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Penal Policy: Decriminalization of Election Crimes in Indonesia

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Abstract

Several election crime articles in Law No. 7/2017 are suspected of causing injustice to subjects who commit election infractions, particularly civil servants, village heads, and election organizers. The potential for injustice arises because the imposition of election crimes on civil servants, village heads, and election organizers causes all three to receive double jeopardy,

although double jeopardy is contrary to the constitution and human rights, meaning that enacting election crimes is unfair to all three. These intrigues should be resolved immediately to achieve legal justice for all three. To answer these dynamics, further research needs to be carried out to find out where the injustice lies and the appropriate solution to overcome it. This research utilizes normative legal or doctrinal to examine injustice and find appropriate advisers. The penal policy approach is the right measure to eliminate injustice in election crime articles in Law No. 7/2017. This injustice is precisely in Articles 490, 494, and 546 of Law No. 7/2017 which regulates criminal sanctions for civil servants, village heads, and election organizers who commit election crimes. Decriminalization of Articles 490, 494, and 546 of Law No. 7/2017 needs to be applied because the application of these three articles has caused civil servants, villages, and election organizers to receive double jeopardy, while double jeopardy is contrary to the constitution and human rights so that the application of these three articles is real injustice.

KEYWORDS *Penal Policy, Decriminalization, Election Crimes, Indonesia*

I. Introduction

Indonesia is one of the countries that adheres democratic system in their jurisdiction. [1]Accordingly, Indonesia should carry out all of the principles of democracy.[2] One of the principles of democracy is the participation of citizens, which is manifested in the general election.[3] This means the general election is inevitable in a democratic state, in any case, the minimum requirement.[4]

The general election is an activity that has a broad impact, as the results of the polls would determine society's future.[5] The general election's extensive leverage necessitates the state's setting up sanctions for violators, particularly to protect the public interest.[6] Indonesia has overseeded several sanctions for election infractions namely criminal sanctions (election crimes) and administrative sanctions (election

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1 Eve Warburton And Edward Aspinall, "Explaining Indonesia's Democratic Regression: Structure, Agency And Popular Opinion", *Contemporary Southeast Asia* 41, No. 2 (2019): 255–85, Https://Www.Jstor.Org/Stable/26798854.

2 Ben Bland, "Politics In Indonesia: Resilient Elections, Defective Democracy", Lowy Institute For International Policy, 2019, Http://Www.Jstor.Org/Stable/Resrep19782.

3 Oleksandra Keudel, "Transforming Patronal Democracy Bottom-Up: Two Logics Of Local Governance In Ukraine", In *Ukraine's Patronal Democracy And The Russian Invasion: The Russia-Ukraine War, Volume One*, Edited By Bálint Madlovics And Bálint Magyar, 373–94. Central European University Press, 2023, Https://Doi.Org/10.7829/Jj.3985461.17.

4 Nankyung Choi, "Democracy And Patrimonial Politics In Local Indonesia", *Indonesia*, No. 88 (2009): 131–64, Http://Www.Jstor.Org/Stable/40376488.

5 Jamie Gough, "Why The Labour Party Lost The British 2019 General Election: Social Democracy Versus Neoliberalism And The Far Right", *Class, Race And Corporate Power* 8, No. 2 (2020), Https://Www.Jstor.Org/Stable/48644421.

6 Friedrich Pukelsheim And Kai-Friederike Oelbermann, "Reform Of The European Electoral Law", *Zeitschrift Für Staats- Und Europawissenschaften (Zse) / Journal For Comparative Government And European Policy* 12, No. 4 (2014): 549–59, Http://Www.Jstor.Org/Stable/26165598.

administration violations) that are stated in Law Number 7 of 2017 on General Election (Law No. 7/2017).[7]

Yet, the adjustment of the election crimes in Law No. 7/2017 raises serious inquiries, specifically related to the justice of norms. Some election crime articles in Law No. 7/2017 are deemed not to provide justice for election violators because they are identified as containing double jeopardy. Hence, the initial hypothesis of this article examines that some of the election crimes articles in Law No.7/2017 are inappropriate for protecting the public interest in the context of the general election. Thus, the discourse on eliminating these articles is a necessity, so that the law not only provides certainty but provides justice too.[8]

The injustice of several election crime articles in Law No.7/2017 encouraged the emergence of this article. The purpose is to explain the role of penal policy in changing laws, then continue to explicate election crime articles that no longer provide justice and end by presenting the decriminalization design of unfair election crime articles. The three diversifications over will are the problem formulation in this article.

