

CHAPTER FOUR

FINDING AND ANALYSIS

A. The Right of ex-Convicted to Become the Regional Heads Candidate according to Constitutional Court Decision.

1. The Right of Ex-Convicted in the Regional Head Election

The right to occupy the position of every citizen is protected by law, as well as in the position of the head of the region. The terms of the requirements as the regional head candidate regulated in Law No. 8 of 2015 on Regional Head Election. The requirements of regional head candidate is regulated in Article 7.⁵⁴

In the Article 7 point g the candidate must fulfill the requirements i.e “has never been imprisoned by a court ruling that has obtained a permanent legal force for committing a criminal offense punishable with imprisonment of 5 (five) years or more”. Therefore, for a person who has a status as the ex-convicted and already returned to the community, but the people ever sentenced to imprisonment punishable with imprisonment 5 (five) years or more, it can be ascertained that the ex-convicted lost the political rights as a citizen and shall not be allowed to become a regional head candidate based on this article.⁵⁵ It is different from the ex-convicted

⁵⁴ Ratna Herawati dan Retno Saraswati, “Kajian Normatif terhadap Calon Kepala Daerah Dikota Pekalongan”, *Diponegoro law journal*, Vol. 6, No. 2, March 2017, p. 8.

⁵⁵ Article 7 “Indonesian citizen may be a Candidate of Governor and Vice Governor, Regent and Vice Regent, and / or Mayor and Vice Mayor by fulfilling the following requirements”.

who has been through a criminal offense and received a penalty of imprisonment under 5 (five) years the people has the legality to run for regional head candidate.

The limitation of the rights of ex-convicted to be the regional head regulate in Article 7 point g. from the text of Article 7 point g above, it can be described that the elements, namely:

1. Never been sentenced to imprisonment based on a court decision that has permanent legal force.
2. For Committing a criminal offense which is punishable with imprisonment of 5 (five) years or more.

The explanation of the two elements is that they cause an ex-convicted to become forbidden to run for the regional head election. From the clarification of the terms of prohibition of the political right from ex-convicted, then the possible limitations which appear can be explained by the table, as follows:

Table 1. the Limitation of the Rights of Ex-Convicted on the Position of Regional Head

Threat of Prison / Verdict	< 5 Years	= 5 Years	> 5 Years
< 5 Years	ALLOWED		
= 5 Years	FORBIDDEN	FORBIDDEN	
> 5 Years	FORBIDDEN	FORBIDDEN	FORBIDDEN

Source: processed by the author

This table is a table which contains the scope of the limitation of ex-convicted to run for the regional head election. As for the explanation of the table of contents, as follows:

1. The ex-convicted who received threat of the imprisonment for less than 5 (five) years and a verdict of prison less than 5 (five) years are allowed to be the regional head candidate.
2. The ex-convicted who received threat of the imprisonment for 5 (five) years and a verdict of prison less than 5 (five) years are forbidden to be the regional head candidate.
3. The ex-convicted who received threat of the imprisonment for more than 5 (five) years and a verdict of prison 5 (five) years, they are also forbidden to be the regional head candidate.

4. The ex-convicted who received threat of the imprisonment for more than 5 (five) years and a verdict of prison less than 5 (five) years remain forbidden to be the regional head candidate.

Thus, there are 3 (three) possible prohibitions for ex-convicted to registers themselves as the regional head candidate. From that explanation between the verdict and the threat. It is clear that the provision of Article 7 point g is more of a threat punishment compared to the verdict. This can be seen even though the verdict is less than 5 (five) years, but as long as it is crime threatens the person 5 (five) years or more, then the ex-convicted is still prohibited to be the regional head candidate.

So there are still the limitation on the rights of a person (ex-convicted) to be the regional head candidate. For this reason the provisions of Article 7 point g has been reviewed by the Constitutional Court.

Because, the guarantee of human rights has been regulated in the 1945 Constitution, it is actually stated in the Article 28D Paragraph (3) that, "Every citizen has the right to the equal opportunity in government.",⁵⁶ Human rights which is related to the right of ex-convicted namely political rights, where is the rights to participate in the government, such as right to vote, right to be elected, the right to establish political parties, etc.⁵⁷

⁵⁶ Masyhur Effendi, Op. Cit, p. 49.

⁵⁷ Bambang Heri Supriyanto, Op. Cit, p. 157.

Regarding the ex-convicted who run for the regional head or legislative candidates, it is the political right of the ex-convicted to be elected in the General Election and Regional Head Election, as well as the right to equality before the law and the government.⁵⁸ The participation of the ex-convicted which is the basic of human rights, because human beings have the same rights and obligations, and also guaranteed in the 1945 Constitution, Universal Declaration of Human Rights, and the Law No. 39 of 1999 on the Human Rights.⁵⁹

The right to participate in government which is the basic important for the society which gives the opportunity to implement their rights in public participation on the process of democracy in Indonesia.⁶⁰ All citizens will be treated the same in the implementation of State. The similarities it implements is that all societies have the same rights to get the opportunity in governance.⁶¹

Every citizen in Indonesian have the right to be elected and to vote in general election or in the regional head election, through the voting which is direct, public, free, confidentially, honest and fair.⁶² But every rights still has some limitations in the implementation of human rights. These rights include in the civil rights and political. Furthermore, the civil

⁵⁸ Abdul Ghoftar, "Kejujuran dalam Bingkai Hak Memilih-Dipilih (Pelajaran dari Pemilukada Bengkulu Selatan), *jurnal Konstitusi*, Vol. 8, No. 1, February 2011, p. 81.

