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Analysis of the Principle of Justice in Constitutional Court Decision Number 65/PUU-XXI/2023 on Campaigning in Educational Places and Government Facilities

Zaini Suryono 

Faculty of Law, State University of Surabaya, Indonesia

E-mail: zainisuryono099@gmail.com

Bachrul Amiq 

Faculty of Law, State University of Surabaya, Indonesia

E-mail: bachrulamiq@unesa.ac.id

Tamsil 

Faculty of Law, State University of Surabaya, Indonesia

E-mail: tamsil@unesa.ac.id

ABSTRACT

As stated in Ruling Number 65/PUU-XXI/2023, the Constitutional Court's legal ratio for permitting campaigns in government buildings and educational institutions is to be examined in this study, together with the legal implications of the quo Constitutional Court ruling. This study employs a normative technique incorporating case, conceptual, and legislative approaches. According to the research findings, the Constitutional Court's decision to permit campaigns in government buildings and educational settings was made to ensure that the rules in Law No. 7 of 2017—specifically, Article 280 paragraph (1) letter h—do not conflict with the provisions in the Explanatory Chapter. In addition, the Court thinks that permitting campaigns in government buildings and educational institutions will promote political understanding, particularly among students. The legal analysis of the Constitutional Court ruling and associated election regulations reveals the necessity for more specific legal requirements to effectively govern campaign processes and concepts, such as Article 280 paragraph (1) letter h. The rules outlined in the explanatory chapter are not always followed by restrictive regulations as specified in the body because the Court should adopt a methodical and forward-looking (futuristic) interpretation.

KEYWORDS

Principle of Justice;
Constitutional Court Decision;
Campaign; Place of Education



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INTRODUCTION

The Constitutional Court (MK) was established in 2003 because of the need to answer various legal and constitutional issues beforehand.¹ To overcome these various problems, the Constitutional Court is mandated by the 1945 Constitution of the Republic of Indonesia (UUD 1945) to exercise five constitutional authorities, namely testing laws against the Constitution, deciding disputes over the authority of state institutions whose authority is granted by the Constitution, deciding the dissolution of political parties, deciding disputes over general election results, and giving an opinion to the House of Representatives regarding the impeachment of the President and Vice President.² The constitutional authority possessed by the Constitutional Court is an embodiment of the principle of checks and balances which means that each state institution has an equal position so that there is supervision and balance in the administration of the state.

Concerning its authority to examine the law against the Constitution, the Constitutional Court is based on Article 24 C paragraph (1) of the 1945 Constitution, which is then regulated in its derivative products, namely Article 10 paragraph (1) and paragraph (2) of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (MK Law).³ The technical implementation is further regulated in Constitutional Court Regulation No. 06/2005 on Procedural Guidelines in Law Review Cases. The application for judicial review of the law itself can be classified into two types, namely first, judicial review of the content of statutory material or legal norms, called material review, and second, judicial review of the procedure for the formation of statutory products, called formal review.⁴

Constitutional Court Decision number 65/PUU-XXI/2023 concerning Campaigns in Educational Places and Government Facilities which is a type of testing of the content of legislation called material testing, because what is tested is the content of norms in the Election Law. With the issuance of the decision, it can create the potential for abuse of authority, because campaigns in educational places and government facilities are still allowed and are further emphasized by the Constitutional Court under certain conditions.

The decision of the Constitutional Court can have an impact on future elections, including the Regional Election which will be held on November 27, 2024. Of course, at the time of the determination of the Permanent Candidate List (DCT) of the DPR RI, DPD, Provincial DPRD, and Regency / City DPRD and the Election of President and Vice President, all contestants have the right to carry out the

¹ Janedjri M Gaffar, "Kedudukan, fungsi dan peran Mahkamah Konstitusi dalam sistem ketatanegaraan Republik Indonesia" (2009) J Mahkamah Konstitusi.