Themes related to election crimes have been discussed by several previous authors. Khairul Fahmi once wrote an article with the theme *"Sistem Penanganan Tindak Pidana Pemilu"* which was published in Jurnal

[7] Fikri Z. R. Cahya, Untung S. Hardjanto, And Untung D. Hananto, "Politik Hukum Undang-Undang No.7 Tahun 2017 Tentang Pemilihan Umum Mengenai Badan Pengawas Pemilu", *Diponegoro Law Journal* 8, No. 1 (2019): 281-304, Https://Doi.Org/10.14710/Dlj.2019.25336.

[8] Cass R. Sunstein, "On The Expressive Function Of Law", *University Of Pennsylvania Law Review* 144, No. 5 (1996): 2021–53, Https://Doi.Org/10.2307/3312647.

Konstitusi Vol. 12, No. 2, 2015, Fahmi discusses perfecting the system of enforcement of election crimes in Indonesia, he argued that Law Number 8 of 2012 on The General Election of The Members of House of Representative, Regional Representative Council, and Regional House of Representative does not provide a mechanism for proving election crimes, which renders election crimes straitened to prove.[9] Diyar Ginanjar Andiraharja also wrote an article regarding election crimes with the theme *"Politik Hukum pada Penanganan Tindak Pidana Pemilu"* which was published in Khzanah Hukum Vol. 2, No. 2, 2020, Andiraharja assessing of reorganizing the rules for election crimes to ensure legal certainty through legal politics approach, he has the view that the provisions of election crimes in Law No.7/2017 are very biased and multiple interpretations.[10]

The explication of the two articles shows that the discussion in this article is recent and completely diverse from the previous article. The two previous articles are known to affirm the existence of election crimes and even emphasize perfecting the rules for election crimes. While this article is the opposite, this article disagrees with the existence of election crimes and instead calls for decriminalization.

The research method that will be utilized in this article is normative legal research or doctrinal legal research. That is to say, this article be

[9] Khairul Fahmi, "Sistem Penanganan Tindak Pidana Pemilu'. *Jurnal Konstitusi* 12, No. 2 (2015): 265-283, Https://Doi.Org/10.31078/Jk1224.

[10] Diyar Ginanjar Andiraharja, "Politik Hukum Pada Penanganan Tindak Pidana Pemilu", *Khazanah Hukum* 2, No.2 (2020): 24-31, Https://Doi.Org/10.15575/Kh.V2i1.7681.

anxious to examine the research object exerting relevant legal sources and theories.[11]

The research object in this article is election crime articles in Law Number 7 of 2017 on The General Election. While the doctrines that will be applied in this article are the Indonesian Constitution 1945 (UUD NRI 45), Law Number 12 of 2011 on The Establishment of Laws and Regulations, Law Number 15 of 2019 on The Amendment of Law Number 12 of 2011 on The Establishment of Laws and Regulations, Law Number 13 of 2022 on The Second Amendment of Law Number 12 of 2011 on The Establishment of Laws and Regulations, Legal Politics Theory, Penal Policy Theory, Legal Objectives Theory, and Legal Change Theory.

II. Penal Policy: An Overview

Penal policy is not a strange term in criminal law, this term has appeared in various studies of criminal law initiated by well-known legal scientists. Penal policy is known by other names among several legal scientists, some call it criminal law policy or *strafrechtspolitiek* in Dutch.

[11] S.N. Jain, "Doctrinal And Non-Doctrinal Legal Research", *Journal Of The Indian Law Institute* 17, No. 4 (1975): 516–36, Http://Www.Jstor.Org/Stable/43953840.

G. Peter Hoefnagels defines penal policy as a science that is useful for preventing and eradicating crime.[12] To complete Hoefnagels, Marc Ancle interprets penal policy as a science and art that has practical goals for designing laws, applying laws, and enacting judicial decisions in the field of criminal law.[13] In more detail, A. Mulder explicates penal policy as a state policy regarding criminal law which covers three things, namely: **First**, the criminal law to be reformed. **Second,** the ideas for reforming criminal law. **Third,** the mechanism of procedural law to enforce the new criminal law.[14]

In Indonesia, penal policy is likewise known as criminal legal politics, or in Bahasa, it is called *Politik Hukum Pidana.*[15] In the discipline of Indonesian constitutional law, legal politics is known as a theory that elucidates the process of transforming legal policies following state objectives as stated in The Indonesian Constitution of 1945, either removing or adding legal instruments.[16]

Set out from that explanation, the authors argue that penal policy has a similar context with legal politics, only the object is diverse. The object of penal policy is criminal law, while the object of legal politics is law in general. The authors directly concur with Mulder's opinion which states that penal policy includes three components, namely the criminal

