

Implications of the Preseidential Threshold Based on the 1945 Constitutional Law Article 6A After the Enactment of Law Number 7 of 2017 (Concerning General Elections)

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Abstract

In essence, general elections or general elections are a means of democracy which is essentially to organize a state government by, from and for the people or in other words to realize sovereignty. Because basically, the constitution is an important document which contains basic regulations regarding the structure government, rights and obligations as well as limitations on state authority. This resulted in the euphoria of democracy and freedom that permeated all life nation and state so that it has an impact on efforts to make changes or changes to the constitution or the basis of state administration. Democracy is closely related with the principle of administering the rule of law on the grounds that in literacy democracy, general elections are one of the principles of the rule of law. This research is a normative juridical research method, research that uses regulations legislation, with a legal theory approach, so that it can help complete the writing of this research.

Keywords: Constitution, Elections, Preseidential Threshold.

1. Introduction

General elections as a mean of democracy aims to organize a state government by, from, and for the people. or in other words, realizing sovereignty in the hands of the people within the framework of a democratic rule of law. In Law Number 7 of 2017 concerning General Elections for President and Vice President, hereinafter referred to as the Election Law, there are several technical matters regulated for holding general elections, one of which is regarding the Presidential Threshold (Dalem et al., 2023; Fitri & Setiadi, 2022; Humairo & Ruslie, 2023; Rafy et al., 2023).

According to Law Number 7 of 2017, particularly Article 221, candidates for President and Vice President are proposed as single pair by a Political Party or Coalition of Political Parties. Furthermore, Article 222 states that candidate pairs are nominated by political parties or coalitions of political parties participating in the election, provided they meet the requirements for obtaining seats of at least 20% of the total seats in the House of Representative (DPR) or obtaining 25% of the valid votes nationally in the previous DPR member election (Anggara, 2019; Dinianto, 2018; Rafy et al., 2023). If Article 221 and Article 222 of the Election Law are read together, it means that the only mechanism or route to become a Presidential and Vice-Presidential Candidate is through a proposal from a political party or a combination of political parties participating in the previous election (Abdul Majid & Anggi Novita Sari, 2023; Adjie Hari Setiawan, 2023; Hapsari & Saraswati, 2023).

With the Presidential Threshold, not all political parties participating in the election can nominate candidates for President and Vice President, but only political parties participating in the election that obtain at least 20% of the total seats in the House of Representative Republic of Indonesia/DPR-RI or obtain 25% of the valid national votes in the DPR-RI member election in accordance with the provisions of Article 222 of Election Law Number 7 of 2017. Based on this literature, the aim of this research is to determine the implications of the presidential threshold according to Article 6A of the 1945 Constitution after the ratification of Law Number 7 of 2017 (concerning Elections).

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2. Methods

This type of normative research is the method used in legal research, which is carried out by examining existing library materials. This research used a library research approach or a normative juridical approach that the authors use in looking at legal objects because they relate to legislation, namely the 1945 Constitution, Law No. 7 of 2017 concerning general elections. The data source for this research used secondary data of library materials, which include official documents, library books, statutory regulations, scientific works, articles, and documents related to research material. Quantitative juridical method was used as the data analysis technique, started from theory to data and ends in acceptance or rejection of the theory used.

3. Results and Discussion

3.1. Democracy in Indonesia

There are two types of democracy, namely constitutional democracy and one group that calls itself democracy, but which essentially bases itself on communism. The fundamental difference between the two perspectives is that constitutional democracy aspires to a government with limited power, namely a state of law (rechtsstaat), which is subject to the rule of law. On the other hand, democracy, which is based on communism, envisions a government whose power must not be limited (machtsstaat) and which is totalitarian.

The characteristic of constitutional democracy is the idea that a democratic government is a government that has limited power and is not permitted to act arbitrarily against its citizens. State power is divided in such a way that opportunities for abuse are minimized, namely by handing it over to several people or bodies in the hands of one body. The juridical formulation of these principles is known as Rechtsstaat (Rule of Law) and Rule of Law. In the view of democratic groups, which base themselves on communist ideology, they always have an ambivalent attitude towards the state.

3.2. Democratic Systems and Practices in Indonesia

As an era and in a political sense as an order or regime, reform must be interpreted as a systematic effort by the Indonesian people to actualize the basic values of democracy; or more broadly to audit and actualize the democracy index, which was manipulated in the past (Muladi, 2022).

