

LAW POLITICS OF 2009'S PRESIDENTIAL ELECTION ACT

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Abstract

Normatively, an act, in whatever form it may be, shall be based on the orientation for the benefit of the people and to ascertain justice for the people. The politics of law of presidential election issued by the relevant body is considered to be conservative and tends to be elitist. On the other hand, the success of Indonesia to exit from the transition of democracy is determined by the legal policy of the government. Through the issuance of an act on Presidential election which is responsive, a better and more democratic new president may be elected.

Keywords : *Democracy, Politics Of Law, Presidential Election*

Introduction

Indonesia acknowledges itself as a nation which is oriented to democratic form of state. However, in its history, development and empirical application, it has not found its ideal form as a democratic state. There has been an on-and-off governmental system and structure of nation recorded in the history of ketatanegaraan of Republic of Indonesia. For example, the shift from liberal democracy to guided democracy in 1945-1959. During the moments, it changed from the united to federal nation through temporary constitution of the Republic of Indonesia in 1949 and became a united nation through the temporary constitution in 1950. The age was marked by a liberal government (liberal democracy) and authoritarian government under Soekarno (guided democracy).¹

In context of executive power, Indonesia is often entrapped in a "revenge" motive. During the liberal democracy era (1945-1959), President Soekarno was irritated by the attitude of the political parties and their free fight in the parliament causing the failure in the arrangement of the Constitution and political instability and the frequent fall of the past cabinet. The reaction from the political liberalism was shown by the Decree of

¹ Moh. Mahfud MD, *Politik Hukum di Indonesia*, LP3ES, Jakarta, 2006, p. 129.

the President, that is, the Decree on July 5, 1959² pointing out that Presiden Soekarno would be a lifetime president, the parliament would be dismissed, and the pattern of liberal democracy was turned into the authoritarian.

The authoritarian democracy began with a philosophical framework that a country should have a governmental system based on the principle of negotiation and agreement led by a centralized power as the bridge between the government and the citizens.³ At that time, the centralized power referred to Soekarno himself.

In its application, guided democracy did not run exactly as expected and intended by Soekarno in the first place as the temptation for an authority could not be avoided. His political line which was repressive towards the press, reluctant to general election, and close to the Indonesian Communist Party (PKI) worsened his relationship with the people.

The transition of power continued to happen when Soeharto took over Soekarno's reign in 1965. He ruled with *a credo* to run a pure and consistent concept of *Pancasila* and the Constitution of 1945. Unfortunately, Soeharto's democratic presidency only lasted for less than 3 years before he decided his real pattern of power through a made-up law product which was authoritarian and elitist (Election Act No. 15 and Structural Act for People's Consultative Assembly, House of Representatives, and Regional House of Representatives No. 16/1969).⁴

Throughout the New Era (Orba), civil and political rights were often violated with an excuse that it would be for the sake of political stability and economic development. Corruption, Collusion, and Nepotism (KKN) and power misconduct spread out, and law became the subordination of the political power.⁵ The absence of role of the law in a social political life had led to a misguided journey of the country. It means that the social political evaluation process did not have a positive role and even ended up with a

² Wirjono Prodjodikoro says *staatnoordrecht* based on the principle of *salus populi supreme lex* (people's safety is the highest law fundamental) as the law source of the decree.

³ Syafie Maarif, in Moh. Mahfud MD, *Politik Hukum*, ...Op. Cit. p. 140.

⁴ Moh. Mahfud MD, *Ibid*, p. 222

⁵ Ni'matul Huda, *Negara Hukum, Demokrasi dan Judicial Review*, Faculty of Law, UII Press, Yogyakarta, p. 24

destructive one.⁶ With a series of law products released during the New Era, Soeharto's regime lasted in a collusive way for over 32 years.

Having been through a 32-year-authoritarian power, this country realizes the importance of law state values both *rechstaat* and real rule of law such as controlling the executive, separating power, constitutions based on human rights, independent or impartial judicial system, and court monitoring.⁷ Now Indonesia is in the reform climate and on a steep road to achieve the goals of democracy. One of the problems faced is the mechanism of direct election in 2004 when the first directly-chosen president and vice president by the citizens were voted. There was a lot of weakness, but it became a milestone in the process of upholding democracy in Indonesia.

