



MENTAL AND PHYSICAL CAPABILITY AS THE REQUIREMENT FOR INDONESIAN PRESIDENTIAL CANDIDATE: LEGAL RATIO AND THE DEVELOPMENT OF REGULATION

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ABSTRACT

The Third Amendment to the 1945 Constitution has regulated new requirements for presidential candidates. One of which is the requirement to be mentally and physically capable of carrying out the duties and obligations of the presidential office. This research aims to find the reason for formulating norms or legal ratio of the formation of such a requirement. The nature of this research is qualitative research using a normative-empirical and comparative approach. The results reveal several legal ratios of the requirement. First, the requirement is considered important because the president has the highest position within the governmental structures. Second reason refers to the close relation between health and decision-making matters, and the third demonstrates reasonable and justifiable limitations from the perspective of human rights. Comparison with several countries exposes that the requirement is fundamental since the president has dual functions, namely a head of state and a chief of government. This research also exhibits that the legal basis of the requirement is not in accordance with the 1945 Constitution since the existing regulation takes the form of the Decree of the General Election Commission. Therefore, this research recommends the appropriate legal basis to further regulate mental and physical requirements by law which regulates some fundamental principles dealing with such requirements.

Keywords: legal ratio; mental and physical; the requirement of a presidential candidate; health requirements

INTRODUCTION

Background

The constitution is the supreme law of the land or the highest law in a state.¹ It contains the regulations related to the filling of state organizational positions. These regulations will decide the eligibility conditions or requirements to fill state organizational

positions,² including the presidential position (fitness and propriety of presidential candidates). One of the requirements for the presidential candidate, as stated in the Third Amendment to the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution),

¹ Dahlan Thaib et al., *Teori dan Hukum Konstitusi* (Jakarta: Raja Grafindo, 2017), 12.

² Elliot Bulmer, *What is a Constitution? Principles and Concepts: International IDEA Constitution-Building Primer 1*, Second edition (Sweden: International Institute for Democracy and Electoral Assistance, 2017), 6-7.

is to be mentally and physically capable of executing the duties and the obligations as the president (and the vice president).

The emergence of this requirement is closely related to a political event in 2001. At that time, the fourth president of Indonesia, Abdurrahman Wahid (also known as Gus Dur), who had health problems, was impeached. One indication that confirms this can be seen from Katin Subyantoro's statement from the Indonesian Democratic Party of Struggle (also known as PDIP) fraction. In his statement, he emphasized the need to pay attention to "the current state affair related to president's health".³ Katin stated his proposal statement is detailed as follow:⁴

"By paying close attention to the current affair in Indonesia related to the president's well-being and health, we proposed additional mental and physical capabilities requirements in Article 6 for presidential candidates. This additional clause is crucial because the current reality we are facing now can be used as a valuable lesson. Therefore, with the provision of Article 6, we proposed an additional clause as follows: Article 6 Section (1), The President Candidate and the Vice President Candidate shall be (respectively) an Indonesian citizen as of his/her birth and shall have never accepted another citizenship on his/her own accord. Article 6 Section (2), The President Candidate and the Vice President Candidate shall be (respectively) mentally and physically capable

of executing the duties and the obligations as a President and Vice President."

The proposal was accepted and has become one of the requirements for the presidential candidate. Politically, the mental and physical capability clause is seen as the effort to prevent Gus Dur to run for the presidential position for the second time. This effort is shown when Gus Dur failed to be one of the presidential candidates in 2004 because of this requirement.⁵

Eventually, the existence of this requirement becomes questionable: is this requirement politically only made to prevent Gus Dur to run for the presidential position for the second time or does this requirement have acceptable basic rationality? This research is conducted based on those discourses. It tries to analyze the basic legal ratio of mental and physical capability requirements for the presidential candidate. The legal ratio here refers to the reasons or the considerations about why the regulation modulates a certain charge of the material, in this case, the mentally and physically capable requirement for the presidential candidate.

From the legal ratio mentioned above, this research is not merely analyzing the debate around the mental and physical capability requirements in constitutional amendment by using the political history approach. It also uses the conceptual approach, namely the concept of the president status as the highest position in the government, the concept of health, and the concept of human rights. This research also uses a comparative approach in several countries that have experienced the same issues.

Furthermore, this research analyzes the regulation development and further practice

3 Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002, Buku IV Kekuasaan Pemerintahan Negara, Jilid I* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 164.

4 *Ibid.*

5 Mujar Ibnu Syarif, "Syarat Kesehatan Fisik bagi Calon Presiden dalam Perspektif Politik Islam dan Politik Indonesia," *Ahkam Jurnal Ilmu Syariah* 17, No. 1 (2017): 171-198.

from the requirement mentioned in Article 6 section (1) of the 1945 Constitution relating to the implementation of the presidential election in the reformation era. Regarding the debate on the 1945 Constitution Amendment, several parties have stated that mental and physical capability for presidential candidacy requirements shall be regulated in detailed law since the arrangement in the constitutions is not conducted in-depth.⁶

The analysis of further development of the requirement mentioned above is needed to understand which regulations contain further arrangements regarding this requirement. Subsequently, this analysis is done to observe whether further arrangement from the presidential candidate's physical and mental capability requirement will undergo changes, replenishment, or decrements over time.

Research Questions

Based on the background of the study explained above, two main questions need to be answered in this research, namely:

1. What is the legal ratio behind the arrangement of mental and physical capability requirements for a presidential candidate in Article 6 section (1) in the 1945 Constitution?
2. How is the development of further regulation of the mental and physical ability requirements for presidential candidates in the various existing regulations?

Research Goals

The purpose of this research is to analyze two main points, namely:

1. The legal ratio of the arrangement of mental and physical capability

requirements for a presidential candidate in Article 6 section (1) in the 1945 Constitution, and

2. The development of further regulation of the mental and physical ability requirements for presidential candidates.

RESEARCH METHODS

Approach

This research is qualitative research using a normative-empirical approach (*socio-legal research*). It covers the whole process from lawmaking to law implementation.

