



The Decision of The Constitutional Court on Verification of Political Parties

Yusuf Mulya Kharismawan¹, Yulia Neta², Muhtadi³

¹ Universitas Lampung, Indonesia
E-mail: Yusufmulya1234@gmail.com

² Universitas Lampung, Indonesia
E-mail: yulia.neta@fh.unila.ac.id

³ Universitas Lampung, Indonesia
E-mail: muhtadi.1977@fh.unila.ac.id

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Abstract

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Political parties are the political suprastructure in a democratic country as a means for citizens to occupy political positions through general elections. The requirements for verifying political parties participating in an election are always contained in every election law making it difficult for political parties to pass verification as well as excluding several political parties that have met certain verification requirements so that they are immediately declared as participants in the next elections. This exception is not in accordance with several Constitutional Court Decisions which have the same substance which consistently declares unconstitutional, except for the Constitutional Court Decision Number 55/PUU-XVIII/2020. The research method used is normative juridical regarding laws and regulations, namely Law Number 7 of 2017 concerning Elections, accompanied by comparative study of jurisprudence Constitutional Court's decision regarding an application for judicial review of political party verification accompanied by literature studies. The research analysis uses a qualitative approach to understand more deeply the legal phenomena that occur and examines the substance to obtain specific conclusions on what is studied. That decision based on a discussion of this research is inconsistent because the arguments and materials of the 1945 Constitution used are different and the Constitutional Court is not required to use jurisprudence as a basis for consideration even though



A. Introduction

Every year, as election season approaches, the requirement for political parties to participate in elections changes. The succession of power, which is held in an open and participatory manner in the form of elections, is one of the inherent characteristics of a democratic system.¹ The provisions of Article 1 paragraph (2) of the 1945 Constitution are a form of legitimacy for direct people's participation in elections. Therefore, in a democratic country, elections are an important characteristic that must be held periodically at certain times.² This is as stated by Moh. Kusnardi and Harmaily Ibrahim say that in the understanding of people's sovereignty (democracy), the owners and holders of the highest authority in a country are the people.³ This participation is then channeled through political parties participating in elections.

According to Carl J Friedrich opinion about the political party is a group of people who are stably organized to take over or maintain government control over the leadership of their party and based on that control, provide ideal and material benefits to their party members.⁴ Then, according to Jimly Asshiddiqie, the task of political parties is to collect, channel, and organize people's aspirations to make public policies that are more systematic and structured. And then, a political party function as a supra structure between the people (civil society) and the state. Therefore, it can be concluded that democracy can't work without political parties.⁵

Political parties in the Indonesian constitution, according to the norms of Article 22E, paragraph (3), and Article 6A, paragraph (2), of the 1945 Constitution, are participants in elections, including the nomination of the president and vice president candidates and the general elections for members of the people's representative council (DPR) and regional people's representative council (DPRD).⁶ And then, political parties can participate in the general election with the qualification requirements regulated in Article 173 of Law Number 7 of 2017 concerning general elections,⁷ namely that the political parties participating in the election are political parties that qualify to pass verification by the General Elections Commission (KPU).⁸

The verification of political parties by the KPU is the stage of the General Election process.⁹ In addition, the verification stage is an effort to select the professionalism of political party institutions in qualifying the requirements as election participants.¹⁰ Although, the verification regulation in every Election Act's often questioned by non-parliamentary threshold political parties by applying for a judicial review to the Constitutional Court (MK) because it is considered prejudiced to the applicant's constitutional right to participate in elections. So far, there have been four decisions of the Constitutional Court that decided on

¹ Gunawan Suswanto, *Mengawal Penegak Demokrasi Dibalik Tata Kelola Bawaslu Dan DKPP* (Jakarta: Erlangga, 2016).

² Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Jakarta: Rajawali Pers, 2011).

³ Moh Kusnardi and Ibrahim, *Pengantar Hukum Tata Negara Indonesia* (Jakarta: PSHTN, 1983).

