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Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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The 5th PROCEEDING

“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS

The 5th International Conference and Call for Paper Faculty of Law 2019 Legal Reconstruction in Indonesia Based on Human Right

Table of Contents

<i>FRONT PAGE</i>	<i>I</i>
<i>Information of The International Seminar</i>	<i>III</i>
<i>Committee Composition</i>	<i>IV</i>
<i>PREFACE</i>	<i>V</i>
Fulfillment Of Teacher Protection Rights	
<i>Yenny AS, Rini Setiawati</i>	<i>1</i>
Legal Reconstruction Of Laws Regarding Human Rights Through Judicial Review To The Constitutional Court	
<i>Umar Ma'ruf</i>	<i>13</i>
Legal Analysis Of Social Security Transformation And The Reality Of Its Implementation In The Community In Indonesia	
<i>Siti Ummu Adillah, I Gusti Ayu Ketut Rachmi Handayani ,Adi Sulistiyono</i>	<i>29</i>
Increasing Voluntary Compliance Of Tax Payments In Micro Small And Medium Enterprises (Msmes) Post-Issuance Of Government Regulation Number 23 Of 2018 (Case Study In Semarang City)	
<i>Amin Purnawan, Akhmad Khisni, Aryani Witasari</i>	<i>40</i>
Legal Analysis Of Racist Exams In Surabaya Papua Dormitory	
<i>Ma'aruf Akib</i>	<i>49</i>
Reconstruction Of Misdemeanor Settlement Based On Pancasila Value	
<i>S. Andi Sutrasno</i>	<i>56</i>
Urgency Of Legal Assistance For Poor People As A Request Of Human Rights	
<i>Adhi Budi Susilo, Indra Yuliawan</i>	<i>62</i>
Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice	
<i>Rahmatsyah</i>	<i>66</i>
Problematic Presidential Electoral Threshold In The Operation Of Value-Based Simultaneous Justice	
<i>Widayati , Winanto</i>	<i>72</i>

Reconstruction Of Learning Methods In Criminal Law Subjects Using Inquiry Methodsbased On Human Rights And Islamic Values <i>Ira Alia Maerani, Eko Soponyono, Nuridin</i>	81
Reconstruction Of Criminal Sanction And Rehabilitation Combating On Narcotic's Victims Based On Religious Justice <i>Carto Nuryanto, Gunarto, Anis Mashdurohatun</i>	91
Study of the theory of Legal Protection Against Online High Yield Investment Program Contracts in Indonesia (HYIP) <i>muhamad Iqbal al Hakiem,aryani witasari</i>	96
Reconstruction Completion Of The Crime Of Light On Value Pancasila <i>Andi S. Sutrasno</i>	102
Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value <i>Wieke Dewi Suryandari ; Gunarto; Amin Purnawan</i>	108
Reconstruction Of Transport Regulatory On Marine Toll To Support Sea Connectivity Based On Pancasila Justice <i>Hartanto, Gunarto, Anis Mashdurohatun</i>	114
Reconstruction Of Scientific Investigation In Indonesia Based On Justice <i>Teguh Prihmono; Gunarto, Sri Endah Wahyuningsih</i>	120
Legal Construction On Training Ship Management Belongs To Human Resources Development Of Transportation (Bpsdmp) Based On Dignity Justice Value <i>Wahyu Wibisono, Gunarto, Anis Mashdurohatun</i>	126
Protection Of Law Refugees/Asylum Seekers In Indonesia (As A Transit State) No Ratify 1951 Convention Of And The 1967 Protocol <i>Muhammad Djamir</i>	133
Reconstruction Of Legal Policy On Decency Crime In Indonesia Based On Pancasila Value (Lgbt Rehabilitation Institute For Children) <i>Cucuk Kristiono, Gunarto, Anis Mashdurohatun; Suparji</i>	144
Legal Protection Against Indonesian Workers (Tki) In Abroad <i>Yaya Kareng (Sripatum UniversityOng Argo Victoria ,Sri Yulianingsih</i>	149
Recontruction Of Auction Execution Of Mortgage Object In Determine The Auction Price Based On Justice <i>Moh Djarkasih**</i>	158

