



Validity of The General Election Commission Regulation on Campaign Setting in Government Facilities

Fazlur Rahman El Islamy

Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Ir. Sutami street, No. 36 Kentingan, Jebres, Surakarta, Jawa Tengah, Indonesia 57126
fazlurrahmanelislamy@student.uns.ac.id

Lego Karjoko

Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Ir. Sutami street, No. 36 Kentingan, Jebres, Surakarta, Jawa Tengah, Indonesia 57126
legokarjoko@staff.uns.ac.id

Abstract—This study aims to evaluate the validity of The General Election Commission (KPU) Regulation Number 20 of 2023 concerning Amendments to KPU Regulation Number 15 of 2023 concerning General Election Campaigns which regulates the use of state facilities in the campaign as a follow-up to the Constitutional Court Decision Number 65/PUU-XXI/2023. The research was conducted through a normative method with a statutory and conceptual approach. The analysis uses a deductive approach, focusing on the principles of legal certainty as well as the principles of justice and fairness in the General Principles of Good Governance and KPU Regulations. The results show that the regulation has fulfilled the principle of legal certainty in accordance with the general principles of good governance but does not fulfill the principles of justice and fairness.

Kata Kunci: *Validity; KPU Regulation; Campaign; Principles of Legal Certainty; Principles of Justice and Fairness.*

I. INTRODUCTION

Democracy as a concept based on the principle of popular sovereignty has been widely implemented by modern countries around the world. One of the indicators to determine the extent to which the principles of democracy are implemented in a country is a general election.[1] As part of the pillars of democracy, the quality of elections needs to be considered as an effort to realize honest and fair elections, to produce a government with legitimacy that represents the will of the people.[2]

In Indonesia, the organization of general elections is regulated in Law Number 7 of 2017 concerning General Elections (Election Law). The Election Law regulates various aspects related to the holding of elections such as organizing institutions, election stages, voting rights, mechanisms for resolving electoral legal problems, and contains elements of an electoral justice system. Electoral justice requires legal certainty and guarantees for all electoral processes and stages.[3]

Efforts to realize the implementation of elections in a fair manner can be carried out both pre-voting, voting, and post-voting. At the stage before the voting, for example, it is done by testing the constitutionality of the Election Law. The case with registration number 65/PUU-XXI/2023 at the Constitutional Court is one of the community's efforts to maintain their constitutional rights while ensuring that elections occur directly, publicly, cleanly, secretly, honestly and fairly.

The object of the petition in the case is regarding the prohibition of campaigns at government facilities, places of worship, and places of education. The Constitutional Court ruled that government facilities and places of education can still be used as campaign venues provided that they get permission from the person in charge of the place and are free from all campaign attributes.[4]

The Constitutional Court does not have law enforcement tools such as police or bailiffs to guarantee the implementation of its decisions. This shows that despite its important institutional role, the implementation of the Constitutional Court's decisions depends on the compliance of other branches of power or other organs within the

Constitutional Court. The power of the Constitutional Court as an instrument of enforcement of its decisions is the constitution itself, which depends on the acceptance and compliance of others.[5]

The General Election Commission (KPU) has stipulated Regulation Number 20 of 2023 concerning Amendments to KPU Regulation Number 15 of 2023 concerning General Election Campaigns on October 9, 2023. KPU Regulation Number 20 of 2023 is an implementing instrument for the Election Law, especially about election campaigns. In a democratic system, political campaigns are crucial in introducing candidates to the public.[6] Political campaigns are understood as structured efforts to influence decisions within a group. To win a particular election, each candidate must devise effective strategies and planning. The importance of this strategy and planning lies in its role in determining the candidate's success in the election.[7]

Potential problems and non-neutrality are feared to occur during the implementation of the campaign with the enactment of the KPU Regulation, where there is a gap for injustice in terms of access to government facilities, where contestants who currently hold positions in the government (incumbents) or have an affiliation with one of the contestants are more favored. In addition, the issue of non-neutrality of the government and its apparatus is one of the trending issues that often becomes a topic ahead of the 2024 simultaneous general elections. Although the regulation on the neutrality of the reform bureaucracy has explicitly prohibited state civil apparatus involved to political activities, in every activity related to practical politics there are still many violations of the principle of neutrality.[8]