⁴ Yusdiyanto, *Telaah Rezim Partai Politik Dalam Dinamika Ketatanegaraan Indonesia*, *Fiat Justisia Jurnal Ilmu Hukum Volume 7 No. 2*, 2013, p. 161.

⁵ Yusdiyanto, *Op. Cit.*, p. 161.

⁶ Luthfi Widagdo Eddyono, *Wacana Desentralisasi Partai Politik: Kajian Original Intent dan Pemaknaan Sistematis UUD 1945*, *Jurnal Konstitusi, Vol 14, No. 1*, (2017), p. 86.

⁷ Lembaran Negara Republik Indonesia (LNRI) Tahun 2017 Nomor 182, Tambahan Lembaran Negara Republik Indonesia (TLNRI) Nomor 6109.

⁸ Putusan Mahkamah Konstitusi Nomor 53/PUU-XV/2017 tentang Pengujian Undang-Undang Nomor 7 Tahun 2017 Tentang Pemilihan Umum terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, pg. 136.

⁹ Ahmad Gelora Mahardika, *Rekonstruksi Verifikasi Partai Politik Sebagai Penegakan Asas Efisiensi dan Efektivitas Pemilihan Umum*, *Jurnal Ilmiah Ilmu Hukum-Era Hukum*, Vol 18, No. 2, (2020), pg. 160.

¹⁰ *Ibid.*, p. 162.

requests for judicial review related to the verification of political parties participating in the election, that's The Constitutional Court Decision Number 12/PUU-VI/2008, The Constitutional Court Decision Number 52/PUU-X/2012, The Constitutional Court Decision Number 53/PUU-XV/2017, and The Constitutional Court Decision/PUU-XVIII/2020.

Firstly, The Constitutional Court's Decision Number 12/PUU-VI/2008, which is a material review of the verification requirements for political parties that are carried out by applicants consisting of 7 (seven) political parties related to the constitutionality of Article 316 letter d of Law Number 10 of 2008 concerning member Elections People's Representative Council (*Dewan Perwakilan Rakyat/DPR*), Regional Representative Council (*Dewan Perwakilan Daerah/DPD*), and People's Regional Representative Council (*Dewan Perwakilan Rakyat Daerah/DPRD*), namely "having a seat in the DPR RI as a result of the 2004 General Election".¹¹ According to the Constitutional Court, in the absence of that regulation, all political parties that do not reach 3% of the total seats in the DPR must be appointed by the KPU.¹² So the Constitutional Court in its decision, declared Article 316 letter d of Law 10/2008 unconstitutional.

Secondly, there are seventeen political parties in the Constitutional Court Decision Number 52/PUU-X/2012 submitting a request for a review of Article 8 paragraph (1) of Law Number 8 of 2012 concerning the Election of *DPR*, *DPD*, and *DPRD* Members, along with the phrase, "that meets the threshold for obtaining votes from the number of valid votes nationally" and Article 8 paragraph (2) along the phrase, "Political parties that do not meet the threshold for obtaining votes in the previous election." Because according to the applicant, the regulation is considered contrary to the 1945 Constitution.¹³ The Constitutional Court in its consideration stated that's regulation was very unfair and discriminatory for the applicant as a political party participating in the last general election (Election 2009), which did not meet the threshold for obtaining valid votes nationally in participating in the next general election (2014 Election) through factual verification requirements is complicated.

Third, the Constitutional Court Decision Number 53/PUU-XV/2017 that the Damai Aman Peaceful Islamic Party (Partai Idaman) submitted a request for a judicial review of Article 173 paragraph (1) on the phrase "has been established" and Article 173 paragraph (3) of Law Number 7 Year 2017 concerning Elections (Law No. 7/2017). According to the Petitioners, the regulation is unfair and discriminatory because the legislators only decide which political parties participating in the general election will be appointed as participants in the next election automatically without going through a factual verification process with more stringent conditions by the KPU. In addition, that regulation has created a double standard and is contrary to the legal principle of *ubi lex non distinguish, nec nos distinguere debemus*, which means that the law does not differentiate and should not be distinguished, and therefore contrary to Article 27 paragraph (1), Article 28, Article 28C paragraph (2), Article 28D paragraph (1), Article 28D paragraph (3), Article 28I paragraph (2) of the 1945 Constitution.¹⁴ So that the Constitutional Court, in its decision declared it unconstitutional,¹⁵ and then all political parties must be thoroughly verified against all requirements as election participants.

