

CHAPTER ONE

PREFACE

A. Background

Indonesia is a country that has been recognized for independence on August 17, 1945, because in the case, the country can be formed if it has four elements of state formation, among others:¹ a) The existence of territory; b) sovereign government; c) People; d) Recognition from other countries. With the 4 elements above, a country is formed. But to become a quality country certainly needs to be based on quality government too. With the existence of a quality government, it will create quality law too. Good quality law will produce quality people too. Then the four elements have a very strong relationship and are based on his government. “Indonesia is a rule of law” state that stands based on the principle of law (*rechtstaat*), not based on mere power (*machstaats*). This is in accordance with the provisions of the 1945 Constitution Article 1 Paragraph (3) stating that Indonesia is a country based on law.² The reason in Indonesia is that there is a division of power known as “Trias Politica”, which is a legislative council that operates in the regulators major, executives engaged in the major of law and judiciary executives engaged in law enforcement. For this reason, the legislature has important authority in the formation of laws, called the house of representative. It is a council that has the authority specified in the formulation and laws maker. This is confirmed in Article 20 paragraph (1) of the 1945 Constitution which reads “*The representative council of the people holds the power to form laws*”.³ So it members have an important role in the formation of the Law. Therefore house of representative members must also be free from criminal cases, especially corruption. In order to obtain

¹ Tim Kurikulum KMI, Tata Negara 1, Darussalam Press, Ponorogo, p.24

² Azhary, Pancasila and the 1945 Constitution, (Jakarta: Ghilmia, 1985), p.85

³ Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Sinar Grafika, Jakarta, 2016, p.115

a qualified the house of representative, it must have a quality of political party because members of the house of representative are represented by each political party.

It is ironic for seeing our country which is still colonized with corruption cases. Which are considered very detrimental and have succeeded in bringing its people far from prosperity. This is one of the factors why this country is difficult for developing itself. But the current situation of national politics is getting warmer. One of them is corruption cases that are increasingly attached to the legislature, both at the central and regional levels. One of the public sentiments was motivated by many members of the council involved in corruption cases.⁴ One of the issues that arise is the legalization of the ex-corrupTOR becoming legislative candidates which will be called “*Caleg*” in the 2019 legislative elections later. This is very contrary with the General Election Commission which is promulgating the rules about regulating the prohibition of ex-corrupTors becoming a legislative candidate in the election.⁵ This was stated in the regulation of general election commission draft No.20 of 2018 Part Three concerning Requirements for prospective candidates Article 7 paragraph (1) point h which reads “*not ex-convicted drug dealers, sexual crimes against children, or corruption;*”⁶ which change into the article 4 paragraph 1.

But some of the ex-corrupTOR did the judicial review concerning the general election rules which prohibited the ex-corrupTOR being the candidate in the election. Receiving all that judicial review, then the Election Supervisory Council and the Supreme Court rules were successfully aborted, and finally, dozens of legislative candidates passed in the 2019 legislative elections later.⁷ This is what seizes the public’s attention on the escape of

⁴ Policy Brief, *Larangan Mantan Terpidana Kasus Korupsi Menjadi Calon Anggota Legislatif 2019*, Indonesia Corruption Watch, Senin, 9 April 2018

⁵ [.https://www.republika.co.id/kanal/news/nasional/Pemerintah_Akhirnya_Sahkan_Larangan_Mantan_Koruptor_Nyaleg](https://www.republika.co.id/kanal/news/nasional/Pemerintah_Akhirnya_Sahkan_Larangan_Mantan_Koruptor_Nyaleg), 4 July 2018, jam 09:01 WIB

⁶ General Election Commission Regulation No.20 th 2018

⁷ Tim CNN Indonesia, Ironi Eks Koruptor Nyaleg Dan Mantan Napi Dilarang Jadi

the ex-Prisoners of following legislative candidate in the 2019 legislative elections later. According to the data at least 81 ex-corrupors was legalized becoming candidates in their election.⁸

Reflect on Islamic government that highly upholds the welfare of its people. Then in the context of leadership, a rule of Islamic law (*qawaid fiqh*) states that every leader's decision must be based on the people benefit concerning public interests must be based on benefit.⁹ *Mashlahah* or the benefit is something good that is related to the preservation of human life, perfection, and the fulfilment of intellectual and emotional needs in an absolute sense.

