

CURRENT REGULATIONS AND ANTICIPATIONS ON CRIMINALIZING BLACK CAMPAIGNS FOR THE 2024 REGIONAL HEAD ELECTIONS

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Abstract

Campaigning plays a critical role in elections, enabling candidates to present their vision, mission, and programs to the public. However, Law Number 8 of 2015, lacks explicit regulations on black campaigning, especially when it occurs via electronic media. This research highlight the Regional Head Election Law only indirectly addresses defamation in Article 69 (b) and (c), which prohibits insults targeting individuals, religions, ethnicities, races, groups, and candidates. Other relevant regulations, such as the Criminal Code and the ITE Law, contain provisions on defamation, hate speech, and incitement, but they are not spesifically regulate in the context of election. This paper examines the urgency of reformulating explicit prohibitions and criminalization of black campaigning within the Regional Head Election Law. Using a normative juridical approach to examines the existing regulations, this research suggests that an amendment to the Regional Head Election Law is necessary to explicitly define and prohibit black campaigning, establishing it as a formal offense and identifying relevant legal subjects. By setting clear prohibitions, this reform would strengthen fairness and integrity in elections, prevent the spread of false information and incitement, and align with the principle of legality, ultimately enhancing the democratic process.

Keywords: *Black Campaign; Criminalization; Regional Head Election.*

1. Introduction

General elections are a cornerstone for any country that considers itself democratic, as they enable the selection of representatives through a competitive process. In a democratic system, leadership positions are determined through these elections, where candidates compete to earn the people's mandate¹. This process upholds the principle that political power is assigned by the electorate, ensuring that leaders reflect the public's will and maintain accountability to those they represent. Through this mechanism, a democratic country affirms its commitment to representation and the fundamental right of its citizens to choose their leaders.

General elections must be held regularly, as the aspirations of the people—the voters—are ever-changing and require consistent representation². This regularity ensures that leadership transitions, both in the legislative and executive branches, remain responsive to the evolving needs and expectations of society. At the national level, general elections serve as a crucial mechanism for renewing state leadership, facilitating peaceful and legitimate transitions of power. Similarly,

¹ Eric Shoemaker, "Democratic Equality and the Elected Avatars of the People," *Dialogue-Canadian Philosophical Review* (2024): 1–23, <http://dx.doi.org/10.1017/S0012217324000349>.

² Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Jakarta: Rajawali Press, 2009).

regional head elections, governed by the Regional Head Election Law, are essential for electing local executives such as governors, regents, and mayors. These elections are not just about filling positions; they are about realizing the principle of popular sovereignty at all levels of government. Through these elections, citizens participate directly in shaping their government, holding leaders accountable, and influencing policies that impact their daily lives.

One of the important stages in the Regional Head Election is the election campaign period³. In this stage, the Election Participant or other parties appointed by the Election Participant will make every effort to convince the Voters by offering a vision, mission, program and/or self-image. Similar to elections, campaigns are also carried out in the Regional Head Election Law. Considering that the election campaign period is also political education for the community, it must be carried out responsibly because the Regional Head Election Law must indeed be carried out freely and fairly. Therefore, Law Number 8 of 2015 which regulates the Regional Head Election Law, not only regulates the form and material of the campaign, but also the prohibition and sanctions for campaign violations. Factually speaking, despite the prohibition and sanctions, campaign violations still occur. Reflecting on the implementation of Regional Head Election Law in several regions in 2017, where violations occurred during the campaign period related to SARA⁴, which also known as a Black Campaign.

Black campaigning is a form of campaign violation that undermines the principles of free and fair elections. Such actions are intended to manipulate public perception and can disrupt the integrity of the electoral process. Although not explicitly addressed in Article 69 of Law No. 8 of 2015⁵, black campaigns typically involve disinformation strategies, including the spread of false information, rumors, and hate speech. These tactics heighten political competition by incentivizing politicians to mobilize voters through misleading narratives, which can instill fear and potentially justify violence⁶. Disinformation of this nature not only skews voter opinions but may also escalate existing social tensions, leading to violent protests or riots, often targeting individuals of distinct groups or government authorities.

In 2019, the Ministry of Communication and Information stated that there were quite a lot of black campaigns that during the period from August 2018 to June 2019, there were 771 hoax or

³ See Article 5 of Law of the Republic of Indonesia Number 8 of 2015 concerning Amendments to Law Number 1 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Law.

⁴ Irwan Hafid, "Kebijakan Kriminal Dalam Mengatasi Kampanye Hitam (Black Campaign) Di Media Sosial," *Jurnal Bawaslu Provinsi Kepulauan Riau* 2, no. 1 (2020): 74–94, doi: 10.55108/jbk.v2i1.233.

⁵ Article 69 letters b and c only regulate insulting, inciting, and pitting people and election participants.

⁶ Hannah Smidt, "Mitigating Election Violence Locally: UN Peacekeepers' Election-Education Campaigns in Côte d'Ivoire," *Journal of Peace Research* 57, no. 1 (2020): 199–216, <https://doi.org/10.1177/0022343319884993>.

fake news content and 181 of them were black campaign content.⁷ Online media while not the sole cause of voter divisiveness, has amplified the impact of such campaigns, blurring the lines between online and offline political dynamics⁸. This trend underscores the growing impact of online platforms in shaping public opinion and complicates efforts to maintain fair elections.

