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Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan  
Surabaya, 60286 Indonesia, +6231-5023151/5023252  
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id

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## Regional Head Election During COVID-19 Pandemic: the Antinomy in the Government Policies

Rizki Ramadani and Farah Syah Rezah

rizkiramadani@umi.ac.id

Universitas Muslim Indonesia

### Abstract

Welcoming the simultaneous regional head election in 2020, it is expected to be an entry point in building a higher quality democracy in Indonesia. Initially, this year's election should be held on September 23. However, this plan must be constrained when the coronavirus disease 2019 (COVID-19) outbreak occurs and spread wildly all over the world including Indonesia, and was officially declared a pandemic by World Health Organization (WHO). When the number of positive cases and deaths continues to increase, the government decided to continue holding the regional election in the midst of the pandemic. Such policy created controversy and faced several challenges, especially regarding the government's inconsistency in fulfilling the rights of its people in the time of the pandemic. This article aims to explain and analyze the contradiction in the government policies from the antinomy of law and human rights perspective. This legal research is doctrinal research conducted using a conceptual, statutory, and case approach. The data will be described in a descriptive-prescriptive manner through qualitative analysis. The results of the analysis show that there are some contradictions between policies regarding physical distancing (both in the Large-Scale Social Restrictions (PSBB) and Health Protocol regulations) and the policy for holding Regional Head Elections during the pandemic. In essence, this contradiction is the antinomy between the aspects of public health and political rights. Antinomies occur when the government seeks to fulfill and guarantee political rights as well as public rights to health at the same time during a pandemic, which actually leads to mutual negation between these rights.

**Keywords:** Regional Head Election; Antinomy; Political Right; Public Health.

### Introduction

The election has been one of the main indicators used by democracy experts and researchers to assess the progress and dynamics of a nation's democratization.<sup>1</sup>

<sup>1</sup> Martin Mašťalír, 'Electoral Participation as an Indicator of Democracy in Post-Communist Countries' [2010] SEER: Journal for Labour and Social Affairs in Eastern Europe.[489]; Jakubcinova Martina, 'Public Election As An Important Part Of Democracy' (2019) 17 Social & Economic Revue.[17].

As a professor of political science from the University of Michigan James Kerr Pollock has pointed out, that if democracy is a machine, then the main driving wheel is the electoral process.<sup>2</sup> Almost every popular democracy index includes elections as a component of its assessment, for example, the assessment report from IDEA<sup>3</sup> or The Economist Intelligence Unit (EIU).<sup>4</sup> Although in practice today, some research has shown that election results do not always determine the quality of a country's democracy as a whole.<sup>5</sup> Nevertheless, the public still believes that the resulting leader of the electoral system is much better than the appointment model.<sup>6</sup> This is because direct elections guarantee the fundamental right for public participation in determining the fate of the government, which cannot be fulfilled by other filling models such as regular selection or appointment.

In the Indonesian context, elections have become an integral part of Indonesia's democratic journey from time to time. One of the major advances was marked by the amendment of the 1945 Constitution which allow the holding of direct general elections in 2004 to elect the president and vice president.<sup>7</sup> In the process, elections are not only held to elect the president and members of the legislature but also spread to the regional head level. Article 18 paragraph (4) of the 1945 Constitution of the Republic of Indonesia mandates that "the governor, regent, and mayor respectively as the head of the provincial, regency and municipal governments be elected democratically". Thus, there are two main principles in the provision; first; regional heads must be "elected" through an election process so that it is not possible to be selected or appointed directly,

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<sup>2</sup> James Kerr Pollock, 'Election or Appointment of Public Officials' (1935) 181 *The ANNALS of the American Academy of Political and Social Science*. [74-79].

<sup>3</sup> International IDEA, 'Assessment of Democratization in Indonesia' (*International IDEA*, 2000) <<https://www.idea.int/sites/default/files/publications/penilaian-demokratisasi-di-indonesia.pdf>> accessed 18 November 2020.

<sup>4</sup> EIU, 'Democracy Index 2019' (*EIU*, 2019) <<https://www.eiu.com/topic/democracy-index>> accessed 19 November 2020.

<sup>5</sup> Matthijs Bogaards, 'Measuring Democracy through Election Outcomes: A Critique with African Data' (2007) 40 *Comparative political studies*. [1211-1237].

<sup>6</sup> Noah Buckley, [*et., al.*], 'The Political Economy of Russian Gubernatorial Election and Appointment' (2014) 66 *Europe-Asia Studies*. [1213-1233].

