

## **The relationship of Article 490 Act Number 7 year 2017 on General Elections to the Principles of Criminal Law**

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**Abstract:** This study discuss whether the Delic formula in article 490 Law No. 7 of 2017 on general elections is in accordance with the principles of criminal law. The purpose of this study is to know and analyze the Delic formulation in article 490 of Law No. 7 of 2017 on general elections in accordance with the principles of criminal law. The usability of the research is to provides reliable and detail information to the legislators. This research is normative research. Literature data or document study method is used in analyzing the data used in this study. The results of the research show that the Delic formula in article 490 Law No. 7 year 2017 on general elections is not in accordance with the principles of criminal law, one of which is the principle of legality and criminal law policy. The reason is because the delict formula is not clear, not detailed and the formulation of prohibited acts is ambiguous. Thus, it raises legal uncertainty and prevents success in criminal proceedings.

**Keywords:** Election, Principles of criminal law

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Date of Submission: 26-08-2019

Date of Acceptance: 10-09-2019

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### **I. INTRODUCTION**

The enactment of Law No. 7 year 2017 on elections is a manifestation of people's participation in a democracy. General elections in Indonesia as one of the efforts to create a democratic state should be well implemented in order to create a professional elections and have the credibility that can be made accountable (Handitya, 2018).

The process of electoral organizing will run democratically when all phases in the elections provide legal certainty in accordance with the principles in the elections. Professional electoral organizers in carrying out their duties and authorities are executed by direct, public, free, confidential, honest, and fair.

Speaking the concept of elections is not separated from a legal process that is closely related to the criminal law in which it adheres to the concept of *Pemidanaan*. Act No. 7 of 2017 on general elections is a legal process that must be exercised by any person who willfully oppose the law.

A village chief who makes decisions and/or performs the beneficial or detrimental action of one of the election participants in the campaign period including the category of election criminal act, as described in Article 490 Act No. 7 year 2017 on elections, which reads (BIP, 2018):

Any village chief or other designations that deliberately make decisions and/or take actions that are beneficial or detrimental to one of the electoral participants in the campaign period, sentenced to imprisonment for a maximum of 1 (one) year and the fine Many Rp 12.000.000, 00 (twelve million rupiah).

When an act has been declared as a criminal act, it is not enough to formulate a criminal offence in the legal norm as a form of policy. However, in formulating a criminal provision in the legislation must be properly formulated so as not to undergo a narrowing of meaning and difficulty in the implementation (Candra, 2013).

In general, the criminal offence at least contains a formula about: the subject of the law that is the target of the norm, the act of being banned in the form of doing something, not doing something and inflicting consequences as well as criminal threats as means to enforce the validity or the provision of such provisions.

The conditions in the field suggest that based on data obtained from the General Election Supervision Committee of Aceh Regency with the report number 002/TM/PL/Kab/01.08/1/2019, there are violations involving the head of the village who participated in the campaign In the elections in ACEH in 2019 on behalf of M. Amin Daya Keuchik Village Deah Mamplam Leupung District. Aceh Besar.

However, the process is only up to the level of investigation and at the stop of the investigation process with the evidence of insufficient formyl and material in proving Keuchik pursuant to Article 490 Act No. 7 of

2017 on elections. The data noted that the application of the chapter cannot be ideally enforced which in fact refers to the principles of criminal law.

The formulation of criminal provisions in legislation, of course, can not be removed from the legality principle. As a consequence, a deed that can be convicted must be based on the law, not to be prepared a retroactive principle, the formulation of its follow-up should be clear (*lex stricta*), and is not allowed to use analogy.

The formulation of criminal acts clearly and appropriately in legislation becomes a necessity. This is if in the formulation of the crime does not give clear and precise formulation, it will impact the absence of legal certainty in the process of implementation will be far from justice and benefit as a goal of the law Criminal itself.

Based on the background above, you want to review in this study is about whether the Delic formula in article 490 of Law No 7 year 2017 on elections in accordance with the principles of criminal law.