⁵⁹ Nurul Qamar. Op. Cit. p. 57.

⁶⁰ Article 43 Law No. 39 of 1999 on Human Rights

⁶¹ Jumadi, 2012, *Refleksi Hak Asasi Manusia diIndonesia*, Makassar, Alauddin University Press, p. 21.

⁶² Article 43 Paragraph (1) of Law No. 39 of 1999 on Human Rights.

rights and political have the some categories consisting of: firstly, the rights which recognized as the rights that can-not be reduced (non-derogable rights) and the second is the rights that can be reduced (derogable rights).

Firstly, the rights that can-not be reduced (non-derogable rights). The concept of non-derogable rights interpreted that some human rights are absolute which is the rights should not be reduced by the State, even in an emergency or in any circumstance by anyone.⁶³ The articles which govern on the rights that can-not be reduced (non-derogable) are Article 28I Paragraph (1) of the 1945 Constitution and Article 4 of Law No. 39 of 1999 on Human Rights which stated “The rights to life, rights to be free from torture, rights of thought and conscience, freedom of religion, freedom of slavery, rights to recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances”.

According to Ifdhal Kasim,⁶⁴ there are some categories of the rights that can-not be reduced (non-derogable) namely:

1. Rights to life
2. Rights to freedom of torture
3. Rights to freedom slavery

⁶³ Ifdal Kasim, 2001, *Hak Sipil dan Hak Politik*, Jakarta, eLSAM. p. xii.

⁶⁴ Ifdhal kasim is one of the activist of Human Rights and he also as the chairman of the National Commission of Human Rights with period 2007-2012.

4. Right to freedom of detention because of failed to fulfill the agreement
5. Right to freedom from any retroactive penalties
6. Right as a legal subject and
7. Rights to Freedom of religion and believe his/her faith.

Secondly, there is the concept of the rights that can be reduced (derogable rights) by States. These rights consist of:⁶⁵

1. Right to freedom of gathering peacefully
2. Right to join an association including to become a member of labor union
3. Right to freedom of expression

The reduction of the rights above can only be conducted if comparable with the threats which arise and not discriminatory. The limitation of rights shall not more than what has been regulated in International Covenant on Civil and Political Rights. In addition, the State which conducted the reduction of rights are required to state the reasons why the limitation was conducted.⁶⁶ So, if there is an implementation of the article which limit against ex-convicted to become the regional head, it can be categorized as human rights violation.

⁶⁵ Ifdhal Kasim, Op. Cit, p. xiii.

⁶⁶ Trisno Raharjo, "Upaya Membangun Demokrasi melalui Penyelesaian Pelanggaran Hak Asasi Manusia", *Jurnal Media Hukum*, Vol. 8, No. 18, October 2001, p. 47.

The limitation of criminal law is applied to a person when the person has been appointed as a suspect, then the defendant and the convicted until finished through a criminal punishment that has been decided by the Judge.⁶⁷ If the convicted already finished in carrying out the criminal punishment given to the convicted, then the convicted becomes the ordinary person or legal subject whose rights and obligations must be returned with the correctional system which regulated in the Law of Correctional.⁶⁸

Recovery of a right and freedom of the person who already carrying out the punishment becomes the goals of correctional system based on Law No. 12 of 1995 on Correctional. The recovery of the right and freedom is aimed for the person who already finished their punishment, in that he/she can be active again in the development of a government.⁶⁹ Someone who has ever been imprisoned in a correctional institution (prison) already carrying out the development program regulated in a correctional institution (prison) can return to be a good citizen.⁷⁰

Administrative requirements which prohibited the ex-convicted to become the regional head candidate can be interpreted as a distrust of the development system in correctional institution.

⁶⁷ Andi Hamzah, 2012, *Asas-asas Hukum Pidana di Indonesia & Perkembangannya*, Jakarta, Sofmedia, p. 286.

⁶⁸ Ibid. p. 250.

⁶⁹ Rakei Yunardhani, "Lembaga Pemasyarakatan di Indonesia", *Jurnal Sisiologi*, Vol. 15 No. 2, April 2014, p. 144.

⁷⁰ Ibid. p. 146-147.

Criminalization in Indonesian is already regulated in the Criminal Code, where the criminalization consists of 2 (two) types, namely: the principal penalty and, the additional penalty. One of the additional penalty is the revocation of certain rights.⁷¹

The revocation of certain rights including the limitation on the right to vote and to be elected which is universally applicable, stated that the revocation of the right to vote shall be exercised by a court through a decision which has permanent legal force. If imposed without a certain condition, it may violate the rights of a person or citizen of a fair legal certainty, as well as equality before the law. Therefore, the rights of citizens which are guaranteed in the 1945 Constitution still exist on ex-convicted. So the legal status of ex-convicted after carrying out the punishment is back and the ex-convicted obtain his/her full legal rights.

2. Constitutional Court Decision No. 42/PUU-XIII/2015

This case is a case of judicial review of Law No. 8 of 2015 on Regional Head Election against the 1945 Constitution in the Constitutional Court.

The first Petitioner is Jumanto and the second Petitioner is Fathor Rashid, as for the legislation examined is the Law No. 8 of 2015 on Regional Head Election, while the norms of the article in the law which is

⁷¹ Agung Pambudi dan Budhi Wisaksono, "Pengaruh Sistem Pembinaan di Lembaga Pemasyarakatan sebagai Bentuk Pertanggungjawaban Pidana dengan Peningkatan Jumlah Narapidana", *Diponegoro Law Journal*, Vol. 5, No. 3, March 2016, p.2.

examined by the petitioners in this decision are Article 7 point g and Article 45 Paragraph (2) point k which regulates any of the requirements to participate in a government which is basically about: “has never been imprisoned by a court ruling that has obtained a permanent legal force for committing a criminal offense punishable with imprisonment of 5 (five) years or more”.⁷²

The petitioners come to the Constitutional Court for examining this Article; because the provisions of the norm have the potential harm to the constitutional rights of citizens. The petitioners stated that the provision of the article harms the constitutional rights, and it has been strengthened with the reason of petitioners as the citizens of Indonesia which are proven by the petitioner’s identity.

