

Election of State Officials with Suspect Criminal Offense Status in Progressive Legal Perspective

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ABSTRACT

Legislative policies in the form of legislation in the Reformation Era, on the one hand, must formally contain ethical and moral values, but on the other hand, legislative policies sometimes seem to ignore ethical and moral values. This can be seen from the absence of strict rules governing whether or not state officials with the status of suspects are allowed to participate in the nomination and election processes. This gives rise to legal problems in the form of blurring legal norms. The question then arises, how does Indonesian law regulate "suspect status" in the nomination and election of state officials in a progressive legal perspective. As a normative juridical study, this paper uses a statutory approach to various related legal materials, in order to conduct a content analysis from a progressive legal perspective. The results show that the nomination and election of state officials with suspect status within the scope of executive positions as regional heads and within the scope of legislative positions as members of the DPR RI do not have rules that require them to resign from their positions but in the perception of the concept of progressive law the law should be more conscientious in the sense that it is loaded with ethical and moral content, thus confirming "Law for humans".

Keywords: Elections, State Officials, Suspect Status, Progressive law.

1. INTRODUCTION

For Indonesia during the Reformation Era, the issue of the relationship between law and morals in the formulation of state legislative policies became a very important point for the existence of the rule of law and the sustainability of the Indonesian state government. The debate about the relationship between law and morals was further ignited in the late 2018's when information emerged about the existence of candidates for state officials within the scope of executive positions as regional heads and within the scope of legislative positions as members of the House of Representatives of the Republic of Indonesia (DPR RI). as a suspect in a criminal act by the Corruption Eradication Commission of the Republic of Indonesia (KPK).

The factual fact that there are prospective state officials with suspect status can lead to the perception that there is disharmony between law and morals in Indonesia, even though the moral and ethical content in the rule of law is a true necessity that emerged along with the legal reform movement in Indonesia.

Starting from the above, this paper attempts to provide a brief review of legal issues: How does Indonesian law

regulate the "status of suspects" in the nomination and election of state officials in a progressive legal perspective? With an emphasis on the scope of executive positions as regional heads and within the scope of legislative positions as members of the DPR RI.

2. METHOD

The method used in this study is a normative research method. normative legal research is research conducted by examining positive legislation/laws using library materials or secondary data. The approach method used in this research is a statutory approach and a conceptual approach [1]. The main/primary legal materials used are statutory regulations. To assist the research, secondary legal materials are also used consisting of bibliographical literature such as books, research reports, journals, and the like that are supportive in nature.

3. RESULT AND DISCUSSION

I. CONTENTS IN THE FORMATION OF LAW

In the context of the rule of law, the formal law made by the state is a legislative policy [2], because it is a product of the legislature. As the opinion of Barda Nawawi Arief that one of the powers of the legislature is to produce legislative policies, its meaning is in the context of making laws [3].

With legislative policies, the law is expected to play a role in maintaining what has become a permanent and accepted thing in society/community stability (as a tool of social control). At the same time, it is expected to play a role in bringing about change in society (as a tool of social engineering), in order to protect the legal interests of the community from various disturbances. In Indonesian society, which is full of religious values, it means that the law must be moral and ethical.

This is in line with the understanding of the concept of law that contains moral and ethical content, which is stated by Shidarta [4] *“Ethics in the life of the nation, therefore, are values that function to provide moral preferences and glue the joints of life for the entire nation. Ethics in the life of the nation must be positioned as a synergistic building above the preferences of primordial ties”*.

Shidarta's opinion is in line with Satjipto Raharjo's opinion which states that legal thought needs to return to its basic philosophy, namely law for humans. With this philosophy, humans become the determinant and point of legal orientation. The law is in charge of serving humans, not the other way around. Therefore, the law is not an institution that is separated from human interests. The quality of law is determined by its ability to serve human welfare. This causes progressive law to adopt "ideology": pro-justice law and pro-people law. [5]

Progressive law views that the law is for humans, so the law is to make humans happy, the law is to serve the interests of humans, not humans for the law. Laws that are loaded with moral and ethical values are better in responding to the development of law and society in Indonesia. So, the law of this concept implies that the law is no longer solely for humans, but to make all living things happy. "That means the law for all living things," in other words the Law as "*Rahmatan lil alamin*" the law as love for all the inhabitants of the universe.