After more than a decade of Reform Age, Indonesia has been dialectic, intelligent, and responsive towards the social phenomena both in the local community and in national scope. There are many advices, suggested by well-known experts, which are very meaningful and constructive for the growth of Indonesia as a law state. One of the interesting contemporary discourses to discuss is the one related to presidential election in 2009. Such an election can be a momentum which is crucial for the advance of democratization in reaching a state of law of Indonesia.

In welcoming the 2009's general election, the House of Representatives is given an authority based on 1945's Constitution to design and ratify the acts on the presidential election which will be used as the law source during its enactment. In making law, the political factor is dominant—thus often ignores the law consideration. It is obvious in the substance of the act on the presidential election which was signed on October 29, 2008.⁸ The support from 20 percent of legislative seats and 25 percent of votes are the requirements for presidential candidates. It sets out a pro and con in society in general as well as law and political practitioners in particular. The fundamental question from the ratification of presidential election act is: what political law underpinning the issuing of

⁶ Artidjo Alkostar, *Korupsi Politik di Negara Modern*, Faculty of Law, UII Press, Yogyakarta, p. 141

⁷ A. Mukhtie Fadjar, *Reformasi Konstitusi dalam Masa Transisi Paradigmatik*, In-TRANS, Malang, 2003, p. 9

⁸ *Koran Tempo*, "Syarat Calon Presiden Dinilai Hambat Partai Baru," Thursday, October 30, 2008, p. A5

the act? How law politics (*ius contitundum*) should be for a better future of Indonesian law?

Elitist Act of Presidential Election No. 42/2009

Normatively, the act is oriented to the prosperity of people in general and the values of justice in the society. Therefore, if a law/act product is proved to be profitable only for certain elitists, then the act is considered a failure in the name of law which should be responsive and democratic.

Moreover, viewed from the point of contemporary social-political reality, it can be found that law which is concretized in the form of law product (act) is not placed in a neutral condition, but just becomes an entity which is in a connected environment affecting one to the other.⁹ It can thus be summed that the act is a product from a variety of elements such as political, social, and cultural; and it makes the act formulation and existence highly dependent on the elements outside the law.

The above conclusion is strengthened by Moh. Mahfud MD who puts forward that law (act) is a mere political product; consequently, its responsive nature is totally determined by the political configuration itself. After an in-depth study, he elaborates as follows, “a democratic political configuration produces a responsive law while an authoritarian one produces a conservative/orthodox law.”¹⁰ Such hypothesis starts from certain type of law, that is, public laws which are closely related to the political power (*gezagverhouding*). Therefore, the more the substance of law is political, the more significant the political role in the law (act) making process.

To this point, a critical question which should be considered is: after getting out of the authoritarian New Era (Orba), why are the law products still conservative and elitist? Despite the fact that we have been through the ten years of Reform Era, when will the law be truly upheld? After five years, the government and House of Representatives from the 2004's election are criticized. The former head of People's Consultative Assembly Amien Rais says that the House of Representatives of 2004-2009 is a mere stamp marker of the government policy. It can be seen in the act produced during the first

⁹ Afan Gaddar, “Pembangunan Hukum dan Demokrasi,” in Moh. Busro Muqaddas et al (editor), *Politik Pembangunan Hukum Nasional*, UII Press, Yogyakarta, p. 104

¹⁰ Moh. Mahfud MD, *Op. cit.*, p. 5

year that they only produce fourteen acts and fifty-five designs of acts. Substantially, the act is not an urgent need for the people such as on sports, religion's court, and several international convention ratifications.¹¹ The situation is worsened by the legislator's orientation there that is more likely to put interest in political/elitist matter than the people supremacy.

