

INDONESIA'S PRESIDENTIAL THRESHOLD AS OPEN LEGAL POLICY IN ELECTION: As A Base for Muslim Studies

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ABSTRACT

Since its inception in the 2004 general election until the simultaneous general election in 2019, the use of standardization of presidential and vice presidential nominations, also known as the presidential threshold system, has garnered numerous benefits and drawbacks. Thus far, the writers have established that the presidential threshold system is an open legal policy (open legal policy) that does not violate the Republic of Indonesia's constitution or is constitutional. The purpose of this article is to examine the presidential threshold's compliance with an open legal policy from the standpoint of Islamic law. The research employs a legal-normative as well as a theological or syar'i approach. The study's findings indicate that the presidential threshold was established in conformity with open legal policy principles strengthened by Constitutional Court Decision 14/PUU-XI/2013. The presidential threshold system is one of the measures to strengthen the presidential system and simplify political parties, thereby enhancing long-term governance and promoting the legislative and executive institutions' professionalism in their performance. According to *siyasa syariyyah*, one must be a descendant of the Quraysh tribe in order to apply as a state or imamate leader. However, this requirement is not absolute; if one has been permitted to become a leader, one does not have to be a descendant of the Quraysh tribe in order to eliminate the sense of *ashabiyah*. Meanwhile, the presidential threshold system ensures full uniformity in order to allow for the nomination of candidates for state leaders (president and vice president).

Keywords: Open Legal Policy; Presidential Thresholds; General election

INTRODUCTION

As a member of the legislature, the House of Representatives (DPR) has the authority to draft and enact legislation and to interpret the constitution (legislative review).¹ Affirmed by Article 24C of the Republic of Indonesia's Constitution (UU NRI

¹ Article 20 paragraph (1) of the 1945 Constitution of the Republic of Indonesia

1945) and the Constitutional Court's Decision 53/PUU-XV/2017. That one of the legislature's functions in enacting laws and regulations is to develop an open legal policy or the legalization of the 1945 Constitution of the Republic of Indonesia.

The authority of open legal policy (open legal policy), which the constitutional court believes is the DPR's sole absolute right and is also referred to as the attribution power (*attributie van rechtsmacht*) to form laws, is affirmed in Article 20 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. guardian and the constitution's unique and supreme interpreter. This is precisely what occurred during the formulation of the presidential threshold, either in terms of the number of votes or the number of seats required for political parties to offer presidential and vice presidential candidates.² Initially, the requirements for presidential and vice presidential candidates were stated in Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states, "The pair of presidential and vice presidential candidates is proposed by a political party or coalition of political parties participating in the general election preceding the election."

On a grammatical or linguistic level, the article creates options for political parties to serve as pawns or as the mecca for establishing democracy in Indonesia, serving as the link between the government (the state) and the population (the citizens).³ to be authorized to propose presidential and vice-presidential candidates. On the other hand, the author believes that the article generates numerous interpretations because it lacks standards for political parties to nominate presidential and vice-presidential candidates. Article 222 of the Election Law is rewritten as follows:⁴

"Candidate Pairs are proposed by Political Parties or Combined Election Contesting Political Parties that have previously obtained at least 20% (twenty percent) of the total seats in the DPR or 25% (twenty five percent) of the nationally valid votes in the election for members of the DPR."

As a result, the authors identified a flaw in Article 222 of the Election Law, which provides an instrument for the submission of presidential and vice presidential candidate pairs by political parties or coalitions of political parties that have attained at least 20% (twenty percent) of the total number of seats. In the last election, the DPR won 25 seats or 25% (twenty-five percent) of the national valid votes. As a result, this tends to restrict and is seen undemocratic in light of the applicable law's provisions.

The authors are interested in doing a study titled "Presidential Threshold as an Open Legal Policy in Indonesian General Elections from the Perspective of Islamic Law" in order to address these issues".

² Sigit Pamungkas, *Perihal Pemilu* (Yogyakarta: Laboratorium Jurusan Ilmu Pemerintahan dan Jurusan Ilmu Pemerintahan Fisipol UGM, 2009), p. 19

³ Lutfil Ansori, *Telaah Terhadap Presidential Threshold Dalam Pemilu Serentak 2019*, Vol. 4 No. 1 (Surabaya: Fakultas Syari'ah dan Hukum Universitas Islam Negeri Sunan Ampel, 2017), p. 18-19

⁴ Article 222 of Law Number 7 of 2017 concerning General Elections (Election)

METHOD

The sort of research is library research, which focuses on obtaining information from the literature and reading the results (laws and regulations, legal books, legal journals and literature related to the object of study in the field of law).⁵ The data for this study comes from two sources: primary data sources in the form of the primary book and secondary data sources in the form of explanatory or supporting books.