II. LITERATURE REVIEW

A. *Laws and Regulations*

The basic principles in the preparation of effective laws and regulations include various aspects such as explicit objectives, adequate supervision, content suitability, recognizability, equality in law, justice, law enforcement, legality, and legal certainty. Based on Article 5 of Law Number 12 of 2011, several principles in the formation of laws and regulations are: 1) the principle of clarity of purpose; 2) principles of institutional or appropriate formers; 3) principles of compatibility between hierarchies, types, and substance of material; 4) principles of implementability; 5) principles of usability and usefulness; 6) principles of clarity of formulation; and 7) principle of transparency.[9]

Democratic law that reflects the will of society has several criteria, namely addressing community problems, formed by involving public participation and through a structured democratic process. The process of forming such laws and regulations is expected to fulfill the aspects of democratic law formation to achieve legal objectives, justice, confidence, timeliness, and the realization of laws that have a sociological basis.[10]

Bayu Dwi Anggono argues that the purpose of evaluating laws and regulations is to create management in creating more efficient regulations. Currently, the management of legislation production in Indonesia does not sufficiently recognize the importance of evaluation. Evaluation is crucial to assessing the effectiveness of a regulation, which depends on how accurately and seriously the evaluation is carried out. Without the evaluation function, the legislation production management system will feel incomplete and potentially not function as it should.[11]

In order to avoid legal uncertainty that should not occur in a state of law, there are two things that need to be considered. First, it needs to be determined whether the regulation is made based on a mandate from higher laws and regulations or through granted authority. If the regulation does not meet these criteria, it can be ignored, indicating that the regulation has a higher position in the hierarchy of legislation. Secondly, by applying general legal principles such as *lex specialis derogat lex generalis*, which states that a more specific regulation will override a more general one in similar cases, and *lex posterior derogat lex priori*, which asserts that in situations where two equal regulations conflict, the newer one will supersede the older one.[12]

B. *Political Campaigns and Fair Elections*

A campaign is a series of information delivery actions or a planned form of communication to create certain effects on the intended public or group within a certain period of time. Campaigns are carried out consciously, gradually, and continuously within a certain time span to influence the specified target audience. In a political context, campaigns are not exclusively party-related or limited to vote-seeking, but encompass a wide range of incentives and objectives related to influencing the electoral process.[13]

In organizing elections, political campaigns disseminate ideas, information and political messages in persuasive ways within a certain period of time and are limited.[14] Although campaigns basically have an important role in advancing political life in a democracy by providing information to voters, encouraging active participation in the electoral process, as well as shaping public opinion related to various political issues. However, campaigns must also be run responsibly in order to ensure that the electoral process is fair and transparent.

Elections are instruments to fill public offices through a democratic process of election by the people. In modern politics, elections serve to give legitimacy to a governing regime.[15] However, organizing elections in a democratic country poses considerable political challenges. Elections must be held honestly, fairly, and with the

legitimacy of the community in general and the competing political parties and stakeholders in the election in particular.[16]

Ramlan Surbakti provides two of seven criteria for fair and integrity elections, among others: 1) Legal certainty formulated based on democratic election principles; 2) fair competition between contestants.[17]

In the practice of organizing the electoral process, there is often what is called electoral malpractice, which is the manipulation of the entire electoral process and stages for the benefit of a person or group or a particular political party by ignoring the public interest.[18] If left unchecked, high levels of electoral malpractice can reduce public participation and decrease public confidence in the electoral system. Electoral malpractice offenses are divided into three categories by Sarah Birch, including:[19]

- 1) *Manipulation of Election Legal Framework*, manipulation of the laws and regulations governing elections.
- 2) *Manipulation of Vote Choice*, which is the manipulation of voters' choices aimed at directing or changing voters' choices in various manipulative ways.
- 3) *Manipulation of electoral administration*, which is the manipulation of the voting and counting process up to the announcement of election results.