² Heru Setiawan, "Mempertimbangkan Constitutional Complaint Sebagai Kewenangan Mahkamah Konstitusi" (2017) 14:1 Lex Jurnalica.

³ Amrizal J Prang, "Implikasi Hukum Putusan Mahkamah Konstitusi" (2011) 13:1 Kanun J Ilmu Huk.

⁴ Jimly Asshiddiqie, *Hukum Acara Pengajuan Undang-Undang* (Jakarta: Sekertariat Jendral dan Kepaniteraan Mahkama konstitusi RI, 2006).



campaign stage for 71 days starting twenty-five days from the determination of the Permanent Candidate List by the General Election Commission.⁵

In carrying out campaign activities, several forms can be carried out such as open campaigns, public meetings, and face-to-face meetings, campaigns can also be carried out through print mass media, online media, social media, and broadcasting media. From the campaign activities, how the contestants convey ideas, ideas, vision, and mission to the general public to get sympathy or support to be elected during the voting period.

Based on the implementation of the election campaign and the campaign team as stated in Article 269, Article 270, and Article 271 of the Election Law must be registered with the KPU, Provincial KPU, and Regency/city KPU. The prohibition of the campaign in the Election Law can be found in Article 280 paragraph (1) letter h, namely: "using government facilities, places of worship and places of education". However, the explanation of Article 280 paragraph 1 letter h states that:

"Government facilities, places of worship, and places of education can be used if election participants are present without election campaign attributes at the invitation of the party in charge of government facilities, places of worship, and places of education".

In the provisions of Article 280 paragraph (1) of the Law a quo, there is legal uncertainty, because the explanatory chapter allows it with the provisions without carrying election campaign attributes and at the invitation of the party in charge of government facilities, places of worship, and places of education. This is what underlies the examination of Article 280 paragraph (1) of the Election Law, so that in its decision the Constitutional Court refers to the provisions contained in the Explanatory Chapter, rather than referring to the norms in the body of the Election Law.

Based on the petition filed by the Plaintiffs, "the existence of contradiction in terminus between the norms of Article 280 paragraph (1) letter h of Law No. 7/2017 and its Explanation, within the limits of reasonable reasoning, according to the Plaintiffs, has caused a loss of constitutional rights as voters and/or as candidates for members of the DKI Jakarta Provincial DPRD, because it results in legal uncertainty in the prohibition of campaigns using government facilities, places of worship and places of education". According to him, legal uncertainty in the prohibition of campaigns using government facilities, places of worship, and places of education is contrary to Article 22E paragraph (1) of the 1945 Constitution and Article 28D paragraph (1) of the 1945 Constitution.⁶

In principle, elections are a means of exercising popular sovereignty based on democratic values. Post-amendment, the 1945 Constitution contains several principles that will animate or become the spirit of organizing democratic elections.⁷ Substantially, the norm of Article 22E paragraph (1) of the 1945 Constitution of the

⁵ Ari Setiawan, "Problematika Dukungan Masyarakat pada Calon dalam Tahapan Kampanye Pemilihan Umum" (2022) 2:1 AWASIA J Pemilu dan Demokr 59–68.

⁶ Didi Nazmi, "Analisis Putusan Mahkamah Konstitusi Nomor 65/PUU-XXI/2023 tentang Kampanye di Ranah Pendidikan dalam Perspektif Hak Asasi Manusia" (2023) 6:1 UNES Law Rev 53–62.

⁷ Ratnia Solihah, Arry Bainus & Iding Rosyidin, "Pentingnya Pengawasan Partisipatif dalam mengawal pemilihan umum yang demokratis" (2018) 3:1 J Wacana Polit 14–28.



Republic of Indonesia contains seven electoral principles, namely: direct, general, free, secret, honest, and fair. The provisions of Article 22E paragraph (1) of the 1945 Constitution of the Republic of Indonesia are the basis for regulating the implementation of the campaign as it is based on fairness and free from the intervention of any party.

