

Legal Analysis Of The Implementation Of The Presidential Threshold In General Elections In Indonesia

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Abstract

Presidential Threshold concept reduces the rights of everyone to get equal opportunities in government. Constitutional Court Decision Constitutional Court Decision Number 14/PUUXI/2013 which decided that the Presidential and Vice Presidential Elections were held simultaneously with the Elections of the People's Representative Council or known as simultaneous elections. The regulation of the presidential nomination threshold (*Presidential Threshold*) is essentially an open legal policy. The source of attribution authority in the constitution, especially in Article 6A paragraph (2) and Article 22E paragraph (6) of the 1945 Constitution of the Republic of Indonesia as a higher legal norm, does not regulate or provide restrictions for anyone who wants to nominate themselves as a candidate for President and Vice President. The existence of a threshold for political parties to have the right to nominate presidential and vice-presidential candidate pairs has legal implications, including violating the 1945 Constitution concerning the Presidential System, contradicting Article 6A paragraph (2) of the 1945 Constitution, the inconsistency of the Constitutional Court in Decision Number 14/PUU-XI/2013 and violating the rights of citizens in the 1945 Constitution.

Keywords: Constitution, General Election, Nomination of Candidate Pairs, *Threshold*.

INTRODUCTION

Legal reforms that have taken place since 1998 have been institutionalized through the amendments to the 1945 Constitution. The spirit of the amendments to the 1945 Constitution was to encourage the development of a more democratic state structure. The results of the amendments to the 1945 Constitution gave birth to state institutions that are on equal footing with each other, exercising *checks and balances*, realizing the supremacy of law and justice, and

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guaranteeing and protecting human rights. This equality and the availability of mutual control are the principles of a democratic state and a state based on the rule of law.¹

The Presidential and Vice Presidential elections have been regulated and simplified into a new Law, namely Law Number 7 of 2017 concerning General Elections. However, the contents of the regulations more or less still adopt Law Number 42 of 2008 concerning the Presidential and Vice Presidential Elections, one of which still remains regarding *the Presidential Threshold*. Constitutional Court Decision Number 14/PUUXI/2013 concerning the 2019 Simultaneous General Elections (Pemilu) granted part of the request except for the provisions of Article 9 of Law Number 42 of 2008 concerning the Presidential and Vice Presidential Elections concerning *the Presidential Threshold* which states: "The Presidential and Vice Presidential candidate pairs must be proposed by political parties or coalitions between political parties participating in the election that meet the requirements of obtaining at least 20% (twenty percent) of the total seats in the DPR or obtaining 25% (twenty five percent) of the total valid national votes in the DPR member elections, before the implementation of the Presidential and Vice Presidential Elections."

The Presidential Threshold then becomes a problem because the dynamics of politics are dynamic. The number of votes obtained by a political party in the previous general election is unlikely to get the same number of votes in the next general election. Moreover, the urgency of regulating this requirement then reduces the right of everyone to get an equal opportunity in government. The problem regarding the *Presidential Threshold concept* is further exacerbated by the Constitutional Court Decision Constitutional Court Decision Number 14/PUU-XI/2013 in the case of testing Law Number 42 of 2008 concerning the General Election of the President and Vice President against the 1945 Constitution of the Republic of Indonesia which decided that the General Election of the President and Vice President be held simultaneously with the Election of the House of Representatives or known as simultaneous elections.

DISCUSSION

The Urgency of Setting *the Presidential Threshold* as a Requirement for Nominating Presidential and Vice Presidential Candidates

A state based on law is a state system that is regulated based on applicable laws, which are just and are structured in a constitution, where all people in the state, both those who are governed and those who govern, must submit to the law, so that everyone is treated equally,

¹Titik Triwulan Tutik, *Principles of Indonesian Constitutional Law Post-Amendment of the 1945 Constitution* (Jakarta: Cerdas Pustaka Publisher, 2008), 1



regardless of differences in skin color, race, gender, religion, region and beliefs, and the authority of the government is limited based on the principle of distribution of power, so that the government is not arbitrary and does not violate the rights of the people, therefore the people are given roles according to their abilities and roles in a democratic manner.²

