

The Constitutionality of the Presidential Threshold on the 2019 Election in Indonesia: An Analysis on Constitutional Court Decision 72/PUU-XV/2017

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Abstract: Article 222 of Law Number 7 of 2017 concerning General Elections requires political parties to obtain a predetermined number of votes threshold to nominate candidates for President and Vice President in the presidential election based on the Panel of Justices of the Constitutional Court's decision to reject Law of Number 72/PUU-XV/2017. Law Number 7 of 2017 concerning General Elections has eliminated political parties' rights to participate in the general elections, especially new political parties participating in the 2019 general election. From a constitutional perspective, the presidential threshold is a constitutional system using the presidential elections because the presidential system is an open legal policy from the legislators. Law Number 7 of 2017 concerning General Elections regulates the political parties participating in the direct president and vice-president candidacy. In legal logic, simultaneous general elections will be flagged with the presidential threshold provisions. The implementation of the presidential threshold rule in the 2019 simultaneous elections is based on the Constitutional Court's decision not to grant the judicial review of article 9 of Law Number 42 of 2008 related to the presidential threshold, which raises two interpretations. First, the presidential threshold is deemed still needed in the 2019 simultaneous elections. Second, the presidential threshold is deemed no longer relevant to be used in the 2019 simultaneous elections. Then in the Constitutional Court decision No. 53/PUU-XV/2017, the Constitutional Court is adamant that even though the General Election is held simultaneously, the implementation of the presidential threshold is still relevant for use.

Keywords: *Presidential threshold; election; legality; constitutionality*

Abstrak: Norma Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum yang dimohonkan untuk diujikan secara khusus, yakni Pasal 222 tentang persyaratan Perolehan Suara Partai Politik untuk mengajukan Calon Presiden dan Wakil Presiden dalam pemilu, dengan Perkara Nomor 72/PUU-XV/2017 telah ditolak oleh Majelis Hakim Mahkamah Konstitusi. Dalam perspektif konstitusi, menggunakan atau tidak menggunakan *presidential threshold*

sesungguhnya tidak bertentangan dengan konstitusi, karena *presidential threshold* merupakan kebijakan hukum terbuka dari pembentuk Undang-Undang. Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum telah mengatur hak partai politik peserta pemilu serentak terhadap pencalonan presiden dan wakil presiden secara langsung. Secara logika hukum, pemilihan umum serentak dengan ketentuan *presidential threshold* memiliki legalitas atas dasar putusan Mahkamah Konstitusi. Implikasi aturan *presidential threshold* pada pemilu serentak 2019 didasari atas: *pertama*, *presidential threshold* secara konstitusionalitas masih berlaku untuk pemilu serentak 2019; *kedua*, *presidential threshold* dilandasi oleh konstitusionalitas putusan Mahkamah Konstitusi atas legalitas Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum. Dalam putusan Mahkamah Konstitusi Nomor 53/PUU-XV/2017, Mahkamah Konstitusi menegaskan bahwa meski pemilu digelar secara serentak, keberlakuan *presidential threshold* masih relevan untuk digunakan.

Kata kunci: *Presidential threshold; election; legality; constitutionality*

Introduction

This study discusses Law Number 7 of 2017 concerning General Elections requested in the 1945 Constitution. I focus, in particular, on Article 222 regarding the requirements for the Election of Political Parties to nominate Candidates for President and Vice President in elections, which proposed Applicant for Case Number 44/PUU-XV/2017, 53/PUU-XV/2017, 59/PUU-XV/2017, 70/PUU-XV/2017, 71/PUU-XV/2017 and 72/PUU-XV/2017. The dynamics of the emergence of a struggle for thought regarding the judicial review of Law Number 7 of 2017 concerning General Elections began with the same conceptions and views of the presidential threshold from various circle of politicians or political parties and academics the public civil society which they have a legal standing. Some of the reasons put forward by them are: *first*, Law Number 7 of 2017 concerning Simultaneous General Elections is contrary to the 1945 Constitution is contained in Article 22E paragraphs 1, 2, and 3 of the 1945 Constitution. The articles in the law and the 1945 Constitution contradict each other that the material needs to examine; *second*, the articles in the Law, namely article 222 Law Number 7 of 2017 contrary to Article 6A paragraph (2) and Article 22E paragraph (1) and (2) of the 1945 Constitution; *third*, a

person's constitutional rights as citizen countries that wish to advance as a presidential candidate from each political party will impose by the requirements for obtaining seats in parliament at least 20% (twenty percent) of the number of seats in the DPR or obtaining 25% (twenty-five percent) of the nationally valid votes in the previous election for members of the DPR contradicts the 1945 Constitution.

