

**THE PRESIDENTIAL THRESHOLD AS AN OPEN LEGAL POLICY
IN GENERAL ELECTIONS IN INDONESIA**

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Abstract

This paper aims to examine the implementation of the legal policy on presidential threshold in Indonesia after the stipulation of The Fourth Amendment of the Constitution of 1945. The stipulation of the presidential threshold based on the Constitutional Court ruling Number 14 / PUUXI / 2013 triggered fierce controversies. As a result, the function of the 2014 legislative election as the threshold for the requirements of presidential candidacy for 2019 general election becomes no longer relevant and applicable. This is a normative legal research, which concludes that it is necessary to make laws about the provision of general election, reorganization of election management institutions, and the preparation of election logistics.

Keywords: Constitution, General Election, Presidential Threshold.

A. Introduction

Indonesia has adopted a presidential government system². The democratic presidential system has been the political choice of Indonesians after the end in 1998, of the Suharto New Order regime. This political choice was agreed upon by the People's Consultative Assembly (hereinafter referred as the "MPR") and finally institutionalized through the amendment of 1945 Constitution in four stages from 1999 until 2002. Although the amendment to the 1945 constitution contains "patchy" elements, the spirit of strengthening and purifying the presidential democratic system scheme clearly underpins it. Broadly speaking, a presidential government system is a system in which the executive

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² Ade Fadillahfitra, 'Analisis Yuridis Ketentuan Presidential Threshold berdasarkan Undang-Undang Nomor 42 Tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden' [2017] Jurnal Jom Fakultas Hukum Vol. IV No. 2, p. 5.

power is not subordinate to the people's representative body. In other words, the executive power is outside (direct) parliamentary supervision.³

The amendment substantially changed four aspects of the constitution, resulting in a presidential system. First, the president and vice president are elected directly by the people. Second, the position of office of president and vice president becomes institutionally permanent. In this case, it applies provides for a maximum of two five-year terms. Third, there is the locus transfer of the legislative function from the authority of the president with the approval of the DPR to the authority of the DPR. Fourth, there subordination of the position and role of the MPR as the highest state institution.⁴ The latter substantial change also ensures the locus transition of political sovereignty from the hands of the MPR to the hands of the people through general elections.

Elections are mechanisms for channeling people's sovereignty and implementing democracy by direct vote. According to Jimly Asshiddiqie, the exercise of popular sovereignty (direct democracy) where power is in the hands of the people, is carried out through general elections, and the implementation of a referendum to declare approval or rejection of planned changes to certain articles in the Constitution.⁵ Direct elections are a procedure in modern government to have a peaceful transition of power. The transfer of power is carried out with a civilized mechanism without the struggle for power through coercion or violence, such as a war or coup.⁶

Elections are regulated by Law Number 7 of 2017 Concerning General Elections, although the rules regarding simultaneous general elections (legislative and presidential and vice-presidential elections carried out simultaneously) resulted from judicial review of Law Number 42 of 2008 on the 1945 Constitution to Constitutional Court. In this decision, the Constitutional Court held that the legislative, presidential, and vice-presidential elections could be held simultaneously in 2019. This decision gave rise to fierce controversy because if held in 2019, the 2019 presidential and vice-presidential elections could be considered unconstitutional. From the perspective of the constitution, using or

³ Titik Triwulan Tutik, *Pokok-Pokok Hukum Tata Negara Pasca Amandemen UUD 1945* (Cerdas Pustaka 2008) p. 151.

⁴ Syamsudin Haris dkk, *Pemilu Nasional Serentak 2019* (Pustaka Pelajar 2016) p.1.

⁵ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Konstitusi Press 2005) p. 75.

⁶ Rahmat Muhajir Nugroho, 'Mendisain Model Pemilihan Umum Kepala Daerah yang Lebih Efisien dan Demokratis', *Proceeding Konferensi Hukum Tata Negara dan Anugerah Muhammad Yamin*, 2014, Sawahlunto, 29 May-1 June 2014, p. 580.

not using the presidential threshold does not actually conflict with the constitution, because the presidential threshold is an open legal policy of the legislators.⁷

The Indonesian state administration system has adopted democratic principles. Historically, the idea of democracy has been around since ancient Greece.⁸ This idea was deduced from the notions of Socrates and Aristotle. Socrates said that the state was entitled to create laws, which must be carried out by leaders or rulers who are carefully elected by the people.⁹ Aristotle also said that the state government was principally elected by the people themselves or at least by a large group of people.¹⁰ The principle of constitutional democracy, respect for human rights, the principle of due process of law, and sovereignty are in the hands of the people, which are implemented based on the constitution.

