

## Axiology of Presidential Threshold System Post-Decision of the Constitutional Court in Legal Political Review in Indonesia

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**Article History**

*Received: 05.02.2018*

*Accepted: 15.02.2018*

*Published: 28.02.2018*

**DOI:**

10.21276/sjhss.2018.3.2.13



**Abstract:** Elections are part of the implementation of democratic principles whereby the people can elect a state leader or his representatives who make a policy based on the will of the people outlined by the head of state or the people's representatives. The nature of elections is a means of democracy that primarily serves a state government by, from, and for the people. In other words, it embodies the sovereignty in the hands of the people within the framework of a democratic constitutional state. Democracy in Indonesia is a constitutional norm. For democracy to be able to rotate by the axis of the constitution, then democracy must be maintained. The problem that will be the focus of attention of this paper is the axiom of the presidential threshold system after the Constitutional Court's decision to bring the system of government in Indonesia. The political legality of the presidential threshold system is not inconsistent with the constitution in Indonesia. The purpose of this paper is to know the direction of the legislative and presidential election system in 2009 and 2014 in the decision of the Constitutional Court and the political implications of the Constitutional Court decision on the legislative and presidential election system in 2009 and 2014. This research method will examine the subject matter through a case approach. It examines the ratios in the decisions of the Constitutional Court which are the object of research and the approach of legislation. The abolition of presidential threshold provides significant benefits in Indonesia's democratic system. This policy can be a restoration of constitutional rights that were previously hurt by the remedy of constitutional rights. Many advantages will be obtained especially from small parties to carry the presidential candidate. Also, the president's choice is also more diverse. Presidential threshold will make it easier for the president to carry out government duties, due to the absence of other dominant party interventions in parliament.

**Keywords:** Axiology, Presidential Threshold, Political Law.

### INTRODUCTION

The third amendment of the UUD 1945 states that Indonesia is a legal state. Democracy is closely linked to the principle of administering the rule of law on the ground that in democratic literacy election is one of nine principles of the rule of law [1, 4, [20, 21]. The general election of the people is part of the implementation of the principle of democracy in which the people may elect the state leaders or their representatives who are entitled to make a policy based on the will of the people outlined by the head of state or the people's representatives. The nature of elections is as a means of democracy which essentially holds a state government by, from, and for the people. In other words, embody sovereignty in the hands of the people within the framework of a democratic constitutional state. Constitutional norms frame democracy in Indonesia. Therefore, for the democratic clout to spin

according to the axis of the constitution, then democracy must be maintained [2, 3]. Juridically the state of Indonesia has held four times post-reform elections indicating some rules must change compared with the new order era. Implementation of the election cannot be separated from the applicable legislation. Elections in 2009 refer to 4 laws relating to the holding of elections while the last election held is elections in 2014. The election refers to the four laws relating to the holding of elections.

According to Mahfud [5], a law is a political product so that when discussing legal politics tend to describe the political influence on the law or the influence of political system on the development of law. The political law also includes an understanding of how politics affects law by looking at the configuration of forces behind law enforcement. The birth of the 2009

and 2014 election laws is inseparable from the political configuration [6-9]. The implementation of the 2009 and 2014 elections is an election that coincides with the unified Indonesia cabinet era. Both elections have a legal and configuration politics that is reflected in the system and its implementation. A configuration of strengths and interests within the legislature and external interventions cannot be ignored in the formation of laws. Groups conduct these interventions with social, political and economic power [10, 11, 22]. In Law Number 42 Year 2008 regarding General Election of President and Vice President, from now on referred to as the Presidential Election Law. There are technical matters governed to hold the election of the President and Vice President. One of them is about the technic of nominating the President and Vice President.