Reconstruction Policy Of Sanctions Against Destruction Of Evidence Illegal Fishing Based Small Fishing Welfare Values <i>R. Juli Moertiyono</i>	165
Reconstruction Of Legal Policy Interfaith Marriage In Indonesia <i>Moh. Zeinudin, Dian Novita</i>	179
Reform Of Couple Sexual Rights Protection In Case Of Diseases Hiv / Aids In Indonesia <i>Nana Ruhyana</i>	186
Legal Protection Against Disability In Getting Work <i>Oktavianto Setyo Nugroho</i>	193
Reconstruction Of Authority To Arrest In Doing Judge Accused Of Value-Based Justice <i>Agus Sugiarto</i>	203
Enforcement Of Criminal Law In False News (Hoax) Management According To Law No. 11 In 2008 That Has Been Amended To Be Law No.19 Of 2016 Concerning Electronic Information And Transactions In Islamic Law And Positive Laws <i>Yanto Irianto</i>	208
Reconstruction Validity Legal Deeds Are Dealing With Children In The Process Of Law Criminal Justice System Based Child Justice <i>Asep Hermawan</i>	220
Reconstruction Of Performance Assessment Of Drinking Water Companies (Pdam) Based On Consumer Protection <i>Bustaman</i>	225
Reconstruction Legal Rights Associated With A Warranty Not A Bank Debt <i>Euislistianti</i>	229
Reconstruction Of Operational System As A Community Economic System Based On Welfare <i>Abbas Ibrahim Idris</i>	234
Reconstruction Of Criminal Responsibility For Actors Prostitutorial Criminal Justice In The Criminal Justice Based On Value <i>Iwan Rasiwan</i>	242
Reconstruction Of Legal Drinking Water Management Company (Pdam) Based On Justice <i>Suharyadi</i>	248

Reconstruction Of Private Criminal System Implementation In The Commitment Values In Indonesia Justice

<i>Sumanto</i>	252
Reconstruction Of Justice Law Protection Law Protection	
<i>Wamyani</i>	260
Criminal Code Draft Law And Development In Indonesia	
<i>Nany Pujianti Suwigjo</i>	265
Deconstruction of the Principle of Legal Thinking	
<i>Sriyati</i>	270
Development Of The Law Of Complete Systematic Land Registration (Ptl) And Effect Of Conduct Values of Land Based On Dignify Justice In The District Of Kendal, Central Java	
<i>Desy Dwi Nurhayati Hartanti</i>	279
Interpretation Teaching Of Human Rights Laws Against Material In Corruption Provisions	
<i>Burham Pranawa, Hartiwiningsih, Hari Purwadi</i>	293
Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice	
<i>Rahmatsyah</i>	301
Law Due To Delay The Registration Under Fiduciary Guarantee Pmk No 130 / Pmk.010 / 2012	
<i>Jaenudin Umar</i>	307
The Effectiveness Of The Handling Of The Criminal Acts Of Light Tend To Be Settled Judicial Custom	
<i>Supena Diansah</i>	313
Urgency Of Legal Assistance For Poor People As A Request Of Human Rights	
<i>Adhi Budi Susilo, Indra Yuliawan</i>	327
Independence Institute Of Justice And Judge In Perspective Judicial Reform Blueprint 2010 - 2035	
<i>Ahmad Agus Bahauddin</i>	331
Policies Against Crime Criminal Law Made By Children	
<i>Achmad Arifulloh</i>	340
Law Enforcement Of Law Number 23 Of 2004 In Preventing Efforts Human Rights Violations In Indonesia	
<i>Andri Winjaya Laksana , Lathifah Hanim</i>	350

Problematic Presidential Electoral Threshold In The Operation Of Value-Based Simultaneous Justice

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Abstract

Presidential candidates nominated by political parties or coalition of political parties at a threshold of 20% of seats in parliament, or 25% of the valid votes nationally. The percentage threshold is determined by the results of previous elections. Election 2019 was held simultaneously between Presidential and legislative elections. It is considered unfair because only the party who competed in the 2014 elections who can nominate Presidential candidate, while a new political party can not. There needs to be an analysis of the provisions of the presidential threshold in order based on justice. In this paper are the issues to be discussed in this paper, the issues to be analyzed is a regulation of the presidential threshold in the legislation that never applies in Indonesia,

