

ELECTORAL JUSTICE FOR THE PRESIDENTIAL ELECTION: THE IMPLEMENTATION OF THE PRESIDENTIAL THRESHOLD AFTER CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA DECISION NUMBER 14/PUU-IX/2013.

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ABSTRACT

Electoral justice is part of justice in general. As intended by the Constitution, it is actually based on the concept of fairness and the social justice in the Fifth Principles of Pancasila. The Presidential Threshold is a concept that aims to propose qualified candidates for President and Vice President. The threshold has the purpose to set a limitation for the political party sitting in the parliament. The threshold requires political party or coalition of political party which have at least 25% of quota sitting in the parliament that may nominate the President and Vice President. This paper has 2 issues, notably the electoral justice in the presidential election in Indonesia and the implementation of presidential threshold in the presidential election in Indonesia after the Court Decision.

To analyze the issues, this paper uses normative method. The method is by analyzing the Constitution and Laws. The results of the analysis have who that the electoral justice is very important to be achieved in the presidential election. The Court Decision Number 14/PUU-IX/2013 considered that the presidential threshold is in order to strengthen the presidential system. However, the current presidential threshold as one of the requirement in nominating the President and Vice President is against justice. It is not supporting the electoral justice.

Key words: Electoral justice, Presidential election, Presidential threshold.

1. Introduction

General election is one of the democracies mechanisms in Indonesia. As a democratic state, Indonesia has to develop the general election on the basis of the people sovereignty ([Huda, 2014](#), [Qomariyah, 2019](#)). In Indonesia, the presidential election is conducted differently from the general election. Election are stipulated in the Indonesian Constitution notably Article 6A regarding on the presidential election and Article 22E on the general election. In more details

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both are regulated by the Laws. With regard to the presidential election in Indonesia, the presidential threshold is applied. Presidential Threshold is the threshold for the candidate of the president and the vice president who is proposed by the political party or the coalition of the political parties.

The Constitutional Court of The Republic of Indonesia (MKRI) has several decisions regarding to the presidential threshold. The Court in its decision Number 49 / PUU-XVI / 2018 considered that the presidential threshold is a product of the Election Law from the open legal policy. In this context, the MKRI rejected the case and that the presidential threshold as it is regulated on Article 222 Law Number 7/ 2017 was still existed. In several Court decisions, e.g., the Decision Number 59 / PUU-VI / 2008, the Decision Number 56 / PUU-VI / 2008, the Decision Number 26 / PUU-VII / 2009, the Decision Number 4 / PUU-XI / 2013, the Decision Number 14 / PUU-XI / 2013, the Decision Number 46 / PUU-XI / 2013, and the recent Court's decision, the Decision Number 53 / PUU-XV / 2017, the Court is consistent in confirming the presidential threshold. Therefore, the presidential threshold is still being applied in the presidential election. Referring to the recent Court's decision, the Court considered that the presidential threshold is in order to strengthen the presidential system. It is in line with the intention of the Amended Constitution that to strengthen the government system, support from the political parties is very important. To this extent, the presidential threshold in Indonesia is relevant to the multi-party system. The aims of simplifying the political parties in the nomination presidential process is addressed to simplifying the mechanism of winning in the presidential election. In this context, it is expected to have limited number of presidential candidates so that the constitutional requirement in the Constitution for the elected president would be achieved.

2. Literature Review

Article 222 the Law Number 7 Year 2017 on the Election stipulates that the candidate of the president and the vice president in pair in the 2019 election who is proposed by the political party or the coalition political parties participated in the previous election and meet the requirement of 20% seats in the parliament or having 25% national votes in the previous legislative election is comprehensively considered based on the Indonesian Constitution and not on the basis of the factual reality. The presidential candidate shall not be based on the existence of the legal norms which strictly regulated the separation of the legislative election and the presidential election. On the other hand, it shall be conducted simultaneously in order to strengthen government and stable the government system. The presidential threshold to propose the candidate of the president in this context is assumed as reflection of social political reflection and the diversity of the community representation. Therefore, in this point, it is assumed to be in line with the Constitution and not a discrimination.