Article 22E of the 1945 Constitution clearly states that elections is held to elect the member of the DPR-DPD, President and Vice President, and DPRD. It is also emphasized in the Constitution once every five years. The enactment of Law Number 7 of 2017 concerning General Elections is contradict to the 1945 Constitution. In normative juridical terms, law enforcement is against a higher level of regulation. The provisions of Law Number 7 of 2017 concerning General Elections are contradict to amendments 1945 Constitution are contained in Article 6A Number 2 of the 1945 Constitution says: the pair candidate of President and vice-President are proposed by political party or coalition of political parties that join the general election before its exercise. Article 6A Number 2 Amendment explains that every political party participating in the general election has the same rights and opportunities to nominate presidential and vice-presidential pairs. In legal logic, new political parties participating in the general election will simultaneously flag the presidential threshold.¹

From the Constitutional Court's decision, it could be seen that the election of the Presidential and Vice-Presidential is no longer held after the legislative general elections. It has regulated in the Article 6A paragraph (2), the second election phrase in Article 22E (2) of the 1945 Constitution says: The candidate pairs for President and Vice President are proposed by political party or coalitions of political parties participating in the general elections before the implementation of the general elections. Article 22E paragraph (2) says: General elections are held to elect members of the House of People's Representatives, Assembly at Provincial, Leadership of

¹ Suparto, "Presidential Threshold Between the Threshold of Candidacy and Threshold of Electability," *Jurnal Cita Hukum* 6, no. 1 (2018), pp. 95–108.

Political Party at Provincial, President and Vice President and the Regional House of Representative.

The Constitutional Court considers that by holding the Presidential Election and the General Election for Representative Assembly members in the simultaneous general election, the provisions of the article requirements for the votes acquired by political parties as a condition for nominating presidential and vice-presidential candidate pairs are the authority of the legislator's law while still based on the provisions of the 1945 Constitution. It means that Article 9 of regulates the Presidential Threshold was not granted by the Constitutional Court so that the 2019 simultaneous elections was held simultaneously but must also used the presidential threshold as a reference for nomination.

The previous description shows that Law Number 42 of 2008 concerning the presidential election and those related to organizers, election participants, and the DPR RI, DPD, and DPRD (*Kab/Kota*) elections then revised by the DPR's Commission II into Law Number 8 of 2012² concerning Election, Law Number 15 of 2011 concerning Election Organizers, and Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 on Political Parties, there is a constitutional substance controversy with the 1945 Constitution Article 6 A Paragraph 2 and Article 22 E Paragraphs 1, 2 and 3. Why does the judicial review of Law Number 42 of 2008 Regarding the Presidential Election was granted by the Constitutional Court? What is the impact of the judicial review of Law Number 42 of 2008 on the presidential election and vice president of the organizers of the election in Indonesia simultaneously but must also use the presidential threshold as a reference for nomination?

Juridically, this law could not be implemented, because, it contradicts a higher level of regulation. The provisions of Law Number 7 of 2017 concerning General Elections are contrary to the amendments to the 1945 Constitution are in Article 6A Number 2 of the 1945 Constitution reads: general election." Explains that every

² The Republic Indonesia's Law Number 8 of 2012 of General Election for House of People's Representatives, Assembly at Provincial, and Leadership of Political Party at Provincial.

political parties that participate the general election have the same rights and opportunities to nominate presidential and vice-presidential pairs. In legal logic, new political parties that participate in the general election will simultaneously flag the presidential threshold.

But, in the Presidential Election Law, the election of DPR members was held before the presidential election. Article 22E of Constitution 1945 clearly states that the election is hold to elect legislative members, the President-Vice-President, and the DPRD. It also emphasized that the election constitution is held once every five years. From the previous description, this research will analyze: *first*, the relevance of the presidential threshold on general election 2019 in Indonesia; *second*, the implications of the Constitutional Court Judge Law Number 7 of 2017 concerning General Elections to President and Vice President in General Election 2019?

Based on I Gusti Ngurah's (2013) journal entitled *Rethinking Ketentuan Persentase sebagai syarat pencalonan Presiden dan Wakil Presiden di Indonesia*.³ He explains that, in the legal language, there is no terminology for the term of Presidential Threshold. A large dictionary of English and Indonesian can help translate threshold terms. The term presidential comes from the word president, which the Black Law Dictionary defines, namely the chief executive of a nation, especially in government in the form of democracy. Furthermore, the threshold that comes from English is the threshold, where the Big Dictionary The Indonesian language defines a threshold as a level of a threshold still acceptable or tolerated.⁴

According to Sigit Pamungkas (2009), the presidential threshold is the level set for support from the DPR, both in terms of the number of votes (ballot) or the number of seats acquired by a political party election participants to be able to nominate the President of the political party or with a coalition of political parties.⁵ I Dewa Made Putra Wijaya (2014), in his journal article entitled *Mengukur Derajat*

³ I Gusti Ngurah Agung Sayoga Raditya, "Rethinking Ketentuan Persentase sebagai Syarat Pencalonan Presiden dan Wakil Presiden di Indonesia," *Jurnal Magister Hukum Udayana* 2, no. 3 (2013), p. 4.

