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by Zulkifli Aspan

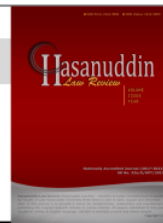
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ABSTRACT

In order to ensure the suffrage of citizens is implemented according to the principle of fair election, regulations on general and local elections may contain various kinds of restriction of suffrage. The rights to vote as well as be voted must be restricted in a way that the process of election may run seamlessly and generate a government capable of exercising the mandate of the people. However, such restriction must be performed in a fair and proportionate manner. The restriction must not cause uncertainty or even distinction of treatment towards the citizens. By means of normative legal research, this research comes to a conclusion that restriction of suffrage in general and local elections have yet been performed fairly. Legal uncertainty in the restriction of suffrage still occurs. Simultaneously, different treatment towards citizens who intend to nominate themselves is still contained in the norms related to the requirements to vote and be voted.

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1. Introduction

The legal framework of election is an imperative instrument to achieving fair election. A fair election will be achieved when election regulation is well-drafted. The word 'well' means the regulation is free from disharmony and does not contain norms that treats citizens and voters partially. Pertaining to this, International IDEA proposes that the justice of election is comprehended as the well running of elections processes according to regulations and the availability of mechanisms for the settlement of election disputes and violations within some designated time.

According to IDEA, the scope of electoral justice system covers the following:¹

- a. Ensuring that each action, procedure and decision related to the electoral process complies with the legal framework;
- b. Protecting or restoring electoral rights; and
- c. Giving people who believe their electoral rights have been violated the ability to file a challenge, have their case heard and receive a ruling.

The rules intended as the basis for fair election implementation is the rules drafted in the course of achieving a just political competition. Election rules must be in a context of how the constitutional rights of the citizens to vote and be voted are respected, protected impartially and equally. According to The United Nations Democracy Fund (UNDEF), the assurance of justice for all voters and candidates in election is one of the principles that must be met for an equitable election.²

The former is in line with the existence of suffrage as citizen's constitutional right.³ As a constitutional right, suffrage is a manifestation of the right on equal opportunity withing the law and government as guaranteed in Articles 27 sentence (1) and 28D sentence (3) of The 1945 Constitution. With such constitutional guarantee, the state is responsible to protect and respect the right by taking various measures including in terms of legislation pertaining to election. When the suffrage or the right to partake in election⁴ is to be further regulated, such regulation must remain under the framework of providing equal opportunity to all citizens in exercising their political rights.

In order to ensure the regulation on limiting of suffrage does not contravene the principles of equal rights and opportunities for all citizens, all regulations must be formulated proportionately. In a sense that, limitations of rights may be adopted, but such limitation must be fair. In order to assess has an election regulation met such principles, two indicators may be applied. First, one regulation must not contradict towards another and this will avoid legal uncertainty; second, the requirements set as the limitation must be implemented equally to every public positions contested through election. The equality of requirements in effect is one of major indicators to assess the fairness an election legal framework.

Based on such explication, this article wishes to further discuss about the regulation on the restriction of suffrage within the regulations of general and local elections in Indonesia, whether such restriction has fulfilled the principles of fairness or not. The discussion of this issue will cover three things: (1) regulation or legal framework on the restriction of the rights to vote and be voted; (2) synchronization of the regulation on the restriction of the rights to vote and be voted; and (3) equality in the implementation of requirements in the rights to vote and be candidates in election.

¹ Ayoub, A., and Ellis, A. (Ed.) (2010), *Electoral Justice: The International IDEA Handbook*, International IDEA, Stockholm, p. 1

² Supriyanto, D., and Surbakti, R. (Ed.) (2014), *Integritas Pemilu 2014, Kajian Pelanggaran, Kekerasan, dan Penyalahgunaan Uang pada Pemilu 2014* (Integrity of the 2014 Election; Studies on Violation, Violence, and Money Misuse in the 2014 Election), Partnership, Jakarta, p. 35

³ Constitutional Court' Ruling No. 011-017/PUU-I/2003 on the Review on Law No. 12 Of 2003 on the Election of Members of House of Representatives, Regional Representative Council, and Regional House of Representatives, p. 35

⁴ Anwar, S., et al. (2017), *Putusan Landmark Mahkamah Konstitusi 2014-2016* (Landmark Ruling, Constitutional Court 2014-2016), Clerk and Secretariat General of Constitutional Court, Jakarta, p. 588

12

2. Method

This research is a normative legal research. The collection of data in the form of primary legal materials such as Laws on general and local elections that have been in effect in Indonesia, collected through library studies. In order to support analysis, the researcher also collected secondary legal material such as research output, opinions of experts and results of interviews.