Therefore, this paper aims to examine the urgency of reformulating the provisions for the prohibition of black campaigns and their punishment in anticipation of the recurrence of these actions in the 2024 regional head elections. Also, there have been several previous studies have examined the prohibition of black campaigns in Regional Head Elections, including by Irwan Hafid, Alfred Bertrand, and Teguh Lubis. However, this research specifically focuses on the need to reform Indonesia's election laws to explicitly prohibit and criminalize black campaigns in regional elections. Highlighting that Law Number 8 of 2015 on Regional Head Elections lacks clear provisions—particularly concerning black campaigns via electronic media, which are increasingly relevant in today's digital era—this study points out that the current regulation only broadly addresses defamation under Article 69 without specific definitions or mechanisms tailored to black campaigning in elections.

This research differs significantly from previous studies by Irwan Hafid, Alfred Bertrand, and Teguh Lubis in its focus and approach to addressing black campaigns. Irwan Hafid⁹ study emphasizes general criminal policy in responding to black campaigns on social media through criminal policy theory but lacks specific proposals for election law amendments. Alfred Bertrand¹⁰, in his study on the 2015 Banggai local election, concludes that existing regulations are sufficient, taking a descriptive approach to assess their effectiveness, whereas this research argues that current laws fail to explicitly address black campaigns at a national level, necessitating specific legal provisions. Teguh Lubis¹¹ focuses on the enforcement of existing laws, particularly the investigation and liability of black campaign perpetrators, but does not propose amendments or expansions in regulation. In contrast, this research not only critiques existing mechanisms but also calls for legislative reform within election laws to explicitly prohibit black campaigns and close regulatory gaps.

⁷ Hafid. Op. Cit., p.84.

⁸ Merlyna Lim, "Freedom to Hate: Social Media, Algorithmic Enclaves, and the Rise of Tribal Nationalism in Indonesia," *Critical Asian Studies* 49, no. 3 (2017): 411–427, <https://doi.org/10.1080/14672715.2017.1341188>.

⁹ *Ibid.*

¹⁰ Alfred B David Dodu, "The Implementation of Political Regulation of Black Campaign: Case Study on Banggai Distrik Election in 2015," *Jurnal Wacana Politik* 2, no. 1 (2017): 52–60, <https://doi.org/10.24198/jwp.v2i1.11315>.

¹¹ M Lubis, "Penegakan Hukum Pidana Terhadap Pelaku Tindak Kampanye Hitam (Black Campaign) Di Media Sosial Mhd Teguh Syuhada Lubis," *Riau Law Journal* 6, no. 2 (2022): 170–197, <http://dx.doi.org/10.30652/rlj.v6i2.7967>.

Although discussing the same theme, namely black campaigns in the Regional Head Election Law, this study specifically examines the formulation of provisions prohibiting black campaigns in the Regional Head Election Law. This research fills a unique niche by directly addressing a gap in Indonesia Regional Head election law, the lack of clear legal provisions for black campaigns in regional head elections. Unlike Hafid broader approach to criminal policy, Betrand descriptive case study on local implementation, and Lubis focus on procedural enforcement, our research calls for a formal amendment to election laws. This makes our research particularly relevant and novel, as it offers reform-focused recommendations aimed at bolstering legal clarity and electoral integrity for the upcoming 2024 elections.

The topic of this research is a crucial legal matter because it addresses a significant gap in Indonesia Regional Head Election Law regarding black campaigns, which threaten the integrity of free and fair elections. Elections are a cornerstone of democracy, ensuring representation, accountability, and the peaceful transition of power. This gap not only complicates law enforcement but also risks escalating social tensions and voter manipulation. With that problem, this research examines the current regulations on the prohibition of black campaigns and explores how these regulations should be restructured to ensure clarity and effectiveness in law enforcement.

2. Method

This research employs a normative juridical approach¹², utilizing secondary data sources such as relevant laws, regulations, and other document references. The study adopts a descriptive-analytical research specification to provide a comprehensive overview of the issues surrounding the prohibition of black campaigns in the Regional Head Election Law. By analyzing the coherence between legal rules and principles, the research focuses on identifying gaps in current regulations and proposing reformulations to enhance their clarity and enforceability.

A qualitative data analysis method is applied to examine the connections between normative findings and scientific reasoning, leading to well-founded conclusions. The primary method of data collection is a literature review, which identifies and examines secondary data and legal regulations pertinent to the subject matter.

3. Results and Discussion

In the Regional Head Election Law, the term "black campaign" is not well known or not explicitly mentioned. Which means, there are no clear and firm regulations about black campaigns.

¹² Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005).