Moreover, this research also uses a comparative approach, particularly a micro comparative approach. According to Ratno Lukito, this approach more focuses on the substance of the law (law as a body of rules), specifically in this study regarding the health requirements of presidential candidates.⁷

The Source of the Data

The source of the data used in this research is primary data in the form of interviews with several parties related to the implementation of mental and physical capability requirements for presidential candidates. These parties include the General Elections Commissions (KPU) and the Indonesian Medical Association (IDI).

In addition, secondary data, such as legal materials, are also used for this study. Legal materials used in this research are primary legal materials, such as constitutions, acts of laws, verdicts, etc. As for the secondary legal materials, this research uses literature, such as textbooks, symposium or seminar materials, essays, and legal journals related to this research. Lastly, for tertiary legal materials, legal dictionaries are used for the completion of this research.

⁶ Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002, Buku IV Kekuasaan Pemerintahan Negara, Jilid 1*, 182.

⁷ Ratno Lukito, *Perbandingan Hukum: Perdebatan Teori dan Metode* (Yogyakarta: Gadjah Mada University Press, 2016), 32-33.

Data Collection Method

The primary data collection method used in this research is interview using the structured concept. It makes the interviewer can freely ask questions to the interviewees. This interview strictly adheres to using interview protocol that guides the researcher.

The secondary data collection method used in this research is the literature review. It includes several books, journal articles, previous studies, related laws, and other literature related to the issues raised in this research.

Data Analysis Technique

The data analysis technique is conducted with the technique that supports the qualitative approach. This technique involves collecting, correcting, marking, classifying, compiling, and analyzing data.

DISCUSSION

The Legal ratio of Mental and Physical Capability Requirement for Presidential Candidate

Based on the study results, there are at least 5 (five) legal ratios related to the mental and physical capability requirement for Indonesian presidential candidates.

1. Political History Ratio

Basically, several provisions in a state constitution are formulated under the influence of several factors, for instance, the country's historical background⁸ and political factors⁹. This also applies to the mental and physical capability requirement for Indonesia presidential candidates in Article 6 section

8 Bagir Manan, *Membedah UUD 1945*, Ed. Moh Fadli (Malang: UB Press, 2012), 6-8.

9 Susi Dwi Harijanti et al., *Syarat Kepala Negara dan Kepala Pemerintahan: Pelajaran dari Konstitusi 195 Negara* (Sumedang: Unpad Press, 2020), 16.

(1) of the 1945 Constitutions. As mentioned in the background of the study, the existence of this requirement is strongly related to Gus Dur's impeachment.

The fourth president of Indonesia was indeed a person with a disability, and he suffered from a disease (known to the public) named glaucoma. It made his left eye did not function properly.¹⁰ As a result, Gus Dur repeatedly seemed to need other people's assistance to carry out his daily activities. This condition raised a debate about Gus Dur's capabilities as a president. Moreover, the debate about his capabilities was increased significantly because of Gus Dur's controversial actions, especially when he decided to issue a Presidential Decree about the dissolution of parliament (this was not normal in a state with a presidential system), which triggered his impeachment by the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat - MPR*).¹¹

In a treatise of the Amendment to the 1945 Constitution, M. Hatta Mustafa, one of the formulators from the Party of Functional Groups (*Golongan Karya - Golkar*) fraction, explicitly mentions Gus Dur's incident as the basis for his argument to support the formulation of the health requirements for a presidential candidate.¹²

Based on Sujit Choudhry and Mark Tushnet's opinion, the requirement of mental and physical capabilities for Indonesia presidential candidate can be interpreted as "... pacts among politically powerful actors on

10 Leonardus Selwyn Kangsaputra, "Mengenai Glukoma, Penyakit Mata yang Menyerang Gus Dur," *Okezone*, November 24, 2019.

11 Nafiysul Qodar, "23 Juli 2001: Dekrit Presiden, Perlawanan Parlemen, dan Celana Pendek Gus Dur," *Liputan 6*, Juli 27, 2019.

12 Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002, Buku IV Kekuasaan Pemerintahan Negara, Jilid I.*, 184.

how to pursue their own narrow interests within the framework of a common constitutional order".¹³ By observing the events that happened during Gus Dur's impeachment and the debate regarding the third amendment to the 1945 Constitution, the physical and mental capability requirement basically reflects the political interests of certain groups (Gus Dur's political opponents). However, these interests are made into a constitutional order to ensure that someone who becomes a president has the ability to carry out his duties and functions optimally. The MPR, as a state organization that has the authority to amend and stipulate the constitution, later on recognizes the presidential candidate's health condition as a true necessity that needs to be implemented to fulfil the presidential function. Based on the experience of having a president with health problems and the tensions that happened between the president and the parliament, Indonesia's experience in formulating this requirement is a unique experience that becomes a moment triggering such provisions.

It contrasts with other countries that stipulate similar requirements with the assumption of the legal influence from the colonizing country. This influence happens to the British colony. They adapt and apply health requirements for the British House of Commons members as the requirement for their parliament member and the requirement for the head of state/government in their country, as in Papua New Guinea, Solomon Islands, India, Pakistan, etc. In addition, the regional practices of this health requirement happen, for example, in African countries such as Chad, the Central African Republic, etc.). Additionally, there are countries that adopt a certain constitutional model.¹⁴ For

example, Marshall Island, which is the colony of the United States, adopts some points from the Westminster model of constitutional design. It includes the health requirements for the House of Commons members, which are adopted as a requirement for a presidential candidate in the Republic of the Marshall Island.¹⁵

2. The President Status Ratio as the Highest Position in the State Government

President is in a very strategic position in the constitutional structure of various countries worldwide. By having a position in a presidential institution, a president has a heavy role and workload because he/she is the "conductor" of the "orchestra" of the state administration. A president is pledged to two important positions in a presidential system. They are the head of a state and the head of a government.¹⁶

In the context of Indonesia's state administration, the 1945 Constitution contains several presidents' authorities. In the 1945 Constitution, a president holds the government authority, proposes a law bill to the House of Representatives (DPR), establishes government regulations to enforce laws, holds supreme authority over the army, the navy and the air force, declares war and makes peace and treaties with other countries (with the approval of the DPR). In addition, based on the 1945 Constitution, a president has authority to declare danger

13 Sujit Choudhry and Mark Tushnet, "Participatory constitution-making: Introduction," *International Journal Of Constitutional Law* 18, No. 1 (2020): 173-178.