<sup>7</sup> See for example Hans Antlov and Sven Cederroth (ed), *Elections in Indonesia: The New Order and beyond*. No. 7 (Psychology Press 2004).

secondly; elections must be conducted democratically.<sup>8</sup> Along with the euphoria of direct democracy, the legal politics of regional elections fell on the direct regional head election (one man one vote) which is considered more democratic, so it is then officially practiced since 2005 until today.<sup>9</sup> Through regional head elections, the more legitimate and local-oriented leader figures are expected to emerge. As with presidential and legislative elections, regional elections become the people's democratic festive once every five years.

Welcoming the simultaneous regional head election in 2020, it is expected to be an entry point in building a higher quality democracy. This year's election should be scheduled to be held on September 23, 2020. Meanwhile, the registration of candidates and the campaign process are scheduled to take place from 19 to 21 June 2020, and 11 July to 19 September 2020. However, this plan must be constrained when the coronavirus disease 2019 (COVID-19) outbreak occurs and spread wildly all over the world including Indonesia, and was officially declared a pandemic by World Health Organization (WHO) on March 11, 2020. Facing such a situation, considering the public safety and health, the Government who was represented by the Minister of Home Affairs, the House of Representatives, The General Election Commission, the Election Supervisory Board, and the Honorary Council of Election Administrators, then agreed to postpone the implementation of the 2020 regional head election. Responding to this condition, the General Election Commission also offered several policy options for implementing the postponement. First, voting will be held again on December 9, 2020. Second, it will be held on March 17, 2021, and the third, it will be held on September 29, 2021.<sup>10</sup>

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<sup>8</sup> Muhammad Bahrul Ulum, 'How Democracy Is Election? Reassessing Article 18 (4) of the 1945 Constitution and Its Implication to the Regional Head Election in Indonesia' (2019) 8 *Jurnal Hukum dan Peradilan*. [315-332].

<sup>9</sup> Michael Buehler, 'Local Elite Reconfiguration in Post-New Order Indonesia: The 2005 Election of District Government Heads in South Sulawesi' (2007) 41 *RIMA: Review of Indonesian and Malaysian Affairs*. [119].

<sup>10</sup> The Indonesian Institute, 'Menimbang Kembali Wacana Pilkada Elektronik Di Tengah Pandemi Covid-19, Policy Assessment' (*The Indonesian Institute*, 2020) <<https://www.theindonesianinstitute.com/wp-content/uploads/2020/06/Policy-Assessment-TII-2020-Aulia-Menimbang-Kembali-Wacana-PilkadaElektronik-di-Tengah-Pandemi-COVID-19-26-Juni-2020.pdf>>.

Referring to the way the government is handling the pandemic, which is still not well controlled, and the trend of positive cases with an increasing number of deaths, the public assumes that the implementation of the regional head elections will be postponed until March 2021. But surprisingly, in September the House of Representatives and the Government agreed to hold elections on December 9, 2020. Some of the government's reasons are that there is no guarantee that the pandemic will end in 2021 and elections may still be held by applying health protocols in a disciplined way. As a result, this decision has drawn widespread criticism and controversy from the public.

Until early November, there were 49.106.931 confirmed cases of COVID-19 worldwide, with the number of deaths reaching 1,239,157.<sup>11</sup> Indonesia itself has reported 506.302 cases as of November, which makes it the first place with the most positive cases in Southeast Asia. In terms of mortality, Indonesia also ranks third highest in Asia with 16,111 deaths.<sup>12</sup> Based on this fact, many people are pessimistic about the government's decision to continue holding the elections during this pandemic. Given that public health is much more important when compared to the election which will surely invite large crowds and potentially create a new cluster of covid-19 transmission. on the other hand, some parties still agree with the government that the regional head election is also an important mandate of the Constitution and the statutes to ensure that everyone's political rights are fulfilled. Based on this, it is interesting to examine the Regional Head Election Policy during the pandemic from the human rights perspective, especially concerning the antinomies between political rights and the public's right to health.

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<sup>11</sup> World Health Organization, 'Global Situation: Confirmed Cases and Deaths (Live)' (*WHO*, 2020) <[https://covid19.who.int/?gclid=CjwKCAiAqJn9BRB0EiwAJ1SztQ3fgTyrNO1rtx-76Cc10SSikISrra0O38q1yNUO28jg9x1ZKExA4mBoCOmgQAvD\\_BwE](https://covid19.who.int/?gclid=CjwKCAiAqJn9BRB0EiwAJ1SztQ3fgTyrNO1rtx-76Cc10SSikISrra0O38q1yNUO28jg9x1ZKExA4mBoCOmgQAvD_BwE)> accessed 9 November 2020.

<sup>12</sup> Worldometer, 'Coronavirus Update Worldwide: Cases and Deaths from COVID-19 Virus Pandemic' (*Worldometer*) <<https://www.worldometers.info/coronavirus/#countries>> accessed 8 November 2020.