The political party is one of that may have impacts as the application of Presidential Threshold. The Law Number 7 Year 2017 has the point to determine the requirement of the presidential.

Presidential Threshold is 20% seats in the legislative (DPR) or the 25% of the national votes that the political party or the coalition of the political parties has gained. According to the recent Court's decision, the presidential threshold is determined by the previous 2014 legislative election. Based 2014 on the election result, there was neither political party gained 20% of the parliament votes nor the 25% of national votes. In this context, there was no political parties may propose the candidate of the president. The situation leads to the situation where there was no political parties met the requirement of proposing the candidate of the president. In further, it may ease the rights of the political party in proposing the candidate of the president. Because constitutionally, proposing the candidate of the president is one of the constitutional rights of a political party. The requirement to have presidential threshold has lessened the constitutional rights of the political party to nominate a candidate of the president. To this extent, the presidential threshold is also assumed as discrimination for the political party. The impact of the presidential threshold against the number of the political party proposing the candidate of the president was also very significant. In the 2019 presidential election, political parties could not meet the requirement, so the only two candidates were eligible to be announced as the candidate of the president. The other new political parties only participated in the presidential campaign and only gave support to the candidate. This situation is actually not in accordance to the intention of the Constitution. The mechanism provokes a different treatment between the ruled political parties and the new political parties. Thus, the mechanism of presidential nomination process has go beyond the intention of the Amendment of the Indonesian Constitution. The Constitution clearly stipul that all political parties or coalition political parties may nominate the president and the vice president. Therefore, in this context, presidential threshold may cause injustice in the political system and the political contestation.

The constitutional court decision impact to the political parties and mostly for the political party which has seats in the DPR. It is because that the requirement to propose the presidential candidate is based on the votes in the election and not on the basis of the total national votes. In this context, there was political party in 2014 which had the stance to be absent or neutral stance in the 2019 presidential election. Such political party may gain an absent stance or neutral stance because they shall not gain seats in the legislative (the DPR) and may gains the national votes which was exceed the parliamentary threshold or the electoral threshold. To this extent, the new political party may also take absent stance or neutral stance in the 2019 presidential election.

The presidential threshold in Indonesia is being assumed as in relevant because, the simultaneously election made the deadlock to only two pairs of candidates participated in the presidential election in 2019. In this context, the presidential election is not working properly as the requirement that may limit criteria of the political party eligible to be participat in the presidential nomination process. The 2019 election which was conducted simultaneously may become a reflection that the presidential threshold is in relevant to be applied. Moreover, the presidential threshold contributes to the electoral injustice where not all the political parties

could participate. The most important thing is that it may hinder the new political parties to participate in proposing a candidate of the president. This is also relevant to the intention of the requirement of the presidential threshold which was actually in order to strengthen the presidential system in Indonesia. An ideal mechanism which may accommodate presidential threshold and the rights of the political parties may only be by making separation of the legislative election and the presidential election. This paper is about clarifying in short, the issue of the application of the presidential threshold from the perspective of electoral justice in the presidential election, in particular the application of the presidential threshold after the Constitutional Court's decision.

3. Materials and Methods

The research method used in preparing the issues uses legal research. Legal research is a process to find the rule of law, legal principles, and legal doctrines to address the legal issues at hand. Legal research is conducted to produce new arguments, theories and concepts as prescriptive in solving problems faced, the answers expected in legal research are right, appropriate, inappropriate or wrong, thus the results obtained in legal research already contain values ([Marzuki, 2007](#)).

The technique of the data collection used in this research was the observation, interview, interpretation of law, law documents, and court decisions. The result of reviewing the ratio legis of law is an argument for solving the legal issue being studied. The conceptual approach in this study moves from the views and doctrines that have developed in the science of law, specifically the law regarding the administration of equitable elections based on the presidential threshold. These doctrines, obtained through law books. Interpretation approach is interpreted in Constitution of the Republic of Indonesia and in this relation to Law Number 7 Year 2017 concerning elections and regulations related to elections in order to find a new theory related to the political equality of political parties in the nomination of candidates for President and Vice President. The case approach is carried out by examining cases related to elections based on the presidential threshold that is relevant to the proposed legal issues and analyzing the results of court decisions as a judge's consideration in issuing a decision.