There are provisions in Article 1 paragraph (4), Article 8, Article 9, and Article 13 paragraph (1) of the Presidential Election Law. When reading simultaneously, it can be understood that the only mechanism or pathway to become a presidential and vice presidential candidate is through a proposed political party or a coalition of political parties participating in the election. The right to nominate a presidential and vice-presidential pair is an exclusive right of the party to the election and is not permitted or unlikely for the presidential and vice-presidential couples to be taken individually. Article 9 of the Presidential Election Law states that the pair of candidates for President and Vice President shall be nominated by a political party or a coalition of political parties participating in the election meeting the requirements for the seats. At least 20 percent of the total seats of DPR-RI or get 25 percent of the national valid votes in the General Election of members of DPR-RI prior to the election of President and Vice President [13-16]. This means that under the positive law of Presidential Threshold in Indonesia 25 per cent of the national legitimate vote of legislative election results or 20 per cent of elected parliamentary seats.

Article 6A Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia states that "A couple of candidates for President and Vice President shall be nominated by a political party or a coalition of political parties participating in general elections prior to the election." Under this provision, therefore, all political parties or joint political parties participating in the election may propose candidate pairs. In its development, the legislation that has been born to hamper the election is experiencing political turmoil as some parties feel dissatisfied with the clause in some articles related to the law. Elections in Indonesia are governed by electoral laws that are constantly changing due to the need for quality improvement due to the influence of political configuration and changes in demographics and government maps. Therefore, the legal products of the

election experienced ups and downs of the substance content of the article. One of them is due to the judicial review in the Constitutional Court. There are several laws that have been tested in the Constitutional Court related to the 2009 and 2014 Election. But not all appeals to the Constitutional Court are accepted, some are rejected and others are granted.

The Constitutional Court's ruling granted becomes a new legal product applied in the 2009 and 2014 General Elections. The Constitutional Court's decision regarding the laws relating to the 2009 General Election includes:

- The decision of the Constitutional Court on the judicial review of Law no. 42 of 2008 on the General Election of the President and Vice President for Article 188 paragraph (2), (3), (5), Article 228, Article 255 relating to the prohibition of quick counting of the presidential and vice-presidential elections on the day of the presidential election;
- Constitutional Court decision on the judicial review of Law no. 10 of 2008 concerning General Election of Members of the People's Legislative Assembly, Regional Representative Council and Regional House of Representatives. Article 214 letter a, b, c, d, e, relating to the determination of candidates for elections to be determined by the majority vote system;
- The decision of the Constitutional Court on the judicial review of Law no. 42 of 2008 on the Election of President and Vice President in connection with the use of ID and Passport in the election of President and Vice President.

The meaning of the presidential threshold is intended here to be the threshold for a presidential/vice president appeal where the the percentage has been determined by the law. The enactment of the presidential threshold has injured the citizens' constitutional rights to be able to elect their candidate [17, 18]. Therefore, a legal breakthrough is needed to restore such constitutional rights, such as the elimination of the presidential threshold.

The threshold terminology in elections is commonly heard in countries with democratic systems. Thresholds can be understood as well as proportional representation systems, numbers, and minimum proportions, of the number of voters to be representatives in parliament. A threshold is also termed a minimum barrier. This term is often used to set the parliamentary threshold and the presidential threshold to be able to participate in the presidential threshold. In Indonesia, the justification arguments for the presidential threshold that have been built so far are with the maximum percentage of support in parliament so the president can carry out his duties easily. Besides, the president who is promoted by the party winning the

general election (election) will also easily win the election [19, 20].

However, these arguments are not entirely correct. The president's party does not always support government issues and policies; this is due to various patterns of view of the problems faced, a simple example is the abolition of fuel subsidies. Another contradiction can be seen from the election of President Susilo Bambang Yudhoyono (SBY) in 2004, where SBY is not from the winning party. The democratic tendency seen in Indonesian society is that the people have been more intelligent in choosing which party is the right to sit in parliament and where the right figure becomes president, the choice of parliamentary representation and the presidential figure may vary.

The restraint in the form of presidential threshold means it has hurt the constitutional rights of citizens, especially in choosing the best figure to lead the nation. Besides, one of the goals of the constitutional amendment is to protect minority rights, such as from a presidential figure whose party is not the winner of the election. From the above background for more detailed discussion, the author briefly wants to analyze the advantages and disadvantages of the elimination of the presidential threshold as an effort to restore constitutional rights.