“This research is a normative legal study with a conceptual, cases, and statutory approach. The author uses secondary data obtained from literature studies, where the data consists of primary legal materials in the form of legal norms in the constitution and other statutory regulations, as well as secondary legal materials consisting of journals, expert opinions, and results of previous research. The data were then analyzed descriptively-qualitatively”.

### **The Concept of Antinomy in Legal Theory**

The initial idea of antinomy can be traced from the thought of Immanuel Kant written in one of his Magnum Opus: Critique of Pure Reason, about the fundamental contradiction between reason and nature.<sup>13</sup> It is this idea which then exerts considerable influence on the way of legal thinking that seeks balance among various contradictory things. From there, the concept of antinomy in the law was born, as a ‘concept of contradiction’ that became a basis in the analytical process of the norms and values contained in a rule of law.

Starting from Kant’s writing about antinomies, then the idea of antinomies in legal theory, or the contradiction of norms in a rule of law, developed.<sup>14</sup> In legal theory, the term “antinomy” is understood as a contradiction, inconsistency, logical mismatch of content, or conflict between two or more legal rules or principles relating to one and the same state of affairs or factual conditions.<sup>15</sup> Regarding the antinomies in legal theory or the rule of law itself, Friedmann explained, that conflicts occur as a result of the natural position of law itself, which stands between philosophical reasoning, and the practical needs of political interests.

According to Ross, antinomies (inconsistencies) between two legal norms can take three different forms: 1) total-total antinomy or absolute antinomy (i.e., “where neither of the norms can be applied under any circumstances

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<sup>13</sup> Immanuel Kant and J. M. D. Meiklejohn, *The Antinomy of Pure Reason* (1899).

<sup>14</sup> Zainal Arifin Mochtar, ‘Antinomi Dalam Peraturan Perundang-Undangan Di Indonesia’ (2015) 1 Hasanuddin Law Review.[316-336].

<sup>15</sup> Luka Burazin, *Antinomies between Implicit Legal Principles: A Solution to the Total-Partial Antinomy.*” *Courts, Interpretation, and The Rule Of Law* (Eleven International Publishing 2014).[167-180].

without conflicting with the other”); 2) total-partial antinomy or antinomy between the general and the particular rule (i.e., “where one of the two norms cannot be applied under any circumstances without coming into conflict with the other, whereas the other norm has, in addition, a further field of application in which it does not conflict with the first one”); and 3) partial-partial antinomy or the overlapping of rules (i.e., “where each of the two norms has a field of application in which it conflicts with the other, but also a further field of application in which no conflict arises”).<sup>16</sup> Whereas according to W. Friedmann, in the development of legal theory has at least six antinomy in it, namely consisting of: 1) Individuals and the universe; 2) Volunteerism and objective knowledge; 3) Reason and intuition; 4) Stability and change; 5) Positivism and idealism; 6) Collectivism and individualism; 7) Democracy and autocracy; 8) Internationalism and nationalism.<sup>17</sup>

The concept of antinomy is also commonly known in the theory of the purpose of the law. Gustav Radbruch, presented about the Law ideals (*Idee des Rechts*) that can be classified into three general principles, consisting of: *purposiveness* (*Zweckmassigkeit*), *justice* (*Ge-rechtigkeit*), dan *legal certainty* (*Rechtssicherheit*).<sup>18</sup> Ideally, these three elements should be able to be accommodated by law, either through law or judge’s decision, proportionately or without neglecting each other. Nevertheless, to create a truly ideal law are actually almost utopian, because the elements in the purpose of law are basically contradictory values (antinomy). For example, the conflict between legal certainty and justice, as stated by Radbruch himself.<sup>19</sup> Another example of antinomy in the concept and rule of law involves

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<sup>16</sup> Alf Ross, *On Law and Justice* (Oxford University Press 2019).

<sup>17</sup> W. Friedmann, *Legal Theory and Philosophy*, *Critical Analysis of Legal Theories, Volume II, from Legal Theory* (Translation: Mohammad Arifin ed, Raja Grafindo Persada 1996).

<sup>18</sup> Torben Spaak, ‘Meta-Ethics and Legal Theory: The Case of Gustav Radbruch’ (2009) 28 *Law and Philosophy*. [3261-3290].