14 Henry Kwasi Prempeh, "Africa's Constitutionalism

Revival: False Start or New Dawn?" *International Journal of Constitutional Law* 5, No. 3 (2007): 473.

15 C. J. Lynch, "Traditional Leadership in the Constitution of the Marshall Islands", *Working Papers Series*, Center for Asian and Pacific Studies in collaboration with the Social Science Research Institute University of Hawaii at Manoa Honolulu, Hawaii, 1984, 1.

16 Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Amandemen* (Jakarta, Sinar Grafika, 2010), 107-108; Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Depok: Rajawali Press, 2019), 323.

status, appoint ambassadors and consuls, grant pardon and rehabilitation (taking the considerations from the Supreme Court into account), grant amnesty and abolition (taking the considerations from the House of Representatives into account), give titles, orders, and other honours as regulated by law, and make government regulations in lieu of law (Perppu). These authorities show enormous power as well as a severe burden for someone who becomes a president.

The president's authority will also be expanded in the emergency situation. As previously mentioned, the president has the power to declare war and declare danger status. Under these conditions, a president can do various kinds of actions to defend the country, even though it is against the laws.¹⁷

The authorities held by the president mentioned above make the president the most regulated position in the 1945 Constitution. However, these authorities do not include the authority given by the laws, which are considered plentiful in Indonesia. Consequently, a president needs to have sufficient mental and physical capabilities to execute all of those authorities well. By having such capabilities, the president does not harm the people for his or her subjective factors.

3. Health Ratio

Ashley Weinberg argues there is relevancy between proper physical and mental (psychological) health towards the process of formulating executive policy. Weinberg uses a (certain) policymaking momentum issued by John F. Kennedy and Anthony Eden to support her conclusion. The former president of the United States of America, John F. Kennedy, decided to strike Cuba under the influence of amphetamines used to treat

Addison's disease. Another case is the former British prime minister's poor health, Anthony Eden, which contributed to the Suez crisis.¹⁸

The relationship between policymaking and someone's physical and psychological health cannot be oversimplified. However, the context of mental and physical health also cannot be ignored. Weinberg states it is important that this regulation is not used to exclude an individual because of his or her health problems, but the job itself carries highly stressful components.¹⁹

According to WHO, any form of illness, whether mental, physical, or social illness, can affect someone making decisions. Tabaszewski explains that the health disruption of a public official has an impact on the "legal security of citizens". It also becomes an obstacle to implementing the public functions that the person carries out. Based on simple logic, how can a person who has to struggle to restore his own health be reliable in managing the whole society or the citizens? Therefore, public officials must be declared healthy starting from the process of the position candidate.²⁰ Chairman of IDI (Indonesian Doctor Association), Daeng M. Faqih, said that IDI is very careful, especially in determining the leader's mental ability test. It is because if a president has a severe psychopathological disorder, it is possible for him to be cruel to his people and do various things that are unpredictable.²¹

17 Jenny S. Martinez, "Inherent Executive Power: A Comparative Perspective," *Yale Law Journal* 115, No. 9 (2006): 2480-2511.

18 Ashley Weinberg, "The mental health of politicians," *Palgrave Communications* 3, No. 17081 (2017): 1-4, <https://doi.org/10.1057/palcomms.2017.81>.

19 *Ibid.*

20 Robert Tabaszewski, "Disease as an obstacle in the exercise of public functions in international and national law", dalam Robert Tabaszewski, *From human rights to essential rights* (Józefów: Alcide De Gasperi University of Euroregional Economy in Józefów, 2017), 206-207.

21 Interview with IDI Chairman, Daeng M. Faqih, 22 September 2021.

4. Human Rights Ratio

The issuance of health requirements for the president and vice president often clashes with the dimensions of human rights, especially the right to equality before law and government (Article 27 paragraph (2) and Article 28D paragraph (3) of the 1945 Constitution). However, it should be understood that human rights are not absolute. In the 1945 Constitution, restrictions on human rights are clearly regulated in Article 28J paragraph (2) of the 1945 Constitution. It states that “ In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society.”

Various rights, including, in this case, passive suffrage or the right to run for public office, for example, running for president, can be limited as long as they are based on reasonable reasons and for the greater interest. For example, the reason to protect the public from decisions or policies is dangerous if someone who serves as president is mentally and physically incapable. This is confirmed by the Office of the High Commissioner for Human Rights (OHCHR) in General Comment No. 25 regarding the right to participate in public affairs, voting rights and the right of equal access to public services contained in Article 25 of the ICCPR. It is stated by OHCHR that “the established mental incapacity may be a ground for denying a person the right to vote or to hold office.”