The affirmation that Indonesia is a country of law and the statement that the judicial power is an independent power, contains the spirit of upholding the principle of equality before the law and protecting interference, both internal and external, towards the judicial power in order to prevent and avoid failure to achieve justice. In relation to legal reform within the framework of the four basic aspects of democracy above, the government must systematically implement reforms based on the elements of the legal system concept, namely: (1) legal structure; (2) elements of legal substance; and (3) elements of legal culture. Friedman emphasized that no matter how good the legal norms are, a law without the support of reliable law enforcement and trusted law will not be effective in achieving its goals. Laws with good norms and supported by reliable and trustworthy law enforcement officers will also be less effective without the support of the legal culture of the community concerned (Friedman & Hayden, 2017).

3.3. Election System and Implementation in Indonesia

The existence of provisions regarding general elections in the 1945 Constitution is intended to provide a stronger legal basis for elections as a vehicle for implementing popular sovereignty. With this provision in the 1945 Constitution, it is guaranteed that the time for elections to be held on a regular basis (every five years) and guarantees the process and mechanism as well as the quality of the election, namely direct, general, free and secret (overflow), as well as honest and fair (*jurdil*). As is known, the implementation of elections so far has not been regulated in the constitution. Both Law No. 7 of 1953, which regulates the 1955 Election as well as Law No. 15 of 1969 with its amendments, adheres to a proportional election system (balanced votes). In implementing the proportional system in Indonesia, electoral districts are determined as Level I Regions. If a Level II Region has at least one representative in the central DPR, then this provision is similar to the district election system, therefore this system is called a variation from the district system (Samidjo, 1986).

Instead of achieving a modern and ideal democratic system as desired by the majority of Indonesian people, the 2019 general election actually harmed the spirit of democracy and also violated legal principles (unconstitutional) due to the political ambitions of the decision makers.

3.4. Presidential Threshold in the Electoral System in Indonesia

General elections in Indonesia take place once in every five years and are regulated in the constitution. Since Indonesia entered the reform era at each election the rules regarding the threshold for candidacy for president and vice president or what we call in this thesis the Presidential Threshold always change, in other words Indonesia has never had a clear and definite standard for determining presidential and vice-presidential candidates.

The term presidential threshold consists of two words originating from English; Presidential and Threshold. Meanwhile, in terms of terminology, the Presidential Threshold is the minimum threshold for obtaining seats and votes for a political party or a combination of political parties in a legislative general election in order to be able to nominate a candidate pair for president and vice president. The presidential threshold provisions in the general election system for president and vice president in Indonesia were first implemented in the 2004 election (Echols, 2016).

Besides the term presidential threshold, the electoral system in Indonesia also knows the term parliamentary threshold or simplified political party. Parliamentary threshold is the threshold for a political party's minimum vote acquisition in legislative general elections to be included in determining seats in the House of Representatives. This provision was first implemented in the 2009 elections. The parliamentary threshold provision was created as an effort to create party stability in order to realize the mandate of the 1945 Constitution in maximizing the presidential system without tarnishing democratic rights in the 1945 Constitution (Tutik & Nuswardani, 1917).

3.5. Juridical Foundations of the Presidential Threshold

As we know, the state constitution has been amended several times based on the spirit of reform of the Indonesian nation. The first period for changes to the 1945 Constitution began in 1999 and the second period in 2000, but in both periods, the provisions regarding filling the position of head of state had not been changed. Then, in the third amendment, there are several provisions related to the requirements for becoming president and vice president and the mechanism for direct election by the people. The provisions in question are stated in Article 6A of the 1945 Constitution. It should be noted that the initial debate in making changes to the 1945 Constitution could not be separated from discussions regarding the electoral system adopted directly or indirectly. Moreover, the debate that emerged was related to personal requirements of someone to be president and vice president Constitutional Court of Republic of Indonesia, 2010).

The direct election of the president and vice president by the people is one of the mandates of participatory democracy, which will provide broad opportunities for the people to participate effectively in the decision-making process concerning public policy. The principle of participatory democracy is equality for all adult citizens to participate in determining the agenda and exercising control over the implementation of the agenda that has been decided collectively. This is carried out to ensure a clear understanding of the appropriate objectives in national affairs, thereby fostering the realization of good governance (Robert A.Dahl, 2001).

Participatory democracy is essentially a democracy that will consciously empower the people in order to realize government '*dari rakyat, oleh rakyat dan untuk rakyat, dan bersama rakyat*' or 'from the people, by the people and for the people, as well as with the people'. The existence of people's empowerment in the form of direct participation is important because the system of people's representation through representative institutions can never be relied on as the only channel for people's aspirations. For this reason, the principle of 'representation in ideas' is differentiated from 'Representation in Presence' because physical representation itself does not necessarily reflect the representation of ideas or aspirations (Robert A.Dahl, 2001).