Jumanto and Fathor Rasyid are petitioners who are Indonesian citizens who have been sentenced to imprisonment for committing a criminal offense punishable by imprisonment of more than 5 (five) years. The verdict has been permanently enforced by Supreme Court Decision Number 1164 K / Pid.Sus / 2010 and Supreme Court Decision Number 2190 K / Pid.Sus / 2010. In the decision there is no additional penalty which prohibit the 2 (two) petitioners to be active in political activities, to be elected and to vote in a regional head election; the petitioners also has been active in the social activity. Then, Jumanto wants to register himself

⁷² See Constitutional Decision No. 42/PUU-XIII/2015.

to be the Regent in Probolinggo Regency and Fathor Rasyid wants to register to be the Regent in Situbondo Regency.

For this reason, the petitioners argue that they have no integrity problem because both of the petitioners have been accepted and gained trust in the society. Therefore, the provision of article above has the political rights potential to make the petitioners able to serve and fully participate in the society development, nation and country.

With all the reasons mentioned above, the petitioners propose the petitions to the Constitutional Court to decide his application with the decision include:⁷³

1. To grant the petitioners petition entirely, stated that the Constitutional Court have the authority to examine and decide upon the petition of the petitioners.
2. Constitutional Court stated that in Article 7 point g and Article 45 Paragraph (2) point k of the Law No. 8 of 2015 on Regional Head Election⁷⁴ contradict with the 1945 Constitution, especially Article 1 Paragraph (2), Article 1 Paragraph (3), Article 27 Paragraph (1) of Article 28C Paragraph (2), Article 28D Paragraph (1) and Paragraph (3), Article 28J Paragraph (2).

⁷³ Ibid, p. 32-33.

⁷⁴ Article 7 “Indonesian citizen may be a Candidate of Governor and Vice Governor, Regent and Vice Regent, and / or Mayor and Vice Mayor by fulfilling the following requirements”. And article 45 paragraph (2) k “The requirements document as referred to a letter of impunity has never been imprisoned by a court decision that has obtained permanent legal force for committing a crime punishable by imprisonment of 5 (five) years or more from the District Court whose jurisdiction covers the candidate's residence, as proof of the fulfillment of the candidate's requirements as referred to in Article 7 letter g;

3. Constitutional Court stated that Article 7 point g and Article 45 Paragraph (2) point k of the Law No. 8 of 2015 on Regional Head Election do not have legal force.
4. Petitioners proposing the fairness if the Judges have another opinion; *ex aequo et bono*.⁷⁵

According to the Constitutional Court, firstly, the provision of the article is a form of reduction of the rights to compliments, which can be equated with the criminal revoked of certain rights. If the rights to vote as the regional head which is revoked based on Article 7 point g of the Law No.8 of 2015 is conducted by law maker, the right to be elected which is revoked from the convicted based on Article 35 Paragraph (1) point 3 of the Criminal Code⁷⁶ is conducted by a Judge decision. Furthermore, the reduction of the rights to be elected can only be conducted by a Judge's decision as an additional penalty.

Secondly, the norm "has never been imprisoned by a court ruling that has obtained a criminal offense punishable with imprisonment of 5 (five) years or more" which is regulated by other Law that still exist should be carried out in accordance with the Constitutional Court Decision No. 4/PUU-VII/2009 dated March 24, 2009, which gives a requirements for someone who will occupy public office through the election, namely:

1. Elected officials

⁷⁵ *Ex aequo et bono* is a latin term which means something is to be decide by principle of what is fair and just.

⁷⁶ Article 35 paragraph (1) 3 "which may be revoked by a judges verdict in the terms: The right to vote and the right may be elected in elections which is conducted based on general law".

2. Applicable for a limited period only for 5 (five) years since the convicted person finished his sentence.
3. Excluded for the ex-convicted who announces openly and honestly that they ever been occupied by the prison and they are an ex-convicted.
4. Not as continually criminal offender.⁷⁷

The problem to be answered is how the provisions of Article 7 point g of the Law No. 8 of 2015 is examined by the petitioner?, So, according to the Constitutional Court Decision, Law No. 8 of 2015 is actually already accommodated with the Constitutional Court Decision No. 4/PUU-VII/2009.

However, it is not regulated in Article 7 point g, but is regulated in the explanation of Article 7 point g of the Law No. 8 of 2015 on Regional Head Election. So, between Article 7 point g and the explanations of Article 7 point g there is a difference. In the norm of Article 7 point g the ex-convicted is prohibited to become the regional head candidate; however, the explanation of Article 7 point g it allowed the ex-convicted to become the regional head candidate. Meanwhile, a law should not create a new norm which make a difference from the meaning of the norm contained in that article. Therefore, according to the Constitutional Court,

⁷⁷ Ibid, p. 71.

there is a contradiction between Article 7 point g with the explanation of the explanations of Article 7 point g of the Law No. 8 of 2015.