⁴ *Ibid.*, p. 4.

⁵ Sigit Pamungkas, *Perihal Pemilu* (Yogyakarta: Laboratorium Jurusan Ilmu Pemerintahan dan Jurusan Ilmu Pemerintahan Fisipol UGM, 2009), p. 19.

Demokrasi Undang-Undang Nomor 42 Tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden,⁶ views that the presidential threshold is related to the parliamentary threshold policy which replaces the electoral threshold. This presidential threshold is one way to strengthen the presidential system through the simplification of political parties. The goal is to create a stable government and does not cause the governing government to have difficulty picking up a policy with the legislature.

In other views, Dwi Rianisa Mausili (2019) explores that the reinforcement presidential system effort is still carried out, one of which is the rule of threshold number in Article 222 of Law Number 7 of 2017 about General Elections. However, the presidential threshold (threshold number) is assumed to strengthen the Indonesian government system, presidential system and experience anomalies, irrational and irrelevant. With the presidential threshold, political parties can nominate the presidents and the vice by provision of political party or joint political party having 20% of seats or 25% of nationally legitimate votes in the previous legislative elections.⁷

As a general custom in the President of the Republic Indonesia's Presidential Threshold election is a term that is often correlated with Article 9 of Law Number 42 the Year 2008 concerning Elections General President and Vice President (Presidential Election Law). Article 9 of the Presidential Election Law did not explicitly emphasize the presidential threshold terminology, however, it become a common habit in Indonesia to mean that presidential threshold, namely the requirements for presidential candidates and vice president to run in the general election. These conditions, namely seat acquisition of at least 20 per cent of the number of seats in the DPR-RI or obtaining 25 percent of the national votes in the election for members of the DPR-RI, before the implementation of the Presidential and Vice-Presidential Election.

⁶ I Dewa Made Putra Wijaya, "Mengukur Derajat Demokrasi Undang-Undang Nomor 42 Tahun 2008 Tentang Pemilihan Umum Presiden dan Wakil Presiden," *Jurnal IUS* 2, no. 6 (2014), p. 564.

⁷ Dwi Rianisa Mausili, "Presidential Threshold Anomaly in Indonesian Government System: Parleментар Reduction in Indonesian Presidential System," *Bappenas Working Papers* 2, no. 1 (2019), p. 31.

Theoretically, the threshold is the minimum level of support must be obtained to place representatives and in general developed in countries that use the electoral system proportional representation. The presidential election is determined in Article 159 paragraph (2) and (3) of Law Number 42 of 2008 using the system plurality/majority with a two-round system variant combined with the terms of the distribution of votes based on Article 159 paragraph (4) and (5) of Law Number 42 of 2008 based on these principles the presidential threshold was not by the system used in the presidential and vice-presidential elections.⁸ The meaning of Presidential Threshold is a rule of a game of tools that determines which political party can nominate a candidate presidential and vice-presidential pair in the election. The parties criticized the presidential threshold, one of them is small parties whose votes do not fulfill the presidential requirements, or small parties that consider this mechanism is contradict to the constitutional rights of citizens. However, there are options for parties that do not meet the Presidential Threshold provisions to join other political parties by uniting ideologies and the national ideals they carried out.⁹

The presidential threshold is defined as setting the threshold for support from the DPR, either in the form of the number of votes acquired (ballot) or the number of seats acquired by political parties participating in the election to nominate the president from the political party or coalition of political parties. Meanwhile, according to R. Kartawijaya (2016), the Presidential Threshold is a requirement for a presidential candidate to be elected president. For example in Brazil 50 percent plus one, in Ecuador 50 percent plus one or 45 percent from a 10 percent difference from the strongest rivals, in Argentina 45 percent or 40 percent from 10 percent different from the strongest rivals and so on.¹⁰

The study of a political constitution is a branch of political or state science. Countries, of course, are distinguished based on

⁸ The Republic Indonesia's Law Number 42 of 2008 of President and Vice-President Election.

⁹ *Ibid.*, p. 34.

¹⁰ Lutfil Ansori, "Telaah terhadap Presidential Threshold dalam Pemilu Serentak 2019," *Jurnal Yuridis* 4, no. 1 (2017), pp. 15–27.

variations in composition and relations between the three power of government. A modern constitutional state is a country that has produced laws and conventions recognized to carry out the third functions of the governmental states - about modern constitutional discussed further later.¹¹

James Bryce¹² defines the constitution as "a framework of political (state) society organized with and through the law. In other words, the law stipulates the permanent institutions with functions recognized and the rights established. The constitutions call for a collection of governing the power and the rights of people. The law can be a written note; the law can find the form of documents that can be amended or amended according to the needs and development of the times, or the law can also form a separate set of law and has special authority as constitutional law.¹³

It is that the foundations of the constitution are stipulated in one or two basic laws while the rest depends on the authority or power of customary. In other words, legal decide the regular institutions permanent with the function recognized and the rights established¹⁴. The constitutions define a set of principles that organize government power and civil rights. The law is a discovered rule in the document amended according to the needs and situations. The constitution can also take the form of separate laws and has special authority as constitutional law. The rule defines in one or two rules depends on the power authority of customs or habits.¹⁵

Base on the previous description, the constitution can be defined as functions of political, social, and economic control at this

¹¹ C.F. Strong, *Konstitusi-Konstitusi Politik Modern: Kajian Tentang Sejarah dan Bentuk-Bentuk Konstitusi Dunia*, (Bandung: Nusa Media, 2008), p. 15.