Pendektan research is a normative legal research using secondary data. Based on the analysis carried out concluded that the presidential regulation threshold change along with political developments. Problematics relating to the presidential threshold is first, irrelevant and unfair because the elections held simultaneously, both the determination of the presidential threshold is unfair because it does not provide the opportunity of new political parties to nominate candidates for president, third, there will be negotiations Presidential candidate by a political party bearer, causing The president-elect is very dependent on the political forces in Parliament. Of these problems then, presidential threshold should weigh the public sense of justice and fairness as a political party voters. The democratic system can not be built without constituted the same right in every election, because in a democratic system only provides the same opportunity (equal opportunity) and not the same result (equal result). Therefore, in the upcoming elections do not need to be provisions presidential threshold.

Keywords: threshold presidential elections simultaneously, justice

A. Background

Issues relating to the conduct of elections is always interesting to discuss. Indonesia is an independent country folk, elections should be organized to ensure human rights, namely the rights in the political field. Sovereignty of the people in Indonesia is conducted by a representative or indirect democracy, which means that the people will elect their representatives through elections.

Elections were held in Indonesia is the election to elect members of the House of Representatives, Regional Representatives

Council, member of the Provincial House of Representatives, Regional Representatives Council District / City, and to elect the President and Vice President. In addition, for filling the positions of Governor and Deputy Governor, the Regent and Vice Regent, Mayor and Deputy Mayor also made a direct election.

Elections can not be separated from the presence of political parties, because political parties are participants in the general election. Political parties in addition to having the right to nominate members of the House of Representatives, members of the House of Representatives Provincial and House of Representatives District / City, also has the

right to nominate a pair of President and Vice President, a couple of Governors and Deputy Governors, couples Regent and Vice Regent, as well as couples Mayor and Deputy Mayor.

The debate on elections are coloring our mass media, related to the elections in 2019. The atmosphere is different from the 2019 election before the election. Atmosphere election had begun two years before the elections. One interesting thing that often the conversation is associated with the threshold for political parties to nominate Presidential couple (presidential threshold).

The debate was also colored parliament building when conducted discussions to change the electoral law. Members of Parliament have a different opinion. No one wants the presidential threshold as before, namely 20% of the membership in the parliament, or 25% of the valid votes obtained national political parties in the last election. The reason is, that not too many candidates for President and Vice President were standing in elections. On the other hand, there is a desire there is no threshold, or the threshold of 0%, so that all political parties have the right to nominate the pair of President and Vice President.

Each member of the House of Representatives had argued for strengthening its opinion, and of course, with the agenda of their respective political interests. The tough debate discussion led to ever change the electoral law. Required in-depth study of the provisions of the presidential threshold in order to reflect fairness, justice both for society and justice for the political parties themselves.

Based on the above background, so in this study will discuss the problematic presidential general election threshold in unison based on values of justice.

B. Formulation of the problem

The problems that were analyzed in this study are:

1. How arrangements regarding the pres-

idential threshold in the legislation that never applies in Indonesia?

2. Problematic what is arising in connection with the presidential general election threshold in unison?
3. How threshold presidential provisions in order to reflect the sense of justice and fairness for political parties?

C. RESEARCH METHODS

The method used in this research is a normative legal research methods, the research law laying down the law as a system of building norms. Norm system in question is about the principles, norms, rules of the legislation and doctrine. The study examined the normative law rules or rules of law as a building system related to a legal event. (Mukti Dawn and Achmad Yulianto, 2010: 36). Data used in this research is secondary data consisting of Legal Materials Primary, Secondary Law Materials and Tertiary Laws material obtained from books, literature, papers, legislation and other data sources. Secondary data collection is done using the method of approach to literature, that is a research literature by using materials that support the law library in this study. The collection of legal materials is done by the search, collection, and document conventionally as reading, viewing, listening, as well as with information technology (internet media)

Secondary data such as primary legal materials, secondary law, and tertiary legal materials that have been collected and processed will be analyzed by the method of normative which will then be presented descriptively

D. Results and Discussion

1. Threshold Presidential arrangement in Legislations Indonesia.

Reform period after the 1945 amendment, Indonesia's elections held to elect members of the House of Representatives, the President and Vice President, and the Parliament. Election to elect members

of the DPR, DPD and DPRD held separately with the election of President and Vice President. Election to elect members of the DPR, DPD and DPRD held first, then held the election of President and Vice President.