General elections (pemilu) are a crucial instrument in a democratic state that adheres to a representative system. Elections serve as a filtering tool for "politicians" who will represent and carry the people's voice within representative institutions. Those elected are considered individuals or groups with the ability or obligation to speak and act on behalf of a larger group through political parties. Therefore, the existence of political parties is essential in modern democratic political life. They are intended to activate and mobilize the people, represent specific interests, provide a compromise for opposing opinions, and provide a means for legitimate and peaceful succession of political leadership.³

Article 7 of the 1945 Constitution of the Republic of Indonesia states that: "The President and Vice President hold office for a term of five years and may be re-elected to the same office for only one further term." Presidential succession is a common process in every country that implements a republican system. This process shows a country's departure from its previous leader, or it is also a process of public awareness in choosing a person or party that is deemed capable of accommodating their aspirations.⁴

Article 1 of MPR Decree Number VIII/MPR/1973 states that General Elections are held based on Pancasila Democracy as a means of implementing the principle of people's sovereignty in the Republic of Indonesia. Article 1 Paragraph (1) of MPR Decree Number VII/MPR/1978 also emphasizes that General Elections are a means of implementing the principle of people's sovereignty based on Pancasila. Both in Article 1 Paragraph (1) of MPR Decree Number IV/MPR/1983 and Article 1 Paragraph (2) of MPR Decree Number III/MPR/1988, the same thing is also emphasized again. This means that legally, General Elections in Indonesia are indeed intended as a means of implementing people's sovereignty.⁵ Initially, the Presidential Election with *the Presidential Threshold* in 2004, 2009 and 2014 did not cause problems and did not reap harsh

²Munir Fuady, *Theory of the Modern Legal State (Rechtstaat)* (Bandung: Refika Aditama, 2011), 3.

³Moh. Mahfud MD, *Legal Politics in Indonesia* (Jakarta: Rajawali Pers, 2017), 61.

⁴Sodikin, Simultaneous Elections (Legislative Elections with Presidential and Vice Presidential Elections) and Strengthening the Presidential System, *Jurnal Rechts Vinding: Media for National Legal Development* 3, no. 1 (2014).

⁵Jimly Asshiddiqie, *The idea of popular sovereignty in the constitution and its implementation in Indonesia: shifting balance between individualism and collectivism in political democracy and economic democracy policies during three democratic periods, 1945-1980s* (Jakarta: Ichtiar Baru van Hoeve, 1993), 84.



criticism, because at that time before the Presidential Election, the election of members of the DPR, DPD and DPRD was first held. This means that each political party had already secured votes from the legislative election, which was held long before the Presidential Election was held, and the acquisition of these votes became the ticket to nominate the President and Vice President. It will become a problem, when the legislative and executive elections are held at one time, at the same hour, day, month, year, from which party pocketed the votes to nominate the President and Vice President, That is what happened in the 2019 election, with simultaneous implementation, maintaining *the Presidential Threshold* , will raise problems, because the election of members of the DPR and President is carried out simultaneously.

Logically, there is no basis for using 20 percent of the seats in the House of Representatives (DPR) and 25 percent of the valid national vote, because these requirements are not met by political parties participating in the election. For the 2019 general election, the presidential, DPR, and DPD elections were held simultaneously. Because they were held simultaneously, the 20 percent *Presidential Threshold requirement* becomes problematic. The 20 percent *Presidential Threshold* is irrational because the 20 percent figure refers to the results of the 2014 DPR and DPD elections, which were already used in the 2014 presidential election. On the other hand, those who agree on the 20 percent *Presidential Threshold* are rational, because the party or coalition of political parties nominates the president and vice president. Viewed from their respective perspectives, both opinions use logically sound arguments. The problem is that 2019 was the first simultaneous general election. Because this is the first time, determining *the Presidential Threshold* seems to be directed at the interests of each party who agrees or rejects the 20 percent figure.