## **II. LITERATURE REVIEW**

The type of research in the preparation of this writing is a type of normative research, normative legal research is also called doctrinal law research, often in the research of this law in the conceptualized as what is written in the Regulation Legal in books or law in the concept of a rule or norm which is a human-behaved benchmark that is deemed appropriate. The legal materials and data collection methods are by literature study or document study. The approach used in this research is a statutory approach as well as a concept analysis approach.

### **III. THE RELATIONSHIP OF ARTICLE 490 ACT NUMBER 7 YEAR 2017 ON GENERAL ELECTIONS TO THE PRINCIPLES OF CRIMINAL LAW**

#### **A. The meaning of delik in the formulation of law**

Dutch criminal law uses the term *Strafbaar Feit*, sometimes also a *delic* derived from the Latin *delictum*. Because the Indonesian criminal CODE is sourced on the Dutch *WvS*, the original term is similar to *Strafbaar Feit*. In the Netherlands the term *Feit* is used on the grounds that the terms do not include only deeds but also neglect. There are two groups that formulate the *delics* as a rounded unity, such as the *Simons*, which formulates that the *Feit Strafbaar* is a criminal offense, which is against the law that relates to mistakes and is done by people Responsible.

A complete formula according to *Simons*, which includes:

1. Be threatened with criminal by law;
2. Contrary to law;
3. Done by the guilty person;
4. The person is deemed responsible for his actions.

In general, a *Delic* formulation contains the core part of a proceeding. It means that the core parts must be in accordance with the deeds done, then someone is threatened with a criminal.

In connection with what *Van Hattum* put forward, it is worth remembering that most criminal law writers say that "deliberately" is a colorless notion, meaning it is not necessary for the maker to know that it is forbidden by Laws. Then it needs to be addressed about the "deliberate" theories. First of all is the so-called theory of wills. According to this theory, then will is the fact of purpose. Intentionally means that the result of a deed is desirable and this turns out if the consequence is truly meant by the deed.

Things to be aware of when formulating criminal provisions in the formulation of legislation is the formulation of prohibited deeds. The Act prohibited in a criminal offence is the content of laws which must be substantiated by the general Prosecutor. When confusion in the formulation of criminal acts, it will cause difficulties in the practice of law enforcement (*Candra, 2013*).

Based on the theory of separation between criminal acts and criminal liability, in the formulation of a criminal offence only formulates the "forbidden deed", not the inner state of the person doing the deed (fault). Mistakes are generally manifested in the 'mental element' (*mens rea*) of a criminal act, either 'intentionally' or 'due to misconduct'.

Such a thing is done given the common assumption that all criminal acts are "intentionally" it is no longer necessary for these words in the formulation of a forbidden deed (*Strafbaar*). In addition, each verb in the formulation of a forbidden deed (*Strafbaar*), must be interpreted as an intentional, so that the words are no longer needed "deliberately" in the formulation (*Candra, 2013*).

## **B. Legality Principles**

The existence of legal principles in the scope of the field of law is very important considering the principles of the law to be a guideline for the development of every jurisdiction in order not to deviate against the law itself. In the criminal law itself the existence of this law is asserted as an attempt to make the criminal justice in limiting Kesewenang-wenangannya in determining whether or not the act is prohibited (Christianto, 2009).

Roeslan Saleh confirms the main point of this legal principle is "to mengnoretat the supervisory function of the criminal law" itself in order not to be used by the government in power (Saleh, 1981). From here it arose the principles of criminal law such as the legality principle listed in article 1 paragraph 1 of the criminal CODE, which reads: "No deed can be sentenced in addition to the strength of the criminal legislation preceding it" (Hamzah, 2004).

Moeljatno writes that the legality principle contains three understandings:

1. No action is forbidden and is threatened with criminal if it is not yet stated in a rule of law.
2. To determine the presence of criminal acts should not be used analogy.
3. Criminal law rules are not retroactive (Moeljatno, 1987).

In the tradition of the civil law system, there are four fundamental aspects of legality that are strictly applied: legislation, retroactivity, Lex certa, and analogy (Fajrimei, 2005).