In a formal sense, democracy is a system of government where people's sovereignty is not carried out by the people themselves, but through representatives elected in representative institutions. In a material sense, democracy can be referred to as a principle, which is influenced by the culture and history of a nation. Thus, we recognize some concepts of democracy such as constitutional democracy, people's democracy and Pancasila democracy.¹¹

Mulyana W. Kusuma emphasized that democratic countries never apply a presidential threshold in their constitutions, but presidential nominations are regulated in closed, partially closed, and open or partially open primary elections to form a coalition of political parties bearing presidential candidates.¹² On that basis, the implementation of state government must respect these principles and be based on rule by the majority, based

⁷Lutfil Ansori, 'Telaah Terhadap Presidential Threshold dalam Pemilu Serentak 2019' [2017] Jurnal Yuridis Vol 4 No 1, p. 15.

⁸Democracy was known since the 5th century BC., based on the bad experience of the City State in Greece due to the frequent transition of the state system from monarchy to aristocracy, and from aristocracy to tyranny. Thus, the great Greek thinkers struggled to determine the ideal system of state for the Greeks, which changed the system from tyranny to democracy. Masykuri Abdillah, *Demokrasi di Persimpangan Makna; Respon Intelektual Muslim Indonesia terhadap Konsep Demokrasi 1966-1930* (Tiara Wacana, 1999), p. 71. See Iso Dede Rosyada, dkk, *Pendidikan Kewarganegaraan (Civic Education) Demokrasi, Hak Asasi Manusia & Masyarakat Madani*, Abdul Rozak, et.al., ed. (ICCH UIN Syarif Hidayatullah Jakarta, collaboration between The Asia Foundation & Prenada Media 2003), p. 110; Ahmad Suhelmi, *Pemikiran Politik Barat; Kajian Sejarah Perkembangan Pemikiran Negara, Masyarakat dan Kekuasaan* (PT. Gramedia Pustaka 2007); Anam Rifai, *Partai Politik Demokrasi dan Kebijakan Publik*, (Program Sekolah Demokrasi Kerjasama dengan Averoes Press 2010) p. 1.

⁹ Soehino, *Ilmu Negara* (Liberty 1986) p. 14.

¹⁰ Abdu Yuhana, *Sistem Ketatanegaraan Indonesia* (Fokus Media 2009) p. 39.

¹¹ Bagir Manan, *Kedaulatan Rakyat, Hak Asasi Manusia dan Negara Hukum* (Gaya Media Pratama 1996) p. 199.

¹²'Pasal Preesidential Threshold Harus Dicabut' (Tempo) <<http://pemilu.tempo.co/read/548090/pasal-presidential-threshold-harus-dicabut>> accessed 15 June 2019.

on the constitution. In addition, the presidential threshold must be viewed through the due process of law, which implies that there is no legal process, political process, or democratic process if not based on applicable legal and constitutional provisions. The Presidential threshold according to the Constitutional Court is¹³: First, the concrete norms set forth under Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia, legal policy delegated by Article 6A paragraph (5) of the 1945 Constitution of the Republic of Indonesia, and the procedures for the election are based on Article 22E paragraph (6) of The 1945 Constitution of the Republic of Indonesia as a legislation and threshold policy delegated in the implementation of elections; Secondly, a presidential threshold bears no logical correlation with democratic elections, which are inherently direct, general, free, secret, honest, and fair because these conditions mean that the democratic process is given by the people's sovereignty; Third, there was initial support in the presidential election because the elected presidential and vice presidential candidates would have been supported by the people through political parties in the election; and Fourth, the delegation of open authority is determined as legal policy by the legislators, so that it cannot be canceled by the Constitutional Court.

According to Aristotle as quoted by Henry J. Schmandt, we must think not only of good governance, but also of what most practical to achieve.¹⁴ The constitution is the mother of a country,¹⁵ with the principles of democratic social and cultural order. The Indonesian Constitution mandates that political parties or a combination of election participants can nominate candidates, as stipulated in Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia.¹⁶ This article provides an opportunity for legislators to make legal policy by determining the presidential threshold as regulated in Article 9 of the Presidential Election Law. By referring to Article 6A paragraph (5) juncto Article 22E paragraph (6) of the 1945 NRI Constitution, and as a manifestation of the mandate of the 1945 NRI Constitution to the legislators, it is inappropriate to determine the presidential threshold because the two aforementioned articles do not regulate the

¹³See the Constitutional Court Decision No. 51-52-59/PUU-VI/2008.

¹⁴ Henry J Schmandt, *Filsafat Ilmu Politik* (Pustaka Pelajar 2009) p. 83.

¹⁵Muhammad Junaidi, *Hukum Konstitusi Pandangan dan Gagasan Modernisasi Negara Hukum* (RajaGrafindo Persada 2018) p. 5.

¹⁶Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia means that the conditions applicable to presidential and vice-presidential candidates are (1) presidential and vice-presidential candidates submitted by political parties both individually and together in a coalition of political parties; (2) all political parties can propose a pair of presidential and vice presidential candidates as long as they meet the requirements as election participants; and (3) there are no additional conditions for the extent of the threshold.

requirements. Election requirements are determined based on Article 6 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, but in determining the conditions for becoming a president and vice president, we must pay attention to the mandates of other constitutions related to presidential and vice-presidential elections.