So, if there is an action of a black campaign, then an interpretation is carried out based on the provisions that already exist in the Regional Head Election Law and is drawn in accordance with what is meant as a black campaign.¹³ According to the Kamus Besar Bahasa Indonesia, a black campaign is a campaign that vilifies political opponents¹⁴. In Indonesia The term black campaign was known as “Kampanye Hitam” is a translation of the term "black campaign" in English which means an evil campaign or a bad campaign. This term refers to a form of campaign that spreads the ugliness of a politician to bring down the good name of the politician so that he is not liked by his supporters and the public¹⁵.

Black campaigns are distinguished from negative campaigns. Negative campaigns, conducted by exposing the weaknesses or mistakes of political opponents—such as sharing valid data on foreign debt—are intended to corner the opponent’s character and can provide electoral advantages by undermining rivals’ perceived competence, reducing support for the targeted politician or party, mobilizing supporters, and persuading undecided or risk-averse voters to choose the “lesser evil¹⁶.” This is different from black campaigns, which are campaigning by accusing the candidate's or a group of political opponents with false or unproven allegations, or through irrelevant things related to his capacity as a leader. Examples of black campaigns include accusing someone of being an unfit regional head candidate to be a leader because of his religion or race. So that the facts used are facts that tend to be invalid or non-existent, the purpose is to destroy a person's character¹⁷.

3.1 Black Campaign Regulations in the Current Law

In the Regional Head Election Law, the prohibition of black campaigns is not strictly regulated. Article 69 letters b and c of the Regional Head Election Law, which specifically regulates the prohibition of campaigning, only regulates the prohibition of insulting a person, religion, ethnicity, race, candidate group and/or other election participants as well as the prohibition of inciting or pitting individuals or the community. Criminal sanctions for violating this prohibition are regulated in Article 187 paragraph (2) which is threatened with a maximum

¹³ Dodu and Betrand, Op. Cit. p. 58.

¹⁴ Badan Pengembangan dan Pembinaan Bahasa, “Kampanye,” *KBBI VI Daring*, last modified 2024, accessed June 25, 2024, <https://kbbi.kemdikbud.go.id/entri/kampanye>.

¹⁵ Ahmad Budiman, “Kampanye Hitam Pemilu Presiden 2014,” *Info Singkat Pemerintahan Dalam Negeri VI*, no. 11 (2014): 17–20, https://berkas.dpr.go.id/pusaka/files/info_singkat/Info_Singkat-VI-11-I-P3DI-Juni-2014-20.pdf.

¹⁶ Markus Wagner Martin Haselmayer, Thomas M Meyer, “Fighting for Attention: Media Coverage of Negative Campaign Messages,” *Party Politics* 25, no. 3 (2017), <https://doi.org/10.1177/1354068817724174>.

¹⁷ Aryo Putranto Saptohutomo, “Mengenal Perbedaan Kampanye Negatif Dan Kampanye Hitam,” *Kompas.Com*, last modified 2022, accessed May 16, 2022, <https://nasional.kompas.com/read/2022/05/16/16070091/mengenal-perbedaan-kampanye-negatif-dan-kampanye-hitam>.

prison sentence of 18 (eighteen) months and a maximum fine of six million rupiah. In a special explanation article by article in the Regional Head Election Law, there is something quite interesting. Although the Article does not explicitly and clearly mention black campaigns, but in the explanation of Article 69 letter c states that the provisions regulated in this section are known as black campaigns. Then in the explanation of Article 69 letter b and the explanation of Article 187 (2), everything states "quite clearly". Although it does introduce the term black campaign in the election of regional heads, further regarding the concept of the black campaign in question still makes it difficult in law enforcement practice against this provision.

Before delving deeper into the two regulations related to black campaigns, it is important to note that the General Election Commission (KPU) also has regulations regarding campaigns, specifically Articles 17 and 57 of the General Election Commission Regulation No. 13 of 2024. Article 17 of this regulation generally addresses provisions regarding campaign materials, but it does not explicitly provide more technical limitations related to the content of campaign materials. Similarly, Article 57 of KPU Regulation No. 13 of 2024 does not elaborate further on campaign prohibitions and merely repeats the provisions of Article 69 of the Regional Head Election Law, which will be discussed later. Even the subsequent articles do not differ from the regulations in the Regional Head Election Law.

Furthermore, although it is effectively in force, the KPU Regulation itself is not part of the hierarchy of laws and regulations. Its existence is limited to administrative matters and serves as a guideline for the KPU and the Bawaslu in determining violations. However, when a campaign violation occurs, the criminal process will still be resolved using higher-tier regulations, namely the Criminal Code and the Regional Head Election Law. Therefore, it is not appropriate to further analyze the provisions related to black campaigns in KPU Regulation No. 13 of 2024, as doing so would essentially involve discussing the same matters as those regulated in the Criminal Code and the Regional Head Election Law.

In the Criminal Law, the Regional Head Election Law is a special criminal law outside the Criminal Code. The Regional Head Election Law is not a special legislation that regulates a criminal act such as the Corruption Crime Law or the Money Laundering Crime Law, but is a non-criminal legislation that contains criminal provisions (administrative criminal law)¹⁸. As a special criminal law or *lex specialis*¹⁹, this special provision applies because of the substance of a rule regulated in the general law and also in the special law. The current Criminal Code (Law Number

¹⁸ Topo Santoso, *Hukum Pidana Suatu Pengantar* (Depok: Rajawali Press, 2020).