In terms of limitations in the organization of campaigns, fairness is very important in the political process.⁸ Fairness itself in the implementation of elections means that there is equal treatment with other campaign participants, and there is no favoritism to cause discrimination. This fair attitude is carried out to maintain the quality of a fair election and not in favor of the interests of certain individuals and groups that cause the election results to lack credibility that can be accounted for. Various cases have occurred that many elections have been carried out unfairly, even the provisions in the legislation indirectly invite other parties to deviate from the principle of fairness in elections.⁹

Based on the background description above, it is very important to raise this title at a more in-depth research level to review the fairness aspects of allowing campaigns in educational places and government facilities. This includes whether all candidate pairs have equal access to campaigning in educational places and government facilities. Thus, the researcher raised the title "Analysis of the Principle of Justice in Constitutional Court Decision Number 65/PUU-XXI/2023 on Campaigning in Educational Places and Government Facilities".

METHOD

To answer the problems described in the background above, this research applies normative research or doctrinal legal research.¹⁰ The purpose of using normative legal research is to find legal rules, legal principles, and legal doctrines to answer the legal issues at hand. This legal research was conducted using several approaches. The approaches used are the statute approach, conceptual approach, and case approach. The statutory approach is a research that prioritizes legal material in the form of laws and regulations as a basic reference material in conducting research.¹¹ Then the conceptual approach is a type of approach in legal research that provides an analytical point of view of solving problems in legal research from the aspect of the legal concepts behind it, or it can even be seen from the values contained in the enactment of regulation concerning the concepts used.¹² The case approach is a study based on decisions that have obtained permanent legal force.¹³

⁸ Dian Fitri Sabrina & Muhammad Saad, "Keadilan dalam Pemilu Berdasarkan Sistem Presidential Threshold" (2021) 3:1 Widya Pranata Huk J Kaji dan Penelit Huk 15–37.

⁹ Solihah, Bainus & Rosyidin, *supra* note 7.

¹⁰ Mukti Fajar & Yulianto Achmad, *Dualisme Penelitian Normatif dan Empiris* (Yogyakarta: Pustaka Belajar, 2015).

¹¹ Peter Mahmud Marzuki, *Metode Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2014).

¹² Amiruddin & H Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT. Raja Grafindo Persada, 2006).

¹³ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).



RESULT & DISCUSSION

The Role of the Constitutional Court in Realizing General Elections with Integrity and Justice: An Analysis of the Decision

In Law Number 7 of 2017, what is meant by General Election is a means of people's sovereignty to elect members of the House of Representatives, members of the Regional Representatives Council, the President, and Vice President, and members of the Regional Representatives Council, which is carried out directly, publicly, freely, confidentially, honestly, and fairly in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

In this case, what needs to be underlined according to the Election Law is the implementation of elections based on Pancasila and the 1945 Constitution of the Republic of Indonesia.¹⁴ The philosophical basis for the implementation of elections based on Pancasila and the 1945 Constitution of the Republic of Indonesia is elections that are fair and fulfill the principles of human rights.¹⁵ In the context of this research, from the provisions of Article 280 paragraph (1) letter h, it can be emphasized that every implementer, participant, and election campaign team is prohibited from using government facilities, places of worship, and places of education for campaign purposes without any exceptions. Because of the importance of this prohibition, the Election Law complements it with quite severe criminal sanctions to ensure that it is not violated as stipulated in the provisions of Article 521 of the Election Law with a maximum imprisonment of 2 (two) years and a maximum fine of Rp 24,000,000 (twenty-four million rupiah).

In using government facilities, places of worship and places of education clearly cannot be used as a place to campaign without any exceptions to provide legal certainty as the theory of legal certainty according to Gustav Radbruch legal certainty is one of the objectives of the law and it can be said that legal certainty is part of an effort to be able to realize justice.¹⁶ Legal certainty itself has a real form, namely the implementation and enforcement of laws against an action that does not look at who the individual is who performs a particular legal action, legal certainty is needed to realize the principles of equality before the law without discrimination.