The Constitution as stipulated in Article 6A paragraph (3) also determines the qualifications for the nomination of president and vice president. According to the constitution, a presidential and vice-presidential candidate who gets more than 50% of the votes and its vote distribution must constitute 20% votes in each province for more than half the number of provinces in Indonesia can be directly considered to meet the requirements of the election winner. Based on these provisions, all political parties have the right to nominate a president and vice president. Therefore, the application of the presidential threshold is contrary to the substance of Article 6A paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia. It also injures the principle of civil rights in the democratic system because the constitution does not mandate the setting of thresholds in the nominations of president and vice president.

There is disagreement on the presidential threshold because it affects the strengthening of the presidential system adopted in the 1945 Constitution. The 1945 Constitution adheres to a pure presidential system, placing the executive branch in a strong position, running the country, even when such orders and regulations are not supported by the majority of parliament. This is because the president is not accountable to parliament, but rather directly responsible to the people who voted for him or her.

Debate about the presidential threshold narrowed with the passage of Law Number 7 of 2017 concerning General Elections. This law mandated in article 222 that the Candidate Pairs are proposed by Political Parties or Combined Election Contesting Political Parties who meet the requirements for obtaining seats of at least 20% of the total number of DPR seats or 25% of the national valid votes in the previous Election of DPR members. Thus, this research addresses the legal politics issue related to the way to determine presidential threshold in Law Number 7 of 2017.

B. Problem Formulations

The following research questions are based on the issues arising from this background:

1. What was the determination of presidential threshold as an open legal policy in 2019 concurrent elections?
2. Does the presidential threshold regulation conflict with the Constitution of 1945 and the principals of democracy?
3. Would the presidential threshold system still relevant to be used in the simultaneous election implementation model of 2024?

C. Methodology

This normative legal research was conducted by examining literature and secondary data.¹⁷ Based on its characteristics, legal science is prescriptive as well as applied science. As a prescriptive science, law studies the purpose of law, the values of justice, the validity of the rule of law, legal concepts, and legal norms. Meanwhile, as an applied science of law set standard procedures, provisions, and guidelines in implementing the rule of law. Thus, the science of law concerns matters that are intrinsic law, not only placing the law as a social phenomenon but examining legal norms is the essence of legal science.

The legal research used the statutory approach, the conceptual approach, and the historical approach.¹⁸ This study relied on secondary data including: Primary legal materials, namely binding legal materials; secondary legal materials, which provided an explanation of primary legal materials; and implied legal materials, namely legal materials that provided instructions or explanations for primary and secondary legal materials.

D. Discussion

1. Determination of the Presidential Threshold as an Open Legal Policy in the 2019 Simultaneous Elections

The Presidential threshold is defined as the determination of the threshold level of support from the DPR, both in the form of the number of votes (ballots) or the number of seats that must be obtained by political parties participating in the election in order to

¹⁷Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. (RajaGrafindo Persada 2006) p. 13-14.

¹⁸According to Peter, the approaches used in legal research are the statute approach, the historical approach, the comparative approach and the conceptual approach, in .Peter Mahmud Marzuki. *Penelitian Hukum* (2nd Ed, Kencana Prenada Media Group 2007) p. 93.

nominate the President of the political party or with a coalition with other political parties.¹⁹

In terms of the application of the presidential threshold, there are no other countries with a presidential system that apply a similar threshold in their presidential elections. For example, the presidential system is inseparable from the government system in the United States,²⁰ because such a system was first established there. In addition, the country is seen as an ideal example of a presidential system because it fulfills almost all the criteria needed in a presidential system. However, as a developed country and an ideal example of the presidential system, the United States has never applied any threshold similar to Indonesia's.²¹ Rather, the United States allows the nomination of many candidate pairs from the Third Party (the term for small and independent parties). In the 2016 elections, there were around 24 candidates registered on the ballot in several states or become written candidates. However, there were no candidates from the third party, who won the votes of certain state in the presidential election from 1968 to 2016.

Similarly, the constitution of Brazil never mentions any regulation related to a presidential threshold in its elections.²² The regulation of political parties also never requires any threshold for nomination of Brazilian presidential candidates. Chapter V of its constitution only regulates the establishment, dissolution, merger and coalition of political parties.²³

Countries whose governments are based on the presidential system do not apply any threshold in presidential candidacy. This is in contrast to Indonesia that requires political parties or coalitions of political parties to meet a presidential threshold to nominate candidate pairs according to Election Law number 7 of 2017, enacted by the DPR, which requires a presidential threshold of 20% of the votes of political parties in parliament or 25% of the national legitimate vote. Previously, the Constitutional Court

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

²⁰ Saldi Isra, *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer dalam Sistem Presidensial Indonesia* (Raja Grafindo Persada 2010), p. 31.

²¹ Ken Kollman, *The American Political Sistem Second Core Edition, 2014 Election Update* (W. W. Norton & Company 2012) p. 45.

