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A CRITICAL LEGAL STUDIES PARADIGM OF THE PRESIDENTIAL THRESHOLD ELECTORAL SYSTEM IN INDONESIA

PARADIGMA CRITICAL LEGAL STUDIES TENTANG SISTEM PEMILU PRESIDENTIAL THRESHOLD DI INDONESIA

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ABSTRACT
In the perspective of the Critical Legal Studies Paradigm, researchers do not have the intention to deliberately dismantle normative legal rules that are legally and constitutionally, but in this discourse the critical legal studies paradigm provides a lens that critical voices are voices that come from the people with a higher realm of awareness in view with the assumption of potential that will occur critically, involving the direction of thinking that tends to be deconstructive and very worthy of questioning. in this case the paradox that occurs between ontology and methodology or in simple language reality with normative methodological values itself, by separating political, sociological, historical, and ethical motives. In this case, the paradox that occurs between ontology and methodology or in simple language reality with normative methodological value itself, by separating political, sociological, historical, and ethical motives. in this study, researchers used a qualitative method based on the study of the normative rules of the 1945 Constitution. normatively in article 222 of Law Number 17 of 2017 concerning the election of the President and Vice President reads: The candidate pair is proposed by a political party or a coalition of political parties participating in the election that meets the requirements of obtaining at least 20% (twenty per cent) of the total seats in the DPR or obtaining 25% (twenty five per cent) of the national valid votes in the election of DPR members, before the implementation of the Presidential and Vice Presidential elections or the Presidential Threshold

system if viewed deconstructively from the process of forming the rules of the Law or the legislature itself does not have a basic limiting framework of legal construction, With the pretext of strengthening the presidential system, the effectiveness of holding elections in an accountable manner, but ontologically or in reality this raises that the law is a political product is a reality and shows that political power is more dominant than the law itself, of course this is very paradoxical with the concept of a country that is considered democratic where political power should be subject to the law. In this foundation, something produced by the legal products of the legislature is worthy of criticism.

Keywords : *Critical Legal Studies Paradigm, Legal Studies, Presidential Threshold.*

ABSTRAK

Dalam Sudut Pandang Paradigma Critical Legal Studies, Peneliti tidak memiliki itikad untuk sengaja membongkar aturan hukum normatif yang secara sah dan konstitusional, namun dalam diskursus ini paradigma critical legal studies memberi lensa bahwa suara kritis ialah suara yang bersumber dari rakyat dengan ranah kesadaran yang lebih tinggi dalam berpandangan dengan asumsi potensi yang akan terjadi secara kritis, melibatkan arah berpikir yang cenderung dekonstruktif dan sangat layak untuk dipertanyakan. dalam hal ini paradoks yang terjadi antara ontologi dengan metodologi atau dalam bahasa sederhana kenyataan dengan nilai metodologis normatif itu sendiri, dengan memisahkan motif politik, sosiologis, historis, dan etika. didalam penelitian ini peneliti menggunakan metode kualitatif yang bersumber pada pengkajian aturan normatif Undang-Undang 1945. secara normatif didalam pasal 222 Undang-Undang Nomor 17 Tahun 2017 tentang pemilu Presiden dan Wakil Presiden berbunyi : *Pasangan calon diusulkan oleh partai politik atau gabungan partai politik peserta pemilu yang memenuhi persyaratan perolehan kursi paling sedikit 20% (dua puluh persen) dari jumlah kursi DPR atau memperoleh 25% (dua puluh lima persen) dari suara sah nasional dalam pemilu anggota DPR, sebelum pelaksanaan pemilu Presiden dan Wakil Presiden atau sistem Presdiential Threshold jika dilihat secara dekonstruktif dari proses pembentukan aturan Undang-Undang atau lembaga legislatif itu sendiri tidak memiliki kerangka limitatif dasar kontruksi hukum, dengan dalih penguatan sistem presidential, efektifitas penyelenggaraan pemilu secara akuntable, namun secara ontologi atau kenyataan hal ini menimbulkan bahwa hukum ialah suatu produk politik adalah kenyataan dan menunjukkan kekuatan politik lebih dominan dari hukum itu sendiri, tentu hal ini sangatlah paradoks dengan konsep negara yang dipandang demokratis dimana seharusnya kekuasaan politik tunduk kepada hukum. didalam pondasi ini ialah sesuatu yang dihasilkan oleh produk hukum lembaga legislatif sangatlah layak untuk dikritisi.*

Kata Kunci : Legal Studies, Paradigma Critical, Presidential Threshold.