5. Comparative Ratio

Based on various existing constitutions, the regulation regarding health requirements or being mentally and physically able,

intended for heads of state and heads of government (either president, prime minister, governor-general, or even king) has become a constitutional trend. However, the regulations regarding this matter are not exactly the same in one country to another.²²

According to the results of previous researches, which compared 195 constitutions of countries in the world regarding health requirements for heads of state and/or heads of government, they can be classified as follows: not declared insane (28 constitutions related to heads of state and 40 constitutions related to heads of government); do not have any physical and mental problems (1 constitution related to head of state); do not have any mental illnesses / weak-minded (5 constitutions related to the head of state and 5 constitutions related to the head of government); not experiencing blindness (1 constitution related to the head of state and 6 constitutions related to the head of government); not mentally or physically disabled (1 constitution related to head of state and 1 constitution related to head of government); not mentally and intellectually disabled (1 constitution related to head of state and 1 constitution related to head of government); have physical and mental capacities that meet the requirements (7 constitutions related to heads of state and 6 constitutions related to heads of government); have the ability to conduct their own affairs (1 constitution related to the head of state); have good health capacity (1 constitution related to head of state and 1 constitution related to head of government); mentally healthy (1 constitution related to head of state); have common sense (3 constitutions related to head of state and 3 constitutions related to head of government); and do not have any disabilities (1 constitution related to the head of government).²³

22 Susi Dwi Harijanti et al., *Syarat Kepala Negara dan Kepala Pemerintahan: Pelajaran dari Konstitusi 195 Negara*, 236-237

23 *Ibid.*

Table 1. Health History Requirements for Heads of State

Formulation of Requirements	Country and Position
Not declared insane (unsound mind) by a competent court	Bangladesh (President), Botswana (President), Dominica (President), Gambia (President), Ghana (President), Guyana (President), India (President), Kenya (President), Kiribati (President/Beretitenti), Lithuania (President), Malawi (President), Marshall Islands (President), Namibia (President), Nauru (President), Nigeria (President), Pakistan (President), Papua New Guinea (Governor-General), Sierra Leone (President), Singapore (President), Solomon Islands (Governor-General), South Africa (President), Sri Lanka (President), Tanzania (President), Tonga (King), Trinidad and Tobago (President), Tuvalu (Governor-General), Uganda (President), and Uzbekistan (President).
No physical and mental infirmity problems	Bhutan (King).
No mental illness/ mental incapacity/ weak-minded	Cyprus (President), Malaysia (Yang di-Pertuan Agong), Seychelles (President), Switzerland (President of the Federal Council), Tonga (King).
Not experiencing blindness	Guyana (President).
Not mentally and physically disabled	Zambia (President).
Not mentally and intellectually disabled	Zimbabwe (President).
Have the physical and mental capacity that meets the requirements	Angola (President), Benin (President), Central African Republic (President), Chad (President), Republic of Congo (President), Republic of Niger (President), and Togo (President).
Have a good health capacity	Guinea (President).
Mentally healthy	Jordan (King).
Having a sound mind	Maldives (President), Somalia (President), and South Sudan (President).

Table 2. Health History Requirements for Heads of Government

Formulation of Requirements	Country and Position
Not declared insane (unsound mind) by a competent court	Antigua and Barbuda (Prime Minister), Bahamas (Prime Minister), Bangladesh (Prime Minister), Barbados (Prime Minister), Belize (Prime Minister), Botswana (President), Dominica (Prime Minister), Gambia (President), Ghana (President), Guyana (President and Prime Minister), India (Prime Minister), Jamaica (Prime Minister), Jordan (Prime Minister), Kenya (President), Kiribati (President / Beretitenti), Lesotho (Prime Minister), Lithuania (President and Prime Minister), Malawi (President), Malaysia (Prime Minister), Malta (Prime Minister), Marshall Islands (President), Mauritius (Prime Minister), Namibia (President, Vice President, Prime Minister, Deputy Prime Minister), Nauru (President), Nigeria (President), Pakistan (Prime Minister), Papua New Guinea (Prime Minister), Saint Lucia (Prime Minister), Saint Kitts (Prime Minister), Sierra Leone (President), Singapore (Prime Minister), Solomon Islands (Prime Minister), South Africa (President), Swaziland (Prime Minister), Tanzania (Prime Minister), Togo (President), Trinidad and Tobago (Prime Minister), Tuvalu (Prime Minister), Uganda (Prime Minister), and Uzbekistan (President and Prime Minister).
No mental illness/mental incapacity/weak-minded	Albania (Prime Minister), Cyprus (President), Malta (Prime Minister), Norway (Prime Minister), and Switzerland (President of the Federal Council).

Not experiencing blindness	Antigua and Barbuda (Prime Minister), Dominica (Prime Minister), Grenada (Prime Minister), Guyana (President and Prime Minister), Lesotho (Prime Minister), and Mauritius (Prime Minister).
No disability	Republic of Ireland (Prime Minister).
Not mentally and physically disabled	Zambia (President).
Not mentally and intellectually disabled	Zimbabwe (President).
Have the physical and mental capacity that meets the requirements	Angola (President), Benin (President and Prime Minister), Central African Republic (President and Prime Minister), Chad (President), Republic of Congo (President and Prime Minister), Republic of Niger (President and Prime Minister)
Have not been declared incapable of conducting his own affairs	Denmark (Prime Minister).
Have a good health capacity	Guinea (President).
Having a sound mind	Maldives (President), Somalia (President), and South Sudan (President).

A number of countries have regulated the requirements for physical and mental ability or health requirements for heads of state and heads of government. It indicates the same awareness among those countries that head of state and head of government, including in this case the president, must have the qualified mental and physical abilities to do his/her job well. In fact, the desire to regulate such conditions for the head of state and the head of government has also been voiced in many countries that have not regulated it. For example, the United States has not regulated physical and mental health requirements for the President at all.²⁴ In addition, Malaysia

²⁴ Megha Dharia, et al., *What Should Presidential Candidates Tell Us About Themselves? Proposals for Improving Transparency in Presidential Campaign* (New York: Fordham University School of Law, 2020), 18-20.

indeed has regulated mental health requirements for His Excellency (*Yang di-Pertuan Agong*), the Prime Minister, and the Members of Parliament, but not yet in terms of physical health.²⁵

Development of Further Regulations of the Mental and Physical Capability Requirements for Indonesian Presidential Candidates

1. 2004 Presidential Election

In the 2004 general election, the president and vice president were elected directly by the people. Further regulation regarding the requirements for being physically and mentally capable is stated in Law Number 23 of 2003 concerning the General Election of President and Vice President along with KPU Decree Number 31 of 2004 concerning Technical Guidelines for Assessing the Mental and Physical Ability of the Candidates for President and Vice President in General Elections.