Election of President and Vice President directly by the people held starting in 2004. The implementation of election of President and Vice-President of this is based on the provisions of the Constitution of the Republic of Indonesia Year 1945 Article 6A paragraph (1) which reads "The President and Vice President elected as a pair directly by the people". Candidates for President and Vice President promoted by political parties, and is not possible to come from the individual candidate. This is as the provision of Article 6A paragraph (2) which reads "Pair candidates for President and Vice President shall be nominated by a political party or coalition of political parties before the general election of elections".

Constitution of the Republic of Indonesia Year 1945 determining the terms of a political party that can mecalonkan candidates for President and Vice President is a political party participating in the election. Other requirements to carry the candidates for President and Vice President appeared in Act No. 23 of 2003 on General Election of President and Vice President. Pursuant to Article 5 of the Act, a political party or coalition of political parties that can carry the candidates for President and Vice President is a political party or coalition of political parties that obtain at least 15% (fifteen percent) of the total seats in the House of Representatives or 20% (twenty percent) of the popular vote nationally valid in the election of members of Parliament. This means that when a political party is not eligible threshold (pesidential threshold) is, should join with other political parties to meet minimal noise 15% of the total seats in the House of Representatives or 20% of the popular vote nationwide in the elections legitimate member of Parliament. The Presidential threshold applied to the elec-

tion of President and Vice President in 2004.

Terms presidential threshold can be accepted by the political parties, meaning that if a political party does not meet the requirements of the presidential threshold, he will join another political party. With the threshold presidential terms, the 2004 presidential election was followed by five (5) candidates for President and Wskil President. Conditions presidential threshold is maintained when the Act neighbor election of President and Vice President is replaced by Act No. 42 of 2008. In the Article 9 of the Act states that "The pair of candidates nominated by political parties or coalition of political parties participating in the elections that meet terms of seats at least 20% (twenty percent) of the total seats in DPR or a 25% (twenty five percent) of the national valid votes in the election of members of Parliament, prior to the implementation of the election of President and Vice President". The addition of the presidential provision increased 5% threshold can also be received by the political parties. At the election of President and Vice President in 2009, followed by three pairs of candidates for President and Vice President.

Conditions presidential threshold in Law Number 42 Year 2008 also apply to the election of President and Vice President in 2014. In the election of President and Vice President in 2014, also no objection to the political parties of the presidential requirement threshold.

Terms presidential threshold into a long debate, when the Constitutional Court in its decision No. 14 / PUU-X / 2013 decided the election of President and Vice-President and the election of members of DPR, DPD and DPRD held simultaneously. In Act No. 7 of 2017 on General Elections, the requirements presidential threshold stipulated in Article 222 which states that candidate pairs proposed by the Political Party or Coalition of Political Parties Elections that meet the requirements of seats at least 20% (twenty percent) of the

the number of seats in DPR or 25% (twenty five percent) of the valid votes nationally on election of members of the previous Parliament. This is the base of the problem when elections can be held simultaneously, but the presidential threshold is still enforced.

2. Problematic Presidential General Election Threshold In Unison

2019 elections be held simultaneously between the election of President and Vice President by the election of members of DPR, DPD and DPRD. The simultaneous elections require careful regulation, so that political parties participating in elections are treated fairly. When examined closely, the provisions of the presidential threshold of 20% of the parliamentary vote or 25% of the valid votes nationally irrelevant applied again because the elections held simultaneously. Despite the Constitutional Court's decision does not eliminate the presidential threshold, but with the simultaneous election, will complicate the presidential tally threshold.

The problems that arise related to the presidential threshold for general elections simultaneously in 2019 are: first, the requirement presidential threshold of at least 20% of the total seats in the House of Representatives or 25% of the valid votes nationwide on Election of Members to the House earlier (2014), which originally did not become problems, in the general election in 2019 into a long debate and it will be a problem. This happens because the general election of President and Vice President before, different execution time with the general election for members of DPR, DPD and DPRD, so the threshold presidential terms is not an issue. Viewed from the right side, all the political party who is contesting the election have the right and equal opportunity to carry the candidates for President and Vice President, do not distinguish between a political party's long-standing with the newly established political party. While at the 2019 general election simultaneous implementation of the general election of President and Vice President in the general elec-

tion for members of DPR, DPD and DPRD.