¹⁹ Zainal Arifin Mochtar and Eddy O. S. Hiariej, *Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori, Asas, Dan Filsafat Hukum* (Jakarta: Red and White Publishing, 2021).

1 of 1946 concerning Criminal Law Regulations), also does not regulate black campaigns, but criminal acts of insult, hate speech, and incitement where the elements of these acts are elements of Article 69 letters b and c of the Regional Head Election Law. In the Criminal Code, the Crime of Insult is regulated in Chapter XVI, Article 310 to Article 321. The main criminal act is regulated in Article 310 paragraph (1) and paragraph (2). Article 310 paragraph (1) of the Criminal Code regulates verbal insults while Article 310 paragraph (2) of the Criminal Code regulates blasphemy in writing. The Criminal Code also regulates the provisions of the crime of defamation regulated in Article 311.

Article 310, paragraph (1) of the Indonesian Criminal Code (KUHP) regulates three main elements in the criminal act of defamation: (1) the element of "attacking the honor or good name of a person," (2) the element of "accusing a certain act," and (3) the element "with the intent that it be known to the public." The first element, regarding the honor being attacked, does not merely relate to moral integrity, but rather refers to a person's self-respect or dignity, grounded in the system of values or norms upheld in society. In this context, honor refers to the fundamental respect that an individual deserves in the eyes of the public. The second element, accusing a certain act that potentially taint people honor, represents the positive perception or assessment that society has toward a person in social life. Honor reflects the image that is acknowledged and accepted by society, indicating the public's view of an individual's reputation and integrity within the social sphere. The third element, "with the intent that it be known to the public," implies the perpetrator's intention to disseminate the accusation so that it reaches a wider audience. This element signifies that the act of defamation impacts not only the individual concerned but can also damage their reputation in the public eye.

The honor that is attacked in this criminal act is not honor in the field of morality, but honor which is a sense of self-esteem or dignity possessed by a person based on the system or value of morality in the social life of the community. Meanwhile, good name is a good view, assessment or recognition from the community towards a person in the association of public life²⁰. The element of accusing an act means accusing a certain act that is embarrassing, not necessarily an act that can be punished such as stealing, embezzlement and so on²¹. The alleged act must be expressly stated by the specific person who committed the alleged act, the time and time in which the alleged act was committed²². The element of "in public" orally (*in het openbaar*) is interpreted as in front of

²⁰ Adami Chazawi, *Hukum Pidana Positif Penghinaan* (Surabaya: Putra Media Nusantara, 2009).

²¹ R Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Bogor: Politeia, 1995).

²² Satochid Kartanegara, *Hukum Pidana: Kumpulan Kuliah* (Jakarta: Balai Lektur Mahasiswa, 1965).

a crowd, in a public place, or a place that is not a public place but can be seen by the public.²³ Meanwhile, if it is done with writing, then public understanding is interpreted as being readable by the general public.²⁴ The element "with the intention to be known to the public" is the core element of insult considering that the nature of the insult lies in "being known to the public" This element is the element of affirmation that the act of attacking honor is the only purpose for the public to know. The nature of unlawful insults is also present in the element of "with the intention of being known to the public".²⁵

The main element in this criminal act of defamation is the same as the crime of blasphemy or blasphemy with writing, but what distinguishes it is that there are additional conditions in the form of²⁶:

- a. That the perpetrator is allowed to prove the truth of the defendant;
- b. That the perpetrator could not prove it; and
- c. That the conjecture was contrary to what he knew.

The ability to prove the truth of the accusation is the authority of the judge, but with the conditions expressly formulated in Article 312 of the Criminal Code,²⁷ namely:

- a. If the accusation is made by the maker by presenting reasons for the public interest.
- b. If the accusation is made because he is forced to defend himself.
- c. If the accusation is directed at civil servants who care about matters in the implementation of their duties.

In addition, according to Article 313 of the Criminal Code, the ability to prove is also impossible if the alleged act is a criminal complaint and the party who should be allowed to file a complaint does not complain. Meanwhile, Article 314 of the Criminal Code stipulates that the alleged act is a criminal act which is then investigated and prosecuted criminally. If the person who is slandered is found guilty of committing a criminal act as alleged, then the person who slandered is automatically exempted from this crime. On the other hand, if a person who is slandered is proven innocent, then this automatically becomes perfect proof that the accusation is not true. However, proven guilty or innocent must be based on the judge's decision that has permanent legal force (Article 314 paragraph (1) and paragraph (2) of the Criminal Code). If there is no decision with permanent legal force, then the prosecution of the crime of defamation is

²³ Chazawi, Op.cit, p.126

²⁴ Soesilo, Op.cit., p. 164

²⁵ Chazawi, Op.cit., p.98

²⁶ S.R. Sianturi, *Tindak Pidana Di KUHP: Berikut Uraianya* (Jakarta: Alumni Ahaem - Petehaem, 1989).