I. INTRODUCTION

In principle, Indonesia in Article 1 paragraph (2) of the 1945 Constitution reads "sovereignty is in the hands of the people and is exercised according to the Constitution." In this case the position of sovereignty is a democratic instrument in running a system carried out by the people in a country, the people have supremacy and take part even the main in a democratic state system. The more democratic a country is, the more visible the sovereignty of the people and vice versa in the perspective of the people.

In the history of the American and French revolutions, the term democracy was very populist, democracy was marked as a revolutionary form against the antimony of the absolute monarchy system in a government, the democratic system was considered to answer the dilemma of the oppression of the people carried out by arbitrary rulers. In its journey, Indonesia embraces a democratic system and has a distinctive character in certain periods, where the distinctiveness of Indonesian democracy can be seen in the historical culture of its journey starting at the beginning of the independence revolution, parliamentary democracy, guided democracy, new order democracy, where in a certain period of decades it can change every periodic political regime.[1].

In fact, in the Indonesian democratic system, which means that every citizen is constitutionally guaranteed in his participatory participation as contained in the 1945 Constitution in the form of constitutional democracy, it has a basic reference in running the country as contained in Article 28 of the 1945 Constitution which reads that every citizen has the right to obtain equal opportunities and the right to advance himself to build society, nation and state. starting from participating in the general election system in determining the election of public officials who have the competence to lead the State.[2].

The principle of constitutional government formally puts the executive institution under the power of the constitution, which means that the role of the executive institution is limited by the power of the constitution, which ideally in a formal legal state there is a separation of powers, recognition and protection of human rights, the principle of legality, and administrative justice. according to its actualization contained in article 6A paragraph (1) of

[1] Syurya Muhammad Nur, (2019), *Demokrasi dan Tantangannya Dalam Bingkai Pluralisme di Indonesia,* Jurnal Ilmiah Mimbar Demokrasi, Vol. 19 No. 1.

[2] Istiqomah Fadlillah, (2022), *Threshold dan Masa Depan Demokrasi di Indonesia,* Jurnal Hukum Kenegaraan dan Politik Islam , Vol. 2 No. 1.

the 1945 Constitution of the third amendment (3) reads that the President and Vice President are elected in one pair directly by the people, this confirms this principle is a democratic principle, but it is mentioned again in article 222 of Law Number 17 of 2017 concerning the election of the President and Vice President reads:

Article 222 Candidate pairs are proposed by a political party or a combination of political parties participating in the elections that meet the requirements of obtaining at least 20% (twenty percent) of the total number of DPR seats or obtaining 25% (twenty-five percent) of the valid votes nationally in the previous election of DPR members.[3]

This effort is a form of stimulus that occurs in strengthening the presidential system by means of the Presidential Threshold system as a result of changes in Law No. 23 of 2003, Law No. 42 of 2008, Law No. 15 of 2011, and Law No. 8 of 2012 concerning Elections of Members of the DPR, DPD, and DPRD.

What is problematic for researchers is that the presidential threshold system has the potential to dwarf the power of small political parties that have rights in politics and benefit political parties that have greater power even though efforts to merge party coalitions can be made. as a result, the ideological differences of parties become fundamental, this tendency causes transactional politics and influences the cabinet, logically this causes the emergence of alternative candidates to be closed and makes this a coalition of party interests of elite politicians.