## **METHODOLOGY**

The problem that can be taken is how the axiom of the presidential threshold system after the decision of the constitutional court to bring the system of government in Indonesia and whether the legal politics of the presidential threshold system is not contradictory to the constitution in Indonesia. This study aims to determine the legal direction of the legislative and presidential election system of 2009 and 2014 in the decision of the constitutional court and the legal political implications of the constitutional court decision on the legislative and presidential elections system 2009 and 2014.

The object of this study is the verdict of the constitutional court regarding the legislative and presidential election system in 2009 and 2014. This research is normative legal research that uses primary legal materials in the form of constitutional court decisions and library materials, or relevant literature and legislation are examined. This research method will examine the subject matter through a case approach, namely to examine the *decidendi in ratio* the decisions of the Constitutional Court which became the object of research, and the approach of legislation.

## **RESULTS AND DISCUSSION**

### **Axiology of the Presidential Threshold System Following the Constitutional Court's decision to bring the system of government in Indonesia**

The Constitutional Court rejected the judicial review of Article 222 of Law Number 7 Year 2017 on General Election. The registered party, Idaman submits this material test with number 53 / PUU-XV / 2017. "Refused the petition for the rest," said Chief Justice of the Constitutional Court, Arief Hidayat when reading the verdict at the Constitutional Court Building, Jakarta, Tuesday (11/1/2018).

The Article 222 sets the threshold for the presidential threshold. A political party or a coalition of political parties must have 20 percent of the House of Representatives or 25 percent of the national legislative votes in the 2014 Election to be able to carry the presidential and vice presidential pairs. In the proposed argument, Party Idaman, among others, assess the article has expired because it uses the results of Pileg 2014 as the threshold of Presidential Election 2019.

Party Idaman also considered the article is not relevant because Pileg and Pilpres 2019 held simultaneously. It is also considered the article is discriminatory for blocking new political parties to file a presidential candidate.

The rejection of material test submitted by Party Idaman still make the provisions of the article is unchanged and declared valid. In its consideration, the Court considers the relevant presidential threshold to strengthen the presidential system. With the presidential threshold, the elected president can later have power in parliament.

The holding of elections to elect the president and vice president has been regulated by Law 42 of 2008 on presidential and vice presidential elections. The procedure of implementation of Article 6A Paragraph (5) of the UUD 1945 states that " The procedure for conducting presidential and vice presidential elections is further stipulated in the Law ".

Indonesia recognizes the principle of "Lex Superior Derogat Legi Inferiori." It is a higher legislation of ruling out the lesser ones. The nomination of president and vice president has been regulated in the 1945 Constitution in chapter 3 on the power of state government article 6A paragraph (2). It states that "Couples of presidential and vice-presidential nominees are nominated by a political party or a coalition of political parties participating in general elections before the election."

Both norms state that the presidential and vice-presidential candidates must be proposed by a political party or coalition of political parties and proposed

before the election. The definition of election is contained in Article 22e Paragraph (2) of the 1945 Constitution which reads "General Elections shall be held to elect members of the People's Legislative Assembly, Regional Representative Council, President and Vice President, Regional House of Representatives."

Elections to elect the President and Vice President of Law Number 23 of 2003 concerning the General Election of President and Vice President shall be changed into Law Number 42 Year 2008 regarding the Presidential and Vice Presidential Election from now on referred to as the Presidential Election Law thereby the old presidential election is no longer valid.

In the new presidential election law, it has been stipulated that the threshold required to be able to nominate the President and Vice President must comply with Article 9 of the Presidential Election Law. This Article states that "A couple of candidates for President and Vice President shall be nominated by a political party or coalition of political parties participating in the General Elections meeting the requirements of seats at least 20 percent of the total seats of the House of Representatives or obtaining 25 percent of the national valid votes in the election of members of the People's Legislative Assembly, before the election of President and Vice President".

The percentage of the threshold is a requirement that must be met in the determination of representation in an electoral organization in the reform era. The fact that has happened in the election in recent years is the election made into two parts namely the election held for members of the House. Three months later the presidential election was held to elect the president on terms prescribed by the presidential election law. With the division of elections, the applicant filed a judicial review of the constitutional court to consider the cost savings incurred by the state.