On the petition which is examined by the petitioners Jumanto and Fathor Rashid above, the Constitutional Court gives the following decisions: First, it granted the petitioners petition. Second, it stated that Article 7 point g of the Law No. 8 of 2015 on Regional Head Election is contradicted to the 1945 Constitution conditionally. Third, it stated that Article 7 point g of the Law No. 8 of 2015 on Regional Head Election does not have legal force conditional as long as it is not interpreted as “excluded for the ex-convicted who announces openly and honestly that they have ever been occupied by the prison and they are an ex-convicted”. Fourth, Article 45 Paragraph (2) point k of the Law No. 8 of 2015 on Regional Head Election is contradicted to the 1945 Constitution and also does not have legal force.⁷⁸

So, the requirements that appear in the Constitutional Court Decision No. 42/PUU-XIII/2015 provide new opportunities for ex-convicted to register themselves as the regional head candidate as long as the ex-convicted must fulfill the requirement. The requirement is the ex-convicted has to announce openly and honestly that he/she have ever been in the prison.

⁷⁸ Ibid, p. 75.

B. Problem of the Ex-Convicted to be the Candidate in the Regional Head Election

1. North Sulawesi Province Case

In 2015 there are several cities held the regional head election with the candidate of ex-convicted. This happened in the North Sulawesi, Manado, and South Bengkulu.

The first in North Sulawesi Province which is Elly Engelbert Lasut is an ex-convicted who wants to register himself to be the Governor in North Sulawesi.⁷⁹

After a very long procedure on July 27, 2015 Golkar Party finally stipulated Elly Lasut and David Bobihoe as the candidate pair of Governor and vice Governor of North Sulawesi. Furthermore, Elly-David as the candidate pair come to the office of General Election Commission of North Sulawesi (KPU-SULUT) to register as the Governor and vice Governor Candidates in 2015-2020.⁸⁰ On August 20, 2015, the General Election Commission of North Sulawesi invited Elly-David and the campaign teams to participate in a peaceful campaign.

However, Elly-David struggle to become the number one person in North Sulawesi in the Governor and vice Governor Election failed.⁸¹ It

⁷⁹ Susanto Amisan, "Maju Pilgub Sulut, Elly Lasut Disandingkan dengan Jefri Rantung", *Tribun Manado*, July 27th 2015, taken from <http://manado.tribunnews.com/2015/07/27/maju-pilgub-sulut-elly-lasut-disandingkan-dengan-jefri-rantung>, accessed on April 17th, 2018, at 10.09 am.

⁸⁰ Susanto Amisan, "E2L-Bobihoe Daftar Cagub-Cawagub Sulut", *Tribun Manado*, July 28th 2015, taken from <http://manado.tribunnews.com/2015/07/28/e2l-bobihoe-daftar-cagub-cawagub-sulut>, accessed on April 17th, 2018, at 10.15 am.

⁸¹ Rimawan, "Pilkada Sulut, Elly Lasut Kembali Gagal, Lolos hanya Olly dan Maya", *Tribun Manado*, August 24th 2015, taken from <http://manado.tribunnews.com/2015/08/24/pilkada-sulut-elly-lasut-kembali-gagal-lolos-hanya-olly-dan-maya>, accessed on April 17th, 2018, at 03.10 pm.

was because on August 24, the General Election Commission of North Sulawesi officially announced the meeting result and then published the Decree No. 35 / Kpts / KPU-Prov-023 / PILGUB / 2015 on the determination of qualified and unqualified Governor and vice Governor Candidates.

From the 3 (three) candidate pairs who registered in the General Election Commission of North Sulawesi, one of candidate pairs was declared unqualified, i.e. Elly Lasut- David Bobihoe who are carried from political parties, because Elly is still a parole.⁸² Declared as unqualified, Elly did a legal effort by filing a lawsuit on the General Election Commission Decree as a regional head election dispute at the General Election Supervisory Board of North Sulawesi (Bawaslu Sulut).

On September 7, it was the first trial on the regional head election dispute which was sued by Elly Lasut-David Bobihoe. They brought a Manado District Court letter which stated that the political rights of Elly are not revoked and he is not in prison.⁸³ The next trial was on September 10, and Elly Lasut presented Jumanto as a witness, the one who filed a judicial review to the Constitutional Court on the provisions of Article 7 point g of the Law No. 8 of 2015 on Regional Head Election.

⁸² Agung, "Berstatus Tahanan, Elly Lasut Gagal Maju Pilgub Sulut", *CNN Indonesia*, August 25th 2015, taken from <https://www.cnnindonesia.com/nasional/20150825121500-32-74320/berstatus-tahanan-elly-lasut-gagal-maju-pilgub-sulut>, accessed on April 17th, 2018, at 03.10 pm.

⁸³Alexander Pattyranie, "Sidang Gugatan Dimulai, Elly dan KPU Sulut sama sama yakin", *Tribun Manado*, September 8th 2015, taken from <http://manado.tribunnews.com/2015/09/08/sidang-gugatan-dimulai-elly-dan-kpu-sulut-sama-sama-yakin?page=2>, accessed on April 17th, 2018, at 05.00 pm.

The judicial review resulted on the annulment of Article which contains the provisions which prohibit the ex-convicted to register themselves as the regional head candidate. Then Jumanto give her opinion. Jumanto said that, he was still a parole status when registering as the regional head candidate.⁸⁴ On September 23, there was a mediation session between Elly Lasut and the General Election Commission of North Sulawesi and also with the conclusion agenda. However, the mediation was not successful to reconcile Elly with General Election Commission of North Sulawesi; because both parties are remained in their opinion. So, the General Election Supervisory Board of North Sulawesi (Bawaslu Sulut) decided the end of the case.⁸⁵

On September 16, the General Election Supervisory Board of North Sulawesi (Bawaslu Sulut) read out the decision on the regional head election dispute, which stated that Elly Lasut is unqualified as regional head candidate and give the opportunity party to chance Elly Lasut.