²⁷ Chazawi, op.cit., p. 114

postponed until there is a judge's decision with permanent legal force (Article 314 paragraph (3) of the Criminal Code).

If the object is an individual person, then Articles 156 and 157 of the Criminal Code regulate insults against one or several groups of Indonesia society. Article 156 of the Criminal Code mentions the expression of feelings of hostility, hatred or insult towards one or several groups of Indonesia society, so Article 157 of the Criminal Code that is threatened with a criminal act is the act of broadcasting or performing it so that it is known to the public. Articles 156 and 157 of the Criminal Code were formed for the purpose of peace, order and security of the lives of the country's population. Therefore, what is forbidden is not an act of hatred or insult, rather than it expressions of hatred, contempt or hostile feelings are expressed in public. The criteria for speech that are expressions of hatred, insult or insult are moral values, moral order and propriety in social life.²⁸ The population of Indonesia is defined as every part of the Indonesia nation that is different because of race, country of origin, religion, place of origin, descent, nationality or position according to constitutional law. Article 242 of the Criminal Code stipulates that the basis of hostility, hatred or insult towards one or more groups of the Indonesia population is race, nationality, ethnicity, skin color, gender or disability, both mental and physical.

Regarding incitement, it is regulated in Article 160 of the Criminal Code. This incitement is carried out to commit a criminal act or violence against the general authority or not comply with the provisions of the law or the rules of office given under the provisions of the law. Incitement can be done orally or in writing. If it is done in oral form, then if inflammatory words have been spoken, then the crime becomes complete. If the incitement is done in writing, then the inflammatory essay must first be written and then broadcast or displayed and then the offense can be said to be complete. If the person who did that was just writing an essay, then there was no experimental element in this offense. If the writing has been completed and he acted to broadcast or perform the writing but has not succeeded and failed, then the person can be said to have carried out a punishable experiment²⁹.

There are still criminal acts related to insults, hate speech and incitement, namely about fake news. This criminal act is regulated in Articles XIV and XV of Law Number 1 of 1946 which is a replacement for Article 171 of the Criminal Code. In this provision, everyone is prohibited from broadcasting fake news that causes chaos among the community. This provision was formulated because in the past, the people of *the Netherlands East Indies* were easily influenced

²⁸ Chazawi. Op.cit, 213

²⁹ Krisna Harahap, *Rambu-Rambu Di Sekitar Profesi Wartawan* (Bandung: Grafiti Budi Utami, 1996).

or believed in news that was somehow impossible to lie, so it was easy to cause problems/shocks in society. This provision was still used later by the Government of Indonesia (although changes were made in its formulation), because the government of the Republic of Indonesia at that time saw that the newly formed government was in dire need of calm, tranquility and unity and unity all aimed at the struggle against the colonizers to defend independence.

For those reason, in addition to being maintained, the sanctions in this provision are also increased (from one year to two, three, and ten years) which can cause shocks in society³⁰. The implementation of this provision during the New Order period, the reform period until now is considered to threaten freedom of opinion. Especially fake news that causes the price of merchandise, funds or securities to fall or rise is regulated in Article 390 of the Criminal Code.

Criminal acts of insults, hate speech and fake news if carried out through electronic media means are sourced from the provisions of Law Number 11 of 2008 concerning Information and Electronic Transactions as amended by Law Number 19 of 2008 (ITE Law). The crime of insulting through electronic media is regulated in Article 27 paragraph (3) of the ITE Law, while the crime of spreading fake news that harms consumers is regulated in Article 28 paragraph (1). Regarding hate speech through electronic media, it is regulated in Article 28 paragraph (2) of the ITE Law. Based on the provisions of the criminal act, the provisions regarding the crime of insult, hate speech, incitement and fake news cannot be used *mutatis mutandis* to interpret the provisions of Article 69 letters b and c of the Regional Head Election Law to be applied to black campaigns. Each provision in the Criminal Code for these criminal acts has a different regulatory intent if it is related to the need for criminal regulation for black campaigns. The crime of insult is a manifestation of the protection of honor and good name which is indeed a human right. Criminal acts in the form of fake news, hate speech and incitement are acts that threaten public order³¹. The need to regulate black campaign penalties is a protection so that elections can be held honestly and fairly, because a person chooses his leader based on objective judgment. Therefore, according to the author, it is necessary to formulate criminal provisions in the Regional Head Election Law which expressly formulate the prohibition of black campaigns and their punishments.

3.2 Formulation of the Black Campaign Ban and Its Law

As previously explained, Article 69 letters b and c of the Regional Head Election Law cannot be directly applied to black campaign actions, but requires an interpretation. Interpretation

³⁰ Djoko Prakoso, *Perkembangan Delik Pers Di Indonesia* (Yogyakarta: Liberty, 1988).

³¹ Abdul Noury and Gerard Roland, "Identity Politics and Populism in Europe," *Annual Review of Political Science* 23 (2020): 421–439, <https://doi.org/10.1146/annurev-polisci-050718-033542>.

is necessary to meet legal needs and fill legal gaps³², considering that the norms in Article 69 letters b and c of the Regional Head Election Law are formulated briefly and generally, making their intent unclear. Therefore, it is essential to amend the current Regional Head Election Law to explicitly regulate the prohibition of black campaigns and their penalties, ensuring that their application no longer requires interpretations that may lead to legal uncertainty.