In Law Number 23 of 2003, to be precise in Article 6 letter d, it only repeats the provisions stated in Article 6 paragraph (1) of the 1945 Constitution, namely that presidential and vice-presidential candidates must meet the requirements of being physically and mentally capable of carrying out their duties and obligations as president and vice president. President. Meanwhile, detailed arrangements regarding these conditions are contained in the KPU Decree, which was mentioned previously.

KPU Decree Number 31 of 2004 contains detailed arrangements. They include the types of examinations carried out, the place and time of the examinations, the procedures for examinations, and conclusion making and reporting. Based on the KPU Decree, presidential and vice-presidential

²⁵ *New Straits Times*, "Vote for Health," *New Straits Times*, April 9, 2013.

candidates must be free from disability to meet the requirements for being physically and mentally capable. If a form of disability is found as stated in the KPU Decree, the candidate will be declared ineligible. The disability referred to in the KPU Decree is a condition that can hinder or negate the ability to carry out the duties and obligations of the president and vice president.

The type of disability, in this case, is divided into two. They are disability in mental health and disability in physical health. Disabilities in mental health include suffering from psychosis (schizophrenic disorders, mood disorders with psychotic features, persistent delusional disorders, acute psychotic disorders, and so on). In addition, having neurosis/ severe neurosis, suffering from mental retardation, or other intellectual disorders (e.g. memory loss as in minimal cognitive impairment and having a personality disorder) are considered disabilities in mental health.

Meanwhile, disabilities in physical health include disabilities in the nervous system, heart and blood vessel system, respiratory system, a field of vision, ear, nose, and throat area, liver and digestive system, urogenital system (kidneys and urinary tract), musculoskeletal system (movement organs), and cancer.

Disabilities in the nervous system include motor disabilities that cannot be corrected, that make one unable to be independent and sensory disabilities in terms of balance, hearing, and vision. In addition, coordination disability, memory disorder (dementia), impaired executive function, and verbal communication disorders are classified as disabilities in the nervous system.

Meanwhile, disabilities in the heart and blood vessel system include heart/blood vessel disorders with a high risk of short-term mortality and morbidity; symptomatic

cardiovascular disorders that are refractory to pharmacotherapy or surgical or non-surgical interventions; and disability due to low physical tolerance/ability. Then, respiratory disorders in the respiratory system with a degree of obstruction and restriction of more than 50%.

Disability in the vision field includes far vision acuity with correction still worse than 6/18 and/or near vision acuity with correction still worse than Jaeger 2 in the best eye; irrecoverable field of view less than 50%; and uncorrected diplopia at a central position of 30°.

Disabilities in the ear, nose and throat (ENT) field include deafness that cannot be corrected with hearing aids and persistent severe dysphonia ("sound disorder") that makes verbal communication difficult.

Furthermore, disabilities in the liver and digestive system include severe liver function disorders (liver decompensation). Urogenital system disabilities include severe kidney function disorders that require dialysis (chronic haemodialysis). Disabilities in the musculoskeletal system (movement organs) are disorders of musculoskeletal function that cannot be corrected. In addition, malignancy (cancer) that is incurable and interferes with performance is classified as a health disability.

At the implementation level, Law Number 23 of 2003 and KPU Decree Number 31 of 2004 has caused one pair of presidential and vice-presidential candidates to be declared as ineligible to be physically and mentally capable. They are Gus Dur, who re-registered as a presidential candidate along with the candidate for the vice, Marwah Daud Ibrahim. The KPU's decision not to pass Gus Dur immediately drew a lot of protests from Gus Dur's supporters. They accused the state of doing discriminatory against someone with a physical disability.²⁶

26 DetikNews, "Pembela Gus Dur Beriklan: Kenapa

Gus Dur himself fought back after being declared ineligible by the KPU through the State Administrative Court (PTUN) and the Judicial Review at the Supreme Court (MA). Gus Dur's resistance failed after the two court decisions rejected the lawsuit and judicial review submitted by Gus Dur. Not giving up, Gus Dur proceeded to the Constitutional Court by reviewing Law Number 23 of 2003. However, the Constitutional Court also rejected Gus Dur's request in the Constitutional Court Decision Number 008/PUU-II/2004

According to the current Chairman of the Indonesian Doctors Association (IDI), Daeng Mohammad Faqih²⁷, and Hasyim Asy'ari²⁸ as a member of the current General Elections Commission, physical disability does not mean that one is automatically declared physically incapable of being a presidential candidate. However, as mentioned in KPU Decree No. 31 of 2004, the disability must be related to a very serious illness, both physically and mentally. These illnesses can hinder or negate one's ability to carry out one's duties and obligations as president. This means that the medical examination team must admit that Gus Dur has such a disease, although Daeng, as the Chair of IDI, did not mention what disease he was referring to because this is Gus Dur's privacy which is protected by law.²⁹

It can be said that the results of the examination team's assessment are correct with the assumption that Gus Dur died in 2009 or 5 years after the failure of his candidacy for the president.³⁰ If Gus Dur was elected

president at that time, it was very likely that Indonesia would lose its president during the ongoing administration period or several months after completing his presidential term. Furthermore, suppose one look at the history of Gus Dur's illness before he died (which is known to the public) and the number of times he entered the hospital between 2004-2009. In that case, it is very likely that Gus Dur's presidential duties will be hampered and must be carried out by the Vice President.³¹

2. Presidential Elections in 2009, 2014, and 2019

In the span of 2009 to 2019, there were two changes to the presidential and vice-presidential election laws. They are Law Number 42 of 2008 concerning the General Election of President and Vice President and Law Number 7 of 2017 concerning General Elections (this law combine the material content of presidential and vice-presidential elections with the general election of the People's Representative Council, Regional Representative Council, and Regional People's Representative Council). Unfortunately, in these two laws (Article 5 letter d of Law Number 42 of 2008 and Article 169 letter e of Law Number 7 of 2017), the regulation regarding the requirement to be physically and mentally capable for a presidential candidate is once again only a repetition from the text of Article 6 paragraph (1) of the 1945 Constitution. However, in Law Number 7 of 2017, there is an additional clause, namely "and free from narcotics abuse".