### *a. Lex Scripta*

In condemnation it must be based on law, in other words based on the law written. The law should govern the conduct which is considered a criminal offence. Without legislation governing prohibited acts, the deed could not be said to be a criminal offence.

### *b. Lex Certa*

In relation to the written law, in forming legislation must formulate clearly and in detail about the deeds referred to as criminal acts. The legislator must define clearly without any vague. So that there is no ambiguous formulation of prohibited and sanctioned deeds. The unclear or overly complicated formulation will only bring about the uncertainty of the law and prevent success in criminal prosecution, so that the public will always be able to defend themselves that such provisions are useless as Code of Conduct (Rommelink, 2003).

### *c. Non-retroaktif*

The legality principle requires that the provisions of legislation formulating criminal acts may not be enforced retroactively. The enforcement is retroactively a arbitrariness, which means that Violations of human rights.

### *d. Analogi*

The principle of legality restricts in detail and meticulously any action that can be criminal. Strict formulation, without any risk of multitasking, and also the restriction of interpretation, will only reduce the existence of morality that is behind the legality. The law becomes dry, technically-Instrumental, and consequently the application of law may fall into practice far from humanitarian expectations (Manullang, 2017).

But the issue, the fact of the legal certainty in the concept of the state of the law is still perceived as the certainty of orientation, so that the laws made must be clear and decisive, there should be no formulation that is blurred. Not only that, this personal complaint further strengthened the critical legal theory that the law in the present is not capable of capturing intense problems. The law is not a personal norm, even when the law is completely dry from the spirit of humanity, because the law has become an answering machine. In addition, as an answering to the problem, the law is determined primarily by (Manullang, 2017).

Legality is held to prevent state decline to authoritarian state and action. Therefore, according to the Magnis Suseno, legality is a crucial element in the concept of legal situation, because it is politically moral, the state can be governed and carry out its duties based on the principle of legal certainty (Magnis Suseno, 1988).

The meanings contained in the principle of more detailed legality are submitted by Schaffmeister, Keijzer and Sutorius which affirm that there are seven aspects of the legality principle. First, it cannot be sentenced except based on criminal provisions under law. Secondly, there is no application of criminal legislation based on analogy. Third, can not be sentenced only by habit. This means that violations of the customary rules do not necessarily result in criminal behavior. Fourth, there should be no unclear formulation of delic or lex certa principles. Fifth, there is no receding power from criminal provisions. It is known by the non-retroactive principle of criminal provisions. Sixth, there is no criminal except the prescribed law. In this sixth

subject, the judge shall not impose a criminal other than that specified in the provisions of the law. Seventh, or the last criminal prosecution only after the prescribed manner of law (Rahayu, 2014).

If we review article 490 of Law No. 7 of 2017 on general elections, which reads (BIP, 2018):

Any village chief or other designations that deliberately make decisions and/or take actions that are beneficial or detrimental to one of the electoral participants in the campaign period, sentenced to imprisonment for a maximum of 1 (one) year and the fine Many Rp 12.000.000, 00 (twelve million rupiah).

The Delic formula in the above article is far from the expectation of certainty, the ambiguous formulation of prohibited acts will bring about legal uncertainty and impede success in criminal proceedings. The uncertainty of meaning "intentionally make decisions and/or take action that is beneficial or detrimental to one of the electoral participants" makes the village head more freely to commit an electoral offence. Because the formula that is in article 490 the law of Nomo 7 year 2017 is not explained in a clear and detailed. Thus complicating the law enforcement officers to formulate the delics in the article.

### **C. Criminal Policy**

The term policy can be derived from the term "policy" English or "Politiek" Dutch (Arief, 2010). According to Barda Nawawi Arief, the term "criminal law policy" can also be called the term "criminal law politics", which in foreign literature the term "criminal law politics" is often known by various terms, among others "penal policy", "Criminal Lawpolicy" or "Strafrechtspolitik".

