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The Implication of Presidential Threshold as an Open Legal Policy in Indonesia's General Election

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ABSTRACT: The decision of the Constitutional Court is final and binding, but there are still opinions of the pros and cons of the emergence of the Constitutional Court Decision related to the presidential threshold which is categorized as an open legal policy. The problem studied in this research is the legal implications of the presidential threshold as an open legal policy. This research uses normative legal research methods, using a statutory approach, case approach and conceptual approach. Based on the analysis of the discussion, first, with the Constitutional Court Decision stating the presidential threshold as an open legal policy, it becomes a problem. The conception of the presidential threshold found a gap whether it fulfills the rules of open legal policy or not. Second, the legal implications of the presidential threshold as an open legal policy in the general elections of the president and vice president in Indonesia, namely: The decision of the Constitutional Court must be implemented because it is final and appealable; Not all political parties can participate because of the threshold; there is no opportunity for new parties to carry their presidential and vice presidential candidates.

KEYWORDS: General Elections; Open Legal Policy; Presidential Threshold

I. INTRODUCTION

Examination of laws or better known as judicial review is a test of legal products carried out by the judiciary. This institution has the authority granted by the constitution to test legal products formed by the legislature. The authority to conduct judicial review is also believed to be carried out to carry out the function of checks and balances between institutions holding state power. In theory, this function is carried out to avoid the arbitrariness of state institutions, one of which is the legislator [1].

In the Indonesian constitutional system, the Constitutional Court is given the constitutional authority to assess the constitutionality of a norm. The Constitutional Court is a decisive actor, especially in playing its role to examine a law against the 1945 Constitution of the Republic of Indonesia, hereinafter abbreviated as UUD NRI 1945 [2]. On the other hand, the Constitutional Court does not always act actively in getting involved in changing policies. Not a few decisions of the Constitutional Court are a form of "judicial restraint" to examine a policy by arguing that the policy is within the realm of authority of open legal policy.

The authority of open legal policy, which is believed by the Constitutional Court to be the sole and absolute right of the House of Representatives (DPR), is also the power of attribution (attributie van rechtsmacht) to form laws together with the president, which is emphasized in Article 20 paragraph (2) of the 1945 NRI Constitution, which is believed by the Constitutional Court to be the guardian and the sole and the highest interpreter of the constitution. This is what happened in the formulation of the presidential thershold norm or the threshold for the acquisition of seats and votes of a minimum political party or a coalition of political parties in the legislative general election in order to propose a pair of presidential and vice-presidential candidates [3].

The formulation of the presidential threshold was first found in Law Number 23 Year 2003 concerning General Elections of the President and Vice President. Article 5 Paragraph (4) of Law Number 23/2003 on the General Election of the President and Vice President states that a presidential and vice-presidential candidate pair can only be proposed by a political party or a coalition of political parties that obtain at least 15 percent of the total DPR seats or 20 percent of the national valid votes in the DPR elections. The provisions of the law then became the forerunner of the presidential threshold and were applied in the 2004 elections.

After the 2004 General Elections and towards the organization of the 2009 General Elections for President and Vice President, Law Number 23/2003 was replaced by Law Number 42/2008 on the General Elections for President and Vice President. One of

the changes in Law No. 42/2008 is the increase in the presidential threshold in Article 9 of Law No. 42/2008, which states that presidential and vice-presidential candidates are nominated by a political party or a coalition of political parties participating in the general elections that meet the requirements of obtaining at least 20% of the total number of DPR seats or obtaining 25% of the national valid votes in the general elections of DPR members before the implementation of the general elections of the president and vice president [4]. Until Article 222 of Law No. 7/2017 on General Elections, in which the presidential threshold is still the same as that stipulated in Article 9 of Law No. 42/2008.

The application for judicial review of the presidential threshold by the Constitutional Court has been decided several dozens of times, both regarding the constitutionality of the provisions of Article 222 of Law Number 7 of 2017 concerning General Elections and regarding the testing of Article 9 of Law Number 42 of 2008 concerning Presidential Elections which was tested before the enactment of the General Election Law. For all of these requests, the Constitutional Court, for the most part in its decisions, reasoned that the presidential threshold is an open legal policy or can be referred to as an open legal policy[5].

The Constitutional Court in several decisions stated that there are provisions (norms) that are open legal policy. When a legal norm falls into the category of open legal policy, according to the Constitutional Court, the norm is in the area of constitutional value or in accordance with the 1945 Constitution[6]. The term open legal policy can be interpreted as a freedom for lawmakers to form laws [7]. As an open legal policy or norm that is in the constitutional area / in accordance with the 1945 Constitution of the Republic of Indonesia, which frees the legislator to interpret and express it in a particular law [7].