In the consideration of General Election Supervisory Board of North Sulawesi it is stated that, the punishment in Indonesia is divided into several final stages of guidance, so Elly Lasut still has the obligation to carry out the punishment.

⁸⁴Alexander Pattyanie, “Jumanto Puji KPU Manado yang Loloskan Imba”, *Tribun Manado*, September 11 2015, taken from <http://manado.tribunnews.com/2015/09/11/jumanto-puji-kpu-manado-yang-loloskan-imba>, accessed on April 17th, 2018, at 05.10 pm.

⁸⁵ Alexander Patturanie, “KPU Sulut dan Elly Lasut Gagal Damai”, *Tribun Manado*, Semtember 13th 2015, taken from <http://manado.tribunnews.com/2015/09/13/kpu-sulut-dan-elly-lasut-gagal-damai>, accessed on April 17th, 2018, at 05.20 pm.

After the appointment, Elly-David as candidate pairs filed a lawsuit on the regional head election in North Sulawesi dispute to the State Administrative High Court (PTTUN) Makassar on September 18, 2015 on a decision issued by the General Election Commission of North Sulawesi No. 35 / Kpts / KPU-Prov-023 / PILGUB / 2015 on the determination of qualified and unqualified Governor and vice Governor Candidates. Then the Court responded this lawsuit by deciding this case with the Decision No. 15 / G / PILKADA / 2015 / PT.TUN.MKS which stated that the plaintiff claim was unacceptable.⁸⁶

2. Manado Case

Besides Elly, there is other candidate who are ex-convicted, Jimmy Rimba Rogi was nominated as Mayor of Manado.⁸⁷ Jimmy Rimba Rogi and Boby Daud as Mayor and vice Mayor of Manado Candidates, each other from the combination of political parties.⁸⁸

On August 24, 2015, the candidate of Mayor and Vice Mayor of Manado registered and had been registered in Regional Election Commission of Manado from a combination of political parties. The Regional Election Commission of Manado stated that the candidate is

⁸⁶ See the Decision No. 15/G/PILKADA/2015/PT.TUN.MKS

⁸⁷ Romi, "Panglima Imba Maju Pilwako Manado", *Manado Post*, July 11th 2015, taken from <http://manadopostonline.com/read/2015/07/11/Panglima-Imba-Maju-Pilwako-Manado/10073>, accessed on April 20th, 2018, at 10.09 pm.

⁸⁸ Alexander Pattryranie, "16 Parpol di Sulut Penuhi Syarat Maju Pilkada 2015", *Tribun Sulut*, February 12th 2015, taken from <http://manado.tribunnews.com/2015/02/12/16-parpol-di-sulut-penuhi-syarat-maju-pilkada-2015>, accessed on April 20th, 2018, at 10.15 pm.

qualified as a Mayor and Vice Mayor Candidates 2015-2020 for period. It was through Regional Election Commission of Manado Decree No. 11 / Kpts / KPU-MDO-023 / PILWAKO / 2015.⁸⁹

After Imba-Bobby were registered, and then Imba-Bobby get the serial number 2 (two) as the candidate of Mayor and Vice Mayor of Manado.⁹⁰ Furthermore, the candidate pairs already followed stage that has been determined, the one of them was the campaign which was already scheduled.

While the pair was declared qualified as a candidate, suddenly on November 8, 2015 through the newspaper, there was a recommendation from the General Election Supervisory Board of North Sulawesi No. 372 / Bawaslu-Sulut / XI / 2015, that essentially the Regional Election Commission must issue a decision which stated that Imba-Bobby is unqualified as a candidate of Mayor and Vice Mayor of Manado in 2015, it is because Jimmy Rimba Rogi was still in a parole status.⁹¹

On November 12, 2015, the Regional Election Commission of Manado responded the recommendation letter given by General Election Supervisory Board of North Sulawesi, and also issued the Regional Election Commission Decree No. 237 / Kpts-MDO-023 / PILWAKO / XI

⁸⁹ Anthonius Iwan, "Inilah Lika-Liku Perjalanan Imba, hingga Keputusan Penentuan Hari ini", *Tribun Manado*, November 25th 2015, taken from <http://manado.tribunnews.com/2015/11/25/inilah-lika-liku-perjalanan-imba-hingga-keputusan-penentuan-hari-ini>, accessed on April 20th, 2018, at 10.48 pm.

⁹⁰ Ibid

⁹¹ Debora Bladina Sinambela dan Catherine Nathalia, "Penyelesaian Sengketa Pencalonan Pilkada 2015 yang Berlarut-Larut", *Jurnal Perludem*, Vol. 8, No. 4, April 2016, p. 87.

/ 2015 which stated that Jimmy Rimba Rogi and Bobby Daud is unqualified as a candidate. About the Regional Election Commission Decree the candidate pairs feel harmed, because without any clarification with the parties first, the Regional Election Commission directly issued this decree.⁹²

On November 19, 2015, the Regional Election Commission of Manado issued again a Decree No. 238 / Kpts / KPU-MDO-023 / PILWAKO / 2015 which states the Imba-Bobby were qualified as a candidate of Mayor and Vice Mayor of Manado. It is because, based on the Supreme Court Decision No. 30 / TUAKA.Pid / X / 2015 dated September 16, 2015, it is stated that a person with parole status is categorized as ex-convicted. This is to be a consideration, so there is virtue of Regional Election Commission of Manado to value its can be accountable.⁹³

On November 26, 2015, the Regional Election Commission of Manado issued the Decree No. 239 / Kpts-MDO-023.436282 / 2015 on cancellation of Regional Election Commission Decree No. 238 / Kpts / KPU-MDO-023 / PILWAKO / 2015 which stated Jimmy Rimba Rogi and Bobby Daud is unqualified as a candidate pairs of Mayor and vice Mayor.