Those legal materials are then analysed by means of statute approach; an approach to study consistency and compatibility of one law to another.⁵ This approach will yield consistency and assessment on the harmony or disharmony between one law to another. Simultaneously, this approach will find if provisions on those regulations have treated all voters and candidates equally. Then, the result of analysis will be put forth and become the basis for the formulation of prescription on how draft a fairer election regulation in ruling the limitation of the right to vote and be voted for Indonesian citizens.

3. Legal Framework for Limiting Suffrage

Since independence, Indonesia had conducted 11 legislative elections and 3 direct, presidential elections. Likewise, after the amendment of the 1945 Constitution, direct, regional elections have also been conducted for three terms of office in 34 provinces, 415 regencies, and 94⁶ cities throughout Indonesia.

The running of election throughout the period has been regulated in 11 Laws. Out of all 11 Laws, two are still in effect as the basis for the running of general and local elections until today, i.e.:

- a. Law No. 7 of 2017 on General Election; and
- b. Law No. 1 of 2015 on Gubernurial, Regent and Mayor Election as amended by means of Law No. 10 of 2016.

Two regulations of general and regional elections rule on the requirements or limitation of the right to vote¹⁰ well as be voted. The requirements ruled within are requirements for nomination of members of the House of Representatives (*Dewan Perwakilan Rakyat*, DPR), Regional Representative Council (*Dewan Perwakilan Daerah*, DPD), President and Vice President, Regional House of Representatives (*Dewan Perwakilan Rakyat Daerah*, DPRD), and heads of regions. Both Laws rule on the limitation of the rights to vote and be voted distinctly. Distinct in terms of Law, and distinct in terms of offices elected in general and regional elections.

In order to exercise suffrage in general election, Law No. 7 of 2017 rules the following requirements:

1. Citizen of Indonesia.⁷
2. On election day aged 17 or is/was married.⁸
3. Registered as a voter.⁹

⁵ Marzuki, P.M. (2006). *Penelitian Hukum*. Jakarta: Kencana, p. 93

⁶ List of regencies and cities in Indonesia, https://id.wikipedia.org/wiki/Daftar_kabupaten_dan_kota_di_Indonesia, accessed on January 20 2018.

⁷ Republic of Indonesia, Law No. 7 of 2017 on General Election, Article 198 sentence (1)

⁸ *Ibid.*, Article 198 sentence (1)

⁹ *Ibid.*, Article 199

4. Not revoked of political rights by the court.¹⁰
5. Not a member of Indonesian Armed Forces (*Tentara Nasional Indonesia*, TNI) and Indonesian Police (*Kepolisian Negara Republik Indonesia*, Polri).¹¹

In order to exercise suffrage in regional election, a citizen must qualify the following requirements:

1. Citizen of Indonesia.¹²
2. On election day aged 17 or is/was married.¹³
3. Registered as a voter.¹⁴
4. Not in psychological/memory disturbances.¹⁵
5. Not revoked of suffrage by a final and binding ruling of the court.¹⁶

In addition to ruling on suffrage, both Laws also rule on the nomination of a citizen as candidate; for membership of DPR, DPD, DPRD, President and Vice President, and Heads of regions. When accumulated, there are up to 38 requirements that serves as limitation of the right for nomination. Such requirements can be found in the Table 1.

Table 1. Requirements to Run as Candidate

No.	Requirements	No	Requirements
1.	Citizen of Indonesia. ¹⁷	20.	Agree not to conduct practice as advocate, notary, land conveyancer official, and not to conduct work in supplier of goods and services in relations to state treasury. ¹⁸
2.	At the minimum age. ¹⁹	21.	Agree not to serve dual position as other state official, board of directors, board of commissioner, supervisory board, employee in state-owned enterprises/region-owned enterprises whose funding come from state treasury. ²⁰
3.	Registered as a voter. ²¹	22.	Obtain minimum support from the concerned electoral district. ²²

¹⁰ *Ibid.*, Article 198 sentence (3)

¹¹ *Ibid.*, Article 200

¹² Republic of Indonesia, *Law No. 1 of 2015 on the Stipulation of Government Regulation in lieu of Law No. 1 of 2014 on Gubernatorial, Regent, and Mayor Election into Law* as amended by Law No. 10 of 2016, Article 56 sentence (1)