[12] Josine Junger-Tas, "Sentencing In The Netherlands: Context And Policy", *Federal Sentencing Reporter* 7, No. 6 (1995): 293–99, Https://Doi.Org/10.2307/20639820.
[13] John Kennedi, "*Kebijakan Hukum Pidana (Penal Policy) Dalam Sistem Penegakan Hukum Di Indonesia*", (Yogyakarta: Penerbit Pustaka Pelajar, 2017), Pp. 58.
[14] Maroni, "*Pengantar Politik Hukum Pidana*", (Bandar Lampung, Penerbit Aura,2016), Pp. 4.
[15] Hanafi Amrani, "*Politik Pembaruan Hukum Pidana*", (Yogyakarta: Uii Press,2019), Pp. 4.
[16] Moh. Mahfud Md, "*Politik Hukum Di Indonesia*", (Depok: Rajawali Pers, 2018), Pp. 10.

law to be reformed, the ideas for reforming criminal law, and the mechanism of procedural law to enforce the new criminal law. Yet, to clarify, the authors disposed to emphasize that the second component of Mulder is necessary to refer to the spirit of each country. In the Indonesian context, the spirit is the Indonesian Constitution 1945.

In addition to affirming Mulder's views, the authors also desire to criticize the views of Hoefnagels and Ancle regarding penal policy which do not yet provide a space for elementary ideas or values that are exactly dissimilar in each country. Thus, elementary ideas and values are the main source of law in each country which functions as a moral compass.

Meanwhile, the authors are solicitous to remark that penal policy is the process of reforming criminal law by adding new criminal acts or deleting criminal acts.[17] The addition of new criminal acts is known as criminalization[18], while the deletion of criminal acts is known as decriminalization.[19] Considerations in criminalization and decriminalization mold into three aspects: The Indonesian Constitution of 1945, Legal Objectives Theory, and Legal Change Theory.

In the context of election crime articles in Law No. 7/2017, the authors intend to utilize a penal policy approach by relying on three questions, such as: **First,** are the election crime articles analogous to the

[17] Barda Nawawi Arief, "*Tujuan Dan Pedoman Pemidanaan*", (Semarang: Badan Penerbit Magister, 2011), Pp. 43.
[18] Teguh Prasetyo, *"Kriminalisasi Dalam Hukum Pidana"*, (Bandung: Nusa Media, 2010), Pp. 31.
[19] Peter H. Solomon, "Criminalization And Decriminalization In Soviet Criminal Policy, 1917-1941", *Law & Society Review* 16, No. 1 (1981): 9–43, Https://Doi.Org/10.2307/3053548.

Indonesian Constitution 1945? **Second,** are the election crime articles yet fair? **Third,** do the election crime articles need to be changed or deleted? The answers to these three inquiries will be explained in sub-chapter four of this article.

III. Election Crimes: An Injustice

Election crime is a new regime in Indonesian electoral law, the first appearance of election crime can be observed in Law Number 8 of 2012 on The General Election of The Members of the House of Representative, Regional Representative Council, and Regional House of Representative and supplemented through Law Number 7 of 2017 on The General Election.

Election crimes are unique because not every democratic country has them. According to research carried out by the authors, only the United States and Indonesia have election crime regimes. Indonesia organized them in Articles 488-554 Law Number 7 of 2017 on the General Election,[20] while the United States organized them in 52 USC 10307: Prohibited Acts.[21]

[20] Suparto And Despan Heryansyah. "Keadilan Pemilu Dalam Perkara Pidana Pemilu: Studi Terhadap Putusan Pengadilan", *Jurnal Hukum Ius Quia Iustum* 29 No. 2 (2022):347-70, Https://Doi.Org/10.20885/Iustum.Vol29.Iss2.Art6.

[21] Barry C. Burden, David T. Canon, Kenneth R. Mayer, And Donald P. Moynihan, "Election Laws, Mobilization, And Turnout: The Unanticipated Consequences Of Election Reform", *American Journal Of Political Science* 58, No. 1 (2014): 95–109, Http://Www.Jstor.Org/Stable/24363471.

The application of election crimes in Indonesia has a robust excuse, one of which is to protect the public interest, particularly a democratic race.[22] As is known, the genealogy of criminal law aims to protect a broad public interest that has a domino effect.[23] Thus, if it is connected to the general election, election crime aims to shield Indonesian democracy according to the constitutional mandate. Because without election crime, it is feared that election fraud will damage the democratic order and the quality of society's life.[24]

Yet, the authors interpret that election crimes contain many propositions because regulating objects that other laws have regulated, thus, some election crime articles are injustice and merely giving unfounded certainty. There are several articles identified as injustice because have been regulated by other laws as follows.

First, the prohibition of civil servants from taking part in political campaigns.[25] **Second,** the prohibition of village heads from taking part in political campaigns.[26] **Third,** the prohibition of election organizers from taking part in political campaigns.[27]

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[22] Academic Text Of Law Number 7 Of 2017 On The General Election, Https://Berkas.Dpr.Go.Id/Akd/Dokumen/Rj1-20161117-115025-2971.Pdf, Accessed October 10, 2024.