Legislative policies that contain moral and ethical laws include the recognition and protection of Human Rights (HAM) in the form of political human rights, which in particular, for example, enable people's involvement in elections. According to the 1945 Constitution of the Republic of Indonesia, after the amendments have provided guarantees in article 27 paragraph (1) in the form of the right to equal treatment in government and article 28 D paragraph (3) in the form of the right to have equal opportunities in government, as well as implicitly in article 1 paragraph (2) the right to participate in government. This provision means that it

has provided a basis for the people as the embodiment of political human rights in the form of the right to participate in government, to vote, and to be elected, which can be ascertained to contain meaning including considering whether the candidate for state official to be elected has and will have strong morals and ethics. to fight for the interests of the people and the state.

Included in the legal concept that is morally and ethically charged is the provision that states that a candidate for a state official has never been convicted by a court of competent jurisdiction as a convict through a decision with permanent legal force, or at least for former convicts departing in good faith and having dared openly and honestly. said that he had been a convict in certain crimes. The context of the principle of legality that prioritizes legal certainty, the issue of prospective state officials being suspects in certain criminal acts, is actually not free from public perception that this is a matter that intersects with moral and ethical content in law.

Provisions regarding state officials as state officials are contained in the provisions of Article 1 number (1) of Law number 28 of 1999 concerning State Administrators that are Clean and Free from Corruption, Collusion and Nepotism (KKN Law), that "State Organizers are State Officials who carry out the functions of executive, legislative, or judicial and other officials whose main functions and duties are related to the administration of the state in accordance with the provisions of the prevailing laws and regulations. In particular, the definition of state officials is further regulated in Article 1 number (4) of Law Number 43 of 1999 concerning Amendments to Law Number 8 of 1974 concerning the Principles of Employment (Employment Law) which reads, "State Officials are leaders and members of the highest/highest state institutions as referred to in the 1945 Constitution and other State Officials as determined by law”.

State officials as understood in the positions above, filling their positions must go through a general election process which among others goes through the nomination and election stages which are burdened with special requirements as regulated in laws and regulations.[6] Regarding the Legislative Elections for members of the DPR RI, it has been stated in the provisions of Article 19 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which has emphasized that "Members of the House of Representatives are elected through general elections" where this provision is then further regulated

by Law Number 7 of 2017 concerning Elections. General (Election Law).

The provisional election of regional heads is related to the provisions in Article 18 paragraph (4) of the 1945 Constitution which has confirmed that "Governors, Regents, and Mayors respectively as heads of provincial, district and city governments are democratically elected", which is then regulated further in Law of the Republic of Indonesia Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning Stipulation of Government Regulations instead of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors to become Laws.

II. LEGALITY ANALYSIS OF CANDIDATES FOR STATE OFFICIALS WHO ARE SUSPECTS

Various efforts have been made to encourage the realization of an Indonesian state that is more serious and transparent in asserting its identity that Indonesia is a state of law, a state of the law in a formal sense [7], among others through legislative policies in the form of the formation of laws and regulations. State formal law on the one hand emphasizes and becomes a separator between good and bad under the pretext of order in the perspective of the formality of state power, and on the other hand, the people are forced to follow the conceptions and formalities made by the State.

The formal law of the Indonesian state in the reform era was triggered by various backgrounds, but what was most visible in the period before, during and after the legal reform process was the emergence of a common awareness about the importance of producing laws that contained various moral and ethical values. One important note regarding the legal and moral relationship is about legislative policies in the form of legislation relating to the election and nomination of state officials from both the executive and legislative branches, which has led to policies that provide opportunities for state officials who have the status of suspects to participate in nomination and re-election process.

Legal certainty actually confirms the status of criminals who have gone through the criminal law enforcement process, namely that there are similarities for all candidates for state officials, namely they both require that they have never been sentenced to prison based on

court decisions that have permanent legal force for committing criminal acts that are threatened with imprisonment. with imprisonment of 5 (five) years or more and nothing regulates the status of the suspect. Prerequisites related to criminal acts in the general election for members of the DPR are regulated in Article 240 letter (g) of the Election Law and for the Election of Regional Heads it is regulated in Article 7 paragraph (2) letter g of the Pilkada Law.