Second, in the 2019 general election held simultaneously / concurrently, the presidential threshold requirements based on the results of the general election vote counting members of Parliament in 2014. It was felt unfair because only the old political parties alone (who participated in the elections of 2014) which can carry the candidates for President and Vice President, while the newly established political parties and qualify to participate in the elections in 2019, was not given the same rights because they can not carry the candidates for President and Vice President. If for example a new political party to join other political parties have become participants of previous elections,

Thirdly, candidates for President and Vice President prior to nomination must first be bargaining or negotiation with the political party or coalition of political parties that will be nominating. This will affect the course of governance if future candidates for President and Vice President won the election and was elected President and Vice President. His policy will be strongly influenced by the political interests of the parties which support him. Negotiation or bargaining are in fact more than a momentary tactical and strategic and long-term. Therefore, the President and Vice President-elect in fact become very dependent on political parties supporting him. It certainly can reduce the positions of President and Vice President to perform the governmental power. Thus, the actual threshold presidential terms in Act No. 7 of 2017 can be said to be holding the President and Vice President that will weaken as authority of President and Vice President.

Fourth, the presidential threshold requirements as much as 20% of the vote in the House of Representatives or 25% of the valid votes nationally, then the candidates for President and Vice President is very dependent on the political forces in Parliament. Political parties bearers partner President and Vice President who have

representatives in the House will greatly influence the policies of President. President of the policy should be in accordance with the aspirations of the people and not the desire of political parties in Parliament.

Various problematikan related to the presidential threshold, several parties then filed a judicial review application against Article 222 of Law No. 7 of 2017 regarding the General Election to the Constitutional Court. Parties who filed a judicial review include the Crescent Star Party through its chairperson Yusril Ihza Mahendra, former Commissioner of the Election Commission Hadar Nafis Gumay, Irlang Yuda activists, NGO Association for Democratic Elections (Perludem), and the Constitution and Democracy Initiative (Initiative code). They considered that the provisions of Article 222 of Law No. 7 of 2017 is contrary to the provisions of Article 6A paragraph (2) of the Constitution of the Republic of Indonesia Year 1945 which states that candidates for President and Vice President shall be nominated by a political party or coalition of political parties Generally, prior to the implementation of the general election. In Article 6A paragraph (2) does not mention the provisions of the presidential threshold. This means that each political party participating in elections can nominate the President and Vice President of the couple, whether it will carry the political party candidates for President and Vice President of its own, or join or together with other political parties.

3. Presidential provisions Threshold, Sense of Community Justice and Fairness for Political Parties

In connection with the presidential threshold, Article 6A of the Constitution of the Republic of Indonesia over 1945 governing the terms nomination of President and Vice President by the political parties do not require or prohibit the presidential threshold. However, with the general election simultaneously, then the provisions of the presidential threshold is irrelevant. How could determine the presidential threshold based

on the number of seats in the legislature or by the vote count results of legislative elections if the election was held simultaneously.

Constitutional Court decision on simultaneous elections did not explicitly mention the absence of presidential threshold. The Constitutional Court decision is an open legal policy (open legal policies), meaning that legislators openly given the opportunity to set the terms of the law. Open legal policy is region free for the legislators because the Constitution of the Republic of Indonesia Year 1945 does not provide guidance as to what legal policies should be taken.

Terms nomination of President and Vice President as provided for in Article 6 and Article 6A of the Constitution of the Republic of Indonesia Year 1945, did not require nor prohibit the threshold nomination of President and Vice President. Although the legislature is given the opportunity openly (open legal policy) to regulate the issue of presidential threshold in the Act, but the presidential determination threshold is not simply the percentage can be changed without any apparent reason or argument. Do not let the open legal policies have resulted in the birth of a law that ignores or outside the control of the Constitution of the Republic of Indonesia Year 1945. Forming the law must consider the aspect of justice which is the spirit of a law.