<sup>19</sup> Brian Bix, ‘Robert Alexy, Radbruch’s Formula and the Nature of Legal Theory’ (2006) 37 *Rechtstheorie*. [139].

public and private law,<sup>20</sup> or between the judicial activism and self-restraint method in the context of judicial-law making.<sup>21</sup>

### **Contradiction in the Government Policies During COVID-19 Pandemic**

During the COVID-19 pandemic, WHO issued several policies to prevent transmission of the Coronavirus throughout the country. One of them is by socializing physical distancing. WHO recommends that everyone maintain a distance of more than 1 meter from other people, always wash their hands, and wear a mask. As a form of application of this appeal, a number of steps have been implemented by various countries. Among other things, through lockdown policies and instructions so that teaching and learning activities, work, and other activities are carried out from home (stay home). This includes avoiding crowds, large gatherings, and minimizing the use of public transportation. This measure is thought to have had a significant impact in helping prevent the spread of the virus,<sup>22</sup> based on the characteristics of COVID-19 which is transmitted from person to person through droplets (splashes of saliva or mucus) when an infected person coughs or sneezes.<sup>23</sup>

Responding to WHO's policies, the Indonesian Government is also studying alternative options that might be taken in efforts to prevent the spread of COVID-19. Based on a series of studies, it is concluded that the physical distancing policy is the most appropriate to be implemented.<sup>24</sup> To emphasize the

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<sup>20</sup> Alex Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 *Journal of International Economic Law*. [469-503]. See also Howard Gillman, 'The Antinomy of Public Purposes and Private Rights in the American Constitutional Tradition, or Why Communitarianism Is Not Necessarily Exogenous to Liberal Constitutionalism' (1996) 21 *Law & Social Inquiry*. [67-77].

<sup>21</sup> Edward McWhinney, 'The International Court of Justice and international law-making: the judicial activism/self-restraint antinomy.' (2006) 5 *Chinese Journal of International Law*. [3-13].

<sup>22</sup> A. Brzezinski, [*et., al.*], 'Belief in science influences physical distancing in response to covid-19 lockdown policies' (2020) The University of Chicago, Becker Friedman Institute for Economics Working Paper. [56].

<sup>23</sup> Park Myungsun, [*et., al.*], 'Optimization of Primer Sets and Detection Protocols for SARS-CoV-2 of Coronavirus Disease 2019 (COVID-19) Using PCR and Real-Time PCR' (2020) 52 *Experimental & molecular medicine*. [963-977].

<sup>24</sup> Ihsanuddin, 'Jokowi: Physical Distancing Paling Pas Untuk Cegah Covid-19 Di Indonesia' (*Kompas.com*, 2020) <<https://nasional.kompas.com/read/2020/03/24/12054741/jokowi-physical-distancing-paling-pas-untuk-cegah-covid-19-di-indonesia?page=all>> accessed 23 November 2020.

implementation of physical distancing, the government then ratified Presidential Decree Number 11 of 2020 concerning the Determination of Public Health Emergencies related to Covid-19 and Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions (PSBB) in the Context of Accelerating Covid-19 Handling on March 31, 2020, where these policies were formed based on the provisions of Law Number 6 of 2018 concerning Health Quarantine.<sup>25</sup> Presidential Decree Number 11 of 2020 basically stipulates two things: First, that Covid-19 is recognized as a type of disease that causes a Public Health Emergency. Second, that this condition creates an obligation to carry out countermeasures in accordance with statutory provisions. While in the preamble to Presidential Decree No. 21/2020 states that the spread of Covid-19 with the increasing number of cases and deaths has resulted in certain conditions (Public Health Emergencies) so that it is necessary to make efforts to overcome them, through the Large-Scale Social Restriction (PSBB) policy. Legal provisions describe PSBB as restricting certain activities of residents in an area suspected of being infected with a disease and/or contamination in such a way as to prevent the possibility of spreading disease or contamination.

Based on the emergency situation of the COVID-19 pandemic, the government has also postponed a number of state agendas, one of which is the regional head election which is planned to be held in December 2020. This postponement decision was agreed upon at the end of March and confirmed in an Executive Order in Lieu of Law (Perppu) Number 2 of 2020. However, after only a few months, the government again decided to continue the stages of organizing the elections and held elections on December 9, which means that the elections will be held in the midst of a pandemic situation that is still not under control. The decision to carry out simultaneous regional elections was accompanied by the passing of the Perppu to postpone the elections into Law Number 6 of 2020. This is where the inconsistency of the government in its policies begins. Based on the results of the

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<sup>25</sup> Edward McWhinney, 'The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy' (2006) 5 Chinese Journal of International Law.[3-13].



analysis, the author found two logical contradictions in government policies which will be described one by one as follows:

### **1. The contradiction between the aspects of “crowd restrictions” and “public participation in regional elections”**