A fundamental assumption pointed out here is the indication that the legislators in the House of Representatives formulating and scrutinizing the presidential election acts are shut in a political dilemma. On the one hand, they are politically hijacked in law process; on the other hand, their position as people's representatives is oriented to a wider interest of people but continuously reflects on the judicial mirror. It is in line with what Bryan A. Garner says that "legislator is making or giving laws; pertaining to the function of law making or to the process of enactment of law with independent and neutral from any other influences".¹²

Unfortunately, the legislators take pleasure in being engrossed within their political party that their policies are obviously oriented to the party's interest. Actually, what is ideal is that the legislators' loyalty to certain political party should be left out when they sit in parliament because they are supposed to represent not only their party but also the common people. That is the main essence of people's sovereignty which is referred to as an independence of legislative: "The independence of legislative is not limited only to the executive pressure or influence. It is a wider concept which takes within it a sweep independence from any other pressure and prejudices. And it includes parties influence."¹³

In the 1945's Constitution, there mentioned that the sovereignty is in the hands of the people and is conducted according to the constitutions. It is stated in Line IV of the Opening of 1945's Constitution: "... therefore, Indonesian Independence is arranged in a Constitution of the Republic of Indonesia which is based on people's sovereignty." After the amendment, the concept of sovereignty is strengthened in Chapter 1 Article 2 of

¹¹ FORMAPPI, "Evaluasi Satu Tahun DPR Hasil Pemilu 2004," in Sebastian Salang, *Jurnal Konstitusi*, Vol. 3 No. 4, December 2006

¹² Bryan A. Garner, *Black Law Dictionary*, 8th Edition, West Group, 1999, United States of America, p. 864

¹³ Justice L. P. Singh, *Judicial Dictionary*, 2nd Edition, Orient Publishing Company, 2001, New Delhi, p. 569

1945's Constitution that: "the sovereignty is in the hands of the people and is to be conducted according to the constitutions." One of its concrete manifestations of sovereignty is the democratic election involving a greater participation of all people to elect the president and vice president.¹⁴ Here it is clearly and firmly shown that the sovereignty is in the hands of the people, and thus the society is the holder and owner of the national sovereignty.

Furthermore, it is then added by a consideration (a) UU No. 22/2003 about the structure of People's Consultative Assembly, House of Representatives, and senates, saying that "to run a people's sovereignty based on a guided sovereignty by profound wisdom and problem solving discussion/representative, there must be, house of representative, and regional representative institution which could reflect the value of democracy as well as absorb and struggle for the people's aspiration for the sake of the development of the nation's life."¹⁵

By the given Act and Law No. 22/2003, it cannot be denied that substantially, the law on presidential election which limits the 20 percent of legislative seats and 25 percent of votes to be the requirement of the presidential candidate is profitable for the well-established parties in the House of Representatives (like Golkar and PDI-Perjuangan) which has directly tainted the message of the act and democratic values of the nation's life. It is due to the fact that in a democratic nation's system, general election is regarded as the main instrument of crucial democracy which is intended to achieve the goal of democracy. Democracy rejects monopoly in the election process which results in a bad impact towards the political rights and the minority.

Logically, with the rising number of political party to forty-four in 2009's election, it will be difficult for the new parties (recommending an independent presidential candidate) to get the 20 percent of legislative seats and 25 percent of the votes. It can be predicted that the big and well-established parties will be able to propose their presidential candidates while the small ones can only be ready to make coalition

¹⁴ Dahlan Thaib, Paper on "Prospek Pemilihan Calon Presiden Independen," presented in a national seminar on the "Prospective Election of Independent Presidential Candidate" which was held by the Study Center of Local Law Development of the Faculty of Law, Islamic University of Indonesia (UII) in corporation with Merti Nusantara Yogyakarta, Auditorium of Faculty of Law, UII, December 20, 2008

¹⁵ Act No. 22/2003 about the structure of House of Representatives, Senate, DPD, and DPD

which at the same time sacrifice their own ideology to bring about their alternative candidates.

It is ironical if the common voters as the determinants of democracy should frown when given a vote card which only offers two or three pictures of incumbent presidential candidates who have been familiar for them for the disappointing job.