Jurisprudence experts (*fuqaha*) have grouped interests and public benefits in three categories including, 1) the benefit which includes absolute needs, such as protection of the soul, property, physical and mental health which must exist; 2) benefit which includes non-absolute interests, but is generally needed, brings social welfare, and makes the community members' lives easier; for example provisions concerning public facilities, such as the construction of highways and city parks; and 3) benefits for certain purposes, such as promoting Islamic morals and culture.¹⁰ Ibnu Taymiyah gave principles in the political power implementation. The three principles are, 1) mandate, 2) justice, 3) deliberation (*syura*).¹¹ Based on these principles, a leader in Islam or the so-called caliph is very careful in determining the officials who will occupy the government later. Very selective in determining who will run an important role in developing their people later. For this reason, Islamic law legalized the ex-corrupt prisoners

PNS, https://www.cnnIndonesia.com/Ironi_Eks_Koruptor_Nyaleg_dan_Mantan_Napi_Dilarang_Jadi_PNS, 25/09/2018, jam 02:45 WIB

⁸ Randy Ferdi Firdaus, *KPK Sarankan Rakyat Tak Pilih Mantan Narapidana Korupsi*, <https://www.merdeka.com/peristiwa/> Diupload pada Ahad, 24 Februari 2019, pukul 19:21

⁹ Ahmad Khoiril Fata, *Kepemimpinan Dalam Perspektif Pemikiran Politik Islam*, *Jurnal Review Politik* Volume 02, No 01, Juni 2012, p.7

¹⁰ *Ibid ...* p.7

¹¹ *Ibid ...* p.8

declaring themselves to be the candidate in the 2019 legislative elections later. For this reason, the writer wants to examine more deeply by raising the title as follows: **“Legality of The Ex-Corruptor As The Legislative Candidates In The General Election Fiqh Siyasah Perspective”**

B. Formulation of Problems

In this research the researcher formulated the following problems:

1. What is the legality of the ex-corruptor becoming a legislative candidate in the legislative elections according to the General Election Commission and Supreme Court?
2. How does Fiqh Siyasah respond the case of legalizing the ex-corruptor as a legislative candidate in legislative elections?

C. Research Objectives

In this research, the researcher divides the objectives research into two forms, there are general goals and special objectives. The first goal, in general, is to find out how the legality of ex-corrupt becomes legislative candidates in the legislative elections according to Islamic law. In this writing, the researcher will present the opinions of *Ahlu Fuqaha* ‘concerning the law of prisoners who nominate themselves as members of the council.

Secondly, as for the specific objectives of this study, among others, to:

1. Know the legality of corrupt former prisoners as legislative candidate in general elections according to the General Election Commission and Supreme Court.
2. Knowing how Islamic law responds to cases legalized by former corrupt inmates to read in the legislative elections.

D. Use of Research

1. Theoretical Use

Describes clearly the legality of ex-corrup as legislative candidates in the elections which have been ratified by the Supreme Court, which contradicts the General Election Commission in its regulation No. 20 of 2018 and how is the law in the perspective of the Islamic law that the government has highly qualified. This paper is expected to be useful for the author and further research to find out how Islam composes its government and becomes an important lesson for the government in Indonesia.

2. Practical Uses

Providing a good and comprehensive understanding of the ex-corrup legalized their candidacy in the legislative election by analyzing the Supreme Court decision that broke the General Election Commission regulation No. 20 of 2018, and how their legal status is according to Islamic law. This paper is expected to be useful for the community as an appeal to use their voting rights in the legislative elections and others. Moreover, the ex-prisoners are expected to be a good community so that they can regain trust in the community.