⁹² Yudiawan Nugraha, "Imba Terancam tak Ikut Pilwako", *Tribun Manado*, November 13th 2015, taken from <http://manado.tribunnews.com/2015/11/13/imba-terancam-tak-ikut-pilwako?page=2>, accessed on April 21th, 2018, at 11.09 am.

⁹³ Wawan Pratama, "Berikut Penjelasan KPU Manado Loloskan Kembali Imba-Boby", *Manado Post*, November 20th 2015, taken from <http://manadopostonline.com/read/2015/11/20/Berikut-Penjelasan-KPU-Manado-Loloskan-Kembali-Imba-Boby/11231>, accessed on April 21th, 2018, at 5.09 pm.

This decree was taken from the plenary meeting of General Election Commission of North Sulawesi.⁹⁴

This is the final decision which is issued by Regional Election Commission of Manado on the Mayor and Vice Mayor candidate in the name of Jimmy Rimba Rogi and Bobby Daud. Meanwhile, on August 19, 2015, before it was stated qualified as a candidate for the General Election Commission of North Sulawesi has requested legal consideration to the General Election Commission of the Republic of Indonesia on the status of parole. On August 23, 2015, the General Election Commission of North Sulawesi received a letter from the General Election Commission of the Republic of Indonesia No. 507/KPU/VII/2015 on the explanation about the candidate which has ex-convicted status as well as a parole status, if the ex-convicted still has a parole status he/she must pay attention to the final free date. So, on August 25, 2015, it was stated that Imba and Bobby was qualified.

After the existence of this stipulation, Imba and Bobby as the candidate pair directly filed a dispute on Regional Election Commission of Manado Decree to the State Administrative High Court Makassar on December 3, 2015. Then the Court responded this case and also decided the case with the Decision No. 21/PEN/PILKADA/2015/PT.TUN.MKS which in the decision stated:

⁹⁴ Ferdinand Rati, "KPU Pusat Perintahkan Manado Batalkan Pencalonan Jimmy-Bobby", *Tribun news*, November 24th 2015, taken from <http://www.tribunnews.com/regional/2015/11/24/kpu-manado-batalkan-pencalonan-jimmy-bobby>, accessed on April 21th, 2018, at 6.15 pm.

1. Accept the plaintiffs petition
2. Regional Election Commission of Manado is required to re-enact the letter of Regional Election Commission of Manado Decree No. 238/Kpts/KPU-MDO-023/PILWAKO/2015 dated on November 19, 2015, on the determination of Jimmy Rimba Rogi and Bobby Daud as the candidate pairs in the regional head election. Especially Mayor and vice Mayor of Manado.⁹⁵

With the existence of this decision, Jimmy Rimba Rogi and Bobby Daud as the candidate pair has the opportunity to participate in the regional head election in 2015-2020 period. However, on December 18, 2015 the Regional Election Commission of Manado filed a cassation to the Supreme Court, because of objections to the legal consideration in the State Administrative High Court Decision No. 21/PEN/PILKADA/2015/PT.TUN.MKS, and then the Supreme Court responded this case and also decided the case with the Decision No. 679 K/TUN/PILKADA/2015.

⁹⁵ Putusan Nomor 21/PEN/PILKADA/2015/PT.TUN.MKS.

3. Supreme Court Decision No. 679 K/TUN/PILKADA/2015.

Decision No. 679 K / TUN / PILKADA / 2015 is a dispute decision of the Regional Election Commission of Manado Decree on the determination that Jimmy Rimba Rogi and Bobby Daud is unqualified as the candidate. Based on the Regional Election Commission of Manado Decree, Jimmy and Bobby then filed this dispute to the State Administrative High Court. After it was decided in State Administrative High Court who granted the lawsuit. Furthermore, the Regional Election Commission of Manado filed a cassation to the Supreme Court.

On December 28, 2015 the Regional Election Commission of Manado filed a cassation to the Supreme Court with the reasons:

1. Objection to the legal considerations contained in the Decision of the State Administrative High Court of Makassar. 21 / PEN / PILKADA / 2015 / PT.TUN.MKS on December 18, 2015.
2. On the granted of the suspension petition which is in dispute a Panel of Judges of the State Administrative High Court of Makassar has issued the determination of suspension petition. With this decision, the Regional Election Commission of Manado objected the consideration in that the Panel of Judges have given contradictory legal consideration. On the other side, the Judges granted the suspension petition with the reason is the suspension was considered relevant.

However, on the other side, the Judge also removed their responsibility related to the implementation of election in Manado on the December 9, 2015 because it is not the authority of the State Administrative High Court to decide about the suspension petition.

3. Subject Matter

Jimmy-Bobby is qualified as a Mayor and vice Mayor candidates in Manado based on the Regional Election Commission of Manado Decree No. 11/Kpts/KPU-MDO-023/PILWAKO/2015 on August 24, 2015.⁹⁶ This decree was issued by the Regional Election Commission of Manado based on the candidate requirements and that Jimmy Rimba Rogi one of the candidate pair does not list the end of guidance. The legal status of Jimmy is known after the Regional Election Commission of Manado received the letter of Ministry of Justice and Human Rights No. W27-PK.01.05-03 regarding the legal status of Jimmy which explains that Jimmy still carries out parole status starting on December 12, 2014 until the end of December 29, 2017.