¹³ *Ibid.*, Article 56 sentence (1)

¹⁴ *Ibid.*, Article 57 sentence (1)

¹⁵ *Ibid.*, Article 57 sentence (3) letter a

¹⁶ *Ibid.*, Article 57 sentence (3) letter a

¹⁷ In particular, for candidates of President and Vice President, citizen of Indonesia since birth and has never received other citizenship on her/his own intention, in Republic of Indonesia, *Law No. 7 of 2017.. Op.cit.*, Article 169 letter b.

¹⁸ This requirement applies only to candidates for membership of DPR, DPD and DPRD.

¹⁹ At least 40 years of age for candidate of President and Vice President, At least 30 years of age for candidate of governor, At least 25 years of age for candidate of regent/mayor.

²⁰ This requirement applies only to candidates for membership of DPR, DPD and DPRD.

²¹ This requirement is not effective for candidates of governor, regent, and mayor. In Republic of Indonesia, *Law No. 1 of 2015 on.....*, Article 7.

²² This requirement applies only to candidates for membership of DPD, in Republic of Indonesia, *Law No. 7 of 2017...Op.cit.*, Article 192 letter p. This requirement also applies to individual candidates of head of region, in Republic of Indonesia, *Law No. 1 of 2015...Op.cit.*, Article 41.

4. Not revoked of suffrage. ²³	23. Report assets or submit report of private assets. ²⁴
5. Physically and mentally capable	24. Not being liable of any individual or legal entity' debt. ²⁵
6. Believe in One God.	25. Not being declared bankrupt. ²⁶
7. Capable of speaking, reading, and writing in Bahasa Indonesia. ²⁷	26. Never committed any act of disgraceful nature. ²⁸
8. Loyal to the Pancasila, The 1945 Constitution, NKRI, and the <i>Bhinneka Tunggal Ika</i> . ²⁹	27. In possession of NPWP and tax returns. ³⁰
9. Not a member of PKI and other proscribed organization. ³¹	28. Never have served two-terms as president and vice president in the same position. ³²
10. Never has been a subject to criminal conviction by a final and binding ruling of court. ³³	29. Never have served two-terms as Governor, Vice Governor, Regent, Vice Regent, Mayor, Vice Mayor in the same position. ³⁴
11. A member of an election participant political party. ³⁵	30. Not in the status of acting governor, acting regent, and acting mayor. ³⁶
12. Reside within the territory of Indonesia. ³⁷	31. Never committed treason to the state. ³⁸
13. Educated with a level of at least senior high school.	32. Never committed corruption and other major felonies. ³⁹

- 15
- ²³ This requirement is only for candidates of heads of regions, not for candidates of members of DPR, DPD, DPRD and President and Vice President.
- ²⁴ This requirement applies only to candidates of President/Vice President and heads of regions, and thus does not apply to candidates for membership of DPR, DPD and DPRD.
- ²⁵ This requirement applies only to candidates of President/Vice President and heads of regions and thus does not apply to candidates for membership of DPR, DPD and DPRD.
- ²⁶ *Ibid.*
- ²⁷ This requirement is not for candidates of heads of regions. In Republic of Indonesia, *Law No. 1 of 2015...Op.cit.*, Article 7.
- ²⁸ *Ibid.*
- ²⁹ Heads of regions candidates are only required to be: loyal to Pancasila, The 1945 Constitution, and the aspiration of Indonesian Independence Proclamation, in Republic of Indonesia, *Law No. 1 of 2015...Op.cit.*, Article 7.
- ³⁰ This requirement applies only to candidates of President/Vice President and heads of regions. In particular for candidates of President and Vice President, there is an extra requirement: meeting all tax obligations for the last five years. This does not apply to candidates for membership of DPR, DPD and DPRD.
- ³¹ This requirement is only for candidates of President and Vice President. In Republic of Indonesia, *Law No. 7 of 2017...Op.cit.*, Article 169 letter s.
- ³² This requirement applies only to candidates of President and Vice President. In Republic of Indonesia, *Law No. 7 of 2017...Op.cit.* Article 169 letter n.
- ³³ For candidate of head of region and member of DPR, DPD and DPRD, this requirement is exempted once the candidate has served her/his conviction term, and that s/he announces to the public that s/he has been a convict. In Republic of Indonesia, *Law No. 1 of 2015...Op.cit.*, Article 7 and Constitutional Court' Ruling No. 42/PUU-XIII/2015 on the Review of Law No. 8 of 2015 o the Amendment of Law No. 1 of 2015 on the Stipulation of Perppu No. 1 of 2014 on Gubernuratorial, Regent, and Mayor into Law, July 9 2015, p. 72.
- ³⁴ This requirement applies only to candidates of head and vice head of region, *Law No. 1 of 2015...Op.cit.*, Article 7 sentence (2) letter n.
- ³⁵ This requirement applies only to candidates for members of DPR and DPRD. In Republic of Indonesia, *Law No. 7 of...Op.cit.*, Article 240 sentence (1) letter n.
- ³⁶ This requirement, especially for candidates of head and vice head of region, *Law No. 1 of 2015...Op.cit.*, Article 7 sentence (2) letter q.
- ³⁷ This requirement does not apply to candidates of heads of regions. In Republic of Indonesia, *Law No. 1 of 2015...Op.cit.*, Article 7.
- ³⁸ This requirement applies only to candidates for President and Vice President, in Republic of Indonesia, *Law No. 7 of 2017...Op.cit.*, Article 169 letter d.
- ³⁹ This requirement applies only to candidates of President and Vice President. *Ibid.*, Article 169 letter d.