Considering the *adagium* that believes fair law sustains the democracy while corrupted law kills the democracy, the new act for presidential election which has just been ratified by the House of Representatives must be turned down because it is so politically corrupted and elitist. It takes courage to propose for a judicial review on the act to the Constitutional Court as the act proves to have violated the principle of freedom in politics (Chapter 28E about Human Rights) which is decisively mentioned in 1945's Constitution and International Convention of Human Rights which has been ratified by Indonesia into Act No. 39/1999 Chapter 43, saying:

- (1) Every citizen deserves to choose and be chosen in the general election based on the equality of rights through a direct, free, confidential, honest, and fair election, according to the law and regulation.
- (2) Every citizen deserves to participate in the government either directly or by representatives which he or she freely chooses, according to law and regulation.¹⁶

Restriction on the citizen's political rights and minority reflects the abuse of legislative process done by the legislators. It is in line with what Karl Kurtz points out: "Abuse of the process in order to prevent minority party members from accomplishing anything that reflects the values of their constituents, then you create a deep and bitter resentment. This resentment will come back to haunt in myriad way. Abuse of the legislative process does not show strength but it shows weakness."¹⁷

Besides the reasons previously mentioned, the act also does not fulfill the beneficial of law and justice which should be the spirit in each regulation made by the government.¹⁸ Moreover, contradictory to the normative law, the act has also damaged the philosophical spirit of the Reform movement and the democratization in Indonesia in

¹⁶ Act No. 39/1999 on Human Rights, Chapter 43

¹⁷ Karl Kurtz. *Rules of Legislative Conduct*, on www.ncsl.magazine.us. The Thicker at State Legislatures, NCSL website, data retrieved on November 7, 2008

¹⁸ The main goals of law are: (1) legal certainty; (2) justice; and (3) beneficial of law. Ideally, these three elements must be included in each law produced by a state

which the Reform spirit is marked as the process of seeking out an ideal democracy which is progressive, revolutionary, dynamic, and sustainable.

It is impossible for the process of democracy to run fast if Indonesia's political life is full of old faces seemingly reluctant to step down from the political arena. The implication of this matter is the increasing of rotten politicians and political decay. The formula is simple: political decay occurs when the political system is damaged by the political corruption down from a monopolistic power (autonomy + monopoly), without any transparency.¹⁹ In the above explanation, it is apparent that the Reform process requires degeneration, renew, and refresh so it generates a never ending and persistent agenda.

According to Ahmad Muzani, "actually all the political parties are able to give their candidates and let the people filter them".²⁰ The statement can be a logical question from the consequence to apply the multi-party system in Indonesia today. By the multi-party system, there will be a more complicated and number of parties, that polarize the support for the government, and the greater chance for a split government and then gives birth to a minority president.²¹ This matter makes the multi-party system still debatable up to now, about whether or not it can be well applied or even a trigger for chaos in the society.

Law Politics of Presidential Election Act

A critical question is raised in this heading: how is the law politics (ius contituandum) for the better future of Indonesia should be? It is especially when related to the ratification of the presidential election act. In this case, the writer of this paper is trying to recommend as the followings.

First, up to now Indonesia cannot be said as a democratic nation because it has been proved that in the process of law making, the legislators are still unable to understand the spirit of people's sovereignty well. In this situation, the political elitists are more likely to have power than the common people. It is a bad picture of oligarch

¹⁹ Denny Indrayana, "Negara antara Ada dan Tiada," Kompas, 2008, p. 45

²⁰ The commentary by Ahmad Muzani in Koran Tempo, "Syarat Calon Presiden Dinilai Hambat Partai Baru," on Thursday, October 30, 2008, p. A5.

²¹ Denny Indrayana, Op. Cit., p. 180

practiced by the legislators. It is the first warning bell of the death of the democracy in Indonesia.

Second, the House of Representatives is the institution which is given the authority by the 1945's Constitution to formulate the act, must be more responsive in absorbing people's aspiration by looking for the living law so that the act is made more down to earth and far from the mere elitists. As Austin says, "the best law is the law transformed from the social values."