¹² M. Zainor Ridho, *Pengantar Ilmu Politik*, (Malang: Intrans Publishing, 2019), p. 18.

¹³ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara II*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2006), p. 30.

¹⁴ Miriam Budiardjo, *Dasar-dasar Ilmu Politik*, 25th Edition, (Jakarta: PT Gramedia Pustaka Utama, 2003), p. 54.

¹⁵ Masdar Farid Mas'udi, *Syarab UUD 1945 Perspektif Islam*, New Edition (Jakarta: Pustaka Alvabet, 2013), p. 45.

moment and as a means of political, social, and economic towards the future. Thus, these are details function of the constitution:¹⁶

1. The function of determining and limiting the power of state organs.
2. The function of regulating power relations between state organs.
3. The function of regulating power relations between state organs and citizens.
4. The legitimacy for state power or the activities of the administration of state power.
5. The channeling or transferring authority from the source state (which is a democratic system is the people to the state organs).
6. Symbolic function as a unifier (symbol of unity).
7. The symbolic functions as a reference for identity and national greatness (the identity of a nation).
8. The Symbolic functions as the center of the ceremony.
9. The functions as a means of community control (social control).
10. The functions as a means of engineering and community reform (social engineering or social reform), both in a narrow and broad sense.

Democracy is a political system appropriates from Greek philosophers. But in the mid-20th century, the meaning of democracy have been going through a paradigm shift: *first*, democracy is a form of government; *second*, democracy is being understood based on the source of authority for the government; and *third*, democracy is one of the procedures to form a government.¹⁷ The main procedure of democracy is the election of political leaders competitively by the people through direct elections. Here, Joseph A. Schumpeter defines democracy with the terms "the will of the people" (source) and the

¹⁶ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, 2nd Edition, (Jakarta: Sinar Grafika, 2011), p. 27.

¹⁷ Samuel P. Huntington, *Gelombang Demokratisasi Ketiga* (Jakarta: Graffiti, 2000), p. 41.

"common good" (purpose). Therefore, according to Schumpeter democracy is called a democratic method. Schumpeter's democratic method is:¹⁸

Institutional arrangements to arrive at political decisions that recognize the general good by making people decide their problems through the selection of individuals to gather to carry out their will.¹⁹

This description shows that democracy has two dimensions, namely contest dimensions and participation. Democracy also implies the existence of civil and political freedom, namely the freedom to speak, publish, assemble and organize what is necessary for political debate and the implementation of election campaigns.²⁰

In addition to these two dimensions, in the history of democratic theory, there is a very sharp difference in whether democracy must mean a type of power or a form of representation of power. From this difference, three main types of model of democracy have emerged:²¹ *first*, deliberative democracy or participatory democracy, a system of decision-making regarding public problems where citizens are directly involved; *second*, there is liberal democracies or representative democracies. This government system includes selected "officials" who carry out the task of "representing" the interests or views of citizens in limited areas while still upholding the "rule of law;" and *third*, democracy is a one-party model.

On the other hand, Anthony Giddens called it direct democracy or a participatory democracy in deliberative democracy. Deliberative democracy contrasts with liberal democracy or representative democracy. According to Giddens, deliberative democracy is a way to reach an agreement on policies or decisions in the political area desired by society. Democracy is closely related to elections because

¹⁸ Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (Yogyakarta: Pustaka Pelajar, 2013), p. 410.

¹⁹ *Ibid.*, p. 411.

²⁰ Fanz Magnis Suseno, *Mencari Sosok Demokrasi: Sebuah Telaah Filosofis* (Jakarta: PT Gramedia, 1997), p. 67.

²¹ David Held, *Demokrasi dan Tatanan Global: Dari Negara Modern hingga Pemerintahan Kosmopolitan* (Yogyakarta: Pustaka Pelajar, 2004), p. 10.

elections are the embodiment of the sovereignty principle. The people are given the freedom to determine candidates for people's representatives who are political party members²². According to Lyman Tower Sargent (2014), states that a democratic country must fulfil several elements,²³ namely:

1. Citizen that involved in political decision making
2. citizen equality.
3. The guarantee of equality, liberty and freedom for citizen.
4. The existence of a delegation system.
5. The existence of rules for general election system.

Democracy has the potential to provide something good for humans, especially in the face of repressive power and the people are seem to be have equality in politics. Equality in politics could be obtained through equal rights and opportunities for every citizen or political party in the general election process.