B. *General Principles of Good Governance*

In order to conduct good and efficient governance, the government uses the General Principles of Good Governance (AAUPB) as a guide.[20] AAUPB serves as a reference when it comes to administering or interpreting the terms of ambiguous laws and regulations about state administration. Also to limit and avoid the possibility of state administration implementing policies or implementing policies that are far from the provisions of regulations and laws.[21] According to Philipus M. Hadjon, AAUPB must be seen as unwritten legal norms, which must always be obeyed by the government. The conception of AAUPB which includes several principles including: Transparency, Accountability, Responsibility, Independence and Fairness.[22]

In addition, there are 3 principles that are intertwined in the scope of government administration, including: 1) principle of balance; 2) principle of not interfering with authority; and 3) principle of fairness and reasonableness. [23]

The Principle of Justice dictates that any action taken by a state administrative body or official shall reflect justice proportionate for every citizen, according to the viewpoint of the legislation (Local Government Law, State Civil Apparatus Law, and Ombudsman Law). Furthermore, the idea of fairness mandates that the government refrain from acting capriciously or failing to maintain proportionality. Government officials may be held accountable for their arbitrary or unreasonable conduct. According to the law, this principle also calls for giving anything to the legitimate owner.[24]

III. METHOD

This study employed a normative methodology that combines a conceptual and legislative approach. Normative research primarily uses library or legal materials as its data sources. The author uses primary and secondary legal sources as well as other legal resources for study and analysis. Laws and regulations are the primary legal elements. As for the secondary legal sources employed in this study, they comprise scientific publications, books, journals, and research findings. This study examines relevant laws, doctrines, and statutes to pinpoint weaknesses and offer fresh perspectives on how to improve law enforcement in particular circumstances. Furthermore, a literature review and the use of a normative juridical methodology are included in this research to assess the regulatory framework following the Constitutional Court's implementation Number 65/PUU-XXI/2023.

IV. RESULT AND DISCUSSION

In hierarchical structure, the General Election Commission (KPU) Regulation is not included in the hierarchy of laws and regulations that regulated by Law on the Establishment of Laws and Regulations. This causes KPU Regulations to be outside the structure of ordinary laws and regulations, parallel to other types of regulations made by institutions or officials who have the authority to create their own laws. KPU Regulations are still considered part of statutory regulations because they contain general legal norms and are formed by the competent authority through a legal procedure.[25]

The independence of the election organizer (KPU) is the main focus of the constitutional amendment in the electoral sector, with the aim to prevent the election organizer from outside interventions that are not part of the electoral institution.[26] KPU regulations play a role in making technical guidelines for simultaneous presidential, legislative, and regional head elections, giving them a strong legal basis and directly under presidential regulations in the context of executive power. However, it should be noted that not all KPU Regulations can be classified as statutory regulations, although their status as statutory law products is recognized because they are formed on the basis of the authority granted by law.

KPU already has regulations regarding the process of forming legal products that regulate the follow-up of the Constitutional Court Decision. Based on KPU Regulation Number 1 of 2022 concerning Procedures for the Formation of Regulations and Decisions within the General Election Commission (KPU Regulation 1/2022). The regulation is formed in order to ensure legal certainty over the formation of regulations and decisions within the General Election Commission.[27] This is in accordance with one of the general principles of good governance, namely the Principle of Legal Certainty.

Article 10 of KPU Regulation 1/2022 stipulates that in certain circumstances, the initiator can submit a draft KPU regulation outside the KPU regulation drafting program. The specific circumstances referred to are related to changes in laws governing elections and/or elections, changes or revocation of laws and regulations, implementation of decisions of the Constitutional Court and the Supreme Court, results of monitoring and evaluation of the implementation of KPU regulations, and the need to implement the duties, functions, and authority of KPU. Furthermore, based on Article 13 paragraph (2) of KPU Regulation 1/2022, it is stipulated that The Compilation Bureau harmonizes the conception of the draft KPU regulation against the provisions of higher and/or equal laws and regulations, the decision of the Supreme Court and/or the Constitutional Court, the agreement on the content material of KPU regulations, and the technique of drafting laws and regulations.

With the regulation of the campaign process in the election through Law Number 7 of 2017 and KPU Regulation Number 20 of 2023 and also its derivative regulations in the form of KPU Regulations, it cannot be directly interpreted that the election has or will run fairly. The fairness of the electoral process needs to be reconfirmed by looking at how the electoral justice system is implemented by the election organizers.[28] The various principles, characters, and criteria for fair elections cover all aspects related to the holding of elections, including the system, voting rights, the time of implementation, and matters relating to equal treatment in the holding of elections.[29] In the *dissenting opinion of* Constitutional Judge Saldi Isra in Decision Number 1/PHPU.PRES-XXII/2024, he stated that the running of the electoral process in accordance with the existing provisions or regulations does not necessarily mean that the electoral process is substantively fair, as it was during the New Order era.[29] Therefore, the existing electoral law regulations need to be followed by honest and materially fair attitudes and actions in the implementation of the electoral legal framework.