¹¹ Putusan MK Nomor 12/PUU-VI/2008 tentang Pengujian Undang-Undang Nomor 10 Tahun 2008 tentang Pemilihan Umum Anggota DPR, DPD, dan DPRD terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, hlm. 96.

¹² *Ibid.*, p. 101.

¹³ Putusan MK Nomor 52/PUU-X/2012 tentang Pengujian Undang-Undang Nomor 8 Tahun 2012 tentang Pemilihan Umum Anggota DPR, DPD, dan DPRD terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 *Op.Cit.*, pg. 67-68.

¹⁴ *Ibid.*, p. 105.

¹⁵ *Ibid.*, p. 136.

Fourth, the Decision of the Constitutional Court Number 55/PUU-XVIII/2020, namely that the Garuda Party submitted a request for a judicial review of Article 173 paragraph (1) of Law 7/2017. Even though the article being tested materially is the same as that which was decided by the Constitutional Court, the Petitioners again filed for a judicial review of this article because it is supported by different arguments and legal standing, namely Article 28H paragraph (2) of Law No. 1945 Constitution,¹⁶ so that it has formally complied with the regulation of Article 60 paragraph (2) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court.

The judges considerations in the Constitutional Court Decision Number 55/PUU-XVIII/2020 are different from the previous Constitutional Court decisions, namely the Constitutional Court Decision Number 12/PUU-VI/2008, the Constitutional Court Decision Number 52/PUU-X/2012, and the Constitutional Court Decision Number 53/PUU -XV/2017 in terms of interpreting the perspective of justice. According to the Constitutional Court Decision Number 55/PUU-XVIII/2020, justice is treating something that should be treated the same and treating something differently that should be treated differently. So that carrying out the same verification of all political parties participating in the election, both political parties participating in the previous election and new political parties is an injustice.¹⁷ Meanwhile, the Constitutional Court Decision Number 53/PUU-XV/2017 as well as previous Constitutional Court decisions, state indicators of fairness for each candidate participating in the General Election, namely equal or equal treatment between election participants.¹⁸

So that the Constitutional Court Decision Number 55/PUU-XVIII/2020 causes political parties as election contesting candidates to be divided into 2 (two) groups in the verification process. In the first group, political parties that pass the parliamentary threshold have seats in the DPR RI in the 2019 Election, only to be verified administratively without the need for factual verification in the next election. The second group, is political parties that do not pass the parliamentary threshold so that they do not have seats in the DPR RI but have seats in the Provincial/Regency/City DPRD and do not have seats in the DPRD and new political parties must go through the administrative and factual verification stages in the 2024 Election.¹⁹

Therefore, the classification of political parties in the stage of qualifying for verification of political parties participating in the election in the next election is caused by Constitutional Court Decision Number 55/PUU-XVIII/2020. However, the consideration of the Constitutional Court judges in previous decisions used the principle of equality before the law, especially equality in the verification of political parties participating in the election. So, the writer researched with the title "The Decision of The Constitutional Court on Verification of Political Parties." The research method used is normative juridical regarding laws and regulations, namely Law Number 7 of 2017 concerning Elections, accompanied by a comparative study of the jurisprudence of the Constitutional Court's decision regarding the application for judicial review of political party verification accompanied by literature studies in the form of books, journals, and internet websites. The research analysis uses a qualitative approach to understand more deeply the legal phenomena that occur and examines the substance to obtain specific conclusions on what is studied.

¹⁶ Putusan Mahkamah Konstitusi Nomor 55/PUU-XVIII/2020, tentang Pengujian Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, p. 8.