From this, researchers use the paradigm of critical legal studies in a critical view through the Ontological, Epistemological, and Methodological frameworks in criticizing the presidential threshold election system, a critical view is a view in the form of potentials that critically criticize legal products that in judicial review testing are constitutional which legally impose a presidential threshold system on the pretext of the effectiveness of the general election of the President and Vice President which is seen in the presidential threshold system strengthening the presidential system for the point of view of the law makers.

II. METHOD

Critical Legal Studies is a form of deconstructive legal thinking in thought as a result of the dominance of the thinking of legal experts who are considered to be established and hegomoni, through deconstructive thinking efforts to criticize in depth the legal doctrines that apply[4]. The method used

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[3] Fawzi Ali Akbar Rasfanjani, Jumadi, Tri Suhendra Arban, (2023), *Problematika Sistem Presidential Threshold Dalam Pemilihan Presiden Dan Wakil Presiden Dalam Perspektif Sistem Presidensial Di Indonesia,* Alauddin Law Development Journal, Vol. 5 No. 1.

[4] Otje Salman, (2008), *Filsafat Hukum (Perkembangan & Dinamika Masalah),* (Bandung: PT Refika Aditama), 73.

by researchers is a qualitative method with a normative approach, which is studied on the basis of written positive law, explained in Hans Kelsen's Vienna madzhab only by separating political, sociological, historical, and ethical elements, in studying the researcher's title in the form of a Critical Legal Studies Paradigm of the Presidential Threshold Election System in Indonesia.

III. ANALYSIS AND DISCUSSION

a. Normative Study of the Presidential Threshold Election System in Indonesia

Article 28 and Article 28E paragraph (3) of the 1945 Constitution guarantee certainty regarding the freedom of association and assembly where the right to establish and become a member of a political party. Article 22E paragraph (3) reads:

Participants in the general election to have members of the House of Representatives and Members of Regional Representatives are Political Parties and Article 6A paragraph (2) reads: Candidate pairs for President and Vice President are proposed by a Political Party or a coalition of Political Parties participating in the general election before the implementation of the general election.

While Voting Rights and the Electoral System, on the basis of equal rights, elections must be followed by all citizens of the Republic of Indonesia except those who are legally unable to exercise their voting rights in a democracy. there are three principles of democracy, among others, the principle of popular sovereignty, the embodiment of popular sovereignty is found in the will of the people “expression of the will of the people”, and sovereignty is in the hands of the people.

Elections in Indonesia in the period 1945 to 2024 have taken place with the flow of regimes which are divided into three regimes including the 1955 elections with the 1950 Provisional Constitution or UUDS, elections in the New Order regime 1971 to 1997, the 1999 reform era, and the 2004, 2009, 2014 elections are the elections resulting from changes in the constitution of the 1945 Constitution of the Republic of Indonesia.

Article 21 Universal Democratic Rights Human Rights

1. Everyone has the right to participate in the government of his own country, either directly or through freely chosen representatives.
2. Everyone is entitled to equal opportunity to be appointed to a public office.
3. The will of the people must be the basis of governmental power; this will must be expressed in periodic elections which are fair and which are conducted according to general and equal suffrage, and by

secret ballot or other means which also guarantee freedom of expression.[5].

Keep in mind that in the political configuration and legal products, the assumption of political determinants of law is something that is proven in reality, where law is a political product, where the ideals of producing responsive law are things that must be done and are sustainable with a democratic political configuration, normatively in Law Number 7 of 2017 concerning General Elections Article 222 reads:

Candidate pairs are proposed by a political party or a coalition of political parties participating in the elections that meet the requirements of obtaining at least 20% (twenty percent) of the total seats in the DPR or obtaining 25% (twenty-five percent) of the national valid votes in the elections for members of the DPR, prior to the implementation of the elections for President and Vice President" which is an amendment to Law Number 23 Year 2003 concerning General Elections for President and Vice President.

