>42</sup> VOA Indonesia, "Apa Kabar Amerika: Edisi Bolehkah Mantan Napi Nyaleg di Amerika?" (2018), online: <<https://www.voaindonesia.com/a/apa-kabar-amerika-edisi-bolehkah-mantan-napi-nyaleg-di-amerika-/4515765.html>>.

corruption, forgery, bribery, rebellion, treason against the state, etc. In Ohio, however, the state does not prohibit candidates with criminal records from standing for election. In a 2002 case, a member of the United States House of Representatives, James Traficant, was convicted of bribery and corruption.<sup>43</sup> He was stripped of his elective office and sentenced to eight years in prison.<sup>44</sup> After completing his prison sentence, James Traficant ran as an independent candidate in the 2002 general election for his old congressional seat in Ohio's 17th district. In that election, he received approximately 15% of the vote, but did not win.<sup>45</sup> Furthermore, the views of constituents towards having someone running for parliament or the executive in a particular constituency have changed dramatically and rapidly. Therefore, in states that do not have specific requirements (as Ohio does), all matters relating to elections are returned to the constituents who participate in the elections to make choices according to their common sense and conscience.

### *B. Australia*

Australia is a commonwealth country better known as the Commonwealth of Australia.<sup>46</sup> Australia is a constitutional monarchy based on federative powers, where the Australian Government uses a Parliamentary system led by a head of government, the Prime Minister. The leadership of Australia is controlled by Queen Elizabeth II, who resides in the United Kingdom and is represented by the Governor General at the federal level and the Governor at the state level. Australia has three levels of government: federal, state, and local/city. Since it uses a parliamentary system of government, Australia adheres to the bicameral system in its legislature, which consists of the Senate and the House of Representatives.<sup>47</sup>

The Senate in Australia consists of 76 senators, with each state represented by 12 senators for a term of six years. However, every three years there is also a rotation

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<sup>43</sup> NBC News, "Ex-con disqualified from Congress comeback" (2010), online: <<https://www.nbcnews.com/id/wbna38106529>>.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Sebastian Howard Hartford Davis, "The Legal Personality of the Commonwealth of Australia" SAGE Journals (2019) 47:1 Federal Law Review at 3.

<sup>47</sup> András Sajó & Renáta Uitz, "Parliamentarism and the Legislative Branch" in András Sajó & Renáta Uitz, eds, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017) at 249.

system where half of the total senators can be replaced, so the senate is applied to a proportional representation system with quotas based on the number of valid votes cast. Although the United States also has a Senate, the functions of the Senate in Australia are not the same as in the United States. The Senate has the function of considering and amending legislation. Still, it cannot propose bills relating to the expenditure of funds or the imposition of taxes, as outlined in Section 53 of the Commonwealth of Australia Constitution Act. The House of Representatives can initiate bills relating to financial matters.

The second part of parliament is the House of Representatives, which is also directly elected by the people of the Commonwealth and comprises 148 constituency representatives determined by the population of each area. Section 24 of the Australian Constitution stipulates that the number of members in the House of Representatives is based on the population of each state, with each state having a minimum of 5 members. In contrast, the Senate is composed of an equal number of senators from each state, irrespective of population, with each state having six senators. Similar to the discussion in the previous section, to analyze the application of the political rights of Australian citizens, especially the right for former convicts to hold public office, we must cover the requirements in the constitution and the laws related to elections in Australia.

When referring to the Commonwealth of Australia Constitution Act ('The Constitution of Australia'), there are several requirements to be able to hold public office in the Senate and House of Representatives. The requirements to become a Senator are the same as for members of the House of Representatives. The requirements to become a member of parliament in Australia, as contained in the Constitution, are:<sup>48</sup>

“Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

- (i) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the house of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:

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<sup>48</sup> See Section 34 of the Australian Constitution.

- (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or a State.”

The main requirements to become a member of parliament are as follows: an age of at least 21 years, eligibility to participate in the election process, residency in Australia for at least 5 years, and declaration as a resident with original citizenship. Thus, nothing prohibits former convicts from holding government positions within the constitution. Parliamentary elections in Australia are regulated in a special election law, the Commonwealth Electoral Act 1918, similar to Indonesia, which also has a special election law. In this Act, there are more concrete rules for determining the requirements for people to be elected as members of parliament. This can be seen in Section 51 of the Electoral and Referendum Amendment Act 1989 No. 24 of 1990, the qualification for nomination section, which states that people who can be elected include:

- “(1) A person who:
  - (a) has reached the age of 18 years;
  - (b) is an Australian citizen; and
  - (c) is either:
    - (i) an elector entitled to vote at a House of Representatives election; or
    - (ii) a person qualified to become such an elector, is qualified to be elected as a Senator or a member of the House of Representatives.
- (2) A person is not entitled to be nominated for election as a Senator or member of the House of Representatives unless the person is qualified under subsection (1).”