14. Nominated in only one representative institution. ⁴⁰	33. In possession of vision, mission, and programs in running the government. ⁴¹
15. Nominated in only one electoral district. ⁴²	34. Spouse of the candidate for president or vice president is Indonesian citizen. ⁴³
16. Agree to work full time. ⁴⁴	35. Not currently nominated as member of DPR, DPD or DPRD. ⁴⁵
17. Resign from position of civil servant, member or TNI and Polri. ⁴⁶	36. Never serv ⁴ as governor for vice gubernatorial candidate, regent/mayor for vice regent/vice mayor candidate of the same region. ⁴⁷
18. Resign from position of head of region and/or vice head of region. ⁴⁸	37. Resign from the office of governor, vice governor, regent/mayor vice regent/vice mayor who runs in other regions since appointed as candidate. ⁴⁹
19. Resign from position of Board of Directors, Board of Commissioners, Supervisory Board and employees of BUMN/BUMD or other institutions funded by state treasury. ⁵⁰	38. Resign from membership of DPR, DPD and DPRD since appointed as pair of candidate in the election of head of regions. ⁵¹

Source: Processed from the Law on General Election and Election Law of Gubernatorial, Regent and Mayor Election

The requirements above may be classified into five categories, i.e.:⁵² (1) personal qualification requirement; (2) personal disqualification requirement; (3) loyalty to and compliance with the state requirement; (4) limitation to the misuse of power requirement; and (5) nomination administration requirement.

Personal qualification requirements are requirements that must be and must be possessed by any individuals of candidate to be nominated into an election. Personal disqualification requirements are requirements pertaining to something that should not befall upon a candidate. This personal disqualification pertains to certain acts that are forbidden yet committed by the candidate. Meanwhile loyalty to and compliance with the state requirements are requirements related to how someone loyally exercise her/his duties and rights as citizen according to constitution and other existing legislations.

⁴⁰ Applies to candidates for members of DPR, DPD and DPRD.

⁴¹ *Ibid.* Article 169 letter t

⁴² Applies to candidates for membership of DPR, DPD and DPRD. This requirement ought to be implemented when the regional election are concurrently held nationally, in order to avoid a candidate from running in two electoral regions.

⁴³ *Ibid.*, Article 169 letter c.

⁴⁴ Applies only to candidates for membership of DPR, DPD and DPRD, not for candidates of president and vice president, and heads of regions.

⁴⁵ *Ibid.*, Article 169 letter k.

⁴⁶ This requirement is no longer in effect for candidates for President and Vice President.

⁴⁷ This requirement applies only to candidates of head and vice head of region, in Republic of Indonesia, Law No. 1 of 2015...*Op.cit.*, Article 7 sentence (2) letter o.

⁴⁸ This requirement applies only to candidates for membership of DPR, DPD and DPRD. In Republic of Indonesia, Law No. 7 of 2017...*Op.cit.*, Article 240 Sentence (1) letter k

⁴⁹ *Ibid.*, Article 7 sentence (2) letter p.