²²Article 77 of the Brazilian Constitution explains that the mechanism for electing the president and vice president is through simultaneous presidential election on the first Sunday in October, and if there must be a second round, it will be carried out on the last Sunday in October before the end of the current term of office of the President. Article 77 Paragraph (1) of the Brazilian Constitution. 'Brazilian Constitution of 1988 with Amendments through 2014' (Constitute Project 2014) <https://www.constituteproject.org/constitution/Brazil_2014.pdf>

²³ Abdul Ghoffar, 'Problematika Presidential Threshold: Putusan Mahkamah Konstitusi dan Pengalaman di Negara Lain' [2018] *Jurnal Konstitusi*, Vol. 15 No. 3, p. 12.

considered the nature of the presidential threshold. It held that the presidential threshold was a policy issue rather than a constitutional issue. The constitutionality is based on the decision of the Constitutional Court and is the supreme law of the land.²⁴

The Presidential threshold, which is a condition for the nomination of candidate pairs for president and vice president, increases the legitimacy of the elected president and vice president. This presidential legitimacy is not only based on the total number of voters, but also based on the threshold of regional distribution of votes in the unitary state, comprised of many provinces.²⁵ The presidential election system, to fill the position of President in a country, or the executive branch of government, requires a system and mechanism that regulates its implementation. In democracies, people generally elect presidents through an election before the position can be filled.²⁶

Indonesia's 1945 Constitution states that if there are laws that conflict with the constitution, it is incumbent on the Constitutional Court to conduct a material test or judicial review Court. Therefore, one of the authorities of the Constitutional Court according to the 1945 Constitution is to examine the law against the Constitution at the first and last level with a final decision.²⁷

Table 1. Presidential Threshold for the Election of President and Vice President in 2004-2019

Election Year	Legal Basis	Presidential Threshold		Material Review	Implementation
		DPR Votes	Legitimate National Votes		
2004	2004 Law Number 23 of 2003 concerning General Elections of President and Vice President Article 5 Paragraph (4)	15%	20%		Elections were held in two stages

²⁴ Fatmawati, 'Peranan Mahkamah Konstitusi dalam Membangun Kesadaran Berkonstitusi' [2010] Jurnal Konstitusi Pusat Studi Hukum Tata Negara Universitas Indonesia, Vol. I No. 1, p. 92.

²⁵ Muchtar Hadi Saputra, 'Analisa Kritis Ambang Batas Pengajuan Calon Presiden Dalam Pemilu Serentak' Prosiding Konferensi Hukum Tata Negara Ke-5, Tantangan Menjaga Daulat Rakyat Dalam Pemilihan Umum, Pusat Studi Konstitusi (PUSaKO) Fakultas Hukum Universitas Andalas 2019, p. 687.

²⁶ Hayatun Na'imah, *Peralihan Kekuasaan Presiden (Kajian Hukum Tata Negara)* (Eja Publisher 2009) p. 81.

²⁷ The Constitution of 1945, Art. 24C.

2009	2009 Law Number 42 Year 2008 Concerning Election of President and Vice President Article 9	20%	25%	Constitutional Court Decision Number 51-52-59 / PUU-VI / 2008 dated 18 February 2009	Elections were held in two stages
2014	2014 Law Number 42 Year 2008 Concerning Election of President and Vice President Article 9	20%	25%	Constitutional Court Decision Number 14 / PUU-XI / 2013 Dated January 23, 2014 Constitutional Court Decision Number 108 / PUUXI / 2013 dated February 11, 2014	Election were held in two stages
2019	2019 Law Number 7 of 2017 concerning General Elections Article 222	20%	25%	Constitutional Court Decision Number 53 / PUU-XV / 2017 dated 19 December 2017	Elections were held simultaneously

Table 1 above illustrates the periodic elections along with the legal basis and the number of thresholds for presidential nominations from the first direct election after the amendment, namely from the 2004 election to the 2019 election. Of four (4) presidential elections, only the 2004 Election applied a different threshold. The 2009, 2014, and 2019 elections used the same presidential threshold, although with different legal basis.

Thus, this study addresses the question of whether the presidential threshold requirement applied in the 2019 simultaneous elections using the results of the 2014 election is still relevant and democratic to apply in the 2019 elections. In contrast, the 2014 election used the results of the legislative elections three months earlier as the presidential threshold. The provision is that political parties or coalitions of political parties can nominate presidential and vice-presidential candidates if they have 20% of seats in the DPR or 25% of the national legitimate votes. However, since the 2019 General Election was held simultaneously, it was agreed to use the presidential threshold based on the results of the 2014 legislative elections with the presidential threshold remaining unchanged from the 2014 election.