Amendments to the law related to the imposition of criminal sanctions involve defining criminal acts and determining the penalties to be imposed on offenders. Deciding which actions should be prohibited and subjected to criminal sanctions are two central issues in Criminal Law Policy. Determining which actions should be prohibited and threatened with criminal sanctions are two central issues in Criminal Law Policy³³. However, making efforts to overcome crime by *criminal* means must be carried out carefully, selectively and limitedly. This is because criminal sanctions in criminal law in the form of criminal are a negative sanction system³⁴ which means that they are seen as suffering. Sanctions in criminal law are what distinguish them from sanctions in other legal fields.

The determination of an act as a criminal offense, known in criminal law as "criminalization", is a fundamental authority vested in the state. This process involves a careful evaluation of whether certain behaviors or actions pose a significant threat to social order, public interest, or individual rights and thus warrant legal prohibition. Criminalization serves as a proactive step, taken before enforcing any criminal sanctions, to clearly define what constitutes a criminal act and the corresponding consequences for violations³⁵.

The criminalization policy that is the basis for appropriate punishment of an act is closely related to the issue of legal sources or legal basis for declaring an act as a criminal act³⁶. This basis is known as the principle of legality, which is the principle that determines that no act is prohibited and threatened with a criminal act if it is not specified in advance in the law. Usually this principle is known in Latin as *Nullum Delictum Nulla Poena Sine Praevia lege*.³⁷

³² Matheus Gabriel Barbosa and Fabien Schang, "Legal Gaps and Their Logical Forms," *Studia Humana* 13, no. 3 (2024): 23–40, <https://doi.org/10.2478/sh-2024-0017>.

³³ John Kenedi, "Kebijakan Kriminal Dalam Negara Hukum Indonesia: Upaya Mensejahterakan Masyarakat," *AL-IMARAH: Jurnal Pemerintahan dan Politik Islam* 2, no. 1 (2017): 18, <http://dx.doi.org/10.29300/imr.v2i1.1026>.

³⁴ Sudarto, *Hukum Dan Hukum Pidana* (Bandung: Alumni, 1983).

³⁵ Andrew Cornford, "Preventive Criminalization," *New Criminal Law Review* 18, no. 1 (2015): 1–34, <https://doi.org/10.1525/nclr.2015.18.1.1>.

³⁶ Barda Nawawi Arief, *Perkembangan Sistem Pemidanaan Di Indonesia* (Semarang: Program Magister Ilmu Hukum Pascasarjana Universitas Diponegoro, 2011).

³⁷ D. Schaffmeister, N. Keijzer and P.H. Sutorius stated that this condition was the first condition. In fact, Moeljatno stated that it is the main basis for punishing people who have committed criminal acts other than the principle of guilt. See D. Schaffmeister, N. Keijzer, and P. H. Sutorius, *Hukum Pidana* (Bandung: Citra Aditya Bakti, 2007) p. 1; Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 1993). p. 23

Eddy O. S. Hiariej based on Machteld Boot's opinion, stated 4 things related to the Legality Principle, namely³⁸:

1. The principle of *Nullum Crimen, Noela Poena Sine Lege Praevia*, means that there is no criminal act, no crime without prior law. Consequently, the provisions of the criminal law should not apply retroactively
2. The principle of *Nullum Crimen, Noela Poena Sine Lega Scripta*, means that there is no crime, there is no crime without a written law. As a result, both prohibited acts and criminal acts that are threatened against prohibited acts, must be written expressively verbically in law.
3. The principle of *Nullum Crimen, Nulla Poena Sine Lege Certa*, means that there is no criminal act, no crime without clear rules. Consequently, the formulation of the criminal deed must be clear so that there are no multiple interpretations that can endanger legal certainty
4. The principle of *Nullum Crimen, Nulla Poena Sine Lege Stricta*, means that there is no criminal act, no crime without strict laws. The consequence is that analogies are not allowed.

Based on this, if after changes are made in the Regional Head Election Law which contains provisions for black campaigns in the prohibition of campaigns, then the basic principle of legality regarding the need for prior regulation in the law and written rules has been fulfilled. Furthermore, clear arrangements so as not to have multiple interpretations and strict regulations considering that in the criminal law there is a prohibition on analogy.

In formulating a criminal act, there are elements of criminal acts, namely objective elements and subjective elements. Objective elements relate to things outside of human beings such as for actions or behaviors, certain outcomes or conditions that accompany when an action is performed³⁹. Meanwhile, subjective elements related to the perpetrator include the state of the perpetrator, such as the ability to take responsibility and guilt.⁴⁰ The determination of objective elements in criminalizing black campaigns, when referring to Article 69 letter c of the Regional Head Election Law, cannot be interpreted using systematic interpretation based on provisions concerning incitement and defamation as regulated in the Criminal Code (KUHP). This is because

³⁸ Eddy O. S. Hiariej, *Asas Legalitas Dan Penemuan Hukum Dalam Hukum Pidana* (Jakarta: Erlangga, 2009).