⁵⁰ This requirement does not apply to candidates of President and Vice President. Republik of Indonesia, Law No. 7 of 2017...*Op.cit.*, Article 169.

⁵¹ *Ibid.*, Article 7 sentence (2) letter s.

⁵² The terms "qualification" and "disqualification" are also used in *The Constitution of The Rept. 6c of Singapore, Articles 44 and 45*. In Indonesia, these terms have also been used by A.S.S. Tambunan, in A.S.S. Tambunan (1986), *Pemilihan Umum di Indonesia dan Susunan & Kedudukan MPR, DPR dan DPRD, Sejarah Pengaturan, Pemikiran-pemikiran serta Permasalahan yang Melatarbelakanginya dan Perbandingan dengan Negara Lain* (General Election in Indonesia and the Composition and Status of MPR, DPR, and DPRD; History of Regulation, Thoughts, and Complications and Comparison to Other States) Binacipta, Jakarta, pp. 86-88

Requirements pertaining to misuse of authority are requirements related to certain position held by a candidate so s/he will not be able to misuse the authority upon becoming candidate in general and local elections. Last, the nomination administration requirements are requirements related to the election processes without which someone ineligible to be nominated.

Based on the aforementioned qualification, there are 10 requirements that belong to the personal qualification, 6 of personal disqualification, 7 of loyalty to and compliance with the state, 10 of anticipation to the misuse of power, and 4 of nomination administration. Each of the classification does not apply similarly to all offices. There are some type of offices that demand higher personal qualification and disqualification, such as for President and Vice President, and head of region; there are certain offices that does not require high qualification, such as the candidates for membership of DPR, DPD, and DPRD. There are some offices that require higher anticipation to misuse of power, such as head of region; and some offices are lower, such as the legislative member.

The differentiation in the level of difficulties in each office can be understood. However, if the differentiation is not proportionally regulated, this will cause election legal framework unfair. Such legal framework shall leave a crack for malpractice in the management of elections by means of regulation manipulation.⁵³ In order to avoid such malpractice, formulation of candidate requirements must be conducted by considering equality of opportunity to all citizens. No matter what, one of the measures to determine the fairness of election is the standard for the restriction implemented to all elected offices. The more equal the restriction, the fairer the election legal framework. In contrast, the further the gap of differentiation of requirements among candidates, the further the fairness of election legal framework.

Further, the equality on the legal framework of suffrage restriction can also be seen from the synchronization rate and implementation of requirements towards all elected offices. Synchronization of election regulations is one of the instruments to ensure the compliance towards the principles of equal treatment before the law (*het rechtsgelijkheidsbeginsel*).⁵⁴ The compliance towards the principles, as Hans Kelsen said, the unity of legal order⁵⁵ contextually the regulation election will be maintained. At the same time, citizens' rights in election can also be protected, assured in terms of certainty, and be treated fairly.⁵⁶

4. Limitation of Suffrage

In the regulation of limiting suffrage, there is a quite serious issue. It is pertaining to the dissimilarities of requirements implemented for general election and for regional election, meanwhile both are elections for public offices that are filled through election

⁵³ Birch, S. (2011). *Electoral Malpractice*. Oxford: Oxford University Press, p. 51. Sarah Birch identified there are three types of election malpractice, i.e.: (a) *the manipulation of rules, which includes efforts to alter electoral laws and other administrative regulations to partisan advantage*; (b) *the manipulation of voters, which takes place through biased and deceptive political communication during election campaigns, as well as the provision of particularistic incentives*; and (c) *the manipulation of votes, which is a matter of altering the implementation of the procedures governing elections*.

⁵⁴ Indrati, M.F. (2007), *Ilmu Perundang-undangan, Jenis, Fungsi, dan Materi Muatan*. Yogyakarta: Kanisius, p. 254

⁵⁵ Kelsen, H. (1961), *General Theory of Law and State*. New York: Russel & Russel, p. 161

⁵⁶ Yuliandri. (2009), *Asas-Asas Pembentukan Peraturan Perundang-undangan yang Baik*. Jakarta: Rajawali Pers, p. 118

that involves the people. Differentiation policy will create gap of treatment of citizens in election if such policy is not based on logical and objective reasons.⁵⁷

The logical and objective standard in measuring the implementation of differentiation policy is a tough and sensitive task.⁵⁸ This is due to the fact that such measurement shall be based on the objective justification that will depend on the values among the society that can change depending on the space and time. Yet, if related to the study of justice philosophy, the dilemma on the tolerable determination of differentiation measurement can be answered. Such objective measurement is avoiding the occurrence of condition where a group of people shall take benefit, and some other group will be injured in terms of rights. In other words, the objective measurement of implementation of differentiation principle is the proportionality of implementation.