In general, the PSBB provisions have the same purpose as the concept of physical distancing, namely the prohibition of gathering and creating crowds that have the potential to spread disease. The John Hopkins University defined physical distancing as a public health practice that aims to prevent sick people from coming into close contact with healthy people, to reduce opportunities for disease transmission.<sup>26</sup> While, the US Centers for Disease Control and Prevention (CDC), defines social distancing as remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet) from others when possible.<sup>27</sup> The prohibition on gathering and crowds is carried out in the form of limiting the maximum number of people and the minimum distance between each person. In certain situations and locations. For example, this provision is contained in the Minister of Health Regulation number 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions (PSBB) in the Context of Accelerating the Handling of Corona Virus Disease 2019 (COVID-19), which is a derivative of Presidential Decree (PP) number 21 of 2020. In article 13 of Minister of Health Regulation No. 9 of 2020 PSBB was carried out in the form of: 1. School and work vacations, 2. Restrictions on religious activities, 3. Restrictions on activities in public places or facilities, 4. Limitation on social and cultural activities, 5. Limitation on modes of transportation, 6. Restrictions on other activities specifically related to aspects of defense and security. The government at the regional level can also regulate the technicalities for the implementation of the PSBB and include sanctions for violators. Governor Regulation number 88 of 2020 issued by the DKI Jakarta

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<sup>26</sup> The Canadian Agency for Public Health, *Physical Distancing: Actions for Reducing the Spread of Covid-19* (2020).

<sup>27</sup> Hadi Pratomo, 'From Social Distancing to Physical Distancing: A Challenge for Evaluating Public Health Intervention against Covid-19' (2020) 15 Kesmas.[5]

Provincial Government, for example, limits the crowd to not more than five people. As a comparison, the British Government also limits the crowd of its citizens to no more than 6 (six) people after an increase of 3000 cases per day.<sup>28</sup> Meanwhile, in Indonesia, data as of November showed an average increase in cases of 4,500 cases per day.<sup>29</sup>

Nevertheless, the regulations regarding physical distancing and the prohibition of the crowd seem to have been overlooked by the government itself when it decided to hold regional head elections this year. Even though the General Election Commission (KPU) of the Republic of Indonesia has issued a number of technical regulations to adjust the implementation of the regional election with the COVID-19 pandemic situation, there are still rules that are not compatible with PSBB or physical distancing policies. For example related to campaign activities that are instructed to be carried out through social media and online means, or at least in the form of face-to-face meetings with a limit on the number of participants (50 people) and the application of health protocols (Articles 57-58 PKPU No.13 of 2020). Campaign rules like this clearly have flaws. First, campaigns through social media are only effective in certain technology literate circles, such as millennials.<sup>30</sup> A number of studies have also proven that the use of social media as a campaign also has no significant effect on voter decisions and public participation in elections.<sup>31</sup> Although there are also those who conclude that social media has good future prospects as a means of campaigning in Indonesia.<sup>32</sup> However, internet networks and electricity infrastructure in some remote areas are still a major obstacle, not

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<sup>28</sup> Linda Agnesia, 'Alami Lonjakan Kasus Hingga 3000 per Hari, Inggris Larang Warganya Berkumpul Lebih Dari Enam Orang' (*Pikiran Rakyat Cirebon*, 2020) <<https://cirebon.pikiran-rakyat.com/internasional/pr-04731058/alami-lonjakan-kasus-hingga-3000-per-hari-inggris-larang-warganya-berkumpul-lebih-dari-enam-orang>> accessed 22 November 2020.

<sup>29</sup> National COVID-19 Task Force, 'Peta Sebaran Resiko' <<https://covid19.go.id/peta-sebaran-covid19>> accessed 19 November 2020.

<sup>30</sup> Terri Towner and Caroline Lego Munoz, 'Boomers versus Millennials: Online Media Influence on Media Performance and Candidate Evaluations' (2016) 5.[56].

<sup>31</sup> Robin Effing, [*et.,al.*], 'Social Media and Political Participation: Are Facebook, Twitter and YouTube Democratizing Our Political Systems?', *International conference on electronic participation* (Springer 2011).

<sup>32</sup> Leon Andretti Abdillah, 'Social Media as Political Party Campaign in Indonesia' (2014) 16 *Jurnal Ilmiah MATRIK*. [1-10].

to mention the socio-cultural reasons for people who in fact still prefer campaign activities using a face-to-face personal approach, gathering with families, relatives, and certain communities.

Campaign methods that involve the community directly in the crowd (for example holding music concerts and art performances) are still considered to be the most effective method for capturing people's voices.<sup>33</sup> However, with the PSBB policy and health protocols, this is impossible to do. Although face-to-face campaigning activities are still permitted, the restrictions on the number of masses and distances will certainly affect the quality and effectiveness of the campaign. Thus, it can be ascertained that the implementation of regional head elections during a pandemic will not be as effective and democratic as expected. This is because there has been a reduction in public participation which is the main element in democratic elections. This can be understood because the concept of direct elections basically aims to produce leaders with great political legitimacy. This can only be achieved by protecting human rights and involving the maximum public participation in every election process and stage.<sup>34</sup>

This condition logically makes the philosophy of the election implementation policy incompatible/contradictory to the essence of the PSBB policy or physical distancing. As previously explained, PSBB essentially wants to limit the distance between individuals and avoid mass crowds, while the essence of election is basically to involve as many people as possible (public participation) in a democratic party to elect regional heads. Excluding the PSBB policy during a pandemic for the reason of the election would violate and deviate from the essence of the PSBB itself. Meanwhile, the decision to continue holding the pilkada, but by limiting election activities and public participation basically does not reach the essence of democratic elections.