The principle contained in Article 280 paragraph (1) letter h of the Election Law is "fairness". Fairness is "equal treatment" in the context of ensuring the principle of fairness in elections by allowing campaigns in government facilities, places of worship, and places of education by the Explanation of Article 280 paragraph (1) letter an impossible to realize.¹⁷ The use of government facilities will not be evenly distributed to all political parties and candidates, because it will be

¹⁴ Galih Puji Mulyono & Rizal Fatoni, "Demokrasi sebagai wujud nilai-nilai sila keempat Pancasila dalam pemilihan umum daerah di Indonesia" (2019) 7:2 *Citizsh J Pancasila dan Kewarganegaraan* 97-107.

¹⁵ Fathul Hamdani & Ana Fauzia, "Legal Discourse: The Spirit of Democracy and Human Rights Post Simultaneous Regional Elections 2020 in the Covid-19 Pandemic Era" (2021) 5:1 *Lex Sci Law Rev* 97-118.

¹⁶ Heather Leawoods, "Gustav Radbruch: An Extraordinary Legal Philosopher Notes" (2000) 2 *Washingt Univ J Law Policy* 489.

¹⁷ Sun Fatayati, "Relevansi Asas-Asas Pemilu Sebagai Upaya Mewujudkan Pemilu yang Demokratis dan Berintegritas" (2017) 28:1 *Tribakti J Pemikir Keislam* 147-163.



more determined by the closeness of each participant to the Regional Government. Because as is known, the Regional Head in the Regional Head Election, is promoted and supported by a Political Party.¹⁸ It is feared that the Regional Head will not be neutral because those who will be given facilities will tend to be candidates who come from their supporting and supporting political parties so it will be difficult to apply justice (fairness) in the use of educational places and government facilities that are allowed as campaign sites as the theory of justice according to Aristotle more clearly explains justice is interpreted as balance, while the measure of balance according to Aristotle is numerical equality and proportional equality.

The use of educational places will not be fair for candidates whose educational background is only high school level or equivalent because it is certain that access to college campuses and Islamic boarding schools will be much more limited than candidates whose educational background is S1 and above and graduates of Islamic boarding schools. The use of educational places and government facilities will lead to uneven distribution to all Political Parties and Election Participants because it will be determined by the closeness of each Election Participant or Political Party. After all, as is known, the Regional Head in the Regional Head Election is promoted and supported by a Political Party. It is feared that the regional head will not be neutral because those who tend to be given facilities will only be candidates from the supporting and supporting political parties.

Campaigns in Educational Places and Government Facilities are allowed as campaign venues because we know that educational places and Government Facilities that can be used as campaign venues are Colleges, Universities, and Institutes in each District level area not all have Colleges, Universities, and Institutes that can be used by Election Participants. In this case, it can affect the integrity of the Election in terms of fair treatment in the use of educational places and government facilities in the use of campaigning places. The exception of the prohibition of campaigns using government facilities, places of worship, and educational places is proven to have the potential for injustice in the campaign so that it must be declared contrary to the Fair Principles in Elections as stated in the provisions of Article 22E paragraph (1) of the 1945 Constitution of the Republic of Indonesia, therefore the Elucidation of Article 280 paragraph (1) letter h of the Election Law must be declared to have no binding legal force.¹⁹

The potential non-neutrality of the President and/or Regional Head in the implementation of the campaign will certainly injure and weaken the principles of popular sovereignty, as stipulated in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This is because the President and/or Regional Heads are the embodiment of popular sovereignty. After all, they are directly elected by the people. As the embodiment of people's sovereignty, the President and/or Regional Head should represent the interests of all the people, so

¹⁸ Ridho Imawan Hanafi, "Pemilihan Langsung Kepala Daerah di Indonesia: Beberapa Catatan Kritis untuk Partai Politik Direct Election for Local Leaders in Indonesia: Some Critical Notes For Political Parties" (2014) 11:2 J Penelit Polit 1-16.