The presidential threshold requirement is the setting of the support threshold level of the House. It is either in the number of ballots or the number of seats, which must be obtained by the political party contesting the election to nominate the president of the political party or with a combination of political parties. Elimination of the presidential threshold in addition to giving benefits to small parties, also provides benefits in several ways, including:

- Recovering constitutional rights remedy. UUD 1945 does not explicitly regulate the presidential threshold. The regulation on this matter is purely born of the legal, political process taking place in parliament, where the dominance of election-winning political parties greatly benefits from the presidential threshold.

- Provides many options for citizens to choose their leaders. Removing the presidential threshold has given every citizen the opportunity to run for president through certain parties. Every political party may nominate his president. It is very beneficial to the people because later will emerge a new presidential candidate, which is not dominated by old faces. The more candidates will make the more selective the people in choosing their leaders. Thus the track record and achievement of the candidate will be very influential.
- Reduce the intensity of election conflicts in the community. As election in developing countries, the intensity of the conflict during the election cannot be avoided. The abolition of the presidential threshold has provided a channel of political aspiration to small parties.
- Reduce the number of impartial. As more candidates will be chosen by themselves will increase the number of voters. One of the high factors of impartial so far is due to the limited presidential candidate offered in the election [12].
- Time efficiency. Elimination of the presidential threshold makes the presidential and legislative elections can be held simultaneously. Thus the duration of the election can be cut. Another advantage is to minimize and prevent transactional politics or better known as cow trade politics. It will make political parties no longer have to coalesce to carry a presidential candidate.

The abolition of the presidential threshold also has some weak points that are often the subject of criticism, such as; First, the wastage of the election budget is due to the increasing number of presidential candidates, the higher the election budget is needed. The increase in the budget is one of them can be seen from the need of electoral logistics, such as the increase of copying of the vote counting data for the witnesses of the presidential candidate party. From the technical implementation, the General Elections Commission (KPU) will also significantly siphon off the state budget, as the process of election stage is getting longer. KPU should examine in detail (data verification) all administrative requirements and validity of the presidential candidates. Another weak point is the confusion of voters against the number of presidential candidates. Voters who do not have sufficient background knowledge will tend to choose as the fulfillment of democratic obligations. This possibility can happen if the election organizer does not have the opportunity to introduce in detail the candidates who will compete. Plus the level of political education in various regions in Indonesia is not adequate.

#### **Political opposition to the law of the presidential threshold system with the constitution in Indonesia**

The political law seeks to establish and determine how humans should act. It makes an ius



constituendum (the law to be applied) and seeks that constituendum in the next day to act as a law that will prevail in the future. John Austin mentions that the only source of law is the supreme power in a country. The rule of law is real and applicable because it gets a definite form from the official institution and the law is the embodiment of the order of the ruler. Meanwhile, the views of law and society emerged from the School of Sociological Jurisprudence with its characters Eugen Ehrlich and Roscoe Pound. It is a relationship between people. This school valued the importance of society's role in the formation of law. The task of legal politics itself is to examine which changes need to be made to existing law to meet new needs in the life of the community. The existence of legal politics shows the existence of certain state laws, and vice versa, the existence of the law, shows the existence of legal politics of certain countries.

The nature of legal politics can be divided into two:

- Legal law that is permanent can also be called long-term legal politics. For example, the implementation of the judicial review principle, the people's economy, the balance between legal certainty, justice and benefit, the replacement of colonial legacies with national laws, the control of natural resources by the state, the independence of judicial power and so on. Here it is seen that some principles contained in the Constitution at the same time apply as a political law.
- Periodic legal politics, which is made by the development of the situation encountered in any given period whether or not to impose. For example, in the period 1973-1978, there was the legal politics of codifying the unification in the fields of law. In 1983-1988 there was a legal policy to establish the State Administrative Court, and in the period 2004-2009 there were more than 250 plans for the enactment of the Law included in the National Legislation Program.