[23] Lorenzo Zucca, "The Constitution Of Criminal Law", *The University Of Toronto Law Journal* 70 (2020): 27–43, Https://Www.Jstor.Org/Stable/26909376.

[24] Lawrence Norden, Christopher R. Deluzio, And Gowri Ramachandran, "A Framework For Election Vendor Oversight: Safeguarding America's Election Systems", Brennan Center For Justice, 2019, Http://Www.Jstor.Org/Stable/Resrep28489.

[25] See Article 494 Law No. 7/2017

[26] See Article 490 Law No. 7/2017

[27] See Article 546 Law No. 7/2017

Regarding these three prohibitions, the authors have an opinion that these articles are unnecessary because they have arranged in other laws, the explication is in the following.

The prohibition of civil servants from taking part in political campaigns is arranged in Article 4 Government Regulation Number 53 of 2010 on The Discipline of Civil Servants which states civil servants are forbidden from participating in practical political activities.[28] Meanwhile, if the civil servants infract these rules, they will receive punishment following Government Regulation Number 42 of 2004 on Developments of Corps Spirit and Code of Ethics of Civil Servants.[29]

While the prohibition of village heads from taking part in political campaigns is regulated by Article 29j Law Number 3 of 2024 on The Second Amendment of Law Number 6 of 2014 on Village which in short mentions village heads are prohibited from being involved in the general election campaigns.[30] The punishments for village heads who violate the rules have also been regulated by Article 30 of the similar law.[31]

The last one, regarding the prohibition of election organizers from taking part in political campaigns, it has been regulated in Article 8 The

[28] Gusti Lanang Rakayoga, "Displin Pegawai Negeri Sipil Berdasarkan Peraturan Pemerintah Nomor 53 Tahun 2010 Ditinjau Dari Aspek Hukum Kepegawaian Di Indonesia", *Jurnal Ius Kajian Hukum Dan Keadilan* 2, No. 5 (2014); 325-337, Https://Doi.Org/10.12345/Ius.V2i5.173.

[29] Juanda Nawawi, Muhammad Tamar, And Indrayani, "Kode Etik Aparatur Sipil Negara", *Kritis: Jurnal Ilmu Sosial Dan Ilmu Politik* 5, No. 1 (2019): 1-6.

[30] Ramlan Bilatu, "Netralitas Kepala Desa Dalam Penyelenggaraan Pemilihan Bupati Tahun 2015 (Suatu Studi Tentang Undang-Undang No. 6 Tahun 2014 Di Desa Bulaemo B Kecamatan Bualemo)", *Politico: Jurnal Ilmu Politik* 3, No. 1 (2016).

[31] Gian Marvin Singal, "Akibat Hukum Bagi Kepala Desa Yang Tidak Melaksanakan Tugas Dan Kewajibannya Sesuai Dengan Peraturan Perundang-Undangan Yang Berlaku", *Lex Crimen* 10, No. 13 (2021): 155-163.

Honorary Council of Election Organizers Regulation Number 2 of 2017 on The Code of Ethics and The Code of Conduct of Election Organizers which states election organizers should be neutral and forbidden from siding with certain political powers.[32] Sanctions for election organizers who are involved in political campaigns have also been regulated in Articles 21-23 of the same law.[33]

Depart from the explanation over, the authors believe that election crime articles need to be evaluated, especially those related to the prohibition of civil servants from taking part in political campaigns,[34] the prohibition of village heads from taking part in political campaigns,[35] and the prohibition of election organizers from taking part in political campaigns.[36] Because they contain double jeopardy which is against the constitution and human rights. Apart from that, it induces disharmony in law enforcement, it is a waste of the state budget as well, as the known criminal justice system consumes a quite large budget in each case.[37]

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[32] Susi Dian Rahayu, "Modus Kelalaian Kerja Dalam Proses Pemilu", *Jurnal Etika & Pemilu* 4, No. 1 (2018): 27-39.

[33] Syahir H. Wibowo, R. Farhan, And Wan Adrian Rizky Akbar, "Pelanggaran Kode Etik Lembaga Penyelenggara Pemilu Pada Pelaksanaan Pilkada Kabupaten Kebumen Tahun 2020". *Unes Law Review* 6 No. 1 (2023): 658-66, Https://Doi.Org/10.31933/Unesrev.V6i1.795.

[34] Tedi Sudrajat And Sri Hartini, "Rekonstruksi Hukum Atas Pola Penanganan Pelanggaran Asas Netralitas Pegawai Negeri Sipil", *Mimbar Hukum* 29, No. 3 (2017): 445-460, Https://Doi.Org/10.22146/Jmh.26233.