E. Literature Review

As far as the research that has been traced by the researcher from previous books and theses there is no object of research that the researcher will examine. There are several journals that examine the legality of former corrupt prisoners as members of the government according to Islamic law as follows:

Gugum Ridho Putra, in his thesis entitled, *Hak Mantan Narapidana Untuk Dipilih Dalam Pemilihan Umum Kepala Daerah*, 2012. Saying that everyone has political rights protected by law, political rights are protected by law, both internationally and nationally. Internationally, political rights are regulated by the universal declaration of Human Rights (UDHR) and the

International Covenant on Civil and Political Rights (ICCPR). Nationally, political rights are also protected by our constitution and several other laws and regulations, especially Law No. 39 years 1999 concerning Human Rights. The status of a former inmate turns out to have limited political rights, for example in terms of being a regional head. This limitation is explicitly stipulated in article 58 letter f of Law No. 12 of 2008 concerning amendments to Law No. 32 of 2004 concerning Regional Government. In its development, the article was then tested at the Constitutional Court through judicial review. The Constitutional Court has issued several decisions in a conditionally constitutional manner. The verdict overturned a ban on politics for ex-prisoners but provided limited conditions of enactment. The constitutional requirements in the Constitutional Court ruling will be discussed in detail in this paper. With this paper the researcher tries to explore how the political rights of ex-prisoners are regulated, protected and implemented after the conditional constitutional ruling of the Constitutional Court.

The similarity in this thesis is to jointly examine the rights of prisoners in politics but not from Islamic law and in this thesis, it is reviewed from the constitutional court ruling which emphasizes the limitation of political rights and human rights for each person. In the research method also uses library studies. But in this study, the researcher reviews the problems of legality given to ex-convicts, especially corruption, which contradicts with the regulation No.20 of 2018 and reviews it with Islamic law.¹²

Dewi Fortuna DM, in her thesis entitled “ *Analisis Fiqh Siyasah Terhadap Putusan Mahkamah Konstitusi No.04/PUU-VII/2009 Tentang Pencalonan Mantan Narapidana Sebagai Anggota Legislative* “, 2017. Said that the former prisoner was someone who had been convicted and served a sentence in correctional institutions, but after completing a sentence in a prison institution based on a court decision that has obtained permanent

¹² Gugum Ridho Putra, *Hak Mantan Narapidana Untuk Dipilih Dalam Pemilihan Umum Kepala Daerah*, Skripsi Fakultas Hukum Universitas Indonesia tahun 2012.

legal force and the Constitutional Court decision No. 04 / PUU-VII / 2009 concerning the nomination of former prisoners as legislative members with conditions not applicable to elected public office (elected officials), valid for a period of only 5 (five) years since the convict has finished serving his sentence, except for ex-convicts who openly and honestly publicly disclose that the formerly convicted person is not a perpetrator of repeated crimes.

The similarity in this paper with the research conducted by the researcher is to discuss the rights of ex-prisoners in politics by reviewing the decisions of the Constitutional Court No. 04/ PUU-VII/2009 concerning the nomination of former prisoners as legislators and also reviewing from the perspective of Islamic Law and Method The research used also by the library research in gathering theories and concepts, however, in contrast to the research conducted by the researcher that the researcher discusses the legality of ex-prisoners especially corruption by reviewing the regulation No. 20 of 2018 which is clearly very contrary Islamic law.¹³

Akhmad Nikhrawi Hamdie, in his journal entitled, “*Hak Eks Narapidana Menjadi Anggota Legislatif Ditinjau Dari Hak Asasi Manusia*, As Siyasa Journal, Vol. 1, No. 1, 2016. Explaining that in the new function of democracy, Indonesian society now faces the crush of very complex and multidimensional problems covering the dimensions of politics, economics, socio-culture and education. The accumulation is partially inherited from the previous government and others are related to elite turnover and power structures which must be followed by further arrangements. Some that stand out are concerning the tendency of social and political description, namely crystallizing individualism and group solidarity, both between ethnicity and regionalism. Although initially departing from the local tendency towards central domination, but the mistake of this phenomenon stakes the threat of national disintegration, one problem that arises due to the enactment of

¹³ Dewi Fortuna DM, *Analisis Fiqh Siyasa terhadap putusan Mahkamah konstitusi No.04/PUU-VII/2009 tentang pencalonan mantan narapidana sebagai anggota legislative*, Skripsi Progam Studi Hukum Tata Negara Universitas Raden Intan Lampung, 2017

a democratic system is the debate about whether or not ex-prisoners can become legislative and executive members who stick out in discussions - Legislative election bill.

