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Legal Protection Against Police Members in Criminal Actions on Office Orders Post 2024 Election

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Abstract

This research was conducted with the aim of finding out how position orders and position orders without authority are regulated in Article 51 of the Criminal Code and the role of office orders and position orders without authority in providing a balance between the protection of perpetrators and the public interest. By using normative juridical research methods, it is concluded: 1. Regulation of position orders and position orders without authority in Article 51 of the Criminal Code, firstly to protect perpetrators who carry out office orders because carrying out office orders is something that is in accordance with the rules and regulations, and there is also a criminal threat in Article 216 paragraph (1) of the Criminal Code against people who do not comply with orders or requests from officials whose job it is to supervise something. 2. The substance of a position order without authority, namely that a position order without authority basically cannot release the person being ordered from punishment. The only exception to the general provisions regarding orders for positions without authority is if the person being ordered fulfills the two conditions specified in Article 51 paragraph (2) of the Criminal Code, namely: if the person being ordered, in good faith, believes that the order was given with authority; and if the implementation of the order is included in the work environment of the person being ordered.

Keywords: *Position Orders; Position Order Without Authority; Criminal Law*

Introduction

The government, as the organizer of the nation's state administration, continues to look for ideal formulations to encourage the democratic process in Indonesia. Until now, various institutions and regulations have been formed as democratic infrastructure. The process and continuity of democracy are also important if there is public participation and independent institutions that have a reputation for upholding democracy (Yusrin & Salpina, 2023). Indonesia has learned from the level of democracy at the national and regional levels that there are still many democratic processes that deviate from the true essence of democracy. This is marked by the process of contesting the election results themselves in the Constitutional Court (MK). It is in the Constitutional Court that the constitutional route is taken to find the path of justice that the contestants believe in.

Reflections on the 2020 Simultaneous Regional Elections, which have been accepted by the Constitutional Court, are a serious note in the history of our democracy. Learning the history of democracy is the most important part of the epistemic foundation for continuing to determine democracy's way forward. This democratic phase cannot be separated from the evaluation process and formulation of an ideal democratic agenda. Regarding the democratic evaluation process, it cannot be separated from critical studies in democratic spaces to produce ideal leaders in this country at various levels, so that we truly live in a modern state political system (Hidayat, 2023).

Currently, the debate regarding the 2024 general election system (Pemilu) has resurfaced, along with the judicial review of Law Number 7 of 2017 concerning Elections to the Constitutional Court (MK). Considering that the electoral system is an important aspect of organizing elections, the 2024 election system that will be used later must be completed as soon as possible (Tanjung, 2023).

Police discretion in Indonesia is juridically regulated in Article 18 of Law Number 2 of 2002 concerning the State Police of the Republic of Indonesia, namely that in the public interest, officials of the State Police of the Republic of Indonesia in carrying out their duties and authority can act according to their own judgment. This means that a member of the National Police who carries out their duties in the midst of their own community must be able to make decisions based on their own judgment if there is a disturbance to public order and security or if a danger to public order and security arises. Police Discretion can also mean the authority of a police officer to choose whether or not to act legally or illegally in carrying out his duties. Discretion allows the police to choose between various roles (maintaining order, enforcing the law, or protecting the public) and strategies or objectives in carrying out their duties (Dahniel, 2018).

Of course, the focus of this research is that carrying out office orders is one of the reasons for abolishing crimes known in the Criminal Code. Reasons for expunging a crime in the Criminal Code include justifying reasons (*rechtvaardigingsgrond*) and forgiving reasons (schulduitsluitingsgrond). Carrying out office orders is part of the justification. Other reasons are emergencies (noodtoestand), forced defense (*noodweer*), and carrying out statutory orders. Reasons for expunging crimes are also known in legislation outside the Criminal Code.

The formulation of 'office order' (ambtelijk bevel) is regulated in Article 51 of the Criminal Code. Paragraph (1) of this article states that anyone who commits an act to carry out an official order given by the competent authority will not be punished. Furthermore, paragraph (2) states that a position order without authority does not result in the abolition of the criminal sentence unless the person ordered, in good faith, believes that the order was given with authority and its implementation is included in the work environment. What is meant by 'order' in Article 51 of the Criminal Code? Quoting the Hoge Raad decision of December 17, 1899, No. 6603, E. Utrecht (1999: 377) believes that the command here is not only an order in a concrete sense but also a general instruction. A position order or *ambtelijk bevel* can be interpreted as an order that has been given by a superior, where the authority to give such an order originates from an ambtelijke position or a position according to position, both from the person giving the order and from the person receiving the order (P.A.F Lamintang, 2020).

So, between the person giving the order and the person being ordered, there is a public legal relationship. Orders given by public works officials to contractors based on contract law are not included in the category of 'office orders' (Andi Hamzah, 1993). The legal relationship must be according to public law. The position of the order-giver must be based on the provisions of public law. There are three conditions that must be fulfilled for it to be called an office order: (i) there is a relationship between the person giving the order and the person executing the order based on public law; (ii) the authority of the person giving the order must be in accordance with his or her position based on public law; and (iii) the order given falls within the scope of his or her authority (Menajang, 2018).