This is legitimately the absence of contradictions contained in the 1945 Constitution will be a problem if Article 222 of Law Number 7 of 2017 in the Constitutional Court Decision Number 14/PUU-XI/2013 where in this situation as the legislator did not continue the process of reading about the decision a quo in the consideration of the Constitutional Court there is a sentence based on the provisions of the 1945 Constitution the continuity of Article 6a paragraph (2) of the 1945 Constitution with Article 22E paragraph (1) and paragraph (2), Article 27 paragraph (1), Article 28 D paragraph (1) and paragraph (3) of the 1945 Constitution has the information of equal position in all political parties submitting candidates for President and Vice President of the Republic of Indonesia, as Decision Number 14 / PUU-XI / 2013 concerning the 2019 election system which is carried out simultaneously with consideration of strengthening the construction of the 1945 Constitution presidential government system in the check and balances scheme. While in 2024, the simultaneous election process is the result of problematic distractions from 2008-2022, from a critical point of view, it is suspected that this is something that can injure democracy itself with optionally limited public rights in electing the President and Vice President and the loss of political party rights if viewed from a political perspective, political party elites have maneuvered with a series of coalitions where the first coalition is the United Indonesia Coalition (KIB) with the acquisition of 25, 87% of DPR seats, the second is the Great Indonesia Awakening Coalition (KIR) with 23.25% of DPR seats, the third is the Coalition of Democrats, PKS, and Nasdem which legally announced Anies Baswedan as the presidential candidate for the 2024 presidential election, while the acquisition of DPR seats was 28.50%, the

[5] Sirajuddin, Winardi, (2015), *Dasar-dasar Hukum Tata Negara Indonesia,* (Malang: Setara Press), 304.

fourth as the winner of the 2019 election PDIP obtained seats in the DPR totaling 22.38%.

In the context of the historical journey of Article 5 paragraph (4) of Law Number 23 of 2003, then Article 9 of Law Number 42 of 2008 and Article 222 of Law Number 7 of 2017 concerning Presidential and Vice Presidential Elections, there is a perception that the legislative general election is a standard requirement with reference to the previous election period which is logically viewed in terms of political configuration different from the current or future elections. Although in its submission it has repeatedly been to the Constitutional Court in conducting a Judicial Review, the Constitutional Court still sets a threshold that is considered constitutional and open legal policy, when viewed from the perspective of democracy which is contextually from the people, by the people, and for the people, this norm is considered to have harmed the constitutional rights of the people democratically.[6]

Hans Kelsen's Pure Law Theory when viewed from a normative-juridical approach that has efforts to separate historical, ethical, political and sociological elements, this approach is an approach of obedience to written positive law and antimony to the ideological legal science "Reine Rechslehre". By ruling out something that is non-juridical in line with the formation of positive law[7].

John Austin classified the two important roles of legal philosophy as Analytical Jurisprudence or a fundamental law and legal structure as it is & Normative Jurisprudence or criticism of the law as it should be.

When viewed, the authority of the Constitutional Court is to examine the Law as a norm "control mechanism" is a legal norm that can be tested as a norm in making normative legal decisions that are "regeling" then contain administrative determinations "beschikking".

Jimly Asshiddiqie in testing legal norms in truth can be tested by means of judicial mechanisms or nonjusticial mechanisms. as for if the testing process is carried out by a judicial institution, it is called a judicial review, but if the testing process is carried out not from a judicial institution, it cannot be called a judicial review.[8].

Mahfud MD the relative concept of "dependent variable" an idea or legal ideals in positioning politics as an affected variable regarding politics determinant of law or law determinant of politics, in scientific methodology both are true depending on the assumptions and concepts used[9].

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[6] Tsabbit Aqdamana, (2022), *Problematika Penerapan Presidential Threshold 20% Dalam Sistem Presidensial Indonesia,* Jurnal Hukum Kenegaraan dan Politik Islam, Vol. 2 No. 2.

[7] Suteki, Galang Taufani, (2020), *Metodologi Penelitian Hukum (Filsafat, Teori, dan Praktik)*, (Depok: Rajawali Pers), 89.