4. Result and Discussion

4.1. *The electoral justice in the presidential election*

Justice is the constant and sustainable willingness that may be owned by every person and has the purpose to give what it has to be given. John Rawls ([Rawls, 2011](#)), firstly argued that justice is fairness which has principles that every person is free and rationally has freedom to develop their intention and gain better life when they have started. It is a basic condition for every person to participate in activities that they intended to participate. Justice is a legal essence. Secondly,

Rawls is not only mathematically formulated what it said to be fairness when people got similar portion as others. However, justice may also be reflected to the efficiency and effectiveness in the presidential election. Different from the Rawls's concept on the justice, the cumulative justice is the justice which gives people the more as it is quality and quantity without calculating each of achievement.

Justice in the presidential election is the concept of ensuring the acts, procedures, and decisions which all relevant to the election process has already in line with the laws (the Constitution, the Laws, international legal instrument and other rules) and to protect and restore the rights of the election participants, the rights to be heard, and the conflict settlement in the election conflict that has to be resolved effectively and efficiently in accordance to the election Law ([Ayoub & Ellis, 2010](#)). The presidential system is being protected with the mechanism of presidential threshold as the additional rules on the requirement to proposing the President and the Vice President in Article 6A (2) which stipulates that "the candidate of the President and the Vice President is proposed by the political party or the coalition of the political parties participated in the previous election" ([Ayoub & Ellis, 2010](#), [Ismail, 2020](#), [Kim, 2016](#)). The Article is clearly giving room for the political parties to participate in the election by proposing candidate of the president and vice president. To this extent, political parties are the representative of the people and that the relationship between the state and its citizens. In other perspective, the presidential threshold according to Gotfridus is the minimum supports which may be needed by a party to get its representative in the legislative body. Such definition may give emphasis that the presidential threshold may be required in the election in the form of numbers, percentages, or quota ([Gotfridus Goris Seran, 2013](#), [Singh & Jain, 2016](#)).

4.2. The implementation of the presidential threshold after the court's decision

The impact of the Court's decision No. 14 / PUU-IX / 2013 for the election system in Indonesia according to presidential threshold is simultaneously election. To this extent, it may reduce the rights of the political parties to achieve the requirement to participate in the presidential election. This may have consequence to the reduction of the rights of the political parties which could not make it the presidential threshold requirement or which in the previous election does not the percentages as required by the conditions (Constitutional Court Decision Number 14/PUU-IX/2013). The provision limits political parties to propose 2019 presidential and vice presidential candidates based on the presidential threshold system. The application of the Presidential Threshold has the consequence of losing opportunities and citizens' rights through political parties that have not participated in previous elections to nominate their candidates. Therefore, it must be considered, in accordance with the principle of fair elections in determining the threshold for the nomination of candidates for President and Vice President and it should not be detrimental especially to minority groups.

Determination of the President and Vice President Threshold must pay attention to the diversity of the people reflected in political aspirations ([I Dewa Made Putra Wijaya., 2014](#)). Determination of the threshold needs to be done proportionally and pay attention to the political balance of the law simplifying the party and protecting political diversity. The determination of the President must not be based on consideration of the advantages and disadvantages that will be obtained by political parties. The limitations of political parties in the holding of elections are a limiting factor for democratic parties in Indonesia. With a threshold, it reduces opportunities for individuals to run for president and vice president candidates through political parties and simplifies political parties because not all political parties have the same right in promoting candidates for President and Vice President. This has become inconsistent in the holding of elections in Indonesia because political parties that are part of the people do not have the freedom to determine the candidates they choose so that the political rights of citizens are lost. Opportunities for legal problems can occur when simultaneous elections in Indonesia still maintain the threshold provisions of the President and Vice President for political parties to propose pairs of candidates for President and Vice President.

5. Conclusion

Presidential Threshold provides an opportunity for injustice in the election of President and Vice President in Indonesia. There are two arguments notably namely Presidential Threshold restricting political parties to give their candidates in the election of President and Vice President and All political parties participating in the election, they do not have the right to indicate candidates for President and Vice President so that the candidates who enter the Presidential and Vice President elections are limited.

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