The interesting things from Law Number 7 of 2017 are the requirement for being able mentally and physically not only for presidential and vice-presidential candidates but also for election officials, like General Election Commissions (KPU) members at

yang Cacat Fisik Dihalangi," *detik.com*, Mei 7, 2004.

27 Interview with Daeng Mohammad Faqih as IDI Chairman on 22 September 2021.

28 Interview with Hasyim Asy'ari as the member of KPU on 7 Juli 2021.

29 Desriza Ratman, *Rahasia Kedokteran: Di Antara Moral dan Hukum Profesi Dokter* (Bandung: Keni Media, 2016), 23.

30 Bayu Galih, "30 Desember 2009, Gus Dur Tutup Usia," *Kompas*, Desember 30, 2016.

31 Liputan 6, "Riwayat Penyakit Gus Dur Dimulai 1985," *Liputan 6*, Desember 31, 2009.

the national, provincial and district levels/city. The same requirement is also applied to field election officers such as the District Election Committee (*Panitia Pemilihan Kecamatan - PPK*) and the Voting Committee (*Panitia Pemungutan Suara - PPS*), etc. The Members of General Elections Supervisory Institution (*Badan Pengawas Pemilihan Umum - Bawaslu*) at the national, provincial, and district/city levels; as well as candidates for members of House of Representatives (DPR), Regional Representative Council (DPD), and Regional People's Representative Assembly (DPRD) are also obliged to follow this requirement.

There is no further explanation regarding the requirement for being physically and mentally capable for presidential and vice-presidential candidates in the law. However, there is an explanation for the mental and physical requirements for election officials and members of the DPR, DPD and DPRD, namely the matter of proving their condition as physically and mentally capable status. This status is shown by a health certificate or a letter of statement from a doctor, state-owned hospital, or health centre. In addition, the law affirms that physical disability is not a health disorder and is not included in the physically and mentally incapacitated category for election officials and members of the DPR, DPD and DPRD. Of course, this should be criticized because further regulations regarding this matter related to presidential and vice-presidential candidates are not in the law and are again submitted to the KPU Decree.

The authors admit the lack of data for this research happens because The General Election Commissions (KPU) Decree on Technical Guidelines for Assessing the Mental and Physical Capability for Presidential and Vice Presidential Candidates in 2009 Presidential and Vice Presidential Election and their attachments are not found. Likewise,

in 2014, the authors did not find The General Election Commissions (KPU) Decree on Technical Guidelines for Assessing them. Therefore, this lack of data has been tried to be solved by asking The General Election Commissions (KPU) for the data. However, KPU does not find the data for the two decrees and only found the attachment of Technical Instructions for Assessing the Mental and Physical Capability for Presidential and Vice-Presidential Candidates in 2014 Presidential and Vice-Presidential Election without the main text of the KPU Decree.

In the development of further regulations in the 2014 Presidential General Election, there are several differences with the 2004 Presidential General Elections. For example, there is an affirmation that one can be considered mentally and physically able to carry out his/her duties and obligations as president and vice president without being free from disease, impairment or disability. However, at least they must be able to carry out daily physical activities independently without significant obstacles and do not have any diseases that are expected to result in loss of physical abilities in the next 5 years. In addition, they are required not to have mental health that makes them lose the ability to make observations, analyses, make decisions, and communicate these points.

Furthermore, there are also differences in the conclusions of health assessment in 2014 and 2004. For example, the 2004 conclusions are divided into "qualifying" or "not eligible". Meanwhile, the 2014 conclusions are divided into "no risk factors found that can result in the inability to carry out duties and obligations as president and vice president" and "risk factor found that can result in the inability to carry out duties and obligations as president and vice president."

In addition, there are also differences regarding diseases or types of disabilities that can cause a person to not fulfil the

requirements as a presidential candidate in 2014 (based on the Technical Guidelines for Assessing the Mental and Physical Ability for President and Vice President in the Presidential and Vice Presidential General Election of 2014 issued by the KPU), namely:

- The limitation forms of psychosis by the abolition of the word “etc.” in 2004 Technical Instructions;
- There is an assertion about the intellectual disruption that must be severe intellectual impairment;
- Replacement of memory disorder, executive function disorder, and verbal communication disorder with the incurable severe single domain cognitive disruption (including impairment in any of the following attention, language, memory, visuospatial, and executive functions) and severe incurable multi-domain cognitive disruption;
- There is an affirmation regarding heart/blood vessel disorders that cannot be cured;
- Changes in the type of respiratory system disability, namely the addition of primary lung cancer and the change of “respiratory disorders with obstruction and restriction degrees more than 50%” to “respiratory disorders with severe obstruction and severe restriction degrees”;
- Changes in the type of visual disability, namely the original open visual of less than 50%, which cannot be cured to an open vision of fewer than 20 degrees, the abolition of the phrase “30-degree central position “ in terms of diplopia, and the addition of diseases in the form of organic disorders caused by other diseases that result in the limitation in doing the job;
- Changes in the type of disability in the ear-nose-throat (ENT) field, namely an affirmation of deafness that is not curable with hearing aids, must be decided after pure tone audiometry has been

performed;

- Changes in the case of severe kidney function disorders, which originally required “dialysis (chronic haemodialysis)” to “dialysis including CAPD and haemodialysis”;
- There is an affirmation about the musculoskeletal function disorder that cannot be fixed “through independent ADL (activity daily living) scoring”; and
- The addition of new types of disabilities, namely disabilities in the field of teeth and mouth, including malignant oral tumours, severe jaw joint disorders that interfere with jaw function, large cysts in the oral cavity that interfere with speech and swallowing functions, severe phonetic disorders, severe abscesses lead to sepsis and congenital abnormalities of the mouth, gums, and palate after fixed still disturb voice and speech function.