Presidential Threshold provisions that restrict the rights of small political parties are not in accordance with the essence of Indonesian democracy. Every nation has its own conceptions and ideals according to the conditions, challenges, and characteristics of the nation concerned.⁶ Considering that Indonesia is a country consisting of various minority groups (racial, ethnic, religious, and so on) who agreed to form a country, the state should have a role to accommodate all the aspirations of society, including the aspirations of minority groups. In addition, conceptually, Indonesia has strong national principles and vision. Indonesia's national vision can not only bring together the diversity of society in the newness of a shared political community, but also can provide the possibility for diverse communities to not be uprooted from their

⁶Yudi Latif, *Pancasila Revolution* (Jakarta: Mizan, 2015), 28.



respective traditional and historical roots.⁷

Presidential Threshold Concept as a Requirement for Nominating Candidates for President and Vice President

The Constitution is the highest legal product a country possesses. In addition to being a guideline for the administration of the state, the constitution holds a position as the soul of the nation, formalized in written text. The 1945 Constitution of the Republic of Indonesia (UUD) has provided guidelines for the implementation of the Presidential Election in Indonesia. This regulation is contained in Article 6A Number (2) of the 1945 Constitution, which states: The Presidential and Vice Presidential candidate pairs are proposed by political parties or coalitions of political parties participating in the general election before the general election is held. Article 6A Paragraph (2) of 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. The legislators, as the institutions that translate the intent of the constitution into law, should understand that the Constitution in a transitional period is often formed as a response to things that reflect injustice in the past, to be used as valuable lessons in the future state system, not to be repeated.

The implementation of *the Presidential Threshold* in the 2019 Election does not provide a sense of fairness for first-time voters. First-time voters are citizens who only gained the right to vote in 2019, meaning they are newly adults. In the 2014 election, first-time voters did not yet have this right and did not vote at the *Presidential Threshold percentage* in 2014.

Implications of the Presidential Threshold Concept in Elections

The existence of a threshold for political parties to have the right to nominate a pair of presidential and vice-presidential candidates (*Presidential Threshold*) in the General Election held simultaneously, gives rise to legal implications, namely: The existence of a threshold for political parties to have the right to nominate a pair of presidential and vice-presidential candidates (*Presidential Threshold*) in the General Election held simultaneously, gives rise to legal implications, namely:

⁷Yudi Latif, *The Complete State of Rationalist Historicism, and the Actualization of Pancasila* (Jakarta: PT Kompas Gramedia Pustaka Utama, 2011), 177.



Violating the 1945 Constitution regarding the Presidential System

If it is considered that the Indonesian government system uses a pure presidential system, as stated in the 1945 Constitution, namely: Article 1 Paragraph (1) of the 1945 Constitution, which reads, "The State of Indonesia is a unitary state in the form of a republic." Then the President is the highest administrator of the State government.

According to the Constitution, Article 3 Paragraph (2) and Article 4 Paragraph (1) to (2), it is explained that the President is not responsible to the DPR. Articles 4 to 16 and Articles 19 to 22B, explain that the Minister of State is an assistant to the President. This automatically violates the provisions of the 1945 Constitution which stipulates that the Indonesian government system is presidential, because the *Presidential Threshold rules* in the 2019 simultaneous elections, as stipulated in Law Number 7 of 2017 concerning General Elections, actually weaken the presidential system adopted by Indonesia. In the Presidential system scheme, the President and the DPR are two separate institutions that have different political legitimacy bases, and the executive and legislative institutions are not interdependent, so the presidential nomination should not be determined by the political formation of the national parliament resulting from the Legislative Election. Moreover, in terms of mandate, the President and the DPR are not the same so it is impossible to combine them.