The method used in this article is normative legal research methods. Normative legal is a process to find a rule, legal principles, and doctrines of the law to address the legal issues at hand. The study is the argument, theory, or the new concept as a prescription in solving the problems. Normative legal is research that uses the law as the foundation of the norm. It means that research based on library research focusing on reading and analyzing the primary and secondary materials. This research describes the case, seeks, and processes various data from the document of library study to generate research findings. The conclusion is to identify the concept, principles, and legal principles.²⁴

²² Anthony Giddens, *Beyond Left and Right: Tarian "Ideologi Alternatif" di Atas Pusara Sosialisme dan Kapitalisme* (Yogyakarta: IRCiSoD, 2003), p. 182.

²³ *Ibid.*, p. 185

²⁴ Abdulkadir Muhammad, *Hukum dan Penelitian Hukum* (Bandung: PT. Citra Aditya Bakti, 2004), p. 53.

Presidential Threshold: Between Legality and Constitutionality of General Election President and Vice President

After reading the Constitutional Court's decision to judicial review law number 42 in 2008, since 23th of January 2014, some of the articles do not have a legal force. So from the date, the Constitutional Court Decision was read, namely 23th of January 2014 Articles or paragraphs in Law Number 42 of 2008 which was declared to be contradictory to the 1945 Constitution which no longer has legal force, such as the ruling below:

1. Partially granted the applicant's petition:
 - a. Article 3 paragraph (5), Article 12 paragraph (1) and (2), Article 14 paragraph (2), and Article 112 Law Number 42 of 2008 concerning General Elections of the President and Vice President (State Gazette of the Republic of Indonesia 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924) contradicts the 1945 Constitution of Indonesia.
 - b. Article 3 paragraph (5), Article 12 paragraph (1) and (2), Article 14 paragraph (2), and Article 112 Law Number 42 of 2008 concerning General Elections of the President and Vice President (State Gazette of the Republic of Indonesia 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924) does not have binding legal enforce.
2. The first previous decision applied in the administration of the 2019 general election and the next general election;
3. Refusing the others applicant's petition;
4. Order the proper loading of this decision in the State Gazette of the Republic of Indonesia.

The Legislative General Election must be held simultaneously as the Election of the President and Vice President, including the Nomination of the President and Vice President must be conducted before the General Election. However, the Constitutional Court's decision will only be implemented in the 2019 Election with consideration of technical reasons that do not allow it to be implemented in the 2014 Election. In addition, there is one article

that is closely related to the judicial review that is rejected, that is article 9, which says:

Candidate Pairs are proposed by Political Parties or Joint Election Political Parties that meet the requirements for seat acquisition of at least 20% (twenty percent) of the number of DPR seats or obtain 25% (twenty five percent) of national legitimate votes in the election of DPR members, before the implementation of the Election of the President and Vice President.

Because of article 9 was rejected by the Constitutional Court, it is mean that Article 9 is still be valid. While in article 9 clearly contains the requirements that could only be done if the Legislative Election is held separately and precedes the Presidential Election. In addition there are phrases that clearly state that the DPR member elections are held before the election of the President and Vice President.

The similar opinion was also conveyed by Yusril Ihza Mahendra, that every decision of the Constitutional Court that had been appended and read out was automatically valid since the panel of judges pronounced it. But in the context of the presidential election judicial review ruling, the Constitutional Court ordered that simultaneous elections (meaning in accordance with the Constitution) be carried out in 2019. Because the foundation for the implementation of the 2014 Election is inconsistent, the results of the upcoming 2014 election are also constitutional. Consequently, the DPR, DPD, DPRD, and the President and Vice-President that elected in the 2014 general election are also unconstitutional.

The Constitutional Court (MK) rejected the judicial review of the presidential threshold that stated in Law Number 7 of 2017 concerning General Elections (Election Law). One of the Decisions Number 49/PUU-XVI/2018 is "To completely reject the applicant's Petitions," because the petition is not based on the law/legal reasoning or is groundless according to law. In its consideration, the Court feels that it has no reason to change its stance on previous decisions, including the Constitutional Court decision Number 51-52-59/PUU-VI/2008, Constitutional Courts decision Number 53 /PUU-XV/2017. The Court thinks that Article 222 of the Election Law constitutes constitutional engineering, not constitutional breaching as stated by the petitioners. The Constitutional Court's

decision regarding the constitutionality of Article 222 of the Election Law contained in the previous decision was based on a comprehensiveness consideration that the nature of the presidential government system by the design of the 1945 Constitution. According to the Court, has no change in the constitutional courts of the 1945 constitution evidence of the law amendment as a further regulation in the constitutionals system. Therefore, Article 222 of the Election Law does not contradict the 1945 Constitution as in the previous Constitutional Court Decisions.