On November 8, 2015 through the newspaper it was known that the General Election Supervisory Board of North Sulawesi issued recommendation No. 372/Bawaslu-Sulut/XI/2015 with

⁹⁶ See the Supreme Court Decision No. 679 K/TUN/PILKADA/2015, P. 27.

the main point that Regional Election Commission of Manado must issue a decree which stated that Jimmy and Bobby is unqualified as a candidate pair in the regional head election. The legal reason for the General Election Supervisory Board of North Sulawesi stated that Jimmy Rimba Rogi is unqualified as a Mayor candidate in Manado, because General Election Supervisory Board has studied the candidate requirements and found the legal status of Jimmy who is still carry out the parole status.

After Regional Election Commission of Manado get a decision from the Honorary Council of the Organization of the Elections (DKPP) which justified the action of the Regional Election Commission of Manado which stated Jimmy and Bobby qualified again as candidate.⁹⁷

Actually the Regional Election Commission of Manado objected with the legal considerations above, because the legal considerations were not by the fact. This is According to Regional Election Commission of Manado, the decision of DKPP is not true and DKPP never stated in the decision that Jimmy and Bobby is qualified. Furthermore, the DKPP basically does not have authority to decide whether a candidate is qualified or not, because the decision is not related to the

⁹⁷ Ibid. p. 35-36.

candidate status, however, it is more to the ethics of the regional head election organizers.

Before discussing the decision, the Supreme Court gives a consideration first to the case of this dispute. In the consideration, the Supreme Court, it is stated that:

1. State Administrative High Court does not consider carefully about the issue of the object of the dispute.
2. General Election Commission as an election organizer which have hierarchy of organization from the center to the region. So, if a lower organization unit can-not maximize their authority, then the authority is transferred by law to a higher unit.
3. The Regional Election Commission of Manado which establishes the Petitioners is qualified as a Mayor and Vice Mayor of Manado candidates is contradict to the provisions of Article 7 point g of Law No.8 of 2015 on the Regional Head Election and the Constitutional Court Decision No. 42/PUU-XIII/2015.

Based on the consideration above, according to the opinion of Supreme Court there are sufficient reason to granted the cassation petition from the Regional Election Commission of Manado.

In this decision, the Supreme Court made two decision follows of:

1. Granted the cassation petition from the Chairman of the Regional Election Commission of Manado.

2. Canceled the State Administrative High Court of Makassar Decision No. 21/G/PILKADA/2015/PT.TUN.MKS on December 18, 2015.⁹⁸

The Supreme Court Decision has strengthen the Regional Election Commission of Manado Decree on the determination that Jimmy Rimba Rogi and Bobby Daud as unqualified candidate, because the person who is still in parole status is categorized as a convict before the guidance period ends, then the person is not yet become ex-convicted that still has the obligation to complete the sentence outside the prison and still under the correctional institution supervision.

On the other had, the Regional Election Commission of Manado has committed negligence in the examination of candidate papers in the administrative process of regional head election. In the fact, the regional head candidate is still in a parole status.

In the beginning, to the existence of Article 7 point g of the Law No. 8 of 2015 on Regional Head Election, it prohibits the ex-convicted to register themselves as a regional head election and therefore Jimmy Rimba Rogi and Elly Lasut has no longer opportunity to participate in the regional head candidates.

The Constitutional Court granted the judicial review of the provision of Article 7 Point g of the Law No. 8 of 2015 on Regional Head Election that gives a hope for Jimmy Rimba Rogi and Elly Lasut to have the

⁹⁸ See Supreme Court Decision No. 679 K/TUN/PILKADA/2015

political right to participate in the regional head election. However, the hope never come to a reality, because Jimmy Rimba Rogi and Elly lasut are still in parole status.

4. South Bengkulu Case

In South Bengkulu, there is a candidate who is ex-convicted registered as regional head candidate in regional election, Dirwan Mahmud registered as a regent in the regional head election 2015. In 2008, Dirwan had also been nominated as Regent candidate in South Bengkulu.

In 2008 Dirwan won the regional head election; however, the victory was aborted by the Constitutional Court on January 7, 2009. The victory of Dirwan was sued by a pair candidate who lost in the election. They claimed that the status of Dirwan as ex-convicted is legal to be the candidate.⁹⁹

In the Constitutional Court Decision, it is explained that Dirwan had ever been sentenced for 7 (seven) years imprisonment in the Class 1 Cipinang Penitentiary in East Jakarta from 1985 to 1992; due to a murder case. While in the regional head election in 2008 which is still based on the Law No. 32 of 2004 on Regional Head Election, especially in the Article 58 letter (f) it is stated that the requirement of regional head candidate and the vice regional head candidate should have never been

⁹⁹ Yandi Mohammad, "Jejak Bupati Bengkulu Selatan", *Beritagar*, May 16th, 2018, taken from <https://beritagar.id/artikel/berita/jejak-bupati-bengkulu-selatan-dari-pembunuhan-narkoba-hingga-kpk>, accessed on October 25th October, 2018, at 10.40 a.m.

imprisoned by a court decision that has obtained a permanent legal force by committing a criminal offense that threat the imprisonment for 5 (five) years or more.¹⁰⁰

With these requirements, Dirwan that had been punished with 7 (seven) years imprisonment should not be able to follow the regional head election in South Bengkulu. So, in the Constitutional Court Decision, it is stated that the victory of Dirwan in the regional head election in 2008 is null and void. The Constitutional Court also give the instruction to General Election Commission of South Bengkulu to hold a re-election without Dirwan-Hartawan.¹⁰¹

In 2011, Dirwan had been caught in an ecstasy possession case. Dirwan was accused with saving and carrying drugs when he wanted to cross Bekauheni port. On December 13, 2011. The Supreme Court gave the decision that Dirwan is guilty and was sentenced to 4 (four) years imprisonment. Dirwan had through a prison period in Class IIA Kalianda Penitentiary and already finished in carrying out the criminal punishment on April 3, 2015.¹⁰²

Dirwan had already finished in carrying out the criminal punishment before regional head election 2015 which was held on December 9, 2015.