The determination of the presidential threshold had led to controversies among many parliament members, creating four fractions in the DPR. Gerindra, PAN, Democrats and PKS, walked out during the plenary meeting of ratification of Law number 7 of 2017. These four political parties considered the implementation of the presidential threshold of 20% in the 2019 election as inappropriate because it was not based on the 2019 legislative election. It is even more inappropriate if the presidential threshold is based on the results of the 2014 election. The rejection of the presidential threshold caused many parties to bring suit in the Constitutional Court. However, in its decision, the Constitutional Court rejected the lawsuit and declared that the presidential threshold was constitutional in accordance with Law Number 7 Year 2017 concerning General Elections. As seen from the legal politics, those parties refusing the determination of the presidential threshold came from the same coalition in both the 2014 and 2019 elections. As a legal policy which remains embroiled in political friction, the presidential threshold could be used as a tool to benefit one group. Moh. Mahfud MD emphasized that the political configuration in parliament (DPR) greatly influenced the characteristics of the law and the laws that were passed.²⁸

An open legal issue is the discretion of lawmakers in determining a rule, prohibition, obligation or limitations in the law-making process based on the policy choice of law makers. Thus, the presidential threshold provisions in the simultaneous election are yet to be settled law.²⁹

Regarding the constitution, Jimly Asshiddiqie explained:

“The constitution does not contain all the things that we consider important. Thus, in addition to the importance of developing constitutional practices in the future, it is also necessary to allow a space for decision-making that does not depend solely on formal texts. Likewise, it is vital to allow a room for legislators in the DPR to make correct and accountable decisions. The Parliament together with the Government must translate the norms of the constitutional rules into legal norms that are more operational in the form of

²⁸ In Moh. Mahfud MD, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi* (Rajawali Press 2010) p. 8. Furthermore, Mahfud MD said that the ideals of law can only be achieved if national legal politics comply with four prohibitions or signs in the formation of legislation, namely: 1) Prohibition for the emergence of laws that are contrary to the values of the Pancasila; 2) Prohibition for the emergence of laws that are contrary to the values of God and civilized religiosity; 3) Prohibition for the emergence of laws that are contrary to human values and human rights. 4) Prohibition for the emergence of laws that conflict or potentially damage the ideological integrity and territory of the Indonesian nation and state; 5) Prohibition for the emergence of laws that violate the principle of popular sovereignty; 6) Prohibition for the emergence of laws that violate the values of social justice.

²⁹ Radita Ajie, ‘Batasan Pilihan Kebijakan Pembentuk Undang-Undang (*Open Legal Policy*) dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi’ [2016] *Jurnal Legislasi Indonesia*, Vol. 13 No. 02, p. 2.

laws. As legislators, parliament members as individuals and as a part of parliamentary body have the right and authority to interpret the constitution as well, only that the interpretation in the form of law formulation is binding ,”³⁰

The most significant impact of using the results of the 2014 legislative election for the presidential threshold of the 2019 presidential candidate requirements was to the detriment to new political parties, because it prevented emerging political parties from participating in the 2019 elections to nominate their own candidate pairs. Thus, new political parties were required to form a coalition because they could not nominate presidential candidates on their own, despite the fact that coalitions do not ensure an absolute victory. According to William Riker as quoted by Ni Wayan Indra Winasih, I Ketut Putra Erawan, most coalitions lost the competition over minority coalitions in the general election, because the then current political trend indicated that a large or major coalition did not guarantee victory in elections.³¹

In addition, political parties also bore the effects of the presidential threshold. Law No. 7 of 2017 states that the presidential threshold is 20% of seats in the DPR or 25% of the national legitimate votes of political parties, or a combination of political parties taken from the Parliamentary Elections held in 2014. Looking at the results of the People's Representative Election, in 2014, no political party won 20% of the votes of the DPR or 25% of the votes nationally.³² Thus, this caused political parties to face the risk of not being able to nominate their presidential candidates in the 2019 general elections in Indonesia because there were no political parties in the 2014 general elections that reached the threshold.

2. Simultaneous Election Determined with Non-Democratic Presidential Threshold

³⁰Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi, Perspektif Baru tentang Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics* (Sinar Grafika 2016) p. 243.

³¹ Wayan Indra Winasih, I Ketut Putra Erawan, ‘Peran Partai Politik dan Kalkulasi Elit Terhadap Karakteristik Koalisi’ (Neliti) <<https://media.neliti.com/media/publications/248644-peran-partai-politik-dan-kalkulasi-elit-ed8f141a.pdf>> accessed 16 June 2019.

³² Ayon Diniyanto, ‘Mengukur Dampak Penerapan Presidential Threshold di Pemilu Serentak Tahun 2019’ [2018] Indonesian State Law Review, Vol. 1 No. 1, p. 5.

Simultaneous general elections are basically combining election of the legislative and executive branches in a single election.³³ Theoretically, the concept of simultaneous elections applies to countries that adhere to a presidential system. It is unlike the parliamentary government system, where the legislative elections automatically produce executive officials, because political parties or coalitions of political parties that win general elections become the majority ruler of parliamentary seats to form a government.³⁴

Indonesia's simultaneous general election occur because of the Constitutional Court Decision Number 14 / PUU-XI / 2013 which decided that the general elections of 2019 and thereafter will be held simultaneously.³⁵ Prior to the 2019 election, the presidential and legislative elections in 2004, 2009 and 2014 were conducted separately. Legislative elections were always conducted before the presidential and vice-presidential elections. The results of the legislative elections, which formed the basis of the coalition of the party supporting the presidential and vice-presidential candidates in the presidential election of the same period. In considering the decision of the Constitutional Court, the General Elections conducted separately were considered to have more negative impacts and were unconstitutional.