Based on some changes contained in the 2014 Technical Guidelines, there are a lot of changes to the physical requirements. Therefore, it can be said that there are more physical requirements to become a presidential candidate. Meanwhile, in the 2019 development, which is regulated in KPU Decree Number 1004/PL.02.02-Kpt/06/KPU/VIII/2018 concerning Technical Guidelines for Assessing Mental and Physical Ability of Candidates for President and Vice President of the Republic of Indonesia in 2019 General Election, several changes are found that differ from the points stipulated in the 2014 Technical Guidelines. The most basic change is changing the word “disability” to the phrase “medical incapacity”. Then, there are also changes in the types of disability or what in the 2019 General Election was called “medical incapacity”, including:

- Conversion of “severe neurosis” to “severe mental emotional disorder without any impairment of reality assessment (anxiety disorders including phobias, panic and PTSD; depressive

disorder, bipolar disorder and substance abuse disorder”);

- The addition of new diseases related to the respiratory system, namely “metastatic lung cancer” in addition to primary lung cancer;
- Additional requirements for severe liver function disorders (liver decompensation), which are the disorders that cannot be recovered even with organ transplantation; and
- Changed the provisions regarding severe kidney function disorders, which originally “required dialysis including CPAD and haemodialysis” to “which is not possible to be cured even with organ transplantation.

Based on the development of the 2019 Technical Guidelines, it can be seen that the mental requirement becomes more strict compared to the physical requirement, which can be continuously corrected over time due to the improving quality of health technology. This analysis is in line with Daeng Mohammad Faqih’s statement as the Chair of IDI. He states the incompetence that is increasingly highlighted at official public positions is the mental inability. It is because a public official will make policies and decisions that affect the lives of the people. As a consequence, the mental requirement must be increasingly tightened.³²

Even though the mental and physical requirements become stricter, no candidates fail to be presidential candidates due to mental and physical capability requirements in the 2009 to 2019 elections.

3. Criticism of Further Regulations of Mentally and Physically Capable Requirements for Presidential Candidates

Article 6 paragraph (2) of the 1945 Constitution has clearly ordered that “the

requirement to be President and Vice President are further regulated by law.” Therefore, the further regulation of being physically and mentally capable as the requirement for presidential candidates, which has been included in several KPU decrees, needs to be reviewed. The decree made by KPU should only regulate matters of technical guidance regarding the requirement for being physically and mentally capable. For example, it only regulates the types of examinations carried out, the place and time of the examinations, procedures for examinations, and conclusion making and reporting.

It is necessary to consider more detailed arrangements regarding what is meant by the terms “mental” and “physical” contained in the law. As explained above, the material content of KPU decrees is purely technical. The material contained in the law contains principles or basis related to a physical and mental health requirement. It means the law needs to provide “guidance” on the delegated material. By doing so, the material in the KPU decree does not make additional requirements as stated in the 1945 Constitution and Law Number 7 of 2017.

Article 6 paragraph (1) of the 1945 Constitution states that one of the requirements is “mentally and physically able to carry out his duties and obligations as President and Vice President.” However, what does it mean to be physically and mentally capable? That is one of the questions that the law must answer.

Bagir Manan, for example, defines “physically incapable” refers to “any physical condition that causes dependence on the assistance of others to carry out one’s work as President and Vice President or situation that will hinder President and Vice President to carry out their obligations.”³³

32 Interview with Daeng Mohammad Faqih as IDI Chairman on 22 September 2021.

33 Bagir Manan, *Hukum Tata Negara Dalam UUD 1945*, (tanpa tahun).

From the perspective of human rights, theoretically, it is said that if people's rights are regulated, the people, as the sovereign owner,³⁴ must set and agree to these restrictions under the laws. Moreover, the requirement for being physically and mentally capable is related to the limitation of a person's rights to become president and vice president. As stated in Article 28J paragraph (2) in the 1945 Constitution, the limitation of rights must be settled by law. Thus, if the practice of further regulation of the presidential health requirements in the KPU SK continues, then legislators and general election organizers have the potential to violate the constitution.

CLOSING

Conclusion

Based on the description, several conclusions can be made through this study. First, *the* legal ratio behind the requirement of being mentally and physically capable for the presidential candidate in Article 6 paragraph (1) of the 1945 Constitution is initially based on the historical political ratio when Abdurrahman Wahid (Gus Dur), as Indonesia's fourth president, was impeached in 2001. This situation triggered the formation of the physically and mentally capable requirement for presidential candidates, making Gus Dur unable to participate in the presidential election in 2004. Based on the analysis, some legal ratios or other logical considerations are behind this requirement. They should be regulated, among others, because the president status as the highest official rank in the state government carries such great power as well as very heavy obligations. Therefore, the physical and mental health of the president has the potential to make his decisions harmful for the citizens. Meanwhile, being a president means one must protect public interests above his

own rights to run for president. In addition, the practice of similar requirements in various countries is significant for the head of state and the head of government. Therefore, those legal ratios behind being physically and mentally capable requirements have a solid basis. Thus, this requirement is very worthy of being implemented for the presidential candidacy.

Second, in practice, the development of further regulation regarding the mental and physical requirement for presidential candidates (outside the 1945 Constitution) shows the law always repeats the text contained in Article 6 paragraph (1) of the 1945 Constitution. Concreted and detailed arrangements regarding mental and physical requirements are actually listed in KPU Decree. This requirement is almost always updated in every presidential general election from 2004 to 2019. The updates themselves are in the form of a Technical Guide to the Assessment of Mental and Physical Ability for Presidential and Vice-Presidential Prospective Candidates in the Republic of Indonesia General Election.

This practice should be reviewed because it may conflict with Article 6 paragraph (2) of the 1945 Constitution. This article orders that the requirement to become president are further regulated by law. This practice is not in accordance with Article 28J paragraph (2), which states that human rights restrictions must be set by law. Therefore, the requirement to be physically and mentally capable as one of the requirements for a presidential candidate is a form of human rights limitation that should be further regulated by law.