Departing from the above, of course there are problems. This research focuses more on the legal protection and handling of police officers on duty, especially in carrying out election duties based on orders from superiors who do not comply with what is desired and, in fact, sometimes take the risk of treating their duties and obligations as members of the police in carrying out elections that are inappropriate and even violate the police code of ethics. Of course, this will not be good in the process of human resource management within the police force and will even create a bad image in society when superiors give orders that are not in accordance with the mandate of establishing statutory regulations, especially in the police law and the police code of ethics in matters that question the police code of ethics.

Research Methods

The researcher attempted to conduct this research using a normative legal research approach model (Soetandyo Wignjosoebroto, 2002). Apabila dalam aspek keilmuan hukum, maka hukum akan menjadi objek penelusuran dan penelitian berbagai disiplin ilmu, sehingga hukum sebagai ilmu bersama (*rechts is mede wetenschap*). In the legal scientific aspect, law will become the object of research and research in various scientific disciplines, so that law becomes a shared science (rechts is mede wetenschap). Within the framework of developing normological science, normative legal science is directly related to legal practice, which is aware of the formation of law and the application of law (Jonaedi Efendi dan Johnny Ibrahim, 2018).

Result and Discussion

In handling criminal acts in the 2024 election, there are good stories; there are also bad stories. Experience during the 2024 election requires evaluation of various aspects and cases that are considered interesting. There is a need for evaluation of the legislative aspect, namely Election Law Number 7 of 2017, which has the character of 'lex specialis' with a fairly fast handling time for criminal acts. Especially in Article 486 of Law 10/2017, which contains four paragraphs explaining the existence of the Gakkumdu Center (Integrated Law Enforcement) from three institutions, namely Bawaslu, police, and prosecutors from the central (national), provincial, and district/city levels, of course experiencing problems. in the process of handling election crimes.

The Election Law regulates approximately 67 articles relating to election crimes, which are far more than the provisions for criminal acts in organizing elections for governor and deputy governor. Of the 67 provisions, there are several regulations regarding election crimes that have elements of offenses that are difficult to prove. This was confirmed by the process of handling election criminal violations in 2019. The offense provisions of this article contributed substantively to the weakness in handling election criminal violations. The articles in question include: Article 492, Article 494, Article 495, paragraphs (1) and (2), Article 513, Article 515, Article 518, and Article 545. The article above provides an illustration that there are several articles of criminal provisions in the Election Law that have elements that are difficult to apply in handling criminal violations in the 2024 Election (Lenni et al., 2023).

Handling election crimes has different characteristics from other election violations. Handling election violations does not only involve law enforcement officials in the ordinary criminal justice system but also involves election organizing institutions, in this case Bawaslu and its staff (Kasim et al., 2021). Handling election violations in the construction of the Election Law begins with a report of alleged election violations and is then discussed in an integrated law enforcement center. The Election Law and Bawaslu Regulations stipulate that the process of handling election criminal violations is carried out in four stages of discussion (Fahmi, 2015). Before there is a discussion process, alleged election violations must first go through a review by Bawaslu and its staff. If the results of the election supervisor's study conclude that there are allegations of election crimes, then the results of the study along with the election supervisor's recommendations are forwarded to the police investigator. Because it involves a number of

institutions in handling election crimes, the aim is to equalize the understanding and pattern of handling election crimes by Bawaslu, the police, and the prosecutor's office.

In election administrative violations, they are also known as structured, systematic, and massive administrative violations ("TSM"). According to Article 1 Number 33 of Bawaslu Regulation 8/2022, administrative violations of the TSM election are actions or actions that violate the procedures, procedures, or mechanisms relating to the administration of the election at every stage of the election, and/or presidential candidate pairs and vice president, candidates for members of the DPR, DPD, provincial DPRD, district/city DPRD who promise and/or provide money or other materials to influence election organizers and/or voters in a structured, systematic, and massive manner. One of the Constitutional Court decisions that became landmarks regarding TSM election administration violations was Constitutional Court Decision No. 41/PHPU.D-VI/2008. Landmark decisions are decisions that are made as precedents because they are not accommodated by existing regulations or decisions that deviate from the law because they are necessary for justice and are accepted by the public in the application of the law.

So far, if there are allegations that members of the police are not neutral in elections, they are only resolved internally by the police, and the sanctions given to the perpetrators are only administrative in nature. (2) Factors inhibiting the enforcement of criminal law against members of the police who are not neutral in the general election (Pemilu), consisting of: a) Legal substance factors, namely the provisions of Law Number 7 of 2017 concerning general elections, which provide limited time to law enforcement officials to complete the handling. of election crimes, while the law enforcement process takes longer considering the complexity of election crimes. b) The law enforcement apparatus factor, namely the presence of public prosecutors who experience difficulties in bringing defendants or witnesses before the court or executing the judge's decision and the lack of coordination between the criminal justice subsystem and related institutions such as the KPU and Bawaslu. c) Facilities and infrastructure factors, namely the absence of special funding allocations for handling election criminal cases and limited time for handling cases, while the public prosecutor also prioritizes resolving other cases (Nasution, 2016).