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<sup>33</sup> Indama, [*et., al.*], 'Efektivitas Kampanye Para Calon Legislatif Pada Pemilihan Umum Legislatif Di Kabupaten Banggai Tahun 2019' (2020) 5 Jurnal Administrasi Publik.

<sup>34</sup> Janedjri M. Gaffar, 'Peran putusan Mahkamah Konstitusi dalam perlindungan hak asasi manusia terkait penyelenggaraan pemilu' (2016) 10 Jurnal Konstitusi.[15].

## 2. The contradiction between “efforts to reduce COVID-19 cases” and “creating new clusters of transmission”

With the stipulation of Covid-19 as a type of disease that causes a Public Health Emergency, it also has implications for criminal law enforcement. Anyone who does not comply with or obstructs the implementation of PSBB or does not implement physical distancing and health protocol can be charged with criminal sanctions. Article 93 of Law no. 6 of 2018 concerning Health Quarantine affirms that “Every person who does not comply with the implementation of Health Quarantine (including, in this case, PSBB) and/or obstructs the implementation of Health Quarantine so as to cause a Public Health Emergency shall be sentenced to imprisonment of one year and/or a maximum fine of one hundred million rupiah”. At the regional level, local governments have also drafted a number of regulations regarding legal sanctions and fines against violators of the PSBB policy.

Logically, the use of criminal law is intended so that the public is more obedient to the rules of physical distancing in order to reduce the number of COVID-19 cases, which will run effectively if the implementation of the elections is postponed. Thus, the government, law enforcement officers, and health workers can concentrate on reducing the rate of spread of the virus by disciplining the public. Unfortunately, the politics of criminal law are not in line with the government’s decision to continue the election process. Even though the government should have been able to predict if the election activities would definitely lead to crowds and violations of PSBB and health protocols. As a result, there were a number of participants who were 60 candidates for regional heads in 21 provinces exposed to Covid-19.<sup>35</sup> Similarly, dozens of election organizers confirmed positive Covid-19. Even a number of prospective candidates died.<sup>36</sup> In the COVID-19 data compiled

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<sup>35</sup> Dian Erika Nugraheny, ‘Catatan Kasus COVID-19 Di Pilkada 2020, Penyelenggara Dan Peserta Tertular Hingga Meninggal’ (*Kompas.com*, 2020) <<https://nasional.kompas.com/read/2020/10/03/11231181/catatan-kasus-covid-19-di-pilkada-2020-penyelenggara-dan-peserta-tertular?page=all>> accessed 24 November 2020.

<sup>36</sup> CNN Indonesia, ‘70 Calon Pilkada Positif Corona, 3 Orang Meninggal’ (*CNN Indonesia*, 2020) <<https://www.cnnindonesia.com/nasional/20201124100409-32-573668/70-calon-pilkada-2020-positif-corona-3-orang-meninggal>> accessed 24 November 2020.

by the National Human Rights Commission (Komnas HAM) until September 25, 2020, there were still 266,845 positive cases, while entering the campaign period, the number of positive cases dramatically increased to 502,110 cases.

Reflecting on the conditions above, it can be said that the implementation of the election will have an impact on the emergence of new COVID-19 transmission clusters. This has actually been predicted by many epidemiologists and the public who have reminded the government in advance that carrying out regional elections in the midst of a pandemic is an unwise decision. In terms of policy theory / rational choice,<sup>37</sup> it may be more than just unwise, that is, irrational. A rational policy should be based on existing science and scientific data, by conducting risk mapping. From the scientific and risk studies carried out, recommendations for policymaking are deemed the most appropriate. In fact, there are already a lot of data and research related to the transmission pattern of COVID-19, where positive cases are still high and uncontrolled, a number of data also show a significant decrease in COVID-19 cases when the implementation of PSBB is carried out with discipline.<sup>38</sup> On the other hand, the facts show that almost all of the countries that held elections during this pandemic experienced a significant increase in positive cases. For example, The United States set a one-day record for new coronavirus cases with at least 102,591 new infections and as hospitals in several states reported a rising tide of patients, according to a Reuters tally.<sup>39</sup>

Above all logical considerations and empirical facts, the government still decided to carry out the election. Thus, if it must be consistent with existing criminal policies, should the government be prosecuted for the mistakes of allowing its citizens to be affected by the COVID-19 outbreak? As stated by Moulton [*et., al*], that

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<sup>37</sup> Max Neimun and Stephen J. Stambough, 'Rational Choice Theory and the Evaluation of Public Policy' (1998) 26 Policy Studies Journal. [449-465]. See also Mark Whitehead, [*et., al*], 'Governing Irrationality, or a More than Rational Government? Reflections on the Rescientisation of Decision Making in British Public Policy' (2011) 43 Environment and Planning A. [2819-2837].