The consideration of constitutional judges in deciding Decision Number 14 / PUU-XI / 2013 leading to a different decision from the previous decision No. 51-52-59 / PUUVI / 2008 was related to the simultaneous election. The analysis indicates that there was a change in the consideration of constitutional judges in deciding Decision Number 14 / PUUXI / 2013 concerning testing of Law Number 42 of 2008 concerning Presidential Elections and Decision Number 14 / PUU-XI / 2013 deciding that the presidential and vice presidential elections must be held simultaneously with the election of members of DPR, DPR and DPRD. However, in the previous ruling, Decision Number 51-52-59 / PUU-VI / 2008, in the examination of the same article and law (Article 3 paragraph (5) of Law Number 42 of 2008), the Constitutional Court decided that the presidential and vice presidential elections, which took place after the election of members of the DPR, DPD, and DPRD (not simultaneously) did not contradict the 1945 Constitution (constitutional).

³³ Ria Casmi Arrsa, 'Pemilu Serentak dan Masa Depan Konsolidasi Demokrasi' [2014] Jurnal Konstitusi Vol. 11 No. 3 Vol. 11, p. 532.

³⁴ Muhadam Labolo and Teguh Ilham, *Partai Politik dan Sistem Pemilihan Umum Di Indonesia* (Rajagrafindo Persada 2017), p. 248.

³⁵ Muhammad Mukhtarrija, I Gusti Ayu Ketut Rachmi Handayani and Agus Riwanto, 'Inefektifitas Pengaturan Presidential Threshold dalam Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum,' [2016] Jurnal Hukum IUS Quia Iustum Universitas Islam Indonesia Vol. 24, p.5.

The conflicting decision was partly due to differences in the interpretation of the constitution. The Constitutional Court, in decision Number 14 / PUU-XI / 2013 held that the presidential election would be held simultaneously because the 2014 election process was near. Thus, the simultaneous election was held in the 2019 election based on the threshold from the 2014 election results.

Implementation of simultaneous elections with the presidential threshold can be measured using IDEA democratic standards.³⁶ It was conducted by analyzing five main attributes of democracy that include five features emphasized by various traditions of democratic thought connected with the concepts of electoral democracy, liberal democracy, social democracy, and Participatory democracy.³⁷ First, representative government includes clean elections, inclusive suffrage, free political parties, and elected governments. Second, it covers human rights including access to justice, civil liberties, social rights, and equality. Third, government supervision includes an effective parliament, judicial independence, and media integrity. Fourth, impartial administration covers the absence of corruption and predictable law enforcement. Fifth, participatory involvement includes civil society participation, electoral participation, direct democracy, and national elections.

Based on the 5 (five) indicators above, there are standards that were not met in the 2019 simultaneous elections concerning the presidential threshold requirements. The first indicator was fulfilled except in the free political parties section, because in the 2019 simultaneous elections, not all political parties had the freedom to nominate a president. Based on the second indicator, the element of human rights was not fulfilled including access to justice and equality in small parties since new political parties were not able to offer presidential and vice-presidential candidates themselves. Whereas as seen from the third indicator, government supervision that includes an effective parliament, judicial independence, media integrity, was hardly met on a massive scale. Some media became campaign tools for candidates or pairs of candidates from certain parties. As for the fourth indicator, government supervision includes an impartial parliament, namely the absence of

³⁶The International Institute for Democracy and Electoral Assistance (IDEA) is an intergovernmental organization consisting of countries from all continents which is mandated to spread the sustainability of democracy throughout the world. IDEA was established in 1995 to provide means and share practical opportunities to build sustainable democracy by sharing information with Indonesian communities on a number of issues including offering electoral system designs, building more democratic local governments, strengthening women's political participation, and handling conflict through democratic institutions and processes. See *Democracy Assessment in Indonesia*, International Institute for Aid for Democracy and Elections (IDEA) 2000, p. xii.

³⁷ Catherine Natalia, *Global State of Democracy* (Translation, Kirana Karya 2017) p. 13.

corruption and law enforcement that can be expected to meet IDEA indicators. In the fifth Indicator, participatory involvement includes civil society participation, electoral participation, direct democracy, and national elections as evidenced by the involvement of all elements of society as the committee and supervisor of elections and the direct implementation of general election.