[35] Ichsan Ariansyah Muchtar And Andi Safriani, "Tindak Pidana Pemilu Yang Dilakukan Oleh Kepala Desa Di Kabupaten Takalar", *Aldev* 2, No. 3 (2020): 270-275, Https://Doi.Org/10.24252/Aldev.V2i3.12617.

[36] Farid Maulana Ramadhani, "Pelanggaran Kampanye Pemilihan Umum Perspektif Fikih Jinā¢Yah". *Al-Daulah: Jurnal Hukum Dan Perundangan Islam* 5, No. 1 (2015): 63-94. Https://Doi.Org/10.15642/Ad.2015.5.1.63-94.

[37] Aida Ratna Zulaiha And Sari Angraeni, "Menerapkan Biaya Sosial Korupsi Sebagai Hukuman Finansial Dalam Kasus Korupsi Kehutanan", *Integritas : Jurnal Antikorupsi* 2, No. 1 (2018):1-24, Https://Doi.Org/10.32697/Integritas.V2i1.136.

While, on the other hand, without election crimes, they would just be tried through administrative sanctions which have been regulated in other laws.

Meanwhile, the authors insist that election crimes are pointed to the prohibition of civil servants from taking part in political campaigns, the prohibition of village heads from taking part in political campaigns, and the prohibition of election organizers from taking part in political campaigns are preferably reduced. The abolition mechanism will be explicated in the next sub-chapter.

IV. Decriminalization of Election Crimes in Indonesia

Subsequent explaining the concept of penal policy and the several injustice election crime articles in Law No. 7/2017, the authors in this section intend to explicate the mechanism for deleting election crime articles that appertain to the prohibition of civil servants from taking part in political campaigns, the prohibition of village heads from taking part in political campaigns, and the prohibition of election organizers from taking part in political campaigns. This mechanism is called decriminalization.

As outlined in the second sub-chapter of this article, decriminalization is a criminal acts deletion process.[38] The process of

[38] Judit Takács And Tamás P. Tóth, "Liberating Pathologization? The Historical Background Of The 1961 Decriminalization Of Homosexuality In Hungary", *The Hungarian Historical Review* 10, No. 2 (2021): 267–300, Https://Www.Jstor.Org/Stable/27115451.

decriminalization certainly cannot be carried out according to the tastes of the state authorities, many serious considerations should be carefully considered.

In the context of the decriminalization of election crime articles in Law No. 7 of 2017, the authors are consistent with the statement in sub-chapter two of this article which wishes to utilize The Indonesian Constitution of 1945, Legal Objectives Theory, and Legal Change Theory as a foundation for decriminalization. The authors will amplify concisely and clearly the excuses for decriminalization referring to these three deliberations to pursue forceful legal reasons.

The Indonesian Constitution of 1945 is the highest legal norm of The Republic of Indonesia, meaning that all legal norms should refer to this one.[39] The fourth paragraph of The Indonesian Constitution of 1945 emphasizes that Indonesia has four main purposes: **First,** protect the entire Indonesian nation. **Second,** promote general welfare. **Third,** enlighten the life of the nation. **Fourth,** engage world order.[40] The four state purposes are manifested in 37 articles. The interpretation of the Constitution is unrestrained, as long as no disputes, the commendation of the Constitution in law is valid. [41]Unless there is a dispute, The Indonesian

[39] Nadirsyah Hosen, "Religion And The Indonesian Constitution: A Recent Debate", *Journal Of Southeast Asian Studies* 36, No. 3 (2005): 419–40,Http://Www.Jstor.Org/Stable/20072669.

[40] H. J. De Graaf, "The Indonesian Declaration Of Independence: 17th Of August 1945", *Bijdragen Tot De Taal-, Land- En Volkenkunde* 115, No. 4 (1959): 305–27, Http://Www.Jstor.Org/Stable/27860204.

[41] Nor Fadillah, "Analisis Metode Penafsiran Mahkamah Konstitusi Dalam Perumusan Putusan Nomor 91/Puu-Xviii/2020 Terkait Pengujian Formil Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja", *Lex Renaissance* 7, No. 4 (2023):726-44, Https://Doi.Org/10.20885/Jlr.Vol7.Iss4.Art4.

Constitutional Court will provide further interpretation of the constitutional text.[42]

One of the objects arranged in the Constitution is the general election which is stated in Article 22E (1)-(6).[43] Even though there are 6 points in Article 22E, the authors will quote point 1 as it is closely related to the discussion of this article. Article 22E (1) declares that elections are held directly, publicly, freely, secretly, and fairly every five years.[44] This text is utilized as the foundation for the formation of election laws, covering the regulation of election crimes, the aim is to ensure that elections are held directly, publicly, freely, secretly, and fairly every five years.[45]

Nowadays, formally, Law No. 7/2017 is constitutional, hitherto no party has submitted a judicial review of Law No. 7/2017 for unconstitutional occasions. Yet, materially, Law No. 7/2017 is by no means without problems, several articles in Law No.7/2017 have been submitted for judicial review to the Constitutional Court. A number of these articles include articles on open proportional systems which are regulated in articles 168 (2), 342 (2), 351 (1) b, 386 (2) b, 420 c and d,

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42 Marcus Mietzner, "Political Conflict Resolution And Democratic Consolidation In Indonesia: The Role Of The Constitutional Court", *Journal Of East Asian Studies* 10, No. 3 (2010): 397–424, Http://Www.Jstor.Org/Stable/23418865.