In the Constitutional Court decisions Number 53/PUU-XV/2017, the Constitutional Court rejected the review of the Election Law Article 222. The Constitutional Court also refers to the previous Constitutional Court decision Number 51-52-53/PUU-VI/2008 concerning judicial review of Article 9 of Law Number 42 of 2008 concerning the Presidential Election considered relevant. The Constitutional Court assessed the threshold for presidential candidacy as an open legal policy for legislators. The Court argued that the presidential norm for proposing presidential and vice-presidential candidates had nothing to do with the legal existence of regulating the separation of the implementation of the legislative and presidential elections. Instead, the two have put together to create an ideal government system. The presidential nomination threshold is considered to reflect the socio-political legitimacy, the diverse representation of society. Therefore, Article 222 of the Election Law does not contradict the 1945 Constitution and is not discriminatory.

The theoretical argument of the constitutionality of the requirements regarding the threshold the minimum limit of votes acquired by a political party (or coalition of parties politics) to be able to nominate candidates for President and Vice President is not derived from the logic of joining or separating elections to elect the President/Vice President by Election to vote members of the DPR, DPD, and DPRD but from theoretical arguments for strengthening the presidential system in the sense of realizing the system and governance practices that are increasingly closer to the ideal

characteristics of the system The presidential government prevent the exact model that shows the kinds of the Parliamentary system.²⁵

The presidential nomination threshold is injustice for new political parties that could not nominate candidates for president/vice president and proposed confusion in the presidential and parliamentary systems. The stipulation on the presidential threshold of 20 percent contradicts Article 22E, Article 27, and 28 of the 1945 Constitution should guarantee equal rights to every political party participating in the elections to nominate candidates for president and vice president. The Legislative election determines the president or the vice-presidential nomination will undermine the logic of the presidential system. Because the presidential system is the mandate given separately, respectively the legislature and executive. The results of legislative elections determine the threshold in executive elections, the form of government has a parliamentary system (features). That is maintaining a presidential system in the process of filling executive positions imposes the logic from the parliamentary to the presidential system.

The desire to synchronize the simultaneous election model is a mandate from the presidential system of government in the Unitary State of the Republic of Indonesia based on the 1945 Constitution after the amendment. Simultaneous elections are only applied to the legislative and presidential elections, while local elections and regional elections are not carried out with it. It will lead to confusion over the system of government adopted and the consequences will jeopardize the course of effective governance.²⁶

At this point, it can be ascertained that 9 constitutional judges will be overwhelmed in handling disputes over election results. In fact, as stipulated in the Election Law and procedural law in the Constitutional Court, the dispute over election results is limited in time. Therefore, it is an obligation to review Law Number 23 of 2004 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning the third amendment to the Constitutional Court

²⁵ Muhammad Alim, *Asas-Asas Negara Hukum Modern dalam Islam: Kajian Komprehensif Islam dan Ketatanegaraan* (Yogyakarta: LKiS, 2011), p. 25.

²⁶ Valina Singka Subekti, *Menyusun Konstitusi Transisi: Pergulatan Kepentingan dan Pemikiran dalam Proses Perubahan UUD 1945* (Jakarta: Rajawali Press, 2008), p. 120.

Law. This review aims to increase the number of constitutional judges or establishing special election courts in the jurisdiction of the Supreme Court (MA) or the Constitutional Court (MK) and can make their representation in several provinces and criminal acts of corruption.

The Implication of Presidential Threshold of President And Vice-President in General Election 2019

The presidential election before the amendment to the 1945 Constitution showed that the presidential election was carried out with representative democracy, while direct democracy in the presidential election in Indonesia began after the amendment of the 1945 Constitution, which is based on the provisions of the amendment results in article 6A of the country, namely regarding with a general election, which is regulated in the 1945 Constitution Article 22E paragraph (2) which reads:

General elections are held to elect members of the House of Representatives (DPR), Leadership of Political Party at Provincial (DPD), President and Vice President and the Assembly at Provincial (DPRD).²⁷

The enactment of Law Number 7 of 2017 concerning General Elections is contrary to the 1945 Constitution. Juridically, this law cannot be enforced because it contradicts higher regulations. The provisions of Law Number 7 of 2017 concerning General Elections which are contrary to the amendments to the 1945 Constitution are contained in Article 6A Number 2 of the 1945 Constitution which says: the candidate for President and Vice President are proposed by political party or the coalition of political parties that participate in the general election before its exercise. Article 6A Number 2 Amendment to the 1945 Constitution explains that every political party that participate in the general election have the same rights and opportunities to propose president and vice-president pairs.²⁸

²⁷ Post-Amendment of The 1945 Constitution of The Republic of Indonesia.

²⁸ Abdul Ghoffar, "Problematika Presidential Threshold: Putusan Mahkamah Konstitusi dan Pengalaman di Negara Lain," *Jurnal Konstitusi* 15, no. 3 (2018), pp. 480–501.