¹⁷ *Ibid.* p. 62.

¹⁸ Putusan Mahkamah Konstitusi Nomor 53/PUU-XV/2017, *Op. Cit.*, p. 113.

¹⁹ Putusan Mahkamah Konstitusi Nomor 53/PUU-XV/2017, *Op. Cit.*, p. 64.

The novelty of this research is to explore election arrangements regarding the requirements of the parliamentary threshold, which of course creates a sense of discrimination against certain political parties, especially political parties that do not pass the parliamentary threshold. In previous elections or new political parties wishing to participate. In an election, through a judicial review test of 4 similar decisions regarding the unconstitutionality of the Election Law, there was one decision that was not granted. However, reviewing the existence of a claim clause based on the principle of equality of law, the judges of the Constitutional Court have made the fairest decision.

B. Discussion

1. Regulation of The Political Parties Verification as General Election Contestants Before The Constitutional Court Decisions

After the establishment of the Constitutional Court as an independent judicial institution from the Supreme Court, as referred to in Article 24 paragraph (2) of the 1945 Constitution, the laws which are the legal basis for the implementation of General Elections in Indonesia, especially those that regulate the requirements for verification of political parties participating in the election, have been made the object of a petition for a judicial review to the Constitutional Court, including Law Number 10 of 2008 (Law 10/2008), Law Number 8 of 2012 concerning the Election of Members of the People's Representative Council (*DPR*), Regional Representative Council (*DPD*), and People's Representative Council (*DPRD*) (Law 8/2012), and the currently applicable Law Number 7 of 2017 concerning General Elections (Law 8/2017).

Political party participation in the 2009 General Election is regulated in Article 8 of Law Number 10 of 2008 concerning Elections for Members of DPR, DPD, and DPRD (Law 10/2008). There is an added qualification for political parties to become election participants to include 30% representation of women in the management of political parties at the top level. This is Article 8 of Law 10/2008:²⁰

- (1) Political parties can become election participants if they meet the requirements:
 - a. status as a legal entity in accordance with the Law on Political Parties;
 - b. have management in 2/3 of all provinces;
 - c. have management in 2/3 of the total regencies/cities in the province concerned;
 - d. include at least 30% representation of women in the management of political parties at the top level;
 - e. have at least 1,000 members or 1/1,000 of the total population in the management of a political party as referred to in letter b and letter c as evidenced by ownership of a membership card; and
 - f. have a permanent office for management as referred to in letter b and letter c; and
 - g. submit the name and logo of political party to the KPU.
- (2) Political parties participating in the previous general election may participate in the general election in the next election.

In Law 10/2008, there are transitional regulations, namely Article 315 and Article 316 which contain requirements that must be met by political parties participating in the 2004 General Election to become participants in the 2009 General Election. One of the conditions that must be qualified by political parties participating in the election to become participants in the next election is to have seats in the DPR as a result of the 2004 General Election in Article 316 letter d of Law 10/2008:

²⁰ LNRI Tahun 2008 Nomor 51, TLNRI Nomor 4836.

Article 316

Political parties participating in the 2004 General Election that do not meet the provisions of Article 315 may participate in the 2009 General Election with the following provisions:

- a. Join a political party participating in the General Election according to the rules referred to in Article 315; or
- b. Join a political party that does not qualify the requirements as referred to in Article 315 and then use the name and image of one of the political parties that join so that it passes the minimum number of seats; or
- c. Join a political party that does not qualify in Article 315 by forming a new political party with a new name and logo so that it meets the acquisition of the minimum number of seats; or
- d. Has seats in the DPR RI as a result of the 2004 General Election; or
- e. May adjust the verification requirements by the KPU to become a political party participating in the General Election as stipulated in this Law.