43 Fuadi, Abdul Basid, "Politik Hukum Pengaturan Keserentakan Pemilu". *Jurnal Konstitusi* 18, No. 3 (2022):702-23, Https://Doi.Org/10.31078/Jk18310.

44 Rahmat Bijak Setiawan Sapii, Andre Hartian Susanto, And Axcel Deyong Aponno, "Kekosongan Hukum Peraturan Penyelesaian Sengketa Proses Pemilu: Hambatan Pemilu Demokratis Dan Berintegritas Rezim Orde Baru", *Japhtn-Han* 1, No.1 (2022):1-17, Https://Doi.Org/10.55292/Japhtnhan.V1i1.3.

45 Academic Text Of Law No. 7/2017, Https://Berkas.Dpr.Go.Id/Akd/Dokumen/Rj1-20161117-115025-2971.Pdf, Accessed October 01, 2024.

422, and 426 (3),[46] and article concerning the age threshold for presidential and vice-presidential candidates as organized in Article 169 q Law No. 7/2017.[47]

The judicial review of these two issues has been decided by the Constitutional Court through *Putusan Perkara Nomor 114/PUU-XX/2022* and *Putusan Perkara Nomor 90/PUU-XXI/2023*. The first decision rejected the applicant's judicial review, meaning the electoral system remained open proportional systems. [48]While the second decision granted the applicant's judicial review, implying it allowed presidential and vice-presidential candidates under the age of 40, yet, should have experience as a regional head as though governor, regent, and mayor.[49]

Departing from the fact of judicial review of Law No.7/2017 material, the authors believe that in the upcoming day, it will enable parties to conduct a judicial review of articles 490, 494, and 546 Law No. 7/2017 for unconstitutional premises. The motive is very clear, enactment of articles 490, 494, and 546 Law No. 7/2017 renders individuals to receive double jeopardy which includes criminal punishments and

[46] Baihaki Sulaiman And Yoyoh Rohaniah, "Analisis Pemilu Dengan Sistem Proporsional Terbuka", *Petanda: Jurnal Ilmu Komunikasi Dan Humaniora* 4, No. 2 (2022): 85-105, Doi: 10.32509/Petanda.V4i2.3319.

[47] Dirga Achmad And Aulia Audri Rahman, "Kontra Produktif Putusan Mahkamah Konstitusi Nomor 29/Puu-Xxi/2023 Mengenai Batas Usia Capres-Cawapres". *Jurnal Esensi Hukum* 6, No. 1 (2024), 1-14. Https://Doi.Org/10.35586/Jsh.V6i1.323.

[48] Yuniar Riza Hakiki And Zaqil Widad, "Konstitusionalitas Sistem Proporsional Terbuka Pasca Putusan Mahkamah Konstitusi", *Prosiding Seminar Hukum Aktual: Dinamika Dan Tantangan Pemilu 2024*, (2024): 15-29.

[49] Alan Bayu Aji, "Inkonsistensi Mahkamah Konstitusi Tentang Pemberian Kedudukan Hukum Pemohon Dalam Putusan Nomor 90/Puu-Xxi/2023 Dengan Putusan Nomor 74/Puu-Xvii/2020". Soedirman Law Review 5, No. 4 (2023): 40-56, Https://Doi.Org/10.20884/1.Slr.2023.5.4.16059.

administrative punishments.[50] However, in the authors outlook, double jeopardy is opposite to Article 28D of The Indonesian Constitution of 1945 which expresses the right to justice.

Controvert Article 28D of The Indonesian Constitution of 1945 means it is opposite to the principle of human rights, meaning that the application of double jeopardy cannot be interpreted narrowly as simply contesting The Indonesian Constitution of 1945, yet, likewise compete to international human rights instruments which provide the right to justice too. International human rights instruments provide several rules regarding the right to justice which are stated in Article 5 of the Universal Declaration of Human Rights (UDHR) [51]and Article 14 (7) of the International Covenant on Civil and Political Rights (ICCPR). [52]

Thus, in the authors view, the enactment of double jeopardy through Articles 490, 494, and 546 Law No. 7/2017 is an unconstitutional act because it is an infraction of human rights and even increasingly dissociating Indonesia away from its initial purpose of protecting the entire Indonesian nation. Consequently, the authors are increasingly convinced that Articles 490, 494, and 546 Law No. 7/2017 should be abolished.