This raises an interesting attraction principle that is quite strong between maintaining the “honour” of officials by giving them the opportunity to “repent”. In this journal, more emphasis on human rights is that every human being, including ex-prisoners who still have the right to political equality, are both discussing former prisoners in public politics in this study. The researchers emphasize the legality of ex-convicts, especially corruption as members of the legislature, which are very contrary to the regulation of general election commission No.20 of 2018 and review it from the standpoint of Islamic Law.¹⁴

Yeni Handayani, in his journal entitled “*Hak Mantan Narapidana Sebagai Pejabat Publik Dalam Perspektif Hak Asasi Manusia*,” Rechtsvinding Journal on 13 October 2014. Explained that general elections (elections) are a democratic party in order to realize popular sovereignty, which provides opportunities for all citizens to choose representatives and leaders democratically to improve welfare. As a basis for the implementation of the Election, Article 22 E Paragraph (1) of the 1945 Constitution of the Republic of Indonesia mandates that elections be held more qualified by including the broadest participation of the people on democratic principles, directly, publicly, freely, confidentially, honestly and fairly through legislation. The holding of elections in the realm of democracy is carried out to fill political positions in both the legislature and executive. The political position is the most open position. With this open character, political positions can be contested by every citizen without seeing any qualifications from that person.

The only condition that can deliver itself to be able to occupy this political position is the political support itself, both political support from

¹⁴ Akhmad Nikhrawi Hamdie, “*Hak Eks Narapidana Menjadi Anggota Legislatif Ditinjau Dari Hak Asasi Manusia*,” Jurnal As Siyasah, Vol. 1, No. 1, 2016

representatives of the people, higher bureaucrats, and from the community. The requirement for political support is absolutely necessary to achieve political office. Participants in the election raise various views on the rights of former prisoners (recidivists) in public office. In Indonesia, collateral for human rights. This political position is also known as an official who occupies a public position. In this journal, it has similarities to the rights of prisoners in politics, but this journal reviews the human rights that every human being has, namely the right to be elected and to vote. The difference with the research that will be written is from the review because the researcher reviewed through Islamic Law and The Regulation of General Election Commission No.20 of 2018.¹⁵

F. The Theoretical Framework

1. The Theory of prisoners

Convicts is someone who has been proven to have committed no crime as a defendant who has been sentenced to a law that is permanent and has legal force. Based on article 1 number 7 of Act Number 12 of 1995 concerning Correctional Services. The definition of a prisoner is a convict who is undergoing a criminal offence for independence in jail. Besides that in Article 1 number 3 of Law Number 12 of 1995 concerning Correctional Services it is said that the correctional institution, hereinafter referred to as Jail, is a place to carry out fostering of prisoners and correctional students. Furthermore, the definition of convicts is regulated such as where it is said that a convict is a person convicted based on a court decision that has obtained permanent legal force.¹⁶

Corrupt inmates are someone who has been proven to have committed no criminal corruption as a defendant has been sentenced to a legal decision that is permanent and has legal force

¹⁵ Yeni Handayani, *Hak Mantan Narapidana Sebagai Pejabat Publik Dalam Perspektif Hak Asasi Manusia*, Jurnal Rechtsvinding, tahun 13 Oktober 2014.

¹⁶ Article 1 number 32 of criminal code Law

and is serving his sentence with loss of independence in the Jail.

2. Election Commission

An election cannot be suddenly held without an institution regulating and coordinate the course of this electoral process. For this reason, an institution is formed which regulates and takes care of all matters concerning both general and legislative elections. In Law No.7 of 2017 concerning elections Chapter 1 Article 1 Paragraph (7) states:

“Election Organizers are institutions that hold elections which consist of the General Election Commission, Election Supervisory Body, and Election Organizing Board of Honor as a unit of implementation Elections to elect members of the House of Representatives, members of the Regional Representative Council, the President and Vice-President, and to elect members of the Regional People’s Legislative Assembly directly by the people. “

Institutions have a huge contribution to the administration of elections. One of them is the General Election Commission, hereinafter referred to as the general election commission. However, the position of it cannot be aligned with the position of other state institutions where the authority is regulated and written in the 1945 Constitution. Even the name of the General Election Commission itself is not written in the 1945 Constitution but is determined by election law which explains that its position is equal to the legal institutions that have been determined by law.¹⁷ Therefore the General Election Commission is an institution that plays a very important role in general elections. For arranging commission regulation prepare for each stage of the election.¹⁸

¹⁷ Jimly Asshiddiqie, *Development and Consolidation of the Reform State Institution*, (Jakarta: Sinar Grafika), p. 200-201