If the criminal act which is punishable by imprisonment of 5 (five) years or more which is used as a basis for consideration in the requirements for the nomination and election of state officials is interpreted as a serious crime, then the initial history of its regulation in the Indonesian state legal system as long as it is related to state officials is related to "violation of the law" is regulated in Article 7A of the 1945 Constitution of the Republic of Indonesia which is specifically related to the dismissal of the President and Vice President of Indonesia. In the 1945 Constitution of the Republic of Indonesia as a result of the amendment, the phrase "violation of the law" is given as an example in the form of betrayal of the State, corruption, bribery, other serious crimes. The example is intended to provide confirmation that the act of "violation of the law" in question is the only one that meets the criteria for a serious crime.

Provisions as long as they relate to candidates for state officials within the scope of executive positions as regional heads and within the scope of legislative positions as members of the House of Representatives of the Republic of Indonesia, in reality, they must not have the status of convicts in any criminal act which is then interpreted as including a trial crime or a minor crime. In the context of the history of law in Indonesia, the above provisions are considered to be able to thwart regional head candidates who will participate in the simultaneous regional elections in 2018, so so far, several requests for judicial review have been submitted to the Constitutional Court of the Republic of Indonesia (MKRI).

The Constitutional Court in its Decisions 14-17/PUU-V/2007, Decisions Number 4/PUU-VII/2009, and Number 42/PUU-XIII/2015 have explicitly stated that to public positions the filling is carried out through elections, the imposition of conditions the substance

contained in the phrase "never as a convict based on a court decision that has obtained permanent legal force for committing a crime punishable by imprisonment of 5 years or more" is contrary to the Constitution. In Decision Number 71/PUU-XIV/2016 In fact, the Constitutional Court stated that Article 7 paragraph (2) letter g of the Pilkada Law is contrary to the Constitution and has no binding legal force as long as the phrase "never as a convict based on a court decision that has obtained permanent legal force" does not mean "never as a convict based on a court decision".[8] a court that has obtained permanent legal force for committing a crime punishable by imprisonment five years or more, except for convicts who commit criminal acts of negligence and political crimes in the sense of an act that is declared a crime in positive law only because the perpetrator has a different political view from the regime in power."

In its decision, the Constitutional Court affirmed that the convict or defendant may still nominate himself as a candidate for the regional head during a criminal act that carries a penalty of fewer than 5 years in prison, a convict who commits a crime of negligence, and a political crime. Except, convicts or defendants whose crimes are punishable by imprisonment of 5 years or more and criminal acts of corruption, treason, terrorists, threatening the safety of the state, dividing the Unitary Republic of Indonesia. The provisions in the decision encourage candidates for regional heads to not be convicts in any criminal act, which is then interpreted as including a trial crime or a minor crime

Existing provisions indicate that candidates for regional heads cannot resign either as individual candidates or if nominated by political parties, there are even strict sanctions for candidates who resign, either because they have violated the law and/or acted disgracefully. As a legislative policy, this provision has emphasized that the law can function as a tool of social control and as a tool for bringing about changes in society, in order to provide protection for the legal interests of the community from various disturbances.

Indonesia should contain various moral and ethical values, both according to the discourse of the state of Pancasila law and according to the concept of a constitutional state of law, so as Tongat [9] argues that

"renewal of national law, including criminal law, must reflect and actualize the values of Pancasila". Although in reality, at the formative level, for example, contained in the Criminal Code (KUHP), there are still many principles/principles and provisions of criminal law that are inappropriate and do not reflect the values of Pancasila [10].

The act of "violation of the law" must therefore be included in the electoral legislation above and be used as the basis for legislative policies in the nomination and election of state officials above, conceptually contains multiple interpretations. Because the forms of action of the concept of "violation of the law" is also very diverse and it is possible to invite a long debate that intersects with the development of law and society. If the "violation of the law" as exemplified in Article 7A of the *UUD NRI 1945* is understood in the context of the provisions in the Criminal Code and can be considered a crime, then Wirjono Prodjodikoro's opinion is drawn, that the stipulation of crime as a criminal act is intended to protect legal interests for safety. and state security from acts that threaten, disrupt and damage the legal interests of the state, as well as disrupt the state's position as a unit that stands amid the international community consisting of various countries, each of which is independent and sovereign [11].

However, what is certain is that the legislative policies in various laws and regulations, it turns out that none of them contain requirements that do not allow the nomination and election of state officials with the status of suspects, which only require that they have never violated the law and have never been sentenced to prison based on a court decision that has obtained permanent legal force for committing a crime punishable by imprisonment of 5 years or more. Nor is his/her voting rights being revoked based on a court decision that has permanent legal force.