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[50] Nathalina Naibaho, Et Al, "Criministrative Law: Developments And Challenges In Indonesia." *Indonesia Law Review* 11, No. 1, (2021): 1-14, Doi:10.15742/Ilrev.V11n1.647.

[51] Carlos J. Ayala, "Universal Declaration Of Human Rights, Article 5", *Poetry* 217, No. 3 (2020): 282, Https://Www.Jstor.Org/Stable/27202814.

[52] Mark Ellis, "The Right To Fair Trials Under International Law", *Proceedings Of The Annual Meeting (American Society Of International Law)* 111 (2017): 79–88,

Post-explaining how unconstitutional Articles 490, 494, and 546 Law No. 7/2017 are, the authors perceive it is notable to examine the application of Articles 490, 494, and 546 Law No. 7/2017 repose legal objectives theory which Gustav Radbruch initiated.

Gustav Radbruch's theory of legal objectives is a highly well-known theory among legal scientists around the world, including in Indonesia. Radbruch introduced that the objectives of law cover three things, such as legal certainty, legal benefit, and legal justice.[53]Unfortunately, several legal scientists have failed to interpret Radbruch intentions, generating misunderstanding and even impacting the utilization of the theory partially. An example of an inappropriate application of Radbrcuh's theory of legal objectives is placing one aspect as superior without looking at other aspects. For instance, highlighting legal certainty without seeing legal justice as a more determinative aspect.

A reflection of the lack of precise application of legal objectives theory able be observed in the academic text of Law No.7/2017. The text arrogantly prioritizes legal certainty eight times respectively, to emphasize legal certainty as the principle of election administration and the available positive legal norms. Worse yet, the text does not contain a theoretical analysis of the function of legal certainty and its relationship to justice as intended by Radbruch.[54]

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[53] Ian Ward, "Radbruch's 'Rechtsphilosophie': Law, Morality And Form", *Arsp: Archiv Für Rechts- Und Sozialphilosophie / Archives For Philosophy Of Law And Social Philosophy* 78, No. 3 (1992): 332–54, Http://Www.Jstor.Org/Stable/23679995.

[54] See Pages 44, 46, 48, 77, 132, 334, 335, And 343 Of Academic Text Of Law No.7/2017.

Even though the text does not express that the legal certainty term refers to Radbruch, the authors believe that Radbruch first coined the legal certainty term in his book entitled *"Rechtsphilosophie"*. [55] Thus, the definition is the oldest and is utilized wheresoever, yet, many scientists are irresponsible in using the term without citing his name.

Radbruch defines legal objectives theory systematically, he explicates that legal certainty, legal benefit, and legal justice have their respective functions. Legal justice is the highest purpose of the law, the legal benefit is practical equipment that provides correctives and benefits for society, and legal certainty is a tool to earmark clear laws in society. Radbruch also supplemented that when a conflict occurs among the three, justice takes priority.[56]

Referring to Radbruch's view, the authors argue that Law No. 7/2017 has moved away from the objectives of the law. Instead of bringing justice in elections without a detailed explanation of justice, on the other hand, Law No. 7/2017 harms justice by infracting human rights through the application of double jeopardy in Articles 490, 494, and 546 Law No. 7/2017.

The authors conclude that in law, one justice must not injure another justice. Meaning, that the aim of holding elections justice should not negate human rights justice which is equally stated in The Indonesian

[55] Anton-Hermann Chroust, "The Philosophy Of Law Of Gustav Radbruch", *The Philosophical Review* 53, No. 1 (1944): 23–45, Https://Doi.Org/10.2307/2181218.

[56] Karl Engisch, "Gustav Radbruch Als Rechtsphilosoph", *Archiv Für Rechts- Und Sozialphilosophie* 38, No. 3 (1950): 305–16, Http://Www.Jstor.Org/Stable/23677842.

Constitution 1945. Therefore, the authors believe that Law No. 7/2017 should not be reused because its function to realize legal justice has been lost. The argument adopts an explanation from the legal change theory proposed by Alan Watson which has a view that laws that are shaped by the wishes of the elites or powers will undoubtedly be abandoned and shortly replaced by laws that are in accordance with the hopes of the community.[57] Despite Articles 490, 494, and 546 Law No.7/2017 were not necessarily made with the willingness of the elites and powers, the authors believe that Articles 490, 494, and 546 Law No.7/2017 will be abandoned because contrary to the constitution and human rights. Apart from that, the strongest reason that Articles Articles 490, 494, and 546 Law No.7/2017 will be discarded in the upcoming days is the injustice of election crimes consequences. For example, civil servants[58] and village heads[59] certainly not be able to return to their jobs, while the election organizers[60] and politicians are able[61]. Consequently, the authors are increasingly convinced that Articles 490, 494, and 546 Law No.7/2017 will soon be ignored, the process is through legislative review

[57] Alan Watson, "Comparative Law And Legal Change", *The Cambridge Law Journal* 37, No. 2 (1978): 313–36, Http://Www.Jstor.Org/Stable/4506104.