The Constitutional Court granted the petition of the petitioner in part, and declared that Article 214 of Law 10 of 2008 which constitutes *ius constitutum* is contradictory to the UUD 1945 and has no binding legal force. The starting point made by the Constitutional Court is the provision of Article 214 letter a, letter b, letter c, letter d, and letter e of Law Number 10 Year 2008 which determines that the elected candidate is a candidate who gets above 30 percent of BPP or occupies a smaller sequential number. If no one obtains 30 percent of the BPP, or who occupy a smaller sequential number if those who obtain 30 percent of the BPP more than the proportional number of seats earned by an election participating political party are unconstitutional as they are contrary to the substantive meaning of popular sovereignty and are qualified against the principle justice as regulated in Article 28D

paragraph (1) of the UUD 1945. It is a violation of popular sovereignty if the will of the people depicted by their choice is ignored in the determination of legislative members. It violates people's sovereignty and justice. If two candidates get very different votes in an extreme, the candidates who get the votes are overwhelmed by the candidates who get a small vote, because those who get a small number of smaller numbers.

The Court takes more legal direction in the law in this decision on the rules of implementation of the implementation of the majority vote system and cancels the regulation of the serial number system. The Court considers there must be an equal with the recognition of the equality of law and equal opportunity in government. This is in Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution. It states that every legislative candidate has the same position and opportunity before the law, to impose an unequal legal provision on the same two circumstances is equally unfair as to impose a common legal provision on two unequal circumstances. The constitutional guarantees of the people to participate and the political rights are affirmed in Article 28E of the UDD 1945 which states that "Everyone has the right to freedom of association, assembly, and expression". It is stated in article 28F of the UUD 1945 which states that "Everyone shall have the right to communicate and obtain information to develop their personal and social environment, and shall have the right to seek, obtain, possess, store, process and convey information using all available channels".

It makes the Constitutional Court has an emphasis in deciding the decision related to quick count. Therefore, this participation position becomes indispensable in the political process. Active civil society will encourage the state to strengthen itself into a balance of power, resulting in a balance of power that leads to the occurrence of checks and balances in the process of organizing the country. All decisions of the state should involve the people in the decision-making process either through representatives of the people residing in parliament or through civil society organizations and the power-sharing in the state. The legal, political direction issued by the Constitutional Court on the ruling is to implement the rules of implementing and cancel the quick count. Improvement of rules conducted by the Constitutional Court relating to the *ius constituendum* of the Court also has a direction for this decision more directed to the relevant release of survey results. No more time restrictions.

Supporters of the parliamentary threshold rule argue that the existence of a minimum limit prevents small and radical groups in parliament. It is considered good because it will simplify the parliament, as well as help the formation of a stable government and

parliament. Critics of this system argue that this system tends to negate people's representatives for small party supporters. The government and some parties want 20 percent of the House of Representatives or 25 percent of the votes to be able to carry the presidential and vice presidential candidates. The need to be studied in depth about the presidential threshold at the time of the upcoming 2019 general election. Minister of Home Affairs, Tjahjo Kumolo said the 20-25 percent figure in the presidential threshold does not reflect the majority of parliamentary votes, for the president to gain parliamentary support. The solution of the current government is to use the old law in the event of a deadlock. The decision of the Constitutional Court says that the elections should be held simultaneously in 2019 while the existing law is not a simultaneous election.

### CONCLUSIONS

The elimination of the presidential threshold has provided significant benefits in Indonesia's democratic system. This policy could be a restoration of the previously wounded constitutional rights with the remedy of constitutional rights. Many advantages will be obtained primarily from small parties to carry their respective presidential candidates, in addition to the president's choice is increasingly diverse. The presidential threshold will make it easier for the president to carry out government duties, due to the absence of other dominant party interventions in parliament. However, the impact and weakness of the elimination of the presidential threshold are also worth considering. The abolition of the presidential threshold will also result in the vulnerability of individual interests that can be obtained through presidential candidacies, such as one who wants to run for president only to gain popularity. Also, from the aspect of national security will result in the expansion of potential conflicts and election violations due to the number of candidates. Regarding efficiency, the election budget allocation will increase. At least the allocation of election funds can be channeled to areas that can increase the welfare of other people. However, this assumption needs to be further proved by in-depth research on the efficiency of campaign funds.

### Acknowledgment

Thanks to the Lembaga Pengelola Dana Pendidikan (LPDP) of the Ministry of Finance of the Republic of Indonesia who acts as a funder and sponsor for the implementation of this research.

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