By means of such measurement, the differentiation of suffrage-implementation requirement regulation will be further analyzed. The requirements of such suffrage are in the following table.

Table 2. Comparison between Requirements to Vote in General and Regional Elections

No	General Election	Regional Election
1.	Citizen of Indonesia	Citizen of Indonesia.
2.	On voting day aged 17 or is/was married.	On voting day aged 17 or is/was married.
3.	Registered as voter.	Registered as voter.
4.	Not revoked of political right by the court.	Not revoked of suffrage by a final and binding ruling of the court
5.	Not member of Indonesian Armed Forces or Indonesian Police	-
6.	-	Evidently not in psychological/memory disturbances.

Source: Excerpted⁴ from Law No. 7 of 2017 on General Election and Law No. 1 of 2015 as amended by Law No. 10 of 2016 on the Election of Governor, Regent, and Mayor.

From the aforementioned data, the reasons to limiting suffrage in both elections are quantitatively similar. There are similar requirements, i.e. the citizen of Indonesia, the minimum age of 17 and registered as voter. There are three other requirements that are applied differently between voting in general and regional elections.

First, the requirement of not being revoked of suffrage. To vote in general election, a citizen should not be in a condition where her/his political right is revoked, meanwhile in order to vote in regional election, it's the suffrage. Political right and suffrage are different. Political right implies the rights related to the chance to participate and one of them is suffrage.⁵⁹

The formulation of the requirement 'not being revoked of political right' leads to a question, when a court rules that one's political right is revoked, does that also include one's suffrage? The court can only sentence someone based on one's severity of transgression. It is almost possible when someone commits one transgression, s/he will

⁵⁷ Nowak, M. (2003) *Pengantar Rezim Hak Asasi Manusia Internasional*, Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Department of Law and Human Rights of Indonesia, Jakarta, p. 9

⁵⁸ *Ibid.*, p. 67

⁵⁹ Article 21 point 3 of the Universal Declaration of Human Right; in The 1945 Constitution of The State of the Republic of Indonesia, regular election is not regulated in the section on human rights, but in a Special Chapter on Election.

be sentenced to total revocation of political rights. In the group of political rights, there are six right, i.e.: freedom of union and association, suffrage, the right to governmental position, freedom of aspiration through election, freedom of religion and freedom to obtain general services from the state.⁶⁰ When someone's transgression only related to one or two out of the six existing political rights, the court is certainly not allowed to revoke one's political rights. The rights to be revoked are only the rights that are related to the transgression. Hence, the limitation of suffrage with a requirement 'not being revoked of political right' is something overdone. To be more precise, the phrase 'not being revoked of suffrage' as contained in the Regional Election Act is much more proportional as it refers to one specific right in concrete.

Second, voting in general election requires someone who is not part of the Indonesian National Army (hereinafter, TNI) and the Indonesian National Police (hereinafter, Polri). Meanwhile, regional election does not require similar. Not only do the two elections differ on this issue, but also do the legal certainty on the voting rights of the members of TNI and Polri in regional election. This is because, the absence of such requirement does not immediately cause members of TNI/Polri to exercise their voting rights in regional election. Members of TNI/Polri are still ineligible to exercise their voting right, however there is no legal ground on limiting the right. In this context, limiting a right has occurred without unequivocal and certain legal framework.

Third, on the 'not in psychological/mental disturbances' requirement. The phrase 'not in psychological/mental disturbances' had been declared in contrast to the 1945 Constitution by the Constitutional Court as long as the phrase is not understood as 'in permanent psychological and/or memory disturbances that, according to professionals in psychiatry, abolish one's ability to vote in election.'⁶¹ However, such requirement is still in effect as a requirement as a voter. This requirement is also implemented differently. The requirement exists in regional election but not in general election. If this particular requirement is not applied in one of the elections type, how can someone with psychological/mental disturbances exercise her/his voting rights? How come people with psychological/mental disturbances are registered as voters in general election?