Article 316 letter d of Law 10/2008 states that one of the requirements for participants in the 2004 general election to become participants in the 2009 election is to have a seat in the DPR RI as a result of the 2004 General Election. However, Article 8 paragraph (1) of Law 8/2012 states that a political party that meets the parliamentary threshold in the previous election can be designated as a participant in the next election if the threshold for obtaining votes from the number of valid votes nationally in the previous election is reached. So that the regulation does not apply to political parties that do not meet the parliamentary threshold and/or new political parties in paragraphs (1) and (2):²¹

- (1) Political parties participating in the General Elections in the last General Election that reach the threshold for obtaining votes from the number of valid votes nationally shall be designated as political parties participating in the General Elections in the next General Election.
- (2) Political parties that did not reach ed the voting limit in the previous election or new political parties can become election participants after the qualified:
 - a. status as a legal entity in accordance with the Law on Political Parties;
 - b. have a management structure in all provinces;
 - c. has management in 75% of the total regencies/cities in the province concerned;
 - d. has management in 50% (fifty percent) of the total sub-districts in the district/city concerned;
 - e. include at least 30% representation of women in the management of political parties at the top level;
 - f. have at least 1,000 members or 1/1,000 of the total population in the management of a political party, as referred to in letter c as evidenced by ownership of a membership card.
 - g. have a permanent office for management at the central, provincial, and district/city levels until the last stage of the general election;
 - h. submitted the name, symbol, and logo of political party to the KPU; and
 - i. include the election campaign fund account number in the name of a political party to the KPU.

²¹ LNRI Tahun 2012 Nomor 117, TLNRI Nomor 5316.

Toward the 2019 Election, the DPR approved Law Number 7 of 2017 concerning the General Election (Law 7/2017), which is the legal standing for the current election. The Law 7/2017 is to implement the Constitutional Court Decision Number 14/PUU-XI/2013 which states that the separation of the legislative and presidential elections is unconstitutional, so that in the 2019 election, the holding of the two elections must be at the same time.²² Because of this, according to the DPR's consideration, it is necessary to unite and simplify into one law as the legal standing of the election at the same time.²³ Based on Article 173 paragraph (1) of Law 7/2017 before the Constitutional Court Decision Number 53/PUU-XV/2017, political parties participating in the election are political parties that have been approved/passed the verification by the KPU. The following is Article 173 paragraph (1) of Law 7/2017, "Political parties participating in the General Election are political parties that have been decision/passed the verification by the KPU.

Overall, there is no change in the requirements for political parties to become election participants in Article 173 paragraph (2) of Law 7/2017, so that it is the same as the previous law, especially Article 8 paragraph (1) of Law 8/2012. However, in relation to participation in the next election, Article 173 paragraph (3) of the Election Law said, "the political parties that have passed the verification with the conditions referred to in paragraph (2) do not need to be re-verified and are designated as political parties participating in the election".

2. Regulation of The Political Parties Verification as General Election Contestants After The Constitutional Court Decisions

Regarding the regulations for verification of political parties participating in the election, there are several decisions of the Constitutional Court that declare unconstitutional or conditionally unconstitutional, including The Constitutional Court Decision Number 12/PUU-VI/2008, The Constitutional Court Decision Number 52/PUU-X/2012, The Constitutional Court Decision Number 53/PUU-XV/2017 and The Constitutional Court Decision Number 55/PUU-XVIII/2020.

The Constitutional Court's decision Number 12/PUU-VI/2008 is a decision that states Article 316 letter d of Law 10/2008 is unconstitutional. The Petitioners in their posita, plead with the Constitutional Court that Article 316 letter d of Law 10/2008 is declared contrary to the 1945 Constitution and has no binding legal standing with arguments:²⁴

- a. Article 316 letter d of Law 10/2008 is contrary to Article 1 paragraph (3) of the 1945 Constitution, namely "Indonesia is a state of law," because in a state of law, all citizens including the legislature, must obey the law in this case the law governing the enactment of the electoral threshold policy that has been declared constitutional by the Constitutional Court according to Decision Number 16/PUU-V/2007.
- b. Article 316 letter d of Law 10/2008 is contrary to Article 28D paragraph (1) of the 1945 Constitution, "Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law" because Article 316 letter d does not provide proper legal protection and certainty as well as providing different treatment to political parties which have been declared by law not to have reached the electoral threshold, just for reasons of not having seats in the DPR.