In Article 51, paragraph (1) of the Criminal Code, a reason for expunging a crime is formulated that is based on the implementation of a position order (*ambtelijk bevel*), especially a position order that is valid or given with authority. An example of a valid position order, namely one given by the competent authority, is that a police officer is ordered by a National Police Investigator to issue an arrest warrant to arrest someone who has committed a crime. In essence, the police took away another person's freedom, but because the arrest was carried out based on a legal order, the police concerned cannot be punished.

In Article 92, paragraph (2), of the Criminal Code, it is determined that those referred to as officials and judges also include referee judges. The so-called judges also include people who carry out administrative justice, as well as chairmen and members of religious courts. Furthermore, according to Article 92, paragraph (3), all members of the War Force are also considered officials. Because the Criminal Code does not provide an authentic interpretation of what is meant by an official, the Hoge Raad (Supreme Court of the Netherlands) has given its consideration that what is meant by an official is "any person appointed by the government and given a task, which is part of the government's duties, and those who carry out work of a public nature or for the public."

Regarding whether an order is a valid order or not, according to Satochid Kartanegara, "it must be viewed from the perspective of the law that regulates the powers of civil servants, because for each civil servant there are their own regulations." Apart from that, the method of carrying out the order must also be "balanced, appropriate, and must not exceed the limits of the order's decision." Satochid Kartanegara gave the example of a police officer who was ordered by his superior to arrest someone who had committed a crime. In carrying out this order, he just needs to catch him and take him; he is not allowed

to hit him, and so on. Regarding whether a position order is a justifying reason or a forgiving reason, criminal law writers agree that the position order regulated in Article 51, paragraph 1, of the Criminal Code is a justifying reason (Dr. Fitri Wahyuni, S.H., 2017). Article 51, paragraph (2) of the Criminal Code, according to the BPHN Translation Team, reads as follows: "Office orders without authority do not result in the abolition of the crime, unless the person being ordered, in good faith, believes that the order was given with authority and its implementation is included in the work environment." Based on the formulation of this article, basically, only a position order given by an authorized official, so a valid office order, can release the person being ordered from punishment. Thus, a position order that is without authority or an office order that is invalid basically cannot release the person being ordered from punishment.

Based on the provisions of Article 51 paragraph (2) of the Criminal Code, members of the National Police who carry out the order cannot be punished because: 1) in good faith they thought the order was given with authority, because they knew the person giving the order as a person who had the authority to make an arrest warrant; and 2) arresting people on the orders of investigating officials is the duty of members of the National Police. A position order without authority that meets the requirements as stipulated in Article 51 paragraph (2) of the Criminal Code is an excuse or reason for erasing mistakes (schulduitsluitingsgronden). This is because the act ordered is still unlawful; only the person being ordered cannot be punished because there was no fault in him.

Even though Article 51 of the Criminal Code only concerns violations of national law, in this case Indonesian law, in Moeljatno's opinion, corporal discipline cannot be justified. In other words, there is still individual responsibility, even if there is an order from a superior, if that order should be recognized as an order that is contrary to law, propriety, and humanity. In this case, people should not be allowed to take refuge solely because there is an order from their position. So, Article 51 of the Criminal Code should act as a balance between the protection of a person who has received a position order and the public interest, which requires that not all office orders can release a person from punishment but rather that an order must be considered first, namely whether it does not conflict with law, decency, and humanity (Junaidi, 2020).

Conclusion

The Election Law regulates approximately 67 articles relating to election crimes, which are far more than the provisions for criminal acts in organizing elections for governor and deputy governor. Of the 67 provisions, there are several regulations regarding election crimes that have elements of offenses that are difficult to prove. This was confirmed by the process of handling election criminal violations in 2019. The offense provisions of this article contributed substantively to the weakness in handling election criminal violations. The articles in question include: Article 492, Article 494, Article 495, paragraphs (1) and (2), Article 513, Article 515, Article 518, and Article 545. The article above provides an illustration that there are several articles of criminal provisions in the Election Law that have elements that are difficult to apply in handling criminal violations in the 2024 election. The role of office orders and office orders without authority is to provide a balance between the protection of perpetrators and the public interest, namely that, based on Article 51 of the Criminal Code, not all office orders can release someone from crime. rather, an order must be considered beforehand, namely whether it does not conflict with law, decency, and humanity. Position orders and position orders without authority in Article 51 paragraphs (1) and (2) are still relevant to be maintained as reasons for the abolition of crimes in the future National Criminal Code.

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