[58] Fauzi Syam, Helmi, Fitria, "Pengujian Keputusan Pemberhentian Tidak Dengan Hormat Sebagai Pns Karena Melalukan Tindak Pidana Kejahatan Jabatan Di Peradilan Tata Usaha Negara", *Jurnal Penelitian Hukum De Jure* 20, No. 1 (2020): 49-70, Http://Dx.Doi.Org/10.30641/Dejure.2020.V20.49-70

[59] Ahmad Yani, "Penataan Pemilihan Kepala Desa Dalam Sistem Ketatanegaraan Di Indonesia", *Jurnal Konstitusi* 19, No. 2 (2022): 456-78, Https://Doi.Org/10.31078/Jk1929.

[60] Suranto, Nasrullah Nasrullah, And Tanto Lailam, "Model Rekrutmen Penyelenggara Pemilu Yang Independen Dan Berintegritas Di Daerah Istimewa Yogyakarta", *Jurnal Konstitusi* 17, No. 1 (2020): 054-079, Https://Doi.Org/10.31078/Jk1713.

[61] Constitutional Court Decision Number 03-03/Phpu.Dpd-Xxii/2024.

by the House of Representatives[62] or judicial review in the Constitutional Court.[63]

Finally, from this analysis, the authors would like to emphasize that Articles 490, 494, and 546 Law No.7/2017 should be immediately changed through decriminalization, meaning that election crime in Articles 490, 494, and 546 Law No. 7/2017 returned to administrative violations which states in Government Regulation Number 53 of 2010 on The Discipline of Civil Servants, Government Regulation Number 42 of 2004 on Developments of Corps Spirit and Code of Ethics of Civil Servants, Law Number 3 of 2024 on The Second Amendment of Law Number 6 of 2014 on Village, and The Honorary Council of Election Organizers Regulation Number 2 of 2017 on The Code of Ethics and The Code of Conduct of Election Organizers.

The Indonesian House of Representatives and the Indonesian Government can carry out the decriminalization process through legislative review which must fulfill several stages: planning, drafting, discussing, ratifying, and enforcing. This mechanism can be observed in Law Number 12 of 2011 on The Establishment of Laws and Regulations, Law Number 15 of 2019 on The Amendment of Law Number 12 of 2011 on The Establishment of Laws and Regulations, Law Number 13 of 2022

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62 M. Ilham F. Putuhena, "Politik Hukum Perundang-Undangan: Mempertegas Reformasi Legislasi Yang Progresif", *Jurnal Rechtsvinding* 2, No. 3 (2013): 375-395, Http://Dx.Doi.Org/10.33331/Rechtsvinding.V2i3.66.

63 Maruarar Siahaan, "Integrasi Konstitusional Kewenangan Judicial Review Mahkamah Konstitusi Dan Mahkamah Agung," *Jurnal Konstitusi* 17, No. 4 (2021): 729-52, Https://Doi.Org/10.31078/Jk1742.

on The Second Amendment of Law Number 12 of 2011 on The Establishment of Laws and Regulations. The authors also emphasize that the decriminalization process is forbidden to abandon the principle of meaningful participation as explained by the Indonesian Constitutional Court through *Putusan Mahkamah Konstitusi (MK) Nomor 91/PUU-XVIII/2020.*[64] Moreover, as an alternative, decriminalization can be carried out through judicial review by the Constitutional Court, for the court to decide that the application of double jeopardy through Articles 490, 494, and 546 Law No. 7/2017 is unconstitutional. The hope is that decriminalization through two mechanisms can create fair punishments for election violations.

V. Conclusion

This article's discussion shows that penal policy studies are still needed to resolve the dynamics of applying election crimes in Indonesia. The dynamics necessary to be overcome are the enactment of Articles 490, 494, and 546 Law No. 7/2017 which induces double jeopardy, while this is confronted with the constitution and human rights which are the foundation of justice in Indonesia. The injustice in Articles 490, 494, and 546 Law No. 7/2017 causes these provisions to potentially be abandoned in the future because they no longer follow the wishes of the community. Therefore, penal policy through decriminalization is a necessity,

[64] Constitutional Court Decision Number 91/Puu-Xviii/2020.

decriminalization can be held through legislative review by the House of Representatives or judicial review by the Constitutional Court, in this way, legal justice for perpetrators of election violations will be realized.

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