¹⁸ UU No.7 tahun 2009 Pasal 12 point c

3. The Supreme Court

The Supreme Court is an institution having the power in the realm as the highest state court, the cassation court is tasked with fostering uniformity in the application of the law through a verdict of the cassation and review to keep all the law and legislation throughout the Republic of Indonesia applied equitably, precise and true. The Supreme Court authorized the judge of cassation, on the level of testing and regulations under the act against the law, and the other has the authority granted by the laws.¹⁹

Furthermore, in this case, facing the supreme court uses judicial functions. The function of the judiciary aims to uniformity in the application of the law through a verdict of the cassation and review to keep all the commandments and laws throughout the country applied equitably, precise and true.

Intimately connected with the judicial function is the right test material, i.e. the authority to test/assess in the legal regulation of material under the law about whether a regulatory review of its contents (the material) is contrary to regulations of higher level (article 31 of the Act Supreme Court No. 14 Year 1985).²⁰

4. Fiqh siyasah

Islam is revealed perfectly as the word of Allah in the Quran,
 "...الْيَوْمَ أَكْمَلْتُ لَكُمْ دِينَكُمْ وَأَتَمَمْتُ عَلَيْكُمْ نِعْمَتِي وَرَضِيْتُ
 لَكُمْ الْإِسْلَامَ دِينًا..."²¹

which means:

"I have perfected this day for you your religion, and have given Me My favour, and I have blessed it as a religion for you".

Even though technically some problems are regulated in

¹⁹ UUD 1945 Pasal 24A ayat 1

²⁰ <https://www.mahkamahagung.go.id/id> concerning the authority and function of Supreme Court

²¹ Al-Maidah: 3

general so that it requires a method of *ijtihad* in further discussions, such as constitutional issues. In Islamic countries applying *fiqh siyasah* or known as *Siyasah Syar'iyah* as a rule in terms of state administration. The definition of *fiqh siyasah* itself is the study of matters and the ins and outs of regulating the affairs of the people and the state with all forms of laws, regulations and policies made by holders of power that are in line with the principles of the teachings and spirit of the *shari'ah* to realize people's misfortune.²² Everything that deals with the rule of the state is regulated by *fiqh siyasah* which regulates the social institutions and political affairs of the state.

G. Research Methods

This research is normative legal research that is based on research that includes legal principles, legal systematic and legal comparisons that use research literature or literature. This type of writing is descriptive which aims to describe precisely the nature of an individual and the condition of a group of applicable laws. Regarding the legality for the former corrupt inmate to become a candidate in the legislative elections later which is contrary to the regulation of general election commission No. 20 of 2018 which strictly prohibits the registration of former corrupt prisoners as candidate in the upcoming legislative elections. For this reason, a variety of sources are needed, such as the following:

1. Primary

Sources these primary sources are binding source materials such as the 1945 Constitution, legislation concerning legislative candidates regulated by the General Election Commission regulations No.20 of 2018 and also Islamic law taken from Al-Quran, Al-Hadist, Books of *fiqh* regarding the criteria as a member of the legislature.

²² Suyuti Pulungan, *Fiqh siyasah Doctrine, History and Thought*, (Jakarta: PT. Grafindo Persada, 2002), p.26

2. Secondary Sources

Legal material that explains the primary legal, that is not bound. For example books, opinions of lawyers, research results such as journals, as well as seminars in seminars and articles obtained from the internet related to this research.

3. Tertiary Sources Tertiary

Legal materials are materials that provide instructions and explanations for primary legal materials and secondary legal materials. Like dictionaries, encyclopedias, etc. That is relevant to this study.

H. Systematics Writing

Systematic of writing that describes the contents of this study is divided into 4 (four) chapters, namely:

Chapter 1 Introduction. In this chapter, the authors include background research, problem formulation, research objectives, theoretical uses and practical uses, theoretical frameworks, research methods and writing systematics.

Chapter 2 In this chapter, the researcher will discuss the legislative candidate in Indonesia and Fiqh Siyasah perspective

Chapter 3 In this chapter, the researcher contains: The house of representative in Fiqh Siyasah and the legality of the ex-corrupor being the legislative candidate in perspective Fiqh siyasah

Chapter 4 Closing. In this chapter the researcher contains: Conclusions and conclusions.