¹⁹ Irvan Mawardi & Moh Nizar, *Keadilan Pemilu: Dilema Bakal Pasangan Calon di Pilkada* (Yogyakarta: Nusamedia, 2021).



they should not take sides or allow themselves to be used and used by one of the political forces.²⁰

Allowing the use of educational institutions for campaigns, will also potentially lead to the organization of elections that will divide educational institutions into certain political forces during the implementation of the campaign. This will certainly harm our education system, which has the main objective of educating the lives of all the people (nation) without discriminating against religious, racial, ethnic, class, or educational backgrounds. Based on the provisions in Article 280 paragraph (1) letter h, it is clearly stated that the prohibition in the campaign in the body of law 7 of 2017 concerning general elections that every implementer, participant, and election campaign team is prohibited from using places of education, places of worship and government facilities without exception, but the explanatory article provides another interpretation so that it provides space to be used, the Election Law even complements it with criminal sanctions that are heavy enough to ensure that the rules are not violated as in the provisions of article 521 of the Election Law with a maximum imprisonment of 2 (two) years and a maximum fine of Rp 24,000,000,-.

As stated by Riley in his theory of constitutional democracy, a democratic state should be based on the sovereignty of the people implemented by the command and will of the constitution. This means that by allowing campaigns in educational places and government facilities, there is the potential for arbitrariness from local governments or educational institutions in utilizing their positions, such as giving permission or not giving permission for certain candidates only, this is considering the phrase used in the Election Law is “as long as obtaining permission from the institution concerned”.

In terms of theory, popular sovereignty is an important political concept in the context of law and government.²¹ This concept has had a major influence on the formation of legal and government systems in various countries. The theory of popular sovereignty is a theory that explains that the sovereignty of the state is held by the people. In addition, the Constitutional Court should have a better understanding because the body of the law should not be contradicted in the elucidation article to result in unclear norms as in number 176 it has been explained that the Explanation only contains a description of words, phrases, sentences or equivalents of foreign words/terms in the norm which can be accompanied by examples. Explanation as a means to clarify the norms in the body must not result in unclear norms.²²

The explanation in Article 280 paragraph (1) letter h along the phrase has violated number 177 of Appendix II of Law of the Republic of Indonesia Number 12 of 2011 concerning the Formation of Legislation, because it includes a formulation containing norms, where the formulation containing the norm is then used as a legal basis (or at least used as a legal reference) in KPU Regulation No. 23 of 2018

²⁰ Sarbaini, “Penyelenggaraan Pemilihan Kepala Daerah Secara Langsung dan Demokratis Sebagai Bentuk Perwujudan Hak Asasi Politik Masyarakat di Indonesia” (2020) 12:1 Leg J Huk 107–136.

²¹ Mexsasai Indra, “Konsepsi Kedaulatan Rakyat dalam Cita Hukum Pancasila” (2014) 1:2 J Selat 120–126.

²² Ahmad Ziruddin, Kholilur Rahman & Mohammad Agus Maulidi, *Merawat Negara Hukum* (Bogor: Guepedia, 2023).



concerning Election Campaigns, especially in Article 69 paragraph (4), which excludes campaigns using government facilities, places of worship and places of education as part of election crimes. Whereas number 177 has emphasized that:

"Explanation cannot be used as a legal basis for making further regulations and should not include formulations that contain norms".²³

Against the Decision of the Constitutional Court in outline that the author does not agree or is wrong because it still allows educational places and government facilities to be used as campaign sites even though there are conditions that must be met, one of which is that campaign participants cannot use campaign attributes. So researchers hold a more agreed view that educational places and government facilities cannot be used as a means of campaigning without any exceptions.