Article 6A of the 1945 Constitution does not mention the provisions on the threshold for presidential and vice-presidential candidacy, but based on the provisions of Article 6A paragraph (5) of the 1945 Constitution of the Republic of Indonesia which states that; "The procedures for holding the election of the President and Vice President are further regulated in the Law." Our country's Constitution gives constitutional authority to the Government together with the House of Representatives to make more comprehensive regulations regarding the procedures for

holding presidential and vice-presidential elections because the 1945 Constitution of the Republic of Indonesia does not contain detailed and concrete details regarding this content.

Then, a law was formed regarding the election of president and vice president, which contained Presidential Threshold provisions. This is a political agreement between several factions in the People's Representative Council with the consideration that in order to create a strong and effective presidential system, the requirement to nominate a president and vice president based on the number of valid national votes is necessary for political parties or combinations of political parties as proof of the legitimacy of the people.

The basic agreements in making changes to the 1945 Constitution include; first, do not change the opening part of the 1945 Constitution; second, continue to maintain the Unitary State of the Republic of Indonesia; third, changes are made by means of an addendum; fourth, emphasize the presidential system of government; and, fifth, the explanation of the 1945 Constitution is removed so that things Normative in the explanation section is appointed into the articles (Ria, 2014).

According to Law No. 23 of 2003 concerning the General Election of the President and Vice President, Presidential Threshold is the first legal instrument created to regulate the presidential election mechanism as mandated by Article 6A paragraph (1) to paragraph (5) of the 1945 Constitution of the Republic of Indonesia after the amendment.

Article 5 paragraph (4) of the *a quo* law formulates a new regulation that political parties that can nominate presidential and vice presidential pairs are only political parties or combinations of political parties that have met the electoral threshold of at least 15% of the total number of seats in the Council. People's Representatives (DPR) and 20% of the valid votes cast nationally in the DPR Member Election (Al Rasjid, 1999).

Presidential Threshold According to Law No. 7 of 2017 concerning General Elections is the latest regulation related to elections, which was passed at the plenary meeting of the House of Representatives (DPR) of the Republic of Indonesia in the early hours of July 21 2017. The legal instrument that has sparked polemics is related to the presidential threshold for political parties or combinations of political parties to nominate candidates for president or vice president). It contains 573 articles, explanations, 4 appendices, and is fragmented in several books; the first book is General Provisions, the second book is Election Organizers, the third book is the Implementation of Elections, the fourth book is Election Violations, Election Process Disputes, and Election Results Disputes, the Fifth Book is Election Crimes, and the sixth Book is Conclusion. This law was promulgated by the Minister of Law and Human Rights, Yosanna H. Laoly on August 16, 2017.

Regarding the threshold for political parties or combinations of political parties to nominate candidates for president or vice president, this law confirms that candidates for President and Vice President are proposed in 1 (one) pair by a political party or combination of political parties that meets the requirements for obtaining at least seats. 20% (twenty percent) of the number of DPR RI seats or obtaining 25% (twenty five percent) of valid votes nationally in the previous DPR member elections. Political parties or combinations of political parties as referred to only nominate 1 (one) pair of candidates in accordance with the internal mechanisms of political parties and/or joint deliberations of political parties which are carried out democratically and openly.

3.6. Presidential Threshold Implications

The decision regarding Simultaneous General Elections in 2019 was due to the decision of the Constitutional Court Number 14/PUU-XI/2013 concerning Review of Law Number 42 of 2008 concerning the General Election of President and Vice President against the 1945 Constitution of the Republic of Indonesia, which granted for some requests for judicial review of Article 3 paragraph (5), Article 12 paragraph (1) and paragraph (2), Article 9, Article 14 paragraph (2), and Article 112 of Law No. 42 of 2008, which is declared contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force. However, the normative provisions contained in Article 9 "concerning threshold limits" of the Law were the only article that was not granted in the judicial review request. Substantially, the decision mandates that the General Election of President and Vice President, which will be held after the General Election of legislative members no longer have binding legal force as regulated in Article 3 paragraph (5) of Law No. 42 of 2008 which *mutatismutandis* also applies to Article 12 paragraph (1) and paragraph (2), Article 14 paragraph (2), and Article 112 of the Law so that the General Election of the President and Vice President and the General Election of legislative members will automatically be carried out simultaneously with the provisions of the decision applying to the holding of the 2019 General Election and subsequent General Elections.

The existence of a threshold for political parties to have the right to nominate pairs of candidates for President and Vice President (Presidential Threshold) in General Elections, which are held simultaneously, gives rise to juridical implications by violating the 1945 Constitution concerning the Presidential System, contrary to Article 6A paragraph (2) of the 1945 Constitution and violates Citizens' Rights in the 1945 Constitution.