³⁹ Paul H. Robinson and John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (New York: Routledge, 2019).

⁴⁰ Santoso, Op.cit. p. 100-101

acts of incitement and defamation in the Criminal Code are governed by standalone articles, often in separate chapters, indicating that the legal interests protected are also different.⁴¹

Furthermore, the prohibited acts regulated in this article include inciting discord, a concept not recognized in the Criminal Code. Similarly, the provisions of Article 69 letter b of the Regional Head Election Law, which prohibit insults against individuals alongside insults against religion, ethnicity, race, groups, and regional head candidates, differ. The Criminal Code separately regulates insults against individuals and insults against religion or societal groups.⁴² Therefore, in its application, the interpretation used should rely on grammatical interpretation, which is based on the common language used by society.

In amending the Regional Head Election Law, the formulation of the elements of criminal acts should consider the definition of a black campaign as previously described. Consequently, the elements of black campaign actions can be identified as follows:

- 1) accusing a person who is an election participant of false or unproven allegations, or through irrelevant matters related to his capacity as a leader;
- 2) the allegations are based on invalid or existing data;
- 3) The goal is to destroy a person's character so that that person will not be elected in the election. Therefore, this would be an element of behavior that is prohibited from the formulation of black campaign violations.

Author believe that, the element of certain consequences does not need to be formulated in the crime of black campaigning considering that this is a formal violation, in this violation there is no need to be prosecuted to result in the destruction of a person's character so that a voter will certainly not vote for an election participant. This is because one of the principles of general elections is secret, one will not know the choice of others, and if it qualifies to be a material violation, it will certainly be difficult in terms of proof.⁴³ The element of "publicly known" or "in public" serves as an accompanying circumstance in the crime of black campaigning. This element parallels similar components found in criminal acts such as insult, incitement, hate speech, and

⁴¹ The criminal act of incitement is regulated under Article 160 of the Criminal Code (KUHP), which is categorized under the chapter on crimes against public order, aimed at protecting society as a whole. Meanwhile, defamation is regulated under Article 311 of the Criminal Code, which falls under the chapter on insults, focusing on protecting individual rights, specifically personal reputation and honor.

⁴² The criminal act of insult is governed by Chapter XVI of the Criminal Code, which provides protection for individual reputation and honor. In contrast, religious insults are regulated under Article 156a, and insults against societal groups are addressed in Articles 156 and 157 of the Criminal Code, which are part of Chapter V on crimes against public order.

⁴³ A criminal act is a criminal act whose form of action is not formulated in the law, not the result. Violation of a substance in which the law formulates the result, not the action. The violation is completed with the occurrence of the result. See Santoso. Op.cit. p. 96-97

provocation under the Criminal Code, where "in public" or "known to the public" is required for the act to constitute a violation. In the context of black campaigning, this element is particularly relevant because such acts are typically carried out during regional head election campaign activities, where information or statements are intended for broad public dissemination.

Regarding the qualification element of the perpetrator, it is essential to define the subject of the black campaign as broadly as possible to avoid complications in proving the offense. Therefore, the subject of this violation should be "everyone," recognizing that black campaigns may be conducted by both individuals and legal entities. However, additional qualifications can also be established, specifically designating Regional Head Election Participants as a relevant category. This is because campaign activities, by regulation, are restricted to participants in the regional head election. In clarifying this, further explanation could be provided to define "election participants," ensuring the terminology captures those legally recognized within the campaign process. This clarification would strengthen the legal framework, providing a clear basis for who can be held accountable for black campaigning in election settings.

Regarding the element of intent, it is evident that punishment for the crime of black campaigning is premised on the act being committed "deliberately." In my view, this offense cannot arise from mere negligence; it requires a specific intention to harm or mislead, especially given the targeted nature of such campaigns within the election process. Also as previously noted, offenses related to insults, hate speech, and misinformation through electronic media are addressed in the ITE Law, where the nature of the offense focuses on "content" rather than the action itself. The ITE Law emphasizes the distribution, transmission, or accessibility of harmful content, highlighting the violation in the substance of documents or information transmitted electronically, not merely in the manner of transmission. This distinction is crucial, as it clarifies that the offense lies in the harmful content, regardless of the medium.

However, based on this framework, black campaigns would not fall under the ITE Law, even when conducted via electronic media. This is because black campaigns are unique, limited to certain individuals (election participants) and confined to specific periods (election campaign phases). Therefore, any prohibition against black campaigning even if conducted via electronic means should be situated within the specific provisions governing campaign restrictions. I argue that the concept of "in public" or "known to the public" already encompasses electronic media, given the wide reach and public accessibility inherent to social platforms.

There is no pressing need to adopt provisions from the ITE Law that specifically address electronic elements, such as electronic documents or transmission actions. However, to alleviate

any concerns law enforcers may have regarding the interpretation of "in public" or "known to the public," an explicit clarification can be added to the article explanations. This clarification could specify that the element of "in public" or "known to the public" includes communications made via electronic media, thus affirming the applicability of the rule to digital campaign actions. This approach ensures clarity in enforcement while preserving the intent of the law to cover all forms of public outreach, including those conducted online.