The mechanism for proposing presidential candidates based on the constitution's provisions tends to be representative democracy represented by the winning political party. Political parties in the parliament must constitutionally propose the candidates for President and then the presidential candidates are directly elected by the people (direct democracy). This conception shows that the Indonesia state in the presidential election system adheres to the principles of constitutional democracy, the freedom of every citizen, every citizen's right is regulated by the state's constitution.²⁹

Thus, in Indonesia, the rights is guaranteed in the presidential electoral system and the presidential candidate nominate the winning political party by regulation. Besides, the political parties propose the presidential candidate in the presidential election law. A presidential threshold is required, it means that there is an institutional threshold for Presidential candidates which injures the principles of constitutional democracy itself. The emergence of threshold provisions refers to the balance between the parliament and the President in the principle of check and balance, that in the running of government there must be a balance between the legislature and the executive. Check and balance is an essential element stipulated in the constitution on the principle of separation of powers so that certain powers do not have full power. A balance in government is necessary to achieve the stated goals of the government.³⁰

The enactment of Law Number 7 of 2017 concerning General Elections has eliminated the rights of political parties that participate in the general election simultaneously, especially new political parties participating in the 2019 general election and beyond due to the provisions of Article 222. In legal logic, new political parties participating in the general election will simultaneously be flagged with the presidential threshold provision.

Regarding the provisions of Article 9 of Law Number 42 the Year 2008, the Constitutional Court considers that the election and the General Election for Representative Council members requirements for political party vote as a condition for nominating a

²⁹ *Ibid.*, pp. 480-501.

³⁰ Fuqoha, "Pengisian Jabatan Presiden dan Presidential Threshold dalam Demokrasi Konstitusioanal di Indonesia," *Jurnal Ajudikasi* 1, no. 2 (2017), pp. 27-38.

President and Vice-President candidate depend on the legislators elected. The law is still based on the provisions of the 1945 Constitution. This means that article 9 which regulates the Presidential Threshold was not granted by the Constitutional Court so that the 2019 simultaneous elections are held simultaneously but must also use the presidential threshold as a reference for nomination.³¹

In the Indonesia's general election, the presidential threshold was first introduced in the presidential election in 2004. Through the Law Number 23 of 2003 concerning the General Election of the President and Vice President, the government implemented new rules for the 2004 presidential election.³² In its practice in Indonesia so far, the Presidential threshold is interpreted as the acquisition of votes in legislative elections or the acquisition of a certain minimum number of seats in parliament as a condition for nominating candidates for president and vice president or the threshold for presidential and vice president nominations.

The pros and cons of the presidential threshold implementation in the 2019 simultaneous elections, the Constitutional Court decision that did not grant the judicial review of article 9 of Law Number 42 of 2008 related to the presidential threshold led to two interpretations: *first*, the presidential threshold is considered as still necessary in the 2019 simultaneous elections; *second*, the presidential threshold is deemed no longer relevant to be used in the 2019 simultaneous elections. Then, in the Constitutional Court decision Number 53/PUU-XV/2017, the Constitutional Court is adamant that even though elections are held simultaneously, however, the implementation of the presidential threshold is still relevant to be used.³³

The authors argue that concerning the 2019 general election is irrelevant if the presidential threshold is still enacted in the 2019 simultaneous elections. The presidential threshold used as a reference

³¹ M. Faishal Aminuddin, "Dimension Assessment in Democratic Indonesia Electoral System and Party Dimension Assessment in Democratic Indonesia," *Jurnal Ilmu Sosial dan Ilmu Politik* 20, no. 1 (2016), pp. 1–15.

³² The Republic Indonesia's Law Number 23 of 2003 of President and Vice-President Election.

³³ Decision of The Constitutional Court Number 53/PUU-XV/2017.

in the 2019 simultaneous election must refer to the results of the 2014 election. From this, it could be seen that there are differences in treatment for political parties participating in the 2014 elections and political parties that will only participate in the 2019 election contest.

Based on the previous prescriptions, there are several views regarding the implications of the presidential threshold implementation in the 2019 election, namely as follows:

1. The Constitutional Court Decision Number 14/PUU-XI/2013 has mandated that the legislative and presidential elections starting from 2019 must be held simultaneously. With the legislative and presidential elections being held simultaneously, it is irrelevant that a presidential threshold number as a condition for proposing presidential-vice presidential candidates. Moreover, suppose the presidential threshold number must refer to the 2014 election. That case will lead to differences in the treatment of the political parties that have participated in the 2014 elections, and that have just participated in the 2019 elections. In fact, democratic elections require equal treatment for all election participants. Both old and new political parties must be treated the same as supporting the president and vice president candidates.³⁴
2. In fact, the constitution article 6A paragraph (2) of the 1945 Constitution clearly stipulates that the President and Vice-President candidates who can participate in the election are "the pair of candidates for President and Vice President proposed by a political party or coalition of political parties that participate in the general election before the implementation of the general election." Through this article, constitutionally, it has been outlined that political party or coalitions of political parties participating in the elections can produce a pair of president and vice-presidential candidates. If a new political party has registered as a participant in the election, they can automatically propose a president and vice-president candidate.