The mechanism and conditions for presidential and vice-presidential candidates are explained in Article 6A paragraph (2) which states that: "Candidates for President and Vice President shall be nominated by a political party or a coalition of political parties participating in the election prior to the implementation of the election". Textually, Article 6A paragraph (2) of the 1945 Constitution provides space for all political parties participating in the election to nominate the President and Vice President. This is because political parties are the pillars of democracy and the link between the state government (the state) and its citizens (the citizens) [3].

However, Article 222 of the Election Law provides for a presidential nomination threshold, which requires a candidate pair to be nominated by a political party or a combination of political parties participating in the election that meets the requirements of obtaining at least 20% (twenty percent) of the total number of DPR seats or obtaining 25% (twenty-five percent) of the national valid votes in the previous DPR elections [8].

The existence of Article 222 of the Election Law emphasizes and clarifies the provisions of Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia regarding the requirements for presidential and vice-presidential candidates, in which the candidate pairs will be proposed by a combination of political parties that obtain at least 20% (twenty percent) of the seats in the DPR or obtain 25% (twenty percent) of the national valid votes in the previous elections for members of the DPR. This provision is an open legal policy that is a factor in the birth of the term presidential threshold or limits on the nomination of the president and vice president.

Based on the explanation above, the presidential threshold is a problem that can be studied in depth whether it is in accordance with the rules of open legal policy in general elections and its implications. Considering the importance of the study, it is necessary to conduct a comprehensive study entitled, "Implications of the Presidential Threshold as an Open Legal Policy in General Elections in Indonesia". And there are 2 (two) problem formulations that can be a fence in this paper, namely: 1). Is the presidential threshold system in accordance with the rules of open legal policy in Indonesia? and 2). What are the implications of the presidential threshold as an open legal policy on general elections in Indonesia?

II. METHODS

This research is a normative legal research, which uses the doctrinal method in analyzing the principles and laws and regulations related to the interpretation of the Constitutional Court in its decision regarding the Presidential Threshold as an Open Legal Policy and its implications. There are three approaches used in this research, namely: legislative approach, case approach and conceptual approach. Primary legal materials in this research are: (1) 1945 Constitution of the Republic of Indonesia; (2) Election Law; (3) Constitutional Court Law; While secondary legal materials in this study: Minutes of Formation of the 1945 Constitution of the Republic of Indonesia, Minutes of Formation of Laws, Constitutional Court Decisions, legal journals, books and other scientific works. In terms of nature, this research is descriptive research. Descriptive research describes something in a certain time and space. In legal research, this descriptive research is very important to present the existing legal materials precisely, where according to the materials the legal prescriptions are compiled. While from the point of view of form, this type of research is descriptive research, research that aims to provide a description or formulate problems in accordance with existing circumstances/facts. This prescriptive nature will be used to analyze and test the values contained in the law. This

prescriptive nature will be used to analyze and test the values contained in the law. It is not only limited to the values in the area of positive law, but also the values that underlie and encourage the birth of the law.

III. RESULTS AND DISCUSSION

A. Presidential Threshold as an Open Legal Policy

In making legal policy, the legal term is known as open legal policy. Based on the provisions of Article 20 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it reads: "The House of Representatives (DPR) holds the power to form laws and is discussed by the President to obtain mutual consent"[9]. This means that the House of Representatives (DPR) as a representation of the legislative body has legislative power in forming, stipulating, and has the authority to conduct a legislative review of a law and regulation[10]. In relation to the formation of law, it is known as open legal policy, which is a process of law making activities to study or elaborate the constitution in law with the 1945 Constitution of the Republic of Indonesia.

The authority of open legal policy believed by the constitutional court is the sole and absolute right of the DPR and is the power of attribution (attributie van rechtsmacht) as an institution that has a legislative function believed by the constitutional court as the guardian and the sole and the highest interpreter of the constitution [11]. The mechanism of open legal policy formation is a legal policy frame that is desired by the power holder in designing and interpreting a multi-interpretive legal product [12]. This means that every direction of legal policy is oriented towards these policy makers [13].

Regarding open legal policy in the basic norms, namely in the Constitution, it is not explicitly regulated about the constitutionality of public policy which provides an instrument that every open legal policy formation is the authority of the legislature and the executive. The mechanism used to elaborate the constitutional interpretation of laws and regulations is to consider the purpose of the state as stated in the precepts of Pancasila and the basis of the state, namely the basic law. Thus, the common thread is that open legal policy is the legislative authority of the DPR.