¹⁰⁰ Article 58 Letter (f) of Law No. 32 of 2004 on the Regional Head.

¹⁰¹ See the Constitutional Court Decision No. 57/PHPU.D-VI/2008.

¹⁰² Firmansyah, “Jebak Bupati Bengkulu dengan Narkoba, Pejabat BNNP jadi tersangka”, Kompas, February 17th 2017, taken from <https://regional.kompas.com/read/2017/02/17/21052381/jebak.bupati.bengkulu.dengan.narkoba.pejabat.bnnp.jadi.tersangka>, accessed on October 25th, 2018, at 11.30 a.m.

The Constitutional Court Decision No. 42/PUU-XIII/2015 canceled the article that prohibits the ex-convicted to register themselves in the regional head election. With this decision, Dirwan registered himself in the regional head election, especially as a Regent candidate in South Bengkulu.

Dirwan Mahmud and Gusnan Mulyani are Regent and Vice Regent candidate of South Bengkulu in 2015. After going through the administrative process and carrying out a campaign that has been passed by every Regent and Vice Regent candidate, the General Election Commission announced the vote acquisition of the election results on December 16, 2015, at 3.20 p.m., which stated that Dirwan-Mulyani won the regional head election as a Regent and Vice Regent in South Bengkulu of 2015-2020.

However, on December 19, 2015 at 6.07 p.m., Reskan and Ririn, one of a Regent and vice Regent Candidates of South Bengkulu who lost in this election, filed a lawsuit to the Constitutional Court about the election results and also stated that Dirwan was still in the parole status of the drug cases.¹⁰³

About the parole status of Dirwan, Ririn as petitioner who filed the petition to the Constitutional Court. Ririn argue that the participation of Dirwan Mahmud in the regional head election has hidden himself as a

¹⁰³ See the Constitutional Court No. 59/PHP.BUP-XIV/2016, P. 3.

narcotics offender who is still carrying out a punishment, and also Dirwan is dishonest to the public about this.¹⁰⁴

In the subject matter, Dirwan as related party in this lawsuit filed an objection to what was stated by the petitioner above. The objection includes:

1. That the petitioner did not read and, understand carefully the explanation in the Decree of the Minister of Law and Human Rights of Republic of Indonesia No. PAS-132.PK.01.05.06 of 2013 dated June 5, 2013. Based on this decree, it has already been explained that Dirwan Mahmud has been on a parole status since August 1, 2013.¹⁰⁵
2. The Constitutional Court Decision No. 42/PUU-XIII/2015 which stated that “the ex-convicted can nominated themselves in the regional head election, but must fulfill the requirement i.e openly and honestly that they have been in prison”.
3. Based on the description above, Dirwan Mahmud has been in parole status since August 1, 2013 and has finished his sentence on April 3, 2015, so before the regional head election on December 9, 2015. Dirwan had already been the ex-convicted. Meanwhile on July 26 – 28 is the candidate registration.¹⁰⁶

¹⁰⁴ Ibid. p. 8.

¹⁰⁵ Ibid. p. 48.

¹⁰⁶ Ibid. p. 49-50.

4. That on July 28, 2015 and August 2, 2015 Dirwan Mahmud has officially announced through the Radar Selatan newspaper that Dirwan is an ex-convicted. So, by announcing through this newspaper, Dirwan has fulfilled the requirement regulated in Constitutional Court Decision.
5. In the trial, Dirwan filed an exception regarding the petition of petitioner in which the submission has passed the time limit which given by the Constitutional Court

Furthermore, in the decision there is a legal consideration of the Constitutional Court which stated that: That on December 16, 2015, at 3.20, p.m. the respondent (General Election Commission of South Bengkulu) based on Decree No. 57/Kpts/KPU-Kab.BS-007.434305/2015 announced the determination of the recapitulation of the result of vote count for Regent and vice Regent of South Bengkulu 2015.

Regarding the time limit which is given by the Constitutional Court, it is 3x4 (three times twenty-four) hours since the respondent announced the result of vote count on December 16, 2015, at 3.20, p.m., up to December 19, 2015 at 3.20 p.m., but in fact, the petitioner submitted the petition to the Constitutional Court on December 19, 2015 at 6.07 p.m. So, based on the legal fact, General Election Commission of South Bengkulu stated that this petition had passed a time limit of 2 (two) hours, that is more than 47 (Forty-seven) minutes from the last deadline.

Based on the legal consideration above, according to the Constitutional Court, the petitioners has passed the time limit which is regulated in Legislation when submitted the petition.¹⁰⁷ Furthermore, in the Decision it is stated that: First, the exception of related party regarding the time limit for filing the petition was grant. Second, the petition of petitioner could not be accepted.

So, after the petition which was filed by Reskan-Ririn was rejected by the Constitutional Court, Dirwan – Mulyani was officially appointed as Regent and Vice Regent in South Bengkulu 2015-2020 by Governor of South Bengkulu.

¹⁰⁷ Ibid. p. 56-58.