<sup>38</sup> Helen Andriani, 'Effectiveness of Large-Scale Social Restrictions (PSBB) toward the New Normal Era during COVID-19 Outbreak: A Mini Policy Review' (2020) 5 Journal of Indonesian Health Policy and Administration. [61-65].

<sup>39</sup> Lisa Shumaker, 'U.S. Sets a New Record for the Increase in COVID-19 Cases Day after the Election' (*Reuters*, 2020) <<https://www.reuters.com/article/us-health-coronavirus-usa/u-s-sets-new-record-for-increase-in-covid-19-cases-day-after-election-idINKBN27L07L>> accessed 24 November 2020.

the government cannot be blamed for its policies, if data and scientific bases that can be used as a basis for consideration are not yet available.<sup>40</sup> If on the contrary, then there should be legal accountability for irrational and contradictory policies produced by the government.

### The Antinomy of the Political Rights and Public Health

As Fletcher once expressed, “Paradoxes and antinomies, reflect problems of logical rather than factual consistency”.<sup>41</sup> This can be seen from the two contradictions in government policies that have been described previously. The fundamental problem of this contradiction is basically caused by inconsistencies in the premises contained in the policy. If generalized further, the core of the contradiction and conflict between these policies (physical distancing vs election implementation obligations) is the antinomy between the fulfillment of political rights and public health.

As stated by the government through the Coordinating Minister for politics, law, and security, Mahfud MD, the main reason for the government not to postpone the elections is to guarantee the constitutional right of the people to elect and be elected according to the agenda stipulated in the legislation. Meanwhile, there is no certainty when the pandemic will end.<sup>42</sup>

**Table 1.** Antinomies in the policies during COVID-19 Pandemic

| No | Source             | Premise 1 (Public Health/Right to health)   | Premise 2 (Political Rights)  | Conclusion   |
|----|--------------------|---|---|--|
| 1  | (Policy vs Policy) | Prohibition on crowding, Gathering restriction, and physical distancing rules during the Covid-19 pandemic (UU No. 6 Tahun 2018, PP No. 21 Tahun 2020, Permenkes No. 9 Tahun 2020). | Regulation concerning participation and succeeding regional head election (Pilkada) (PERPPU No. 2 Tahun 2020, UU No. 6 Tahun 2020, PKPU No. 10, 11, 13 Tahun 2020). | The concept and objective of physical distancing contradicts the essence of democratic elections which require public participation. |

<sup>40</sup> Anthony D. Moulton, [*et., al.*], ‘The Scientific Basis for Law as a Public Health Tool’ (2009) 99 American Journal of Public Health.[17-24].

<sup>41</sup> George P. Fletcher, ‘Paradoxes in Legal Thought’ (1985) 85 Columbia Law Review.[1263-1292].

<sup>42</sup> Dinata S, ‘Ini Alasan Pilkada Tetap Dilaksanakan’ (*Republika.co.id*, 2020) <<https://republika.co.id/berita/qh5ssl467/ini-alasan-pilkada-tetap-dilaksanakan>> accessed 25 November 2020.

|   |                          |  |   |   |
|---|--------------------------|--|---|---|
| 2 | (Policy vs Factual Case) | Policies and sanctions in an effort to Reduce COVID-19 Cases (Regulations regarding PSBB, health quarantine, and health protocols implemented by the central and local governments). | There were positive cases of Covid-19 against participants and organizers of the election process from registration to the campaign period. | Election activities that have led to an increase in positive cases of Covid-19 are counterproductive to the efforts of the government and health workers to reduce the rate of spread of the virus. |
|---|--------------------------|--|---|---|

Source: Analyzed from the primary source

From a legal perspective, both political rights and public health are the duties and obligations of the state in fulfilling them. The political right to vote and be elected is guaranteed in Article 28D paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that every citizen has the right to equal opportunities in government. This provision is then derivated into Law Number 39 of 1999 concerning Human Rights, Article 43 paragraph (1) states that the right to participate in government includes the right to be elected and to vote in general elections based on equal rights through direct voting, general, free, confidential, honest and fair in accordance with the provisions of laws and regulations. This provision becomes the basis for the realization of political rights into other electoral laws and regulations. Meanwhile regarding public health, which is defined by the Institute of Medicine (IOM) as “what we, as a society, do collectively to assure the conditions for people to be healthy”, also emphasizes the government’s responsibility in its implementation.<sup>43</sup> This is mainly because public health is essentially based on the right of everyone to live a healthy life. The right to health is included as a fundamental right guaranteed by the 1945 Constitution, where Article 28H paragraph (1) which reads “Everyone has the right to live in physical and mental prosperity, to live, and to have a good and healthy living environment and the right. to obtain health services. “ In addition, with regard to the right to health, it is also regulated in Article 34, particularly in paragraphs (3) and (4) which reads

<sup>43</sup> Mark A. Rothstein, ‘Rethinking the Meaning of Public Health’ (2002) 30 The Journal of Law, Medicine & Ethics.[144-149].