Section 51, Paragraph 1, letter c of the Electoral and Referendum Amendment Act 1989 No.24 of 1990 states that the qualifications for members of parliament must meet the same standards as a valid elector. As it is known, in Australia, a voter must enrol before participating in an election to ensure their vote is valid, as regulated by the Commonwealth Electoral Act 1918 and administered by the Australian Electoral Commission (AEC). In Section 93, number 8 of the Commonwealth Electoral Act 1918, the qualifications of an elector and thus also a parliamentary candidate are outlined, which include, among others:

- “(8) A person who:
  - (a) because of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or

(b) has been convicted of treason or treachery and has not been pardoned; They are not entitled to have their name placed or retained on any Roll or to vote at any Senate or House of Representatives election.”

In addition, point 8AA also states that:

“A person who is serving a sentence of imprisonment of 3 years or longer is not entitled to vote at any Senate election or House of Representatives election”.

The article states that there is a special condition that a person who registers themselves as a voter in the election contestation is not allowed to commit the crime of treason. Furthermore, it is also explained that someone serving a prison sentence of 3 years or more is not entitled to vote in the Senate or the House of Representatives elections. However, this rule is only specific to convicts who are serving a sentence, so a former convict who is no longer serving a sentence can participate and register as a voter or parliamentary candidate. Therefore, these two provisions also affect former convicts with similar cases who will stand for election to parliament.

The Australian Constitution, under Section 44(ii), Chapter I, Part IV, confirms that a person is disqualified from sitting as a member of Parliament if they have been convicted and are under sentence, or subject to be sentenced, for any offence punishable by imprisonment for one year or more, whether under federal or state law. As explained earlier, Australia also has states. These states, like the states in the United States, have their own laws, including laws governing elections. Although neither the Constitution nor the federally enacted Electoral Act confirms or prohibits former convicts from participating in elections, state laws do not necessarily allow it. The laws restricting the movement of former convicts who will be candidates for elections in each state are quite strict.

## **V. COMPARATIVE ANALYSIS: INDONESIA, THE UNITED STATES, AND AUSTRALIA**

The three countries have similarities and differences in regulating and implementing the rights of convicted persons to hold elected positions. The similarities and differences can be seen from several criteria that will clarify the legal aspects of each country in regulating the rights of former convicts to stand



for election. The criteria relate to the requirements or normative qualifications for executive and legislative candidacy of former convicts. The results of the comparative analysis of the three countries can be seen in the following table:

**Table 2. Comparison of the Regulation and Implementation of the Right of Former Prisoners to Elected Public Officials**

(Source: Author's Analysis)

No	Criteria	Country		
		Indonesia	The United States	Australia
1.	Former convicts can hold public officials	Yes, it is possible to re-occupy public office in accordance with the conditions set out in Article 240 paragraph (1) letter g of the Election Law	Yes, it is possible to hold public officials as long as they are in accordance with the provisions of the Constitution	Yes, it is possible to hold public officials to the extent prescribed by the constitution and the Commonwealth Electoral Act 1918
2.	The existence of certain conditions for former convicts to hold public officials in elections	Yes, the specific condition is that the former convicts must make a public announcement regarding their status as an former convicts	Yes, as long as they do not commit acts of rebellion and treason against the state	Yes, as long as you don't commit treason against the country

		and/or after 5 years of free from sentence		
3.	The applicability of certain national requirements for former convicts to hold public office in the Laws and Regulations	Yes, stated in Article 240 paragraph (1) of Law 17 Year 2017	Yes, in Article 1 Section 2 and Section 3 the United States Constitution	Yes, it states in the Commonwealth Electoral Act 1918 Article 1 Section 2 Part XIV- Nominees in the nomination qualifications section
4.	Enforcement of the rule that does not allow former convicts to serve in public officials in the state	No, due to the national applicability of the Election Law	Yes, each state has its own laws regarding former convicts' eligibility for elections, such as those in Texas and Ohio.	Yes, each state has its own electoral laws. The states that do not allow this include New South Wales, Queensland, South Australia, Western Australia, Tasmania, Northern Territory, and Australian