Marc Ancel suggests that "Penal Policy" is a science and art that ultimately has a practical purpose to enable positive law regulation in better order and to provide guidance not only to the makers Laws, but also to courts implementing legislation and also to organizers or executor of court decisions (Arief, 2010).

According to A. Mulder there are several things that are the criminal law policy lines:

- a. How far the applicable criminal provisions need to be amended or updated
- b. What can be made to prevent criminal acts
- c. How to investigate, prosecution, judicial, and criminal implementation should be implemented.

The criminal law policy is thus related to the whole criminal law enforcement process. Therefore, criminal law policies are directed at the concretization of material criminal law, formal criminal law and criminal enforcement law. The sense of policy or political criminal law can be seen from legal politics and from criminal politics. According to Prof Sudarto, political law is:

- a. Efforts to realize good rules according to circumstances and situations at a time.
- b. Policy from the State through the competent bodies to establish the desired rules that are in the estimate can be used to express what is contained in the community and to achieve what is in Aspire (Sudarto, 1983).

Furthermore, Sudarto stated that implementing criminal law politics means holding elections to achieve the best criminal legislation in terms of qualifying justice and usability. Criminal law politics means the effort to realize criminal legislation that is appropriate to the circumstances and situations at a time and for future.

The efforts and policies to make good criminal law regulations can in fact be unreleased from the aim of countermeasures. Crime prevention efforts with criminal law are essentially also part of a law enforcement effort. In addition, the crime prevention efforts through the creation of criminal (law) laws are also an integral part of the Community protection effort. Therefore, it is normal to do so if criminal law policy or politics is also an integral part of social affairs or societal politics. (Arief, 2010).

The legal certainty as *Idee des Recht* is a manifestation of the obligation imperative the electoral implementation in implementing the provisions of legislation. Based on the legal norm will give reassurance to all parties, so that the elections participants and Indonesian people in general have a hope, that the future of democracy in the hands of electoral organizing at least there is hope (Fajlurrahman, 2018).

In determining a criminal offence is not separated from the formation of a law, which is essentially a state political policy or legal policy established by the House of Representatives and the President. The law can not only be viewed as imperatives or mandatory clauses of DAS Sollen, but must be viewed as a subsystem in reality (*Das sein*) is not unlikely to be highly determined by politics, Both in the formulation of materials and *pasal-pasalnya* and in their implementation and enforcement.

The provisions of the criminal offence element are crucial in relation to the certainty that a person or perpetrator can have. The subjective element of the criminal act is an element inherent to the perpetrators of criminal acts, including the elements contained in his heart, namely: intention, intent and purpose. While an objective element of criminal action is an element that has to do with acts of perpetrators of crime acts, behaviour or activities. Subjective elements are generally formulated with the word intentionally or accidentally (ALPA) or by plan before the elements in deed or action perpetrators. Sometimes it is also formulated with a phrase with the intent or with the intention after elements of deed or action perpetrators do. Inclusion of subjective elements above carries a consequence of obligation for law enforcement to prove its inner attitude (AR, 2012).

The attitude to enforce electoral law in every stage of elections, is a way to treat harmony, keep conflicts out, and solve all problems with the foundation and the rationality of the law. The law stands as "Commander", who will blow the sword to those who are guilty and protect the righteous and enforce the scales of justice to all parties (Fajlurrahman, 2018).

Therefore, confusion in the formulation will cause difficulties in the practice of law enforcement. According to Beccaria, there are two bad things that are always in the law, the first, there is a legal obscurity in the sense of his home, and secondly, is the desire to perform interpretations as a result of the obscurity itself (Beccaria, 1996).

#### IV. CONCLUSION

The Delic formula in article 490 of Law No. 7 of 2017 on elections is not in accordance with the principle of legality and criminal law policy. This is because there is no clear and detailed formulation in the delics in the article. and the ambiguous formulation of prohibited acts. Thus, it raises legal uncertainty and prevents success in criminal proceedings.

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Muhammad Novriansyah. " The relationship of Article 490 Act Number 7 year 2017 on General Elections to the Principles of Criminal Law." *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*. vol. 24 no. 09, 2019, pp. 41-45.