Identification, reduction, and editing of data are the data processing procedures used in this study. The approach is normative and shari'i in nature. The normative juridical approach examines all facets of policy and law pertaining to the presidential threshold system or standardized presidential and vice presidential nominations. The shar'i or theological approach examines several sections of Islamic law pertaining to the method for appointing a head of state (imamah).

RESULT AND DISCUSSION

1. Indonesia's Open Legal Policy in General Elections

Mahfud MD underlines in his book "legal politics in Indonesia" that open legal policy encompasses all legislative and administrative processes that might reveal the characteristics and direction of the law. Legal politics is conducted on the basis of political configuration in order to lay the groundwork for the process of law development in conformity with the prevailing conditions, culture, and values in society.⁶

Legislation is a component of policy. When a policy is created, it is very visibly impacted by the person who created it, or it can be interpreted that the color of the policy is almost always the same as the color of the person who created it. The process of conceiving a policy involves legal politics, which will decide the policy's path. As a result, it is widely accepted that politics is the determinant of law. This demonstrates that politics and law cannot be separated, as Daniel S. Lev asserts that the most critical factor in the process of establishing a rule (law) is the conception and organization of power. This means that all rules (legislation) are political instruments.⁷

When developing a policy, the term "open legal policy" or "open legal policy" is frequently used. According to Article 20 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it is expressly stated that the DPR has the authority to make laws and that they are considered and approved by the president.⁸ This indicates that the DPR has the authority to enact legislation. Original authority is obtained or

⁵ Jonaedi Efendi¹, Johnny Ibrahim², *Metode Penelitian Hukum*, (Jakarta: Prenadamedia Group, 2018), p. 78

⁶ Mahfud MD, *Politik Hukum di Indonesia*, (Jakarta: Rajawali Pers, 2009), p. 9

⁷ Daniel S. Lev, *Hukum dan Politik*, (Jakarta: LP3ES, 1990), p. xii.

⁸ Article 20 paragraph (1) of the 1945 Constitution of the Republic of Indonesia

derived directly from laws and regulations and is delegated to state agencies or organs. According to Philipus M. Hadjon, "attribution is an authority connected to a position."

Regarding open legal policy, while fundamental standards are not clearly controlled, the term refers to the DPR's duties and functions in enacting laws. Thus, the unifying thread is that open legal policy is the authority enjoyed by the DPR as the legislative authority's representative. The procedure is nonetheless guided by legal constraints, ensuring that no abuse of authority occurs (arbitrarily).

On the basis of this authority, the DPR crafted a new legislative policy, namely Law No. 7 of 2017 on General Elections (Election Law), which became one of the legal instruments necessary to organize concurrent presidential and vice presidential elections in 2019. Previously, Law No. 23 of 2003 on General Elections of the President and Vice President, which became one of the legal instruments for the 2004 presidential and vice presidential elections, and Law No. 42 of 2008 on General Elections of the President and Vice President, which became one of the legal instruments for the 2008 presidential and vice presidential elections, were enacted. President of the United States in 2009 and 2014.

The Election Law (UU/7/2017) defines expressly the presidential threshold system or standardization of votes and seats for presidential and vice presidential nominations. This rule, however, has both advantages and disadvantages because it is deemed excessively restricted for political parties to propose presidential and vice-presidential candidates. This prompted one artist, Rhoma Irama, to demand a judicial review of Article 222 of the Election Law (UU/7/2017), arguing that the policy is a game and political manipulation in which the interests of opposing political parties in parliament are attracted to one another. Additionally, the rejection of other major parties, including the Democratic Party, Gerindra Party, PKS, and PAN, bolstered the proposal.

However, the Constitutional Court stated in its ruling 14/PUU-XI/2013 that "...the provisions of the article requiring political parties to gain votes as a condition for nominating pairs of presidential and vice-presidential candidates are the lawmakers' authority..." as an open legal policy. That is, the author believes that Article 222 a quo is a constitutionally permissible open legal policy.

Thus, in the 2019 simultaneous elections, the presidential threshold system remains in effect, which is an open legal policy that vests the House of Representatives (DPR) with the legislative authority to set the threshold for presidential and vice presidential nominations in the 2019 simultaneous elections.