Sugesstion

Based on this research, there are several suggestions or recommendations. First, the physical and mental capability requirement fulfils the right reasons for the formation

34 Teguh Prasetyo, *Filsafat Pemilu* (Bandung: Nusa Media, 2018), 8.

of law (legal ratio). There is no need for a debate whether these conditions are correct or required in the constitution. However, how far the term “being physically and mentally capable” has the quality to develop in accordance with science and technological development.

Second, it is important to make further regulations regarding a presidential candidate’s physical and mental requirements in a detailed law (act). This is due to the material content of this requirement related to the limitation of citizens’ rights to run for president. Meanwhile, the KPU decree merely stipulates technical material regarding the requirement for being physically and mentally capable.

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REFERENCES

Asshiddiqie, Jimly. *Perkembangan dan Konsolidasi Lembaga Negara Pasca Amandemen*. Jakarta, Sinar Grafika, 2010.

Asshiddiqie, Jimly. *Pengantar Ilmu Hukum Tata Negara*. Depok: Rajawali Press, 2019.

Bulmer, Elliot. *What is a Constitution? Principles and Concepts: International IDEA Constitution-Building Primer 1*. Second edition. Sweden: International Institute for Democracy and Electoral Assistance, 2017.

Choudhry, Sujit, dan Mark Tushnet. “Participatory constitution-making: Introduction.” *International Journal Of Constitutional Law* 18, No. 1 (2020): 173–178.

DetikNews. “Pembela Gus Dur Beriklan: Kenapa yang Cacat Fisik Dihalangi.” *detik.com*, Mei 7, 2004.

Dharia, Megha, et al. *What Should Presidential Candidates Tell Us About Themselves? Proposals for Improving Transparency in Presidential Campaign*. New York: Fordham University School of Law, 2020.

Harijanti, Susi Dwi, et al. *Syarat Kepala Negara dan Kepala Pemerintahan: Pelajaran dari Konstitusi 195 Negara*. Sumedang: Unpad Press, 2020.

Galih, Bayu. “30 Desember 2009, Gus Dur Tutup Usia.” *Kompas*, Desember 30, 2016.

General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25). Office of the High Commissioner for Human Rights, 1996.

Keputusan KPU Nomor 31 Tahun 2004 tentang Petunjuk Teknis Penilaian Kemampuan Rohani dan Jasmani Pasangan Calon Presiden dan Wakil Presiden dalam Pemilihan Umum Presiden dan Wakil Presiden Tahun 2004. Republik Indonesia, 2004.

Keputusan KPU Nomor 1004/PL.02.02-Kpt/06/KPU/VIII/2018 tentang Panduan Teknis Penilaian Kemampuan Rohani dan Jasmani Bakal Calon Presiden dan Wakil Presiden Republik Indonesia

- dalam *Pemilihan Umum Tahun 2019*. Republik Indonesia, 2018.
- Kwasi Prempeh, Henry. "Africa's Constitutionalism Revival: False Start or New Dawn?" *International Journal of Constitutional Law* 5, No. 3 (2007): 473.
- Liputan 6. "Riwayat Penyakit Gus Dur Dimulai 1985." *Liputan 6*, Desember 31, 2009.
- Lukito, Ratno. *Perbandingan Hukum: Perdebatan Teori dan Metode*. Yogyakarta: Gadjah Mada University Press, 2016.
- Lynch, C. J., "Traditional Leadership in the Constitution of the Marshall Islands", *Working Papers Series*, Center for Asian and Pacific Studies in collaboration with the Social Science Research Institute University of Hawaii at Manoa Honolulu, Hawaii, 1984.
- Manan, Bagir. *Membedah UUD 1945*. Ed. Moh Fadli. Malang: UB Press, 2012.
- New Straits Times*. "Vote for Health." *New Straits Times*, April 9, 2013.
- Prasetyo, Teguh. *Filsafat Pemilu*. Bandung: Nusa Media, 2018.
- Putusan Mahkamah Konstitusi Nomor 008/PUU-II/2004*. Republik Indonesia, 2004.
- Qodar, Nafiysul. "23 Juli 2001: Dekret Presiden, Perlawanan Parlemen, dan Celana Pendek Gus Dur." *Liputan 6*, Juli 27, 2019.
- Ratman, Desriza. *Rahasia Kedokteran: Di Antara Moral dan Hukum Profesi Dokter*. Bandung: Keni Media, 2016.
- S. Martinez, Jenny. "Inherent Executive Power: A Comparative Perspective." *Yale Law Journal* 115, No. 9 (2006): 2480-2511.
- Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002, Buku IV Kekuasaan Pemerintahan Negara, Jilid 1*. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010.
- Selwyn Kangsaputra, Leonardus. "Mengenal Glukoma, Penyakit Mata yang Menyerang Gus Dur." *Okezone*, November 24, 2019.
- Syarif, Mujar Ibnu. "Syarat Kesehatan Fisik bagi Calon Presiden dalam Perspektif Politik Islam dan Politik Indonesia." *Ahkam Jurnal Ilmu Syariah* 17, No. 1 (2017): 171-198.
- Tabaszewski, Robert. *From human rights to essential rights*. Józefów: Alcide De Gasperi University of Euroregional Economy in Józefów, 2017.
- Thaib, Dahlan, et al. *Teori dan Hukum Konstitusi*. Jakarta: RajaGrafindo, 2017.
- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Republik Indonesia, 1945.
- Undang-Undang Nomor 23 Tahun 2003 tentang Pemilihan Umum Presiden dan Wakil Presiden*. Republik Indonesia, 2003.
- Undang-Undang Nomor 42 Tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden*. Republik Indonesia, 2008.
- Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum*. Republik Indonesia, 2017.
- Weinberg, Ashley. "The mental health of politicians." *Palgrave Communications* 3, No. 17081 (2017): 1-4. <https://doi.org/10.1057/palcomms.2017.81>.