Juridically, the application of the presidential threshold was not in line with Article 6A paragraph (2) of the 1945 NRI Constitution which states: “presidential and vice-presidential candidate pairs proposed by political parties participating in the general election prior to the general election.” Textual interpretations of this article describe that each political party participating in the election has the right to propose a candidate pair for presidential election with no exceptions. In other words, there are no limitations on political parties participating in elections to nominate presidential and vice-presidential candidate pairs. However, the application of the threshold for the nomination of president and vice president has legally limited political rights to run for an election and nominate as president and vice president because it is constrained by the requirement to reach a percentage of at least 20% of the number of seats in the DPR. In fact, it is not easy to reach 20% votes. Even some major political parties must form a coalition to reach the 20% figure.³⁸

Philosophically, the application of the presidential threshold castrates the political rights (the right to elect and vote) of the people to get the best president and vice president because of the constraints of the threshold. Leo S Strauss stated that philosophy is a quest for wisdom while in politics there is a great effort to find out political problems.³⁹ The philosophy of the general election is related to the right to be elected and to choose according to the essence of a democratic state. Many countries in the world try to democratize the political life of their constitution to create a democratic climate. This means the same as establishing a government that is able to accommodate the values and meanings of democracy.⁴⁰

Miriam Budiardjo stated that politics is an effort to achieve a better life. Politics in a country is related to the issue of power, decision making, public policy, and allocation or

³⁸ ‘Relevansi Presidential Threshold’ (UNJA 2018) <<https://www.unja.ac.id/2018/04/13/relevansi-presidential-threshold-2019/>> accessed 15 June 2019.

³⁹ S.P. Varma, *Teori Politik Modern* (RajaGrafindo Persada 1995) p. 155.

⁴⁰ Titik Triwulan Tutik, *Op.Cit.* p. 71.

distribution.⁴¹ The political dimension in the study of law sees a very close relationship between law and politics, and some even see the law as a political instrument, which then becomes more developed.⁴² Thus, socially, the presence of the presidential threshold has the potential to disrupt the political process, hamper the performance of the elected president, and disrupt the running of government. The imposition of this threshold requires political parties to form a coalition, because it is believed that no political party can win a majority to meet the acquisition of seats for at least 20% of the total DPR seats or obtain 25% of the national legitimate votes in the previous DPR elections.

According to Plato, policy is the same as knowledge, so that the knowledgeable people must be given a decisive role in public affairs. Thus, the task of finding a good ruler is carried out with a knowledge testing.⁴³ Choosing a leader in a democratic country through a direct election should not be restricted by a presidential threshold just like other countries adopting a presidential system in the world.

3. The Irrelevant Presidential Threshold System is Used in the Model for Simultaneous Election in 2024

The presidential threshold system in simultaneous general elections in Indonesia was first used in the 2019 elections using the 2014 election threshold. From the implementation of the 2019 elections there were at least 3 (three) evaluations. First; the nomination threshold that currently applies at 20% is considered ineffective to the regeneration of political parties to produce public leaders. Presidential threshold is considered to only accommodate the interests of large parties and eliminate the rights of small parties. This is not in line with deliberative democracy.

With regard to the concept of deliberative democracy Habermas explains, when the ability to produce law is delegated through the exchanging patterns of certain social systems that operate independently, legal reproduction will fall under the shadow of the power of ambiguous duality that separates the state from social units Public. Habermas' opinion is a lawsuit against the representative democracy model that does not place constituents in the overall legal placement process. In this model, constituents only have political rights to elect parliamentary candidates, then after that their constitutional role is

⁴¹Miriam Budiardjo, *Dasar-dasar Ilmu Politik* (Gramedia Pustaka Utama 2008) p. 55.

⁴² Abdul Latif & Hasbi Ali, *Politik Hukum* (Sinar Grafika Offset 2018) p. 17.

⁴³ Henry J Schmandt, *Filsafat Ilmu Politik* (Pustaka Pelajar 2009) p. 59.

complete. This causes legal ambiguity because the state will create a social system that operates not based on the wishes of the people.⁴⁴

Second, the 2024 general election which uses a threshold of the results of the 2019 elections with a magnitude of 20% causes political parties to have to form coalitions from the start, which allows for bargaining, money politics, conflict of interest and even the development of oligarchies to damage the Indonesian democratic system. There are still many negative aspects of the threshold in the simultaneous election, compared to the 2014 election which is quite relevant, because in the 2014 election the presidential threshold used was the result of the legislative election 3 (three) months before the presidential election. Elections in Indonesia should be a unity in the implementation of democratic principles,⁴⁵ where the people can choose the leaders or their representatives who are entitled to make a policy based on the wishes of the people. An election is basically as a means of democracy that aims to organize the government of the country by the people, from the people, and for the people.

Third, the magnitude of the number in the presidential threshold system in the 2019 elections simultaneously made the presidential candidate narrowed to 2 (two) candidates, this caused the organizers, supervisors, and security forces to run out of time, energy, and energy to handle conflicts between the two opposing camps. Plus the existence of social media that makes the existence of two pairs of candidates has the potential to give birth to sharp conflicts. This forced the organizers, monitors and security forces to pay attention to handling and analyzing cases of false news, hate speech, and defamation on social media. To avoid the repetition of the above, the right legal instruments in conducting elections are needed to realize democratic elections that are just.