The rules governing "suspects" are Law 8/1981 KUHP. The provisions in article 1 number 14 of Law 8/1981 KUHP, states that "a suspect is a person who because of his actions or circumstances based on preliminary evidence should be suspected as a criminal act". There has never been a court decision with permanent legal force (*inkracht*) stating a guilty verdict,

so that the nomination of a state official cannot be canceled or aborted.

The Executive Director of Perludem, Titi Angraini, said the nomination could be dropped or canceled if the candidate in question became a convict status. If the status is still a suspect or defendant, it means that the legal process has not been *inkracht*, the candidacy cannot be canceled or aborted. Husni Kamil Malik, from the General Elections Commission (KPU) also said the same thing, that "The Suspect, Nominations for Regional Heads are Still Legal" [12]. This means that if you look at it from the side of legal certainty that adheres to the principle of legality, then indeed there is not a single article of legislation in Indonesia that requires a candidate for a state official who has the status of a suspect in the scope of the executive position as a regional head and within the scope of the legislative position as a member of the DPR RI must resign, must cancel his candidacy because the status of the suspect is still possible to be tested and can be annulled through a pretrial decision.

In addition, the Indonesian judicial system applies the principle of presumption of innocence, namely as long as there is no *inkracht* court decision, a person cannot be said to be guilty, so that a candidate for a state official within the scope of the executive position as a regional head and within the scope of the legislative position as a member of the DPR RI remains entitled to following the stages of nomination and election of state officials. The existence of a clause that confirms the existence of a court decision which contains imprisonment not for committing a criminal act punishable by imprisonment of 5 years or more, indicates that the law does not prevent a person with the status of a suspect from running for a state official within the scope of the executive position as a regional head and in the scope of the legislative position as a member of the DPR RI. Moreover, if the candidate for a state official openly and honestly reveals to the public that the person concerned is a former convict, then the person concerned can still nominate himself as a state official.

However, this raises the question of whether legislative policies in the Indonesian national legal system, which are characterized by Pancasila, which are supposed to be loaded with moral and ethical values, must

succumb to the principle of legality. That the nomination and election of state officials with the status of suspects must continue because there is no single regulation that prohibits them by the recognition of human rights in the 1945 Constitution after the amendments which tend to be particular. So that it can give the impression that the law governing the nomination and election of state officials with the status of a suspect does not care even though it is contrary to morals and ethics.

It is only necessary to remember that so far Law and humans have undergone a unique relationship, the embodiment of the application of symbiosis in all its forms and meanings. So that the affirmation of the relationship between law and humans is an undeniable necessity, therefore any attempt to ordain or distort the relationship between the two is an impossibility [13]. As Professor Satjipto Rahardjo thinks about Progressive Law, the ideal law is intended to help people in the life of the state. Philosophically and sociologically law ideally brings benefits to humans, the people of a country. In short, "Law for Man is not Man for Law. Therefore, it is necessary to conduct a more in-depth study related to the relationship between law and morals, so that in the future legislative policymakers can further strengthen moral and ethical values in making legislation, and law enforcers need to strengthen themselves more in providing a moral and ethical touch. ethics in the application and enforcement of the law.

4. CONCLUSION

Nomination and election of state officials with suspect status within the scope of executive positions as regional heads and within the scope of legislative positions as members of the DPR RI. Looking at the discussion above, it can be concluded that there is no single article of legislation that requires the candidate for a state official to withdraw/cancel his candidacy even though the status of a suspect is still possible to be tested and can be annulled through a pretrial decision. In the Indonesian judicial system, the principle of presumption of innocence applies, that is, as long as there is no *inkracht* (permanent) court decision, a person cannot be said to be guilty. Court decisions containing imprisonment not for committing a crime punishable by imprisonment of 5 years or more, do not prevent a person from running for a state official. Candidates for officials who openly and honestly state to the public that the person concerned is a former convict

can still run for state office, even though it seems contrary to ethical and moral values. In the perception of the concept of progressive law, the law should be more conscientious in the sense that it is loaded with ethical and moral content, thus emphasizing "law for humans". It is necessary to conduct a more in-depth study related to the relationship between law and morals, so that in the future it can provide more reinforcement of moral values and moral values. ethics to legislative policy makers and law enforcement officers.

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