2. The Presidential Threshold System's Implementation Dynamics

a. Election Dynamics in 2004's Direct General Elections

The 2004 general election received a breath of fresh air from the Indonesian people with the installation of a direct general election system by the people who were previously elected by the People's Consultative Assembly (MPR).

This shift has significant ramifications for state institutions; in this situation, the MPR loses complete authority over the people's sovereignty. However, the Constitution vests the people with complete control over the highest sovereignty.⁹ The jurisdiction of the People's Consultative Assembly (MPR), which was disbanded before to the amendment, included the authority to elect the president and vice president. Previously, the MPR was empowered to elect the president and vice president with the greatest votes. However, following the constitutional amendment, the president and vice president are now directly elected by the people.¹⁰

The presidential threshold system was first used during the 2004 elections, pursuant to Law Number 23 of 2003 on the General Election of the President and Vice President. This provision states exactly why seats and votes must be standardized in order to propose candidates for president and vice president. Article 5(4) of Law No. 23 of 2003 on the General Election of the President and Vice President:

"The Candidate Pair referred to in paragraph (1) may be proposed only by a political party or coalition of political parties that secures at least 15% (15%) of total seats in the DPR or 20% (20%) of valid votes nationally in the election of DPR members"¹¹

These provisions served as the foundation for presenting presidential and vice presidential candidates in the 2004 general election, which was held twice (twice). To begin, there will be a general election for DPR members. Second, the presidency and vice presidency are directly elected.

No candidate duo received 50% (fifty percent) of the votes in the first round. Thus, a second round of elections was held; based on the results of the first round, those eligible to run again in the second round were the SBY-JK pair with a percentage of 33.57 percent (thirty-three point fifty-seven), and the Megawati-Hasym pair with a percentage of 33.57 percent. 26.61 percent (twenty-six hundred and sixty-one) of the vote. Thus, the SBY-JK combination won the second round of the general election with

⁹ Article 1 paragraph (2) the III Amendment to the 1945 Constitution of the Republic of Indonesia.

¹⁰ Article 1 paragraph (2) Prior to the III Amendment to the 1945 Constitution of the Republic of Indonesia.

¹¹ Article 5 Paragraph (4) Law Number 23 Year 2003 concerning General Election of President and Vice President

a percentage of votes of 60.62 percent (sixty six point sixty two). At the time, the SBY-JK combination won the 2004 general election automatically.¹²

b. Direct General Election Dynamics in 2009 and 2014

Considering point c, the House of Representatives (DPR) believes that Law Number 23 of 2003 on the General Election of the President and Vice President is no longer necessary for the development of the democratic system and the dynamics of Indonesian society. Thus, the House of Representatives (DPR) exercises its legislative authority to replace the a qou Law with Law No. 42 of 2008 on the General Election of the President and Vice President.

The presidential nomination threshold for President and Vice President was regulated in the 2009 and 2014 general elections. Regarding this matter, it has been revised in Article 5 paragraph (4) of Law No. 42 of 2008 to read as follows: Candidate pairs are proposed by political parties or coalitions of political parties participating in the general election that meet the requirements for obtaining at least 20% (twenty percent) of the total seats in the DPR or 25% (twenty five percent) of the national valid votes in the election for DPR members".¹³

Pada pengaturan tersebut terjadi kenaikan sistem *presidential threshold* atau ambang batas pencalonan presiden dan wakil sebesar 5% (lima persen). Hal tersebut sangat berimplikasi pada partisipasi politik pada pemilihan umum tahun 2009 dan pemilihan umum tahun 2014.

The presidential threshold mechanism, or the bar for presidential and deputy nominations, is increased by 5% under this arrangement (five percent). This has ramifications for political engagement in the 2009 and 2014 national elections.

Following the conclusion of the electoral process, the Jokowi-JK duo were elected president and vice president with a combined total vote of 53.15 percent (fifty three point fifteen).¹⁴ If the threshold for presidential and vice presidential nominations is increased to 5% (five percent) of the total number of seats in parliament or equivalent to the national valid vote, it will have an effect on political involvement. This results in both advantages and disadvantages. Proponents argue that this approach will bolster the presidential system, which now requires political parties to nominate presidential and vice presidential candidates. If the presidential threshold system is not applied, parliament becomes increasingly dominant, so eroding the presidential system.¹⁵

¹² https://www.kpu.go.id/dmdocuments/modul_1d.pdf accessed on 26 Septmeber 2020

¹³ Article 5 Paragraph (4) Law Number 42 Year 2008 concerning General Election of President and Vice President

¹⁴ https://www.kpu.go.id/dmdocuments/modul_1d.pdf accessed on 2 October 2020

¹⁵ Sodikin, *Pemilu Serentak (Pemilu Legislatif dan Pemilu Presiden dan Wakil Presiden) dan Penguatan Sistem Presidensial*, Vol.13 No.1 (Jakarta: Rechtsvinding (Badan Pembinaan Hukum Nasional), 2014), p. 28.