[8] Ahmad Fadlil Sumadi, Achmad Edi Subiyanto, Anna Triningsi, (2022), *Hukum Acara Mahkamah Konstitusi Perkembangan dalam Praktik,* (Depok: Rajawali Pers), 68.

[9] Moh. Mahfud MD, (2019), *Politik Hukum di Indonesia,* (Depok: Rajawali Pers), 4.

b. Critical Legal Studies Paradigm

The Critical Legal Studies movement began its development and influence in 1970 in America, the Critical Legal Studies movement is the result of antimony to the liberal paradigm which is closely related to legal education in America with a deconstruction thinking approach, in understanding some contradictory subjectifications and then rearranging them in rebuilding the meanings that have been deeply attached, because in a legal development, meanings or terms sometimes have a tendency to be privileged in history, the Critical Legal Studies movement focuses on ethics with the aim of enlightening morality, which is nothing but respect for higher values.

In the branch of philosophy and its development, Guba and Lincoln classify the types of research paradigms, the Guba and Lincoln paradigm framework includes the identification of the Ontology framework which refers to a form and fundamental nature of reality, Epistemology in the form of a connection between those who know and those who can be known, and Methodology in the form of an investigation of something that can be known on a basis that is believed.

J.M. Balkin through the first legal deconstruction technique is carried out by providing criticism of a legal doctrine, secondly how legal arguments can be formed, and thirdly offering a new perspective on the legal text[10].

Ifdhal Kasim The Critical Legal Studies movement is conceptualized in a "Negotiable, subjective-depends as politics. that it is impossible in the formation of contextualized laws free from the influence of political, religious, and moral pluralism.

Roberto M. Unger's theory of the separation of law and politics is unrealistic because law does not exist or occur naturally, but is the result of social reconstruction.

In this discussion, a review of the Critical Legal Studies Paradigm of the Presidential Threshold Election System in Indonesia article 222 of Law Number 17 of 2017 concerning the election of the President and Vice President reads:

Candidate pairs are proposed by a political party or a coalition of political parties participating in the elections that meet the requirements of obtaining at least 20% (twenty percent) of the total seats in the DPR or obtaining 25% (twenty-five percent) of the national valid votes in the elections for members of the DPR, prior to the implementation of the elections for President and Vice President.

[10] Otje Salman, (2008), *Filsafat Hukum (Perkembangan & Dinamika Masalah),* (Bandung: PT Refika Aditama), 74.

The readings of the Article can be interpreted that the determination of the threshold becomes an issue of paradoxical citizens in channeling democratic rights from the point of view of political party elites and the interests of parties that have greater power, rather than parties that have no other way to coalition in determining candidates for President and Vice President while the point of view of popular sovereignty is limited to seeking their democratic rights in choosing candidates for President and Vice President. For this reason, the Republican form of government is inferior to monarchy because it is not consistent and precise in the direction and purpose of the state, as if the political party elites are small kingdoms that confront their interests to fight for power.

IV. CONCLUSION

The pretext for the effectiveness of the general election of the President and Vice President which is seen in the presidential threshold system to strengthen the presidential system is a political reason that in fact weakens the presidential system which depends on the parliamentary vote threshold, this tends to legitimize the executive institution determined by the votes of the legislative parliament, as a sovereign nation and state, reviving democracy without any restrictions is a necessity that should be pursued without a threshold. the issue of democratic issues in a sovereign state is still a problematic state, this shows that political determination becomes dominant over the deeper essence of the law itself.

If seen deconstructively from the process of forming the rules of the Law or the legislature itself does not have a basic limiting framework of legal construction, under the pretext of strengthening the presidential system, the effectiveness of holding elections accountably, but ontologically or in reality this raises that the law is a political product is a reality and shows political power is more dominant than the law itself, of course this is very paradoxical to the concept of a state that is considered democratic where political power should be subject to the law. in this foundation is something produced by the legal products of the legislature is very worthy of criticism.

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