Omitting the requirement from election regulation, basically, has caused damage to the proportionality on the assurance of voting rights. This is because, sane citizens, cannot have the same rights with those who are in psychological/mental disturbances. Equating the suffrage of sane citizens with those who are not is illogical and inobjective and thus, such legal policy can be assumed as unfair. Both groups who are subject of the right ought to be distinguished, as the objective condition of both are dissimilar. Likewise, people with mental disturbances are not the people who are eligible to act as supporter of rights and duties,⁶² hence, they are cannot be held legally liable. Similarly, if they are still subjected to suffrage, their votes in election cannot be legally held liable.

5. Limitation on the Right to be Voted

In the history of Indonesian general election, the regulation to limiting the right to be voted is very dynamic. In such dynamic, there are requirements that are consistently used, there are requirements implemented yet omitted in the next election, and there are new requirements to accommodate the needs of the day.

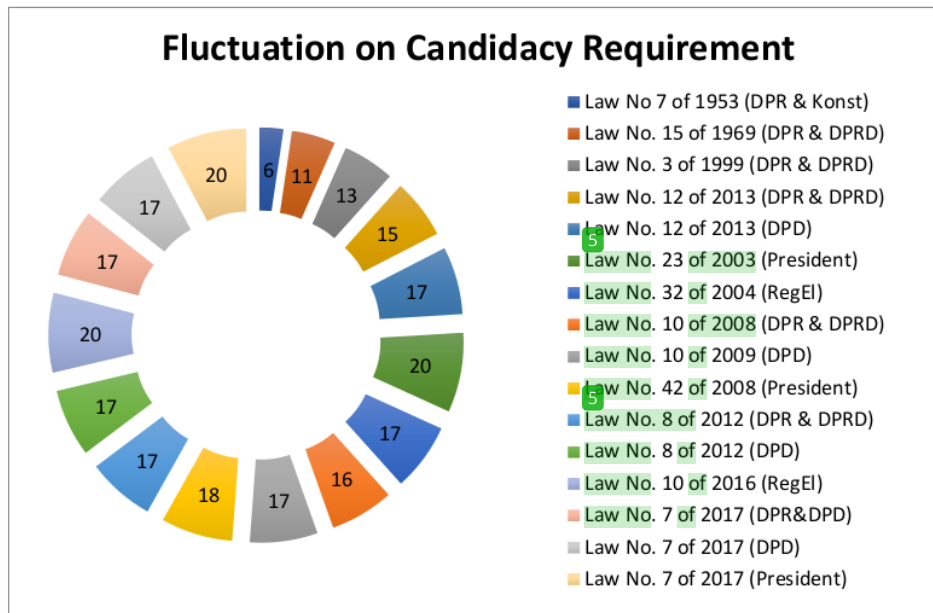
⁶⁰ The 1945 Constitution of The State of the Republic of Indonesia and the Universal Declaration of Human Rights.

⁶¹ [11](#)ul Anwar, et.al., (2017), *Op.cit.*, p. 598

⁶² Syahrani, R. (2006). *Seluk-Beluk dan Asas-asas Hukum Perdata*. Bandung: Alumni, p. 45

In the early periods of general election, the requirement to become candidate in general election is not more than six. During the New Order regime requirements to exercise the right to be voted become eleven requirements. The general election after *reformasi* sees that the requirements become 13. When the election is divided into legislative, presidential, and regional elections, there are additions as well as subtractions to the requirements. The fluctuation of the requirements in exercising the right to be voted can be found in the following chart.

Chart 1. Fluctuation of the number of Requirements to Become Candidate



Source: Processed from General and Regional Election Acts in effect since 1953 up to 2017.

The fluctuation indicates that up to present, there are 38 requirements in effect. As discussed earlier, there are requirements that are in effect similarly as well as distinctively. For requirements that are in effect distinctively, some are tolerable, and some others are intolerable.

Tolerable distinctions are, among others, the citizenship requirement for presidential candidate, minimum age of candidate, membership in political party, nominated in one representative institutions, and some other requirements. Meanwhile the intolerable requirements are, among others, reporting assets, not liable to debt, never committed any act of disgraceful nature, in possession of NPWP etc. The tolerability/intolerability of such distinction is arguable. However, for some requirements, there are very little chances of such argument. The intolerable requirement that may yield the least argument is the asset report, possession of NPWP, and tax return.

The three requirements applies only to candidates of president/vice president, and head/vice head of regions. Such requirements do not apply to candidates for membership of DPR, DPD, and DPRD. Meanwhile, those legislative offices, just like presidency, and heads of regions are similarly political offices elected through election.⁶³ With the similar status of those offices, the three requirements should have been similarly applied to.