Parliament and the President to open legal policy has been agreed to define the threshold as much as 20% of the presidential vote in parliament, or 25% of the valid votes obtained nationally Yag forth in Act No. 7 of 2017 on General Election. Article 221 of Law No. 7 of 2017 stipulates that “candidates for President and Vice President shall be nominated in one (1) pair by a political party or coalition of political parties”, and Article 222 of Law No. 7 of 2017 provides that “the candidates proposed by the political party or coalition of political parties participating in the election that meets the requirements of seats at least 20% (twenty percent) of the total seats in DPR or a 25% (twenty

five percent) of the valid votes in the national elections before members of the House “.

Such provisions have become positive law must be carried out, although there are some parties who filed a judicial review of Article 222 of Law No. 7 of 2017 to the Constitutional Court. Throughout the Constitutional Court has not yet decided, the Act still be valid and should be implemented.

President and Vice President is the right of every citizen who has the right to vote. Only the Constitution of the Republic of Indonesia Year 1945 specify that candidates for President and Vice President shall be nominated by a political party or coalition of political parties. There is no requirement in the Constitution of the Republic of Indonesia Year 1945 that requires political parties to have a certain percentage of a voice in parliament or the percentage of valid votes nationally acquisition. Conditions presidential threshold in the general election of President and Vice President in the previous years is the policy of the legislators. The provision is acceptable since the general election of President and Vice President held after the general election for members of DPR, DPD and DPRD.

The general election in 2019 based on the decision of the Constitutional Court Number 14 / PUU-X / 2013, and pursuant to Act No. 7 of 2017 held simultaneously. With the general election simultaneously, then the presidential threshold of irrelevance. Every political party which passed verification Election Commission and the election is entitled to be participants in 2019, is entitled to carry the candidates for President and Vice President. Constitution of the Republic of Indonesia Year 1945 does not regulate Presidential threshold. Determining the percentage is on voice only count results,

Presidential determination threshold, as the Constitutional Court and Law No. 7 of 2017 could lead to a negotiation and bargaining (bargaining) tactical politics for the sake of momentary interests, so as to create

a strategic coalition negotiations and political parties for the long-term interests. This is as the provisions of Law No. 7 of 2017 in Article 223 paragraph (2) which states that a political party can make an agreement with the other political parties to merge in proposing candidates for President and Vice President. Then in Article 224 paragraph (1) stated that the agreement consists of an agreement between the political parties and the agreement between the political party or coalition of political parties with candidates for President and Vice President.

The parties agree with the provisions of the presidential threshold of 20% of votes in the House of Representatives or 25% of the vote nationally valid reasoned that the policies of President and Vice President so elected will have the support of the parliamentary majority. The reason may be acceptable where members of Parliament chosen in the same year with the election of President and Vice President, because of the noise in the House had to be counted. Parliament members and the President and Vice President began to hold office in the same year, and his office at the same year. However, the reasons are irrelevant because political parties are not necessarily gain significant votes in the general election in 2014, will receive equal voice in the general election in 2019. Not necessarily political parties gain seats in parliament in the general election in 2014, will get more seats in the general election in 2019. Though the vote a political party in the general elections in 2019 is precisely that will affect support to the policies of President and Vice President. In political practice, we even witnessed how the new party could even become the largest party election results. Kadima party in Israel, for example, newly established in 2005, but in the 2006 general election, Kadima instantly became a big party. we even witnessed how the new party could even become the largest party election results. Kadima party in Israel, for example, newly established in 2005, but in the 2006 general election, Kadima instantly became a big party. we even

witnessed how the new party could even become the largest party election results. Kadima party in Israel, for example, newly established in 2005, but in the 2006 general election, Kadima instantly became a big party.

Based on the above description, the terms of the presidential threshold must weigh the public sense of justice and fairness as voters political parties as participants in the general election. The democratic system can not be built without based on the equal rights to every participant elections. That later the same rights in the general election in the end make a big difference or lack of support or vote, then it is the people's choice. Because in a democratic system is just and equal opportunities (equal opportunity) and not the same result (equal result).