³⁴ Jamaludin Ghafur and Allan Fatchan Gani Wardana, *Presidential Threshold: Sejarah, Konsep, dan Ambang Batas Persyaratan* (Malang: Intrans Publishing, 2019), p. 231.

3. If the presidential threshold is raised again, it is clear that the policy violates Article 6A paragraph (2) of the 1945 Constitution, the article is following the original intent, outlining that the conditions for submitting Presidential and Vice-Presidential Candidates are proposed by political party or coalitions of political parties that participate before the general election. There should be no further provisions to expand the meaning of Article 6A paragraph (2) of the 1945 Constitution.³⁵

The legal issue that occurs in the holding of the 2019 simultaneous general election onwards is maintaining the presidential threshold based on the previous general election results. Maintaining the presidential threshold stipulated in article 222 of Law Number 7 the Year 2017 concerning General Elections has implications and discriminates against new political parties participating in the general election.

The enactment of Law Number 7 of 2017 concerning General Elections. has an injustice impact on new political parties as participants in the general election simultaneously. Law Number 7 of 2017 concerning General Elections is not principled by the rule of the game of fair elections. This is reflected in Article 222, which says:

Candidate Pairs are proposed by Political Party or coalition of Political Parties joining general election that meet the requirements for obtaining seats at least 20% (twenty percent) of the total seats in the House of Representative (DPR) or obtaining 25% (twenty five percent) of the valid votes nationally in the previous General Election for DPR members.³⁶

Article 222 has unilaterally benefit for political parties that had seats in the DPR in the 2014 general election. Whereas in the general elections in the same year there are also new parties that constitutionally have the same opportunity to nominate presidential and vice-presidential pairs. It is based on the provisions of Article 6A Number 2, which reads:

³⁵ *Ibid.*, pp. 217-220.

³⁶ Indonesia's Law Number 7 of 2017 of General Election.

The pair candidate of President and Vice-President are proposed by the political party or coalition of political party that participate the general election before its exercise.³⁷

These are several alternatives to achieve the presidential threshold: *first*, by changing the system of government. This choice can be said is difficult, even if we said it is impossible to do. Apart from the traumatic experiences that Indonesia have experienced during parliamentary democracy, the 1945 Constitution explicitly mandated that the Indonesian government system is presidential. It is not easy to amend the Constitution, it will require length debate and is sure to get enormous resistance if the choice is very unrealistic to be chosen; *second*, simplifying the party system. America is one of the countries that implementing a successful presidential system with a bi-party system. If Indonesia wants to imitate America in managing its political system that transforms the multi-party into a bi-party system, this solution also seems difficult to realize because it will go against the current democracy. Indonesian society is plural in nature and will not be able if it represented by two political parties only; *third*, reducing the number of political parties. Too many political parties is also a contributing factor to the ineffectiveness of the government system in Indonesia. Several political parties in the elections led to a coalition built to run for president and vice president because it involves many political parties. The grease of this coalition resulted in a coalition-generated government that cannot be effective because it has to consider many interests. The president-elected should ideally get parliamentary support 50% of the number of seats in the DPR and The number of parties that joined in a coalition was not much or three parties.

Conclusion

The presidential threshold system pattern will become a presence for political party organizations. If the presidential system is still in effect, then before holding general elections simultaneously, political parties will ideally be determined. Partisanship, the presidential threshold is abolished, so automatically, every political

³⁷ Post-Amendment of The 1945 Constitution of The Republic of Indonesia.

party has a system to submit proposals for the president and vice president without forming a coalition. It means, that to realize the concept of having presidential rights with moderate multi parties (simple) in general elections that are simultaneously difficult to reach.

The enactment of Law Number 7 of 2017 concerning General Elections is contrary to the 1945 Constitution. Juridically, this law cannot be enforced because it contradicts higher regulations. The provisions of Law Number 7 of 2017 concerning General Elections that are contrary to the amendments to the 1945 Constitution are in Article 6A Number 2 of the 1945 Constitution which reads: "general election". Article 6A Number 2 Amendment to the 1945 Constitution, explains that every political party participating in the general election has the same rights and opportunities to nominate presidential and vice-presidential pairs.

Therefore, the results of this study can encourage several recommendations: *first*, holding presidential and legislative elections together (Concurrent Elections will create that governance effectively. With simultaneous elections, the elected president will get strong legitimacy from the people and get strong support from parliament; *second*, the political parties participating in the general election in the future will indeed be parties that are ideologically strong and have a large mass base to produce strong leaders from all aspects. There is also necessary to establish a Political Party Supervisory Agency so that it is more focused on the recruitment system for political party cadres, the ideology of political parties adopted, and the selection of election parties worthy of participating in general elections.

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