Judges should use 2 (two) interpretations in deciding case number 65/PUU-XXI/2023, namely:

1. Systematic interpretation is an interpretation that refers to the initial provision that the body is prohibited but the explanation makes exceptions, the Constitutional Court should follow the provisions of the body instead of referring to the explanation article. Systematic interpretation is in which we must refer to the article that has legal force, the legal force is the article in the body itself not in the explanation article, the article in the explanation is to explain what is unclear or still ambiguous.
2. Futuristic interpretation means that the judge in deciding a legal dispute is referred to a future draft legislation (RUU). We think about the future impact because it can lead to discrimination against campaign participants, there can be divisions just because of different choices, because of different political orientations with school and/or pesantren managers, parents of students then move their children to other schools/pesantren, most importantly when principles are violated such as the principle of equality before the law.

The two interpretations above are used to be in line with the theory of justice, which is to guarantee the rights of election participants from the potential abuse of authority of the officials concerned, as Plato's concept of justice is formulated in the phrase "giving each man his due" which means giving everyone what is his right. It is also important that to maintain the neutrality of the bureaucracy, on September 22, 2022, the government issued a Joint Decree (SKB) concerning guidelines for Guiding and Supervising the Neutrality of State Civil Apparatus (ASN) Employees in the implementation of General Elections and Elections.²⁴ The Joint Decree was issued to ensure the neutrality of ASN in the General Election and Simultaneous Regional Head Election in 2024.

²³ Bagus Hermanto, Nyoman Mas Aryani & Ni Luh Gede Astariyani, "Penegasan Kedudukan Penjelasan Suatu Undang-Undang: Tafsir Putusan Mahkamah Konstitusi" (2020) 17:3 J Legis Indones 251-268.

²⁴ Muhamad Afif Kafandi, Yogi Prabowo & Achmad Hafizar, "Kajian Kritis Kedudukan Surat Keputusan Bersama Ditinjau Dari Teori Perundang-Undangan (Studi Pada Surat Keputusan Bersama Tentang Pedoman Pembinaan Dan Pengawasan Netralitas Pegawai Aparatur Sipil Negara Dalam Penyelenggaraan Pemilihan Umum Dan Pemiliha" (2023) 3:5 Innov J Soc Sci Res 1423-1435.



Judges' decisions that reflect justice are not easy to find benchmarks for the parties to the dispute because fairness for one party is not necessarily fair for another. However, the judge's decision in case number 65/PUU-XXI/2023 does not reflect justice, legal certainty, and usefulness considering that campaigning in educational places and government facilities can cause division, discrimination, unfairness, and non-neutrality of the State Civil Apparatus considering that campaigning in educational places and government facilities is only at the university level.

CONCLUSION

The Constitutional Court's decision that considers the permissibility of campaigning in educational places and government facilities by interpreting exceptions still needed by being included in the body of Law No. 7/2017 as a separate norm, namely using educational places and government facilities for campaigning as long as the phrase gets permission from the person in charge and is present without using campaign attributes. The Constitutional Court's decision is viewed from the theory of democracy as stated by Riley in his theory of constitutional democracy, that a democratic state should be based on the sovereignty of the people implemented by the command and will of the constitution. The Constitutional Court's decision is broadly speaking that the Researcher, if viewed from the theory of democracy, because as long as educational places and government facilities are prohibited, the campaign will injure the principle of justice, because it is vulnerable to abuse, especially by certain candidates, such as incumbent candidates and candidates who have close ties to officials in educational or government institutions and can even affect the impartiality of the State Civil Apparatus (ASN). This is in line with the theory of justice, which guarantees the rights of election participants from the potential abuse of the authority of the official concerned, as Plato's concept of justice is formulated in the phrase "giving each man his due" which means giving everyone what is rightfully theirs.

DECLARATION OF CONFLICTING INTERESTS

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