Third, the independence concept must be universally marked, not only directed to the independent presidential candidate (which is free from the political party intervention), but must also be inherent positive values of legislators.²² In the law making process, legislators can no longer be the extended hands of the political party but must also be oriented to the people's interest that they represent. Their loyalty to the political party must be eliminated when they are in the parliament. Legislator must work independently (without being interfered by the political party) and professionally so that their work can be beneficial for people in general. In this essay, the writer criticizes the recall mechanism by the political party as its controlling medium to their men in the parliament. It can be the cause of legislator's fear of the political party that he seems to always be directed by his political party.²³

Fourth, one of the sources to law and politics reform which is intended to fertilize the democracy is located in the political party. That is why the reform of the party itself is urgently needed in the Reform agenda. Basically, the political party is an institution giving a differentiation from one group to another. In terms of politics modernization, there is no single role which is more important than the political party.²⁴ It is because the political parties are historically related to the modernization process in the developing regions. The role of the party often changes if the political condition in country (especially the modern one where a variety of politics development can lead to a wide and complex politics). Besides in the developing countries, there is a special relation between the nation and the society which is closely associated by the party solidarity. In

²² www.ncsl.magazine.us, Karl Kurtz, Rules of Legislative Conduct, The Thicker at State Legislatures, NCSL website, data retrieved on November 7, 2008

²³ International Transparency Report, Political party is the most corrupted institution in Indonesia

²⁴ David E. Apter, Politik Modernitas, PT. Gramedia, Jakarta, 1987, p. 191.

Indonesian context, political party has not yet fulfilled the criteria as a modern party because it is still unable to develop the ability to reach the goal of democracy, meaning that it must have the capacity to run its role as the medium connecting the nation and its citizens. The failure of political party after the Reform Era can be seen by the rising distrust of the people towards the political party as well as the presidential candidate that is proposed by certain political party. In this case, we do not have to be ashamed to say that multi-party system is proved to be ineffective in building the democracy. Therefore, the writer agrees to support the party reform in three ways: (1) by reconstructing the recruitment system of the members of political party; (2) reconstructing the effective pattern of political communication in absorbing the people's aspiration; and (3) fighting against the culture of corruption, collusion, nepotism (KKN) within the party itself.

Fifth, the multi-party system in Indonesia today needs reviewing. It is weird to see if Indonesia's government system is presidential but afraid and seemingly powerless in front of the parliament. It is caused by the minimum support of the party for the president in the parliament (minority president).²⁵ If Indonesia is consistent with the present presidential system which determines the limit of 20 percent of the legislative seats and 25 percent of votes to recommend a president, the party system had better enable two to three-parties in order to create a single minority in the government. On the other hand, if Indonesia is still willing to maintain the multi-party system, the act on the presidential election must be more responsive and realistic for the small parties so that their rights to propose an independent presidential candidate is not ignored.

Sixth, the government must open a wider and clearer opportunity (by the amendment of the acts/the 1945's Constitution) about the independent presidential candidate (non-party) because actually there are many intellectuals out there who have experience and moral integrity which are good, tested, and free from intervention from any political party. It is in line with the *adagium* of politics which says: "Those to be reformed cannot reform themselves. The reformers should come from the outsiders." With the independent presidential candidate, except the candidates from certain political

²⁵ President Susilo Bambang Yudhoyono with Partai Demokrat as the political machine in 2004's Election only attains legislative seats for as many as 57 seats, with votes of 8, 455,225 or about 7.45%). Source: Koran Tempo, "Syarat Calon Presiden Dinilai Hambat Partai Baru," Op. Cit

party, there will be an increasingly competitive presidential election. A fair competition supports the democratization including the political party itself.

Seventh, after the 2009's general election, it is suggested that the government start to firmly underline the rules for electoral threshold for the political parties whose votes are inadequate. The political parties that lose out naturally are to be given a chance to improve themselves and their party organization for the next two periods of election so that there will be a simple party system which is more efficient and democratic. In short, the simpler the party system, the more ideal the presidential system in Indonesia

Conclusion

Indonesia perceives the democratic process as part of inherent life of the country in a way that the democratization is a never ending process in terms of democratic nation. Whether or not Indonesia could successfully shift from the tyrannical phase to democracy is determined by legal policy of the government. In the future, the government (executive, legislative, and judicative) must make a master plan which is based on a collective agreement so that the policy made and run by each institution is not partial and contradictive; instead it should be a check and balance in the upholding of the policy.

The 2009's election is expected to be a starting point of the success of democracy in Indonesia. Having been supported by a responsive law product, there will be a better and more democratic leader of Indonesia chosen.

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