				Capital Territory.
5.	In reality, there have been former convicts who have re-elected to public officials	Yes, it happened in the Simultaneous Regional Elections in 2015, that there were nine former convicts who were candidates for Regional Heads. <sup>49</sup>	Yes, the case of James Traficent. After his sentence was completed, Traficent re-contested the election in the same district of Ohio as an independent.	Yes, there were several cases, one of which was William Hamilton who served a three-year sentence before he was re-elected to the Queensland Legislative Assembly.
6.	The level of public trust of former convicts in elections	The level of trust of the Indonesian people is quite low and can be seen from the several polemics that occur. <sup>50</sup>	The level of public trust in some states is quite low.	The level of public trust is quite fluctuating, as seen from a number of elections, it turns out that former convicts still get a fairly high number of votes.

<sup>49</sup> Febriyan, "Ini 9 Bekas Napi yang Kini Jadi Calon Kepala Daerah" (2015), online: *Tempo* <<https://nasional.tempo.co/read/689110/ini-9-bekas-napi-yang-kini-jadi-calon-kepala-daerah>>.

<sup>50</sup> Nurhadi, "Ada 56 Bekas Narapidana Korupsi Jadi Caleg, Ini Regulasi yang Membolehkan Mereka Nyaleg" (14 November 2023), online: *Tempo* <<https://nasional.tempo.co/read/1796592/ada-56-bekas-narapidana-korupsi-jadi-caleg-ini-regulasi-yang-membolehkan-mereka-nyaleg>>.

As previously explained, the United States and Australia also do not prohibit former convicts from holding public office because the special requirements are only limited to certain severe cases, such as rebellion, treason against the state, corruption, bribery, or other criminal acts that affect public trust. Although the United States and Australia certainly have legal rules related to their respective elections, the requirements for citizens to vote or be elected are also stringent. This is also influenced by implementing a multiparty system, which also affects the low level of trust from political elites, political parties, and local communities in the country.

Essentially, as also expressed by Jimly Asshidiqie, the public may reject former convicts who participate in election contests, namely by: (1) not voting for former convicts as members of the legislature or deputy regional heads; and (2) expressing protests or opinions in a manner consistent with applicable law.<sup>51</sup> Among the countries that have been compared, Indonesia, the United States, and Australia exhibit several concrete rules regarding the extent to which former convicts can be candidates for elections and hold elected positions. In choosing candidates for legislative members and regional heads, control is returned to the supporting political parties and the community as voters who will determine the essence of an election. In this context, human rights and the concept of democracy continue to align, as the community, especially former convicts, retains the right to participate in elections.

## VI. CONCLUSION

The legal issue of the right of former convicts to stand as candidates for public office is an important and complex topic in the context of Indonesian law. This article highlights the Indonesian Constitutional Court's view on the limitation of this right, in which the Constitutional Court, in principle, affirms that former convicts have the political right to hold elected public office, although with certain conditions. The Constitutional Court, through its decisions, has restored the rights of former convicts that were restricted by positive law. In addition, this

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<sup>51</sup> Jimly Asshiddiqie, "Masyarakat Boleh Melarang Eks Napi Tipikor Maju Pilkada" (2018), online: *bukumonline.com* <<https://www.hukumonline.com/klinik/a/masyarakat-boleh-melarang-eks-napi-tipikor-maju-pilkada-lt5e40c0b2ad189/>>.

article also compares the legal arrangements and implementation of the rights of former convicts to hold public officials between Indonesia, the United States, and Australia. Despite differences in specific provisions between these countries, the basic principles of civil and political rights for former convicts are upheld by universal human rights standards. In this context, the article offers valuable insights into the complexities of legal arrangements concerning the rights of former convicts in the electoral process, highlighting the critical need to balance justice, legal certainty, and democratic principles.

Further studies on the political rights of former convicts in holding elected positions still require investigation. One interesting example that still needs further study is a comparative study highlighting one particular type of criminal offence and the consequences on political rights across several countries. For example, comparative studies on the rights of former convicts of corruption, former convicts of terrorism, former convicts of treason, or former convicts of offenses classified as serious crimes, particularly with case studies.

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