Examining the legislative authority of the House of Representatives (DPR) is inseparable from the conception and idea of the Indonesian state as explicitly stated in the provisions of Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which reads: "The State of Indonesia is a State of Law". This means that all forms of policy decided by the government must have clear validity from the relevant institutions and not be an abuse of power (arbitrary). Thus, the formation must be guided by a method of forming laws and regulations so that they are in accordance with the hopes and ideals of the nation.

The rule of open legal policy in general elections in Indonesia has been interpreted by the Constitutional Court as the sole interpreter of the 1945 Constitution. The authority of the Constitutional Court has been explicitly regulated in Article 1 paragraph (1) of the Constitutional Court Law (UU/8/2011). Related to the authority of the Constitutional Court as the sole interpreter is contained in Article 24 Paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia, which reads [9]:

Paragraph (1):

"Judicial Power is an independent state power to administer justice in order to uphold law and justice".

Paragraph (2):

"Judicial power shall be exercised by a Supreme Court and the judicial bodies under it within the general courts, religious courts, military courts, state administrative courts, and by a Constitutional Court."

On the basis of this authority, the Constitutional Court examined and decided the petition of the Prosperous Justice Party (PKS) which filed a judical review to the Constitutional Court of Law Number 7 Year 2017 on General Elections against the 1945 Constitution of the Republic of Indonesia with Registration Number 73/PUU-XX/2022. Partai Keadilan Sejahtera (PKS) as Petitioner I in the petition requested the Constitutional Court as the only institution authorized to interpret the Law against the 1945 Constitution of the Republic of Indonesia, to examine Article 222 of Law Number 7 Year 2017 on General Elections (Law No. 7 Year 2017, LN No. 182, TLN No. 6109) against the 1945 Constitution of the Republic of Indonesia.

The Applicant requests the Court to grant the Applicant's petition in its entirety. Stating that Article 222 of Law Number 7 of 2017 on General Elections (State Gazette of the Republic of Indonesia of 2014 Number 182 and Supplement to State Gazette of the Republic of Indonesia Number 6109) along the phrase "...who meet the requirements of obtaining at least 20% (twenty percent) of the total seats of the DPR or obtaining 25% (twenty-five percent) of the valid votes nationally in the previous elections of DPR members." is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force to the extent that the percentage exceeds the percentage interval of 7% (seven percent) - 9% (nine percent) of DPR seats. As well as ordering the lawmakers to set a fixed percentage threshold for the submission of Presidential and Vice Presidential Candidate Pairs based on the above percentage interval within a period of no later than 3 (three) months after the decision is read out.

After going through legal considerations, according to the Court, the provisions of Article 222 of Law 7/2017 which regulates the threshold for nomination of the President and Vice President by political parties and a coalition of political parties, the Court remains in its stance that this is an open legal policy in the realm of the legislator.

The Presidential Threshold, which is an open legal policy, can actually be seen from previous decisions of the Constitutional Court, such as the Constitutional Court Decision Number 14/PUU-XI/2013 dated January 23, 2014 and the Constitutional Court Decision Number 51-52-59/PUU-VI/2008, dated February 18, 2009, which explicitly states that the percentage provision of the Presidential Threshold is an open legal policy or open delegation of authority that can be determined as an open legal policy by the legislator. However, the decision of the Constitutional Court stating that the norm of the tested article is an open legal policy is not always fully agreed by constitutional judges. There are always judges who choose a dissenting opinion, such as Decision Number 73/PUU-XX/2022, there is a dissenting opinion from 2 Constitutional Judges, namely Suhartoyo and Saldi Isra. Constitutional Judge Suhartoyo remains of the opinion as in previous decisions that with regard to the presidential threshold it is not appropriate to apply a percentage. Meanwhile, Constitutional Judge Saldi Isra argued that the threshold for nominating presidential and vice-presidential candidates is not an open legal policy of the legislators. This is because, constitutionally, the requirements for nominating presidential and vice presidential candidates have been explicitly determined in the 1945 Constitution of the Republic of Indonesia. In this regard, Article 6A paragraph (2) of the 1945 Constitution states, "Candidates for President and Vice President are proposed by a political party or a coalition of political parties participating in the general election before the implementation of the general election". With such a construction or formulation of constitutional norms, the legislator cannot go beyond what has been contained in the constitutional norms by adding new requirements that are not intended by the 1945 Constitution.