Prior to the 2014 election, opposition to the presidential threshold system was based on the belief that it was illegal or violated the constitution. Thus, Effendi Ghaali is subject to judicial review. The Constitutional Court's Decision 14/PUU-XI/2013 states that the presidential threshold system clause in Article 9 of Law No.42/2008 is constitutional or does not violate the constitution.

c. Simultaneous General Elections in 2019

Elections were held concurrently for the first time in 2019 during the political contestation. Specifically, the election of members to the legislative and executive branches of government. The execution is based on the provisions of Law No. 7 of 2017 on General Elections (Election Law). This provision regulates the presidential threshold system in Article 222 of the Election Law, which states:¹⁶

“Candidate Pairs are proposed by Political Parties or Combined Election Contesting Political Parties that have previously obtained at least 20% (twenty percent) of the total seats in the DPR or 25% (twenty five percent) of nationally valid votes in the election for DPR members.”

Following the 2019 election, numerous polemics ensued, ranging from the deaths of numerous KPPS officers to a vote of no confidence in the victorious PRABOWO-SANDI Pair against the KPU's vote count and the presence of a miraculous DPT. Where they suspected fraud against the mystical DPT, according to the winning team for the PRABOWO-SANDI combination. Thus, the winning team for the PRABOWO-SANDI pair petitioned the Constitutional Court to set aside the results of the presidential and vice presidential elections.

Following the stage of reading, the Constitutional Court issued the judgement in case No. 01/PHPU-PRES/XVII/201, dated Thursday, June 21, 2019. The Court did not reject all of the applicant's petitions that, in the judgment of the Constitutional Court's panel of justices, had a clear legal basis. As a result, Jokowi-Amin will be declared the victor of this political election.¹⁷

3. Perspective of Siyas Syari'iyah Against Presidential Threshold System

Political institutions in government are separated into three (three) categories under the Siyasah Syari'iyah idea, namely the Imamate, Ahl al-halli wal al-'aqdi, and Wizarah. Imamah literally translates as priesthood, government, and leadership in the context of the Indonesian state headed by the president. It is also the scope of the dusturiyah siyasa, which can be said to discuss issues of legislation and representative institutions, including the concept of the constitution and legislation, as well as discussions on shura', democracy, and the ummah. According to Rasyid Rida, Imamah is a government tasked with the responsibility of preserving religion and regulating

¹⁶ Article 222 of Law Number 7 of 2017 concerning General Elections

¹⁷ See Constitutional Court Decision No 01/PHPU-PRES/2019

global or political events.¹⁸ Tujuan dibentuknya imamah, menurut Al-Mawardi adalah untuk mengganti fungsi kenabian guna memelihara agama dan mengatur urusan dunia.¹⁹

According to Al-Mawardi, the Imamate's aim is to take the position of the prophethood in order to protect Islam and manage world events.

General elections have been controlled in QS as a means of implementing the democratic system. Ali'Imran 3: Verse 159, Allah swt. stated:

فَبِمَا رَحْمَةٍ مِّنَ اللَّهِ لِنْتَ لَهُمْ ۚ وَلَوْ كُنْتَ فَظًّا غَالِيظَ الْقَلْبِ لَانْفَضُّوا مِنْ حَوْلِكَ ۚ فَاعْفُ عَنْهُمْ وَاسْتَغْفِرْ لَهُمْ وَشَاوِرْهُمْ فِي الْأَمْرِ ۚ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللَّهِ ۚ إِنَّ اللَّهَ يُحِبُّ الْمُتَوَكِّلِينَ

Meaning:

"By Allah's favor, you (Muhammad) were gentle toward them. They would have stayed away from those around you if you had been cruel and harsh-hearted. As a result, forgive them and beg for their forgiveness, as well as consult with them on this topic. Then, once you've made your decision, place your trust in Allah. Indeed, Allah adores people who trust in Him." (QS. Ali 'Imran 3: Ayat 159)