Furthermore, regarding criminal sanctions for black campaign crimes. Talking about criminal sanctions, the main thing is about the type of criminal sanction and the length of the crime that will be threatened with the crime of black campaign. Article 187 paragraph (2) of the Regional Head Election Law which regulates the threat of criminal sanctions for violations of the campaign ban regulated in Article 69 letters b and c of the Regional Head Election Law stipulates that the types of criminal sanctions are cumulative, namely imprisonment and fines. The length of imprisonment is determined by the maximum limit, which is a maximum of two years, as well as a fine, the maximum limit is set at twenty-four million rupiah.

Determination the type of sanction, the length of imprisonment, or the amount of a criminal fine for a black campaign offense is a complex process that demands thoughtful consideration. It cannot be done arbitrarily, as these choices directly connect to broader legal and punitive policy frameworks. In this context, the "politics of law and punishment" must be taken into account, meaning that the underlying objectives of justice, deterrence, and social order should inform every aspect of the sanction formulation. When criminal acts are excessively diversified in legislation, where numerous types of offenses are criminalized without careful alignment, the result can be a fragmented body of law. Such fragmentation complicates the interpretation of norms and can ultimately hinder the realization of legal objectives. If laws become overly complex or unclear, they may lose their deterrent effect and undermine the perceived legitimacy of the legal system, weakening overall law enforcement effectiveness⁴⁴.

Therefore, the process of defining criminal sanctions for black campaign offenses, whether fines, imprisonment, or other penalties must be approached with precision and balance. The sanctions should reflect the seriousness of the offense while aligning with the overarching goals of electoral integrity and social fairness. The duration or severity of these punishments should consider factors such as the offense's impact on public trust in elections, the intent of the offender,

⁴⁴ M.H. Dr. Mudzakkir, S.H., "Perencanaan Pembangunan Hukum Nasional Bidang Politik Hukum Pidana Dan Sistem Pemidanaan," *Leadership Quarterly* 4, no. 1 (2012): 693–727, https://bphn.go.id/data/documents/pphn_bid_hkm_pidana_dan_sistem_pemidanaan.pdf.

and the potential deterrent effect. By carefully calibrating these sanctions, the law can provide clear guidance, uphold democratic principles, and reinforce the credibility of the legal system.

If the crime of black campaign is included in addition to the provisions in Article 69 letters b and c of the Regional Head Election Law, then of course the punishment is also subject to the provisions of Article 187 paragraph (2) of the Regional Head Election Law. Because black campaign actions are equivalent to other prohibited campaign actions in Article 69 letters b and c of the Regional Head Election Law, so is the punishment. A more in-depth study is needed, if parliamentarians consider that black campaigns are more or less reprehensible than other prohibited campaign actions, so that it has an impact on the reduction or aggravation of the punishment rather than the punishment that is currently threatened against the prohibited campaign action.

4. Conclusion

The Black Campaign, a practice that undermines the principles of honest and fair elections, is insufficiently addressed in Indonesia's Regional Head Election Law. Although Article 69 letters (b) and (c) touch upon campaign prohibitions, they fail to explicitly define or adequately regulate black campaign actions. Article 69(b) lacks detailed explanations, while Article 69(c), though it introduces the concept of black campaigns, remains vague and difficult to interpret consistently. This ambiguity forces law enforcers to rely on provisions in the Criminal Code, creating inconsistencies in application and complicating enforcement. To address these shortcomings, there is an urgent need to formulate a distinct provision within the Regional Head Election Law or its subsidiary regulations to prohibit black campaign actions explicitly.

Such a provision must clearly define black campaigns, identifying them as deliberate actions aimed at spreading false, misleading, or defamatory information about electoral candidates to harm their reputation or manipulate voter perceptions. The objective elements should emphasize public dissemination, whether through traditional or electronic media, ensuring the law covers modern campaign practices. Furthermore, the provision should incorporate subjective elements, requiring proof of intent to deliberately undermine an opponent or distort the electoral process. Recognizing the prevalence of electronic media in campaigns, the provision should explicitly address black campaign actions conducted online, ensuring that digital platforms such as social media and messaging apps fall within the scope of public dissemination. The classification of black campaigns as a formal offense where the act itself constitutes the crime without requiring proof of material harm would simplify enforcement and enhance accountability.

In addition, the penalties for black campaigns should align with those for other prohibited campaign actions under Article 187(2) of the Regional Head Election Law, ensuring consistency in punitive measures and signaling the severity of such violations. Implementing this provision could be achieved through amendments to the Regional Head Election Law, offering a robust legal framework with explicit definitions and sanctions, or through the issuance of subsidiary regulations, providing quicker and more flexible implementation. Either approach would benefit law enforcement by reducing ambiguity, strengthening electoral integrity, and deterring harmful practices. Ultimately, a distinct provision would enhance legal clarity, adapt to modern campaigning methods, and promote fair competition in Indonesia's regional elections.

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