In the field of law, the concept of open legal policy is new and relatively unknown. So far, the term policy is more widely known in the field of public policy studies, including the terms communitarian policy, public policy, and social policy. The freedom granted by the 1945 Constitution to legislators has two opposing sides. On the one hand it provides a broad or flexible opportunity to regulate the state, but on the opposite side it can be dangerous if the legislator acts arbitrarily in determining what and how a matter will be regulated.

Open legal policy is something that can be justified as long as it does not violate morality, rationality, and intolerable injustice. Interpreting rationality in the formulation of legal norms can use the basis of argumentation to find the truth. In this case, how is it possible to accept the rationality behind the formulation of the norms of Article 222 of the Election Law when the results of the previous DPR elections are used or used as the basis for proposing presidential and vice presidential candidates for the upcoming elections. Because the results of the previous DPR elections have already been used and the political forces have changed. Similarly, with intolerable injustice, Article 222 of the Election Law is clearly detrimental and very far from a sense of fairness for political parties participating in the upcoming Presidential and Vice Presidential Elections. Using the election results of DPR members in the previous election as the basis for determining the right of a political party or a coalition of political parties to propose a pair of candidates for the next President and Vice President is unfair.

In addition, this injustice is felt by new political parties that are declared as participants in the upcoming elections. In fact, when declared as election participants, these new political parties immediately lose their constitutional rights to nominate candidates for president and vice president. Therefore, the design of Article 222 of the Election Law clearly creates injustice.

B. The Implication of Presidential Threshold as an Open Legal Policy in the General Elections in Indonesia

The legal implications of the final nature of the Constitutional Court's decision have previously been emphasized in Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) which states, "The Constitutional Court has the authority to hear constitutional cases in the first and final instance whose decisions are final". This provision is then further regulated in Article 10 paragraph (1) of the Constitutional Court Law. Article 47 of the Constitutional Court Law emphasizes the final nature of the Constitutional Court by stating that, "The decision of the Constitutional Court has permanent legal force since it is pronounced in a plenary session that is open to the public". Based on this provision, the final nature indicates at least 3 (three) things, namely: (1) that the Constitutional Court Decision directly obtains legal force; (2) because it has obtained legal force, the Constitutional Court Decision has legal consequences for all parties related to the decision. This is because the Constitutional Court Decision is different from a general court decision which is only binding on the litigants [14].

All parties are obliged to obey and implement the Constitutional Court's decision. In Constitutional Court decisions related to judicial review, for example, if the Constitutional Court decides that a law is contrary to the Constitution and declares it has no binding force, then the decision is not only binding on the party who filed the case at the Constitutional Court, but also binds all citizens just as laws are generally binding on all citizens. On that basis, the Constitutional Court's decision is erga omnes. Because it is the first and last court, there are no other legal remedies that can be taken. A decision if there are no legal remedies that

can be taken means that it has permanent legal force (in kracht van gewijsde) and obtains binding force (resjudicata pro veritate habetur) [15].The Constitutional Court's decision is not only against the parties who are directly litigating, but also as a whole against citizens who are subject to the constitution. This is because the nature of the norms of the law being tested and the norms used as the basis for testing are general norms (abstract and impersonal). Therefore, the Constitutional Court's decision should be binding on all Indonesian citizens since the decision was issued. As a negative legislature, the Constitutional Court's decision certainly has legal implications because it affects what becomes law and what does not become law. Although on the other hand, positive legislature decisions have developed.

The organization of the Presidential and Vice Presidential Elections to be held in 2019 and subsequent elections, if it continues to refer to the provisions of Article 222 of the Election Law, then there are two options for political parties or a coalition of political parties participating in the elections that can propose their candidate pairs in the presidential and vice presidential elections. First, political parties or a coalition of political parties participating in the elections that obtain at least 20% (twenty percent) of the total seats in the House of Representatives. However, if the proposal of presidential and vice-presidential candidate pairs refers to this provision, it has the consequence that only political parties that have seats in the House of Representatives can propose candidate pairs. Thus, political parties that are just about to participate in the elections that have been declared as election participants by themselves cannot propose presidential and vice-presidential candidates. This, of course, will raise new legal issues regarding the constitutionality of the holding of presidential and vice-presidential elections because it is contrary to the essence of democracy as also guaranteed in the 1945 Constitution of the Republic of Indonesia.. Second, a political party or a coalition of political parties participating in the election that obtained 25% (twenty-five percent) of the total national valid votes in the election of members of the DPR. Different consequences also arise if the nomination of presidential and vice-presidential candidates refers to the second option. Namely, with simultaneous elections, how to find out which political party or coalition of political parties obtained 25% (twenty-five percent) of the total national valid votes in the elections for members of the DPR, while the elections for members of the DRP have not yet been held. So that if the implementation of the elections to be held in 2019 and subsequent elections continues to apply the provisions of Article 9 of Law No. 42 of 2008 as described above, then it will certainly have an impact on the legality of the holding of the elections themselves, especially the legality of the holding of presidential and vice presidential elections.