The Constitutional Court decision Number 14/PUU-XI/2013 and Law Number 7 of 2017 concerning General Elections regulates that elections are held simultaneously plus there is a Presidential Threshold, which is considered to strengthen the Indonesian Presidential system. It violates the provisions of the 1945 Constitution, which regulates that the Indonesian government system is Presidential because the Presidential Threshold rules in the 2019 simultaneous elections, as regulated in Law number 7 of 2017 concerning General Elections, actually weaken the presidential system adopted by Indonesia. In the presidential system scheme, the Presidential and DPR institutions are two separate institutions that have different bases of political legitimacy, and the executive and legislative institutions are not dependent on each other, so the presidential candidacy should not be determined by the political formation of the national parliament as a result of the legislative elections. Moreover, the mandates from the President and the DPR are not the same so they cannot be mixed up.

The existence of the Presidential Threshold provisions in Law Number 7 of 2017 is in conflict with Article 6A paragraph (2) of the 1945 Constitution, which states that the candidate pairs for President and Vice President are proposed by political parties or a combination of political parties participating in the Election before the Election is held. This means that every political party should be able to nominate pairs of candidates for President and Vice President, including political parties that have just participated in the elections. With the Presidential Threshold provisions, it certainly limits the rights of each party to nominate presidential candidates, 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, which are neither extraordinary nor fulfilling.

In the 1945 Constitution, there are provisions regarding citizens' rights, which can be seen in Article 27 paragraph (1). It explains the rights of citizens to vote, which are contained in the rights of citizens guaranteed by the constitution in the form of equality of position under the law and government. Moreover, Article 28D paragraph (1), explains the right to obtain recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law. As well as Article 28 D paragraph (3) explains the right to obtain equal opportunities in government. These rules regarding Human Rights are a form of manifestation of people's sovereignty as regulated in Article 1 paragraph (2) and Article 6A paragraph (1).

The authority of each political party participating in the general election to nominate pairs of candidates for President and Vice President in the General Election is a form of implementation of the human rights of citizens, considering that participants in the Presidential Election are individual candidate pairs themselves as guaranteed in Article 27 paragraph (1) of the 1945 Constitution, namely "All citizens have the same position under the law and government and are obliged to uphold the law and government without exception".

3.7. Implementation of the 2014 and 2019 General Elections

The 2014 General Elections to elect members of the Legislature and the President were held separately, even months apart. Apart from that, Article 9 of Law Number 42 of 2008 clearly states that parties or combinations of political parties that reach 20 percent of DPR seats and 25% of the national vote can nominate candidates for President and Vice President. Law Number 42 of 2008 is one of the legal bases for holding the 2014 elections. This law was not updated because it was considered still adequate as a legal basis for holding elections. The general election system implemented in Indonesia in 2014, namely the election of members of the Legislative Assembly first to determine the number of votes and seats in the DPR in determining and encouraging Presidential candidates using a proportional system, makes it difficult to encourage a pair of Presidential candidates from one party but from a combination of several parties. Because in the 2014 Legislative Election, no party passed the Presidential threshold. The 2014 election implementation system was implemented separately between the legislature and the executive. This is to be able to map out which parties have passed the threshold, so that they are eligible to nominate candidates for President and Vice President because based on Law Number 42 of 2008, not every party participating in the Election can nominate its Presidential candidate and there is a threshold rule (Ernasari & Rakhmatika, 2021; Katrino & Afrida, 2021). This is different from the 2019 election, where the election implementation system is regulated by simultaneously holding the Presidential Election and the Legislative Election. These separate institutions hold elections at the same time. The 2019 general election still uses threshold rules as regulated in Law Number 7 article 222 of 2017, thus, the results of obtaining DPR seats or valid national legislative votes in 2014 will be used to determine, which parties have the right

to nominate candidates for President and Deputy. in 2019. The 2019 general election is based on experience of the problems of the 2014 general election, namely how to avoid or minimize three basic problems in general election practice, namely, first, political oligarchy, where a group of elites from the national level to regional governments continuously try to perpetuate power in every possible way, especially by using a powerful approach to power (Anggara, 2019; Ansori, 2017). The second is the economic-political oligarchy, namely a group of people who choose capital or very large capital and are willing to finance candidates participating in general elections at both the national and local levels in the hope of getting large concessions for managing natural resources and projects in the government. The third problem in the general election is minimizing the birth and development of “political bandits”, namely a group of people who use their social influence to cheat the general election in the hope of winning a candidate pair with personal rewards to the public figure (ERI, 2015).

4. Conclusion

With the existence of simultaneous general elections and a threshold for presidential/vice presidential candidacy (Presidential Threshold) in the 2019 general election, the use of the Presidential Threshold is no longer appropriate and in fact the regulation is no longer useful if referring to the 1945 Constitution, especially article 6A paragraph 2. The Presidential Threshold restricts the freedom of Presidents to act according to their preferences, leading to predetermined and limited choices, which in turn adversely affects the functioning of Indonesian electoral politics.

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