Act No. 7 of 2017 on the Election problematic for violating the basic principles equal opportunity for a new political party. Article 6A paragraph (2) of the Constitution of the Republic of Indonesia Year 1945 gives equal rights to political parties or coalition of political parties gain brings candidates for President and Vice President. That is, any political party that signed up to the Election Commission and passed verification as participants in the elections, has the right to carry the candidates for President and Vice President.

E. Conclusion

Based on the description that has been discussed in the last chapter deals with the problematic presidential general election threshold in unison based on values of justice, the study came to the conclusion as follows:

When the election of the President and Vice President is done by the Assembly, there is no regulation regarding the presidential threshold. Setting the threshold presidential election begins in 2004, when the general election was held for President and Vice President of the first directly by the people. Law Number 23 Year 2003 on which the General

Election of President and Vice President in Article 5 (5) determine the terms for a political party or coalition of political parties may nominate candidates for President and Vice President (presidential threshold) is a political party or coalition political parties that obtain at least 15% of the total seats in the House of Representatives or 20% of the popular vote nationally valid in the general election of DPR members earlier in the same year.

General election of President and Vice President in 2009 and 2014 organized by Act No. 42 of 2008. Article 9 of Law No. 42 of 2008 specifies that the Candidate Pair proposed by the Political Party or Coalition of Political Parties participating in the election that meets the requirements for at least the number of seats 20% (twenty percent) of the total seats in DPR or a 25% (twenty five percent) of the national valid votes in the election of members of Parliament, before the election of President and Vice President. Therefore, the political party or coalition of political parties can nominate candidates for President and Vice President of seats if it meets the requirements of at least 20% of the total seats in DPR or 25% of the national valid votes in the general election for members of DPR,

General election of President and Vice President in 2019 by Act No. 7 of 2017 was held simultaneously with the general election of members of DPR, DPD and DPRD. Although held simultaneously, Article 222 of Law No. 7 of 2017 remains decisive condition for the political party or coalition of political parties that can carry the candidates for President and Vice President is to gain seats at least 20% of the total seats in DPR or 25% of the votes national legitimate member of Parliament in the general election. Conditions threshold for the presidential general election of President and Vice President in 2019 basing on the results of the vote in the general election in 2014.

1. The problems that arise with regard to the presidential general election thresh-

old in unison:

- a. *determination presidential threshold is irrelevant and unfair for the conduct of elections to elect members of the House of Representatives, the President and Vice President, and members of parliament were held simultaneously.*
 - b. *determination presidential threshold based on the results of vote counting in elections the previous period to be unfair because it does not give a chance to the political party recently founded and qualify to participate in the elections to nominate candidates for President and Vice President. The only chance to belong to the old political parties who participated in the elections in the previous period. Whereas Law No. 7 of 2017 already provides space for the establishment of a new political party to participate in elections in 2019, but on the other side of this Law does not provide the same rights for political parties to determine the candidates for President and Vice President.*
 - c. Candidates for President and Vice President prior to nomination must first be bargaining or negotiation with the political party or coalition of political parties that will be nominating. This will affect the course of government penyelenggaraan when will candidates for President and Vice President won the election and was elected President and Vice President. His policy will be influenced by the political interests of the parties which support him. Negotiation or bargaining are in fact more than a momentary tactical and strategic and long-term.
 - d. Terms presidential threshold of 20% of the number of seats in the House of Representatives will cause candidates for President and Vice President is very dependent on the political forces in Parliament. Political parties bearers partner President and Vice President who have representatives in the House will greatly influence the policies of President.
2. Conditions presidential threshold must weigh the public sense of justice and fairness as voters political parties as participants in the general election. The democratic system can not be built without based on the equal rights to every participant elections. That later the same rights in the general election in the end make a big difference or lack of support or vote, then it is the people's choice. Because in a democratic system is just and equal opportunities (equal opportunity) and not the same result (equal result).

F. Suggestion

Some suggestions as a recommendation of this study is that the general election of President and Vice President simultaneously with the general election of members of DPR, DPD and DPRD then presidential threshold becomes irrelevant. Therefore, it is necessary to amend Article 222 of Law No. 7 of 2017 on General Elections, in order to reflect a sense of justice for the people as voters, as well as fairness for political parties as participants in a general election are eligible to nominate candidates for President and Vice President.

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