It seems that the argument that the presidential threshold is an open legal policy must be reviewed. The reason is that after tracing back the Comprehensive Manuscript of Amendments to the Constitution of the Republic of Indonesia 1945, especially Chapter V on General Elections, there is no discussion in the original intent related to the presidential threshold requirements or presidential threshold, especially based on the number of seats and national valid votes in the legislative elections based on the results of the previous 5 years of elections, from the discussion during the first amendment period to the fourth amendment period. The formulation of the fourth amendment as we can see now is contained in Article 6A:

Paragraph (1) reads [9]:

"The President and Vice President shall be elected in one pair directly by the people"

Paragraph (2) reads: "Candidate pairs for President and Vice President shall be nominated by a political party or a coalition of political parties participating in the general election prior to the implementation of the general election."

Paragraph (3) reads: "A Presidential and Vice Presidential candidate pair that receives more than 50% of the total votes in a general election with at least 20% of the votes in each province spread across more than half of the provinces in Indonesia shall be inaugurated as President and Vice President."

Paragraph (4) reads: "In the event that no candidate pair for President and Vice President is elected, the two candidate pairs that receive the first and second highest number of votes in the general election shall be directly elected by the people and the pair that receives the most popular votes shall be inaugurated as President and Vice President."

Article 6A Paragraph (2) of the 1945 Constitution of the Republic of Indonesia requires that candidates for President and Vice President be nominated by a political party or a coalition of political parties. However, the problem is the open legal policy made by the DPR by formulating new norms in Article 222 of Law Number 7/2017 on General Elections[16] by adding a limitation rule of 25% of nationally valid votes which is not actually contained in Article 6A Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Moreover, according to J. Mark Payne as quoted by Allan Fatchan Gani Wardhana and Jamaludin Ghafur, the presidential threshold in the presidential system means that it is an election requirement and not a nomination requirement as is common in countries that adhere to the presidential system. This means that what should be referred to as the presidential threshold is contained in Article 6A Paragraph (3) which reads:

"The pair of candidates for President and Vice President who get more than 50% of the total votes in the general election with at least 20% of the votes in each province spread across more than half of the provinces in Indonesia, are inaugurated as President and Vice President." On this basis, the norm of Article 222 of Law Number 7 of 2017 Concerning General Elections is contrary to

the norm in Article 6A Paragraph (2) of the 1945 Constitution of the Republic of Indonesia which only regulates political parties or a combination of political parties participating in the elections in accordance with the original intent of the formulation of the norm. Therefore, the norm of Article 222 of Law Number 7 of 2017 Concerning General Elections is not an open legal policy because it contradicts the basic norm by adding new restrictions which in fact do not exist in the formulation of Article 6A Paragraph (2) of the 1945 Constitution of the Republic of Indonesia as the Basic Norm of the State of Indonesia.

IV. CONCLUSIONS

Open legal policy is something that can be justified as long as it does not violate morality, rationality, and intolerable injustice. Interpreting rationality in the formulation of legal norms can use the basis of argumentation to find the truth. In this case, how is it possible to accept the rationality behind the formulation of the norms of Article 222 of the Election Law when the results of the previous DPR elections are used or used as the basis for proposing presidential and vice presidential candidates for the upcoming elections. Because the results of the previous DPR elections have already been used and the political forces have changed. Similarly, with intolerable injustice, Article 222 of the Election Law is clearly detrimental and very far from a sense of fairness for political parties participating in the upcoming Presidential and Vice Presidential Elections. Using the election results of DPR members in the previous election as the basis for determining the right of a political party or a coalition of political parties to propose a pair of candidates for the next President and Vice President is unfair. Therefore, the norm of Article 222 of Law Number 7/2017 on General Elections is not an open legal policy because it contradicts the basic norms by adding new restrictions that do not actually exist in the formulation of Article 6A Paragraph (2) of the 1945 Constitution of the Republic of Indonesia as the Basic Norm of the State of Indonesia.

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