This verse is about the establishment of democracy. The term'shura'is used in Islamic jurisprudence to refer to democracy (deliberation). The stage of deliberation and agreement reached by members of the legislature in proposing candidates for state leaders during the implementation of elections using the presidential threshold system is the stage of deliberation and agreement reached by members of the legislature in proposing candidates for state leaders. Thus, the verse explains *وَشَاوِرْهُمْ فِي الْأَمْرِ* demonstrating the permissibility of ijtihad in all instances and establishing joint estimations based on revelation. Because Allah permitted this to happen to His Messenger.²⁰

The verse's language emphasizes that all government actions must be deliberate and based on democratic values. This conforms to Al-understanding, Jalalain's according to which one of the purposes of contemplation is to arrive at a solution to a problem.²¹ The verse's language emphasizes that all government actions must be deliberate and based on democratic values. This conforms to Al-understanding, Jalalain's according to which one of the purposes of contemplation is to arrive at a

¹⁸ Rasyid Ridha, *Al-Khilafat wa al-Imamat al-'Uzhmat*, (Qahirat: Al-Manar, t,t), p. 10.

¹⁹ Usman Jafar, *Fiqh Siyasaah: Telaah Atas Ajaran, Sejarah dan Pemikiran Ketatanegaraan Islam*, (Makassar: Alauddin University Press, 2013), p. 85

²⁰ Imam Al Qurthubi, *Tafsir Al Qurthubi*, Terj. Dudi Rosyadi dkk.,(Jakarta: Pustaka Azam 2008), p. 623.

²¹ Muhammad Al-Mahalli dan Abdurrahman asy-Syuyuthi, *Tafsir al-Qur'anul adzim*, (Surabaya: Daar al „abidin, Tth), p. 64.

solution to a problem. This means that when the presidential and vice presidential election systems are applied to the presidential and vice presidential nomination limit systems, prospects for achieving a good governance civil society become apparent.

The author draws parallels between the terms of presidential and vice presidential nominations under national law and *siyasa syariyyah*. Al-Mawardi is a practical political theorist who grounds his political theory on the fact that he lays out various requirements for Ahl Al-Imamah, or the head of state with the authority to fill the role of Imam. These specifications are as follows:

1. Capable of acting or behaving in a fair manner.
2. Possess sufficient understanding of *ijtihad* in assessing legal *ilat* in order to resolve legal cases.
3. Normal hearing and eyesight, so that they can be used effectively and do not impair all types of action and behavior while in the workplace.
4. He possesses no flaws in any of his bodily members.
5. Possess sufficient understanding to oversee the populace, manage their interests, and eliminate the adversary.
6. Must be descended from the Quraish.

Meanwhile, Article 222 of the Election Law expressly states the qualifications for the presidential threshold system, as well as the conditions for presidential and vice-presidential candidates:²²

“Candidate Pairs are presented by Political Parties or Combined Election Contesting Political Parties that meet the conditions for gaining at least 20% (twenty percent) of the total seats in the DPR or 25% (twenty five percent) of the nationally valid votes in the election for former DPR members.”

According to this reasoning, the researcher concludes that there is no correlation between the presidential threshold system or the criteria for Imamate nomination from the *siyasa syariyyah* perspective. In general, the *siyasa* position holds that the *shari'ah* does not clearly control the presidential threshold system for the nomination or appointment of the head of state (*imamah*), but rather highlights and obligates the Quraish. Because the Quraish had the best image among the Arab people at the time, possessed all the virtues, were extremely knowledgeable about all government concerns, and were extremely well-respected by the tribes throughout the *Jahiliyah* period. However, this did not work correctly or successfully in practice because the provisions for the appointment of a state leader at the time were based on the majority of the people in power at the time. Thus, the terms of candidacy are determined by the party in power.²³

²² Article 222 of Law Number 7 of 2017 concerning General Elections (Election)

²³ Ibnu Khaldun, *Mukaddimah Ibnu Khaldun*, (Jakarta: Pustaka Al Kautsar, 2015), p. 194-195.

CONCLUSION

The presidential threshold system or requirement is an open legal policy derived from the terms of Article 6 Paragraph (1) of the Republic of Indonesia's 1945 Constitution, under which the qualifications for President and Vice President nomination would be further regulated by law. The implementation of the presidential threshold system will benefit future government stability by maximizing coalition links between political parties in order to nominate presidential and vice presidential candidates and so strengthening the presidential system. The *siyasa syariyyah* study of a person who can be proposed as an imam or authentic leader does not apply strictly since it has been permitted to become a leader; it does not have to be from the Quraysh tribe in order to eradicate the sense of *ashabiyah*. Meanwhile, in the presidential threshold system, the nomination threshold is set by a political party or coalition of political parties that is specifically specified in Article 222 of the Election Law.

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