Contrary to Article 6A Paragraph (2) of the 1945 Constitution

Presidential Threshold provision in Law Number 7 of 2017, contradicts Article 6A Paragraph (2) of the 1945 Constitution which states that the Presidential and Vice Presidential candidate pairs are proposed by political parties or coalitions of political parties participating in the Election before the Election is held. This means that every political party should be able to propose a Presidential and Vice Presidential candidate pair, including political parties that have just participated in the Election. With *the Presidential Threshold provision*, of course, limits the rights of each party to propose a Presidential candidate, or new political parties are forced to support the available presidential and vice presidential candidate pairs without having the political power to convey their wishes or aspirations due to their positions that are neither odd nor complete. Because in essence, *the Threshold* in its original meaning is not a threshold that prevents the nomination of the President and Vice President, but is a minimum percentage rule for the election of the President and Vice President. This has been regulated in the 1945 Constitution, namely Article 6A Paragraph (3) of the 1945 Constitution, which explains that the presidential and vice-presidential candidate pair, who obtain more than 50 percent of the total election votes with at



least 20 percent of the votes in each province in more than half of the provinces in Indonesia, are inaugurated as President and Vice President.

MK's Inconsistency in Decision Number 14/PUU-XI/2013

The Constitutional Court's ruling No. 14/PUU-XI/2013 mandating that the legislative and presidential elections be held simultaneously, but the election could only be held in the 2019 election and not in 2014, demonstrates the Constitutional Court's inconsistency in implementing legal provisions. Article 46 of the Constitutional Court Law states that Constitutional Court decisions are legally binding immediately after being pronounced in open session. Legal provisions whose implementation can be suspended are those contained in the law, while court decisions, including Constitutional Court decisions, cannot be suspended and must be implemented immediately.

Another example of the inconsistency of the Constitutional Court, for example, can be seen in the decision Number 072-073 / PUUII / 2004 which in essence states that the Pilkada is an election regime so that disputes are resolved in the Constitutional Court, which was then changed by decision Number 97 / PUU.XI / 2013 which in essence the Constitutional Court is no longer authorized to handle Pilkada disputes. Therefore, the Constitutional Court should also be responsible for decisions that can cause inconsistencies or result in various interpretations, such as the Constitutional Court decision Number 14 / PUU-XI / 2013 which has given rise to various interpretations, because some interpret *the Presidential Threshold* as no longer relevant, but there are also interpretations that the Constitutional Court decision states that *the Presidential Threshold is an open legal policy* for lawmakers as in decision Number 51-5259 / PUU-VI / 2008 which rejected the judicial review of Article 9 of Law Number 42 of 2008 concerning the *Presidential Threshold*. The Constitutional Court should have emphasized in its decision whether *the Presidential Threshold is still relevant* to be implemented in the 2019 simultaneous elections or not, so that there is no legal confusion in the 2019 simultaneous elections.

Incomplete Understanding of Constitutional Court Decision Number 14/PUU-XI/2013

There is an incompleteness of the drafters of Law Number 7 of 2017 concerning General Elections in viewing and reading the Constitutional Court decision Number 14/PUUXI/2013 regarding the judicial review application against Article 9 of Law Number 42 of 2008 concerning *the Presidential Threshold*. Referring to the legal considerations of the Constitutional Court in the decision document, the Constitutional Court is of the opinion that "Regarding the constitutionality



test of Article 9 of Law Number 42 of 2008, the Court considers that with the implementation of the Presidential Election and the Election of Members of Representative Institutions in the General Election simultaneously, the provisions of the article on the requirements for obtaining political party votes as a condition for nominating a pair of presidential and vice-presidential candidates are the authority of the drafters of the Law while still basing it on the provisions of the 1945 Constitution."

In the legal considerations, it is understandable that regarding the minimum threshold provisions in the nomination of President and Vice President, the Constitutional Court is of the opinion that this is the authority of the legislators, in this case the House of Representatives together with the Government (President). In reading this, it seems that there is something that the legislators of Law Number 7 of 2017 did not pay attention to, because it seems to stop at the sentence "the authority of the legislators", even though the following sentence emphasizes that "it is still based on the provisions of the 1945 Constitution".