“The state is responsible for the provision of proper health service facilities and public service facilities. The affirmation of the right to health as a human right is also emphasized in Law Number 36 of 2009 concerning Health.

Based on the above provisions, it can be understood that the political rights to vote and be elected and the public’s right to health have the same constitutional importance. However, in the context of the Covid-19 pandemic, efforts to fulfill both of them have proven to be not optimal. In this case, the contradiction that occurs between the physical distancing policy and the implementation of regional elections is unavoidable, unless the government implements election policies in a method that does not require mass mobilization such as electron voting and online-based campaigns. That is with the consequence that the political rights of the people will not be fulfilled to their full potential because the electoral system and its processes do not guarantee access for all and do not involve public participation. Contradictions and inconsistencies in such policies will only cause confusion that leads to public distrust of the government. There will be speculation and the assumption that the government is prioritizing political agendas rather than the safety of its people, which is the case today. Opinions that are growing and getting wilder even have the potential for the emergence of public disobedience,<sup>44</sup> where the community will begin to become apathetic and indifferent to physical distancing obligations and ignore health protocols.

Basically, this contradiction or antinomy should not have occurred if the government did not rush to decide to carry out elections in the midst of the uncontrolled COVID-19 pandemic. Data from The Council of Europe also shows that European countries have largely postponed elections at the local/regional level.<sup>45</sup> On the one hand, this delay will maintain the concentration and focus of the government in maintaining public discipline with the PSBB policy and

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<sup>44</sup> Matthew R Hall, ‘Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law’ (2006) 28 *Cardozo L. Rev.*[2083].

<sup>45</sup> Council Of Europe, ‘Impact of COVID-19 on Elections and Referenda in Europe’ (2020) <<https://www.coe.int/en/web/electoral-assistance/elecdata-covid-impact>> accessed 23 November 2020.



preventing the spread of the pandemic. On the other hand, postponing open elections with the intention of neglecting the fulfillment of the right to vote and be elected, but temporarily postponing this right so that these rights can be maximally manifested in simultaneous elections that are democratic and free from fear due to the pandemic.

### **Conclusion**

The government's decision to continue the regional head elections (Pilkada) in the midst of a pandemic has in fact created a contradiction with the Obligations for large-scale social restrictions (PSBB) and health protocols. The contradiction covers at least two things: First, the contradiction between Policies for "Prohibition on crowding, gathering restriction and physical distancing" as regulated in Law no. 6 of 2018, Executive Order No. 21 of 2020, and Minister of Health Regulation No. 9 of 2020, with Policies for "participation and succeeding regional head election" as stipulated in Law No. 6 of 2020, and some of the General Election Commission Regulations (PKPU). The philosophy of the election implementation policy is incompatible/contradictory to the essence of the PSBB or physical distancing. As previously explained, PSBB essentially wants to limit the distance between individuals and avoid mass crowds, while the essence of election is basically to involve as many people as possible (public participation) in a democratic party to elect regional heads. Excluding the PSBB policy during a pandemic for the reason of the election would violate and deviate from the essence of the PSBB itself. Meanwhile, the decision to continue holding the regional election, but by limiting election activities and public participation basically does not reach the essence of democratic elections. Second, the contradiction between "Policies and sanctions in an effort to Reduce COVID-19 Cases" with the "Election processes which have Created New Clusters of COVID-19 Transmission". Instead of focusing on handling the pandemic, the government has actually implemented regional elections that break public concentration and discipline on PSBB and health protocols. This policy is very counterproductive to the efforts of the community and health workers

in reducing COVID-19 cases. Instead of competing in a democratic election, many candidates confirmed positive of COVID-19, even died.

The fundamental problem of this contradiction is basically caused by the antinomy between the fulfillment of political rights and public health, where both rights are fundamentally guaranteed by The Constitution and the derived statutes. Antinomies arise as a result of the government's efforts to guarantee the implementation of political rights and public health simultaneously in a pandemic situation so that instead of fulfilling both, there is mutual negation between existing policies. This antinomy should not have happened if the government postponed implementing the election until things returned to normal. In other words, in a health emergency situation, the public health aspect should still be the top priority of government policy. This refers to a large number of countries choosing to cancel or delay the implementation of elections during the COVID-19 pandemic.

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