Democratic election standards require that fair and fair elections can be achieved if there are legal instruments that govern all processes for conducting elections; while being able to protect the organizers, participants, candidates, voters, observers, and citizens in general from fear, intimidation, violence, bribery, fraud, and various other fraudulent practices that will affect the election results. Therefore, fair and fair elections require

⁴⁴Wimmy Halim, 'Demokrasi Deliberatif Indonesia: Konsep Partisipasi Masyarakat Dalam Membentuk Demokrasi Dan Hukum Yang Responsif' [2016] Jurnal Masyarakat Indonesia Vol. 42 No. 1, p. 25

⁴⁵ Ali Masykur Musa, *Sistem Pemilu: Proporsional Terbuka Setengah Hati* (Pustaka Indonesia Satu 2003) p.162.

electoral legislation along with the officials in charge of upholding the electoral legislation.⁴⁶

The three important highlights above can be repeated because the draft General Election Law has been drafted, in the draft revealed the presidential threshold reached 20% of the DPR seats or 25% of the national vote accumulation, that number has not changed compared to the 2019 Elections. Overall must be done on the presidential threshold system in the simultaneous election. Large presidential threshold numbers and using the results of previous elections could cause the loss of democratic rights of Indonesian citizens in politics. The government should give political freedom as a basis for the right to freedom of association and association which gave birth to the right to establish political parties, the right to participate in elections and the right to run for president must be analyzed based on the principles of Pancasila.⁴⁷ The results of this analysis are the concept of political freedom and political parties that are unique to Indonesia, which do not depart from the Indonesian Nation's view of life, Pancasila.

E. Conclusion

The presidential threshold regulation as an open legal issue in simultaneous elections in Indonesia is regulated in Law No. 7 of 2017 concerning the General Election of 20% of seats or 25% of valid national votes. The legal policy was materially reviewed by a number of parties before the Constitutional Court because the presidential threshold in the 2019 election was based on the results of the 2014 legislative elections. The 2019 election is unlike the 2014, 2009 and 2004 elections, in which the Presidential threshold was based on the results of legislative election 3 (three) months earlier. Presidential threshold is an open legal policy of lawmaking. The formulation of the amendments to the 1945 Constitution does not stipulate the presidential threshold provisions. The agreed formulation is to delegate to the legislature to regulate it in law. That is, if the presidential and vice-presidential elections are held simultaneously with the legislative elections, the presidential threshold arrangement can be carried out.

Presidential threshold is contrary to democracy. The use of presidential threshold of the 2014 legislative election results for the 2019 presidential candidate requirements is detrimental to new political parties because new political parties contesting in the 2019

⁴⁶ Syamsuddin Haris, *Pemilu Nasional Serentak 2019* (Pustaka Pelajar 2016) p. 145.

⁴⁷ Kuswanto, 'Konstitusionalitas Penyederhanaan Partai Politik Pengaturan Partai Politik Dalam Demokrasi Presidensial', *Setara Press* (Malang 2016).

elections cannot nominate President and Vice President. The determination of presidential threshold requires new political parties to form coalitions since they cannot nominate the Presidential candidates on their own. Law No. 7 of 2017 has stated that the presidential threshold is 20% of seats in the DPR or 25% of the national legitimate votes owned by political parties or a combination of political parties taken from the DPR elections held in 2014. Unlike the previous elections that used threshold of legislative election results 3 (three) months earlier, the 2019 simultaneous elections used the results of the 2014 election. According to IDEA, it did not meet the elements of democracy in the general election, since it indicates the failure to fulfill justice and equality for small parties and new political parties because they could not nominate their own presidential and vice-presidential candidates.

The implementation of the Presidential threshold of 20% in the Election Law will limit the political rights of citizens to run for Presidential candidates and narrow the space for the people to get quality leaders who are in conflict with the Presidential system. With reference to the facts that occurred in 2019 concurrent elections, the presidential threshold is no longer relevant to be applied to the simultaneous elections of 2024 by using the threshold results from the results of previous elections. This will only accommodate the interests of large parties and eliminate the rights of small parties and is not in line with the principles of deliberative democracy.

There are many things to note from the implementation of simultaneous national legislative and executive elections in 2019. This indicates that the parties involved in preparing the next election of 2024 should have better plan, not only related to the making of a legal framework governing simultaneous elections, reorganization of EMBs and logistical readiness of the elections. Based on the analysis, we made the following recommendations: all national election stakeholders - government, DPR, DPD, election organizers - must have the same understanding (definition) regarding simultaneous elections and their scope. The same definition of simultaneous elections at the national level will facilitate the making of separate legal rules between simultaneous national elections to elect the President/Vice President, members of the DPR, and members of the DPD, and simultaneous local elections to elect governors, regents, and mayors, as well as DPRD members of each province and district/city. As a final recommendation, the government should make the National Simultaneous Election Act and amend the Act on Regional Election of Regional Head (Pemilukada) to be Simultaneous Local Election.

The government should evaluate the implementation of the elections simultaneously in 2019, create various models of the application of the presidential threshold and provide a legal instrument that regulates all election implementation processes. Parliament and the government immediately formed the Election Law which accommodates all the interests of political parties both large and small political parties.

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