Returning to the context of organizing democratic elections, the campaign allows the people to be actively vote and voice their choices. In addition, campaigns are also part of public political education that must be carried out responsibly. Campaigning responsibly entails setting limits to avoid hurting or treating other candidates unfairly. Campaign limits contribute to election equity by giving each candidate an equal chance of gaining support. To prevent so-called electoral malpractice. Violations of campaign provisions and the use of state resources for campaign purposes are some of the modes that fall under the malpractice category of *manipulation of vote choice* according to Sarah Birch.[19]

To see the context of campaign restrictions in elections, it is important to re-read the legal considerations in Decision Number 65 of 2023. The Constitutional Court states that campaign restrictions about place or location are intended to preserve the neutrality and integrity of general election administration while also preventing disturbances to public activities in specific areas to uphold the principle of balance. Another thing that is also important is to avoid misuse of public facilities. The existence of a balance between the rights and interests of contestants or political parties campaigning with the rights and interests and public institutions is an absolute principle of balance. Meanwhile, the principle of neutrality requires public places to remain neutral from practical politics in order to keep the use of public resources used for the public interest and clean from political interests. Based on these two principles, the prohibition or restriction of some public places not to be used as places for campaign activities is a necessity in organizing honest and fair elections.

The establishment of KPU Regulation 20 of 2023 is very necessary considering that there has been a change in the meaning of the campaign ban in government facilities and educational places. If the KPU does not revise KPU Regulation 15 of 2023, it will create legal uncertainty in the community in organizing general elections and will harm the election participants in the implementation of the campaign. According to Gustav Radbruch, from the aspects of justice, certainty, and legal benefits, justice is the main element of the three aspects discussed. However, this does not ignore the other two aspects. An efficient law is one that can combine these three aspects to promote the welfare and prosperity of society. Radbruch interpreted legal certainty as a state in which the law is applied as a rule that must be followed. The role of law is to create legal certainty, with the main objective being to maintain social order. Legal certainty is an essential feature of law, particularly in the context of written law.[30]

KPU Regulation 20 Year 2023 has elaborated on the meaning of government facilities allowed for campaigns, which are limited to places, so that it can be interpreted that it is not other infrastructure facilities other than places as campaign locations. KPU also provides further technical provisions regarding the use of government facilities that are not listed in the Constitutional Court's decision. Then, to ensure the creation of justice, the KPU added the provisions of Article 72B paragraph (2) which provides signs that in granting permits for election campaign activities, the person in charge of government facilities must apply the principles of fairness, openness, proportionality, and neutrality not in favor of one of the election participants. However, this matter certainly depends on the person in charge who may have preferences in the ongoing political contestation. The KPU

Regulation does not regulate what sanctions are imposed on the person in charge of the facility who behaves unfairly. This is important considering that the election participants are also filled with people who have access to government facilities, for example, ministers, members of the parliaments who are still active and want to participate in the election. There is a potential for abuse of authority in the provision of government facilities for the campaign of the election participants who are still actively serving in the executive, legislative, and judiciary or who have exclusive access that can create injustice and inequality in the use of government facilities. As a state administrative official, the person in charge of government facilities must also comply with the General Principles of Good Governance, in this case the Principles of Justice and Fairness.

V. CONCLUSION

The establishment of KPU Regulation Number 20 of 2023 is in accordance with the provisions stipulated in KPU Regulation Number 1 of 2022 which determines that the form of follow-up to the decision of the Constitutional Court is through the establishment of General Election Commission regulations. In connection with that, the establishment of KPU Regulation Number 20 Year 2023 has taken into account the general principles of good governance, especially the principle of legal certainty which requires the existence of a basis for statutory provisions in every policy of government administration. Thus, KPU Regulation Number 20 Year 2023 has fulfilled the validity of the formation of laws and regulations based on the principle of legal certainty in implementing the decision of the Constitutional Court. However, if you pay attention to the substance contained in KPU Regulation Number 20 of 2023 where there are no sanctions for the person in charge of government facilities, it causes election participants who are still serving in the government, both in the executive, legislative and judicial circles, as well as election participants who have access or relationships with the person in charge, to be able to use government facilities in the context of campaigning for themselves or their colleagues, without heeding the principles of justice and fairness in the general principles of good governance. In addition, there is the potential for campaign permits at government facilities not to be granted to election competitors who are not active or not close to the government.

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