The sentence "still based on the provisions of the 1945 Constitution" must refer to the article in the 1945 Constitution that discusses the election of the President and Vice President, which means referring to the provisions of Article 6A Paragraph (1) to Paragraph (5) of the 1945 Constitution which specifically regulates the election of the President and Vice President. Article 6A Paragraph (2) of the 1945 Constitution explicitly stipulates that, "The Presidential and Vice Presidential candidate pairs are proposed by political parties or coalitions of political parties participating in the General Election before the General Election is held", so there should be no *Presidential Threshold regulation* that limits political parties from nominating Presidential and Vice Presidential candidate pairs. Because based on the 1945 Constitution, all political parties have the right to nominate Presidential and Vice Presidential candidate pairs.

Violating Citizens' Rights in the 1945 Constitution

Based on the 1945 Constitution, there are provisions regarding citizen rights which can be seen in Article 27 Paragraph (1) which explains the right of citizens to vote which is included in the rights of citizens guaranteed by the constitution in the form of equal standing before the law and government. In addition, Article 28D Paragraph (1), which explains the right to obtain recognition, guarantees, protection, and fair legal certainty as well as equal treatment before the law. And Article 28 D Paragraph (3), which explains the right to obtain equal opportunities in government. The rules regarding these human rights are a form of realization of the sovereignty of the people which is regulated in Article 1 Paragraph (2) and Article 6A Paragraph (1).



The authority of each political party participating in the general election to propose a pair of presidential and vice-presidential candidates in the election is one form of implementation of citizens' human rights, considering that the participants in the presidential election are the individual candidate pairs themselves as guaranteed in Article 27 Paragraph (1) of the 1945 Constitution, namely "all citizens have equal standing before the law and government and are obliged to uphold the law and government without exception." Likewise, Article 43 of Law Number 39 of 1999 concerning Human Rights stipulates that:

- a. Every citizen has the right to be elected and to vote in the General Election based on equal rights through direct, general, free, secret, honest and fair voting in accordance with the provisions of statutory regulations.
- b. Every citizen has the right to participate in government directly or through representatives freely elected by them, in accordance with the methods determined in statutory regulations. In addition, the political participation of citizens through political parties is the responsibility of the basic rights of every citizen, namely Article 28 E Paragraph (3) of the 1945 Constitution: "Everyone has the right to freedom of association, assembly and expression of opinion." The provisions of Law Number 7 of 2017 concerning Elections which require a threshold for nominating presidential and vice-presidential candidates, constitute a violation of citizens' rights which should not exist in a democratic country like Indonesia.

Although there is a legitimate constitutional basis for restricting the rights of every citizen, namely Article 28 J Paragraph (2) of the 1945 Constitution, which states: "In exercising their rights and freedoms, every person is obliged to submit to restrictions stipulated by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society." However, in the context of the 2019 Election as regulated in Law Number 7 of 2017 which requires the existence of a threshold provision for the nomination of President and Vice President. Of course, it is not appropriate if the threshold rule for the nomination of President and Vice President is considered a logical and correct policy to restrict the human rights of citizens to propose candidates for President and Vice President and be nominated as President and Vice President, based on considerations in guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society.



CONCLUSION

The urgency of setting the presidential nomination threshold (*Presidential Threshold*) is included in the open legal policy *because* the source of attribution authority in the constitution, especially in Article 6A Paragraph (2) and Article 22E Paragraph (6) of the 1945 Constitution of the Republic of Indonesia as a higher legal norm does not regulate or provide limitations for anyone who wants to nominate themselves as a candidate for President and Vice President. The implications of simultaneous general elections for *the Presidential Threshold concept* are something that is impossible or beyond rational. The existence of a threshold for political parties to have the right to nominate a pair of presidential and vice presidential candidates (*Presidential Threshold*) in the General Election which is held simultaneously, gives rise to legal implications, namely violating the 1945 Constitution concerning the Presidential System, contradicting Article 6A Paragraph (2) of the 1945 Constitution, inconsistency and incomplete understanding of the Constitutional Court Decision Number 14/PUU-XI/2013 and violating the rights of citizens in the 1945 Constitution.

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