As candidates for public offices, candidates for membership of DPR, DPD, and DPRD must also be given the duty to report personal assets to the relevant authorities, must be in possession of NPWP, as well as in possession of tax return. This requirement is imperative as paying tax is a duty of citizens, and each candidate for public offices should be the model of other citizens in paying tax.⁶⁴ After all, those requirements are some of the measurements of compliance of a candidate to the duties in serving the state.

Pertaining to this issue, Mahfud MD thinks that the in absence of those requirements for candidates of DPR, DPD, and DPRD because those offices are representation offices, and candidates for these offices are not always persons who qualify as tax subjects.⁶⁵ In contrast, executive officials are inevitably people, due to their income, qualify as subjects of tax.⁶⁶ In line with provisions of tax, the obligation to possess NPWP applies only to citizens both individual and legal entity whose income qualifies the minimum taxed income.⁶⁷

However, that does not excuse the implementation of those three requirements to candidates for membership of DPR, DPD absolutely. The requirements can still be adopted by certain exception; the requirement is compulsory to candidates for membership of DPR, DPD and DPRD whose income has been subject to tax. Meanwhile for candidates whose income is still under such standard, the requirements on tax do not apply to them, yet they still have to report their assets.

Accordingly, when someone is nominated for membership of DPR, DPD and DPRD, those nominees must report all activities, business and income. The report then will indicate whether s/he is a tax subject or not, an obedient tax subject or not. When elected, the asset and tax reports will be one of the control tools towards the possibilities of misuse of power. The existence of this requirement comes from the attempt to drive a clean government and the spirit to fight corruption.⁶⁸

However, in order to achieve equality in election, similar requirements and not related to the specificity of each political offices should be equally applied. The application of requirements equally by considering proportional principles will still open the chance for candidates with income lower than tax standard to be nominated.

⁶³ Read Constitutional Court' Ruling No. 14-17/PUU-V/2007, Read Constitutional Court' Ruling No. 15/PUU-XI/, Read Constitutional Court' Ruling No. 33/PUU-XIII/2015, and Read Constitutional Court' Ruling No. 4/PUU-VI/2009

⁶⁴ Dewan Perwakilan Rakyat Republik Indonesia, *Risalah Rapat Proses Pembahasan Rancangan Undang-Undang tentang Pemilihan Presiden dan Wakil Presiden*, Rapat Kerja ke-10 Pansus RUU Pemilu Presiden dan Wakil Presiden, 7 Mei 2003, hlm. 28

⁶⁵ Moh. Mahfud MD., *Interview in Jember on November 10 2017 at 1:30-2:45 pm Western Indonesia Time.*

⁶⁶ *Ibid.*

⁶⁷ Republic of Indonesia, Law No. 6 of 1983 on the General Provisions and Tax Procedure in conjunction to Government Regulation No. 74 of 2011 on the Procedure of the Implementation of Rights and Duties in Tax.

⁶⁸ Angraini, T., *et al.* (2011), *Menata Kembali Pengaturan Pemilukada*. Perkumpulan Untuk Pemilu dan Demokrasi, Jakarta, p. 45

6. Conclusion

General and regional elections regulations have adopted 5 requirements to exercise voting rights and 38 requirements for the right to be voted for membership of DPR, DPD, office of the president and vice president, head/vice head of regions, and membership of DPRD. Out of the 5 requirements for voting, the Law regulation distinction of application for general and regional elections. Meanwhile for the right to be voted, out of the 38 requirements, there requirements that generally apply to all offices, and also, there are requirement that only apply for certain offices.

In ruling out the requirements to the voting right, there are disharmony in the formulation of norms that may have serious impact for the implementation of voting right, such as the requirement of 'not being a member of TNI and Polri' and the requirement of 'not with psychological and mental disturbances'. The same thing also happens to the ruling of the right to be voted, the legal drafters also apply different requirements. The requirements that should have been applied to all political office turn out to be implemented only to some offices. In this context, the principle of equality has been violated. At the same time, proportionality of the limitation of voting right is not achieved. Consequently, the regulation to limit voting rights has not been able to achieve fair election to all citizens. In order to end this issue, the regulation of general and regional elections need to be re-regulated so it will be in line with the principles of proportionality and equal treatment to all citizens and election candidates.

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