²² Kementerian Dalam Negeri, *Naskah Akademik Rancangan Undang-Undang tentang Pemilihan Umum*, (Jakarta: Direktorat Jenderal Politik dan Pemerintahan Umum, 2016), p. 338.

²³ LNRI Tahun 2017 Nomor 182, TLNRI Nomor 6109.

²⁴ Putusan MK Nomor 12/PUU-VI/2008 tentang Pengujian Undang-Undang Nomor 10 Tahun 2008 tentang Pemilihan Umum Anggota, DPR, DPD, dan DPRD terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, p. 119-120.

- c. Article 316 letter d of Law 10/2008 contrary to Article 28I paragraph (2) of the 1945 Constitution, is "Everyone has the right to be free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment." Because according to the Petitioners, Article 316 letter d of Law 10/2008 has discriminated against political parties that do not reach the electoral threshold. There are political parties that have representatives in the DPR even though only one seat can directly participate in the 2009 Election, while the Petitioners, namely political parties who do not have representatives in the DPR even though they get more votes than political parties that get one seat in the DPR, cannot directly participate in the 2009 General Election.

In its consideration, the Constitutional Court said that in Article 316 letter d of Law, 10/2008 said "the *ratio-legis* is unclear and its consistency is setting the transition period from the electoral principle to the principle of the parliamentary threshold which will be realized through Article 202 Law 10/2008". Article 316 letter d of Law 10/2008 has given unequal treatment and has created legal uncertainty and injustice to fellow political parties participating in the 2004 General Election who are not qualified under Article 315 of Law 10/2008, so this request is reasonable and must be granted.²⁵

Next, the judicial review of Article 8 paragraph (1) of Law 8/2012 on the phrase, "which meets the threshold for obtaining votes from the number of valid votes nationally" and Article 8 paragraph (2) on the phrase, "Political parties that do not meet the threshold for obtaining votes in the previous election or"; which is considered contrary to the 1945 Constitution.²⁶ In this petition, petitioners argued that the constitutional rights of the applicant had been impaired by the existence of Article 8 paragraph (1) and paragraph (2) as well as Article 208 of Law 8/2012 in essence as follows:²⁷

- a. There is a regulation prejudiced to the petitioners because it is very unfair and discriminatory to the petitioners as political parties participating in the last election (General Election 2009) did not reach the threshold of valid votes nationally in the participation of the next election (General Election 2014), with factual verification requirements that very difficult to the political parties by the KPU. However, the KPU only ratified that political parties participating in the 2009 General Elections that qualified the national valid vote threshold were automatically designated as participants in the 2014 General Elections without factual verification. This is contrary to Article 27 paragraph (1), Article 28D paragraph (1), Article 28 paragraph (3), and Article 28I paragraph (2) of the 1945 Constitution.
- b. The existence of this article resulted in the failure of the Petitioners in factual verification by the KPU. Therefore, the Petitioners will be prevented from having their constitutional rights in fighting for their rights collectively to build society, nation, and state as guaranteed by Article 27 paragraph (1), Article 28, Article 28C paragraph (2), Article 28D paragraph (1) and paragraph (3) and Article 28I paragraph (2) of the 1945 Constitution.

According to the principle of equality before the law and the government, new political parties must not be treated differently from old political parties (which have participated in the 2009 General Election) or if political parties are subject to certain conditions, other political parties must also be subject to the same conditions.²⁸ Therefore, according to the consideration of the Constitutional Court that to create equal and fair treatment, all political

²⁵ *Ibid.*, p. 129.

²⁶ Putusan MK Nomor 52/PUU-X/2012 tentang Pengujian Undang-Undang Nomor 8 Tahun 2012 tentang Pemilu Anggota DPR, DPD, dan DPRD terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, pg. 67-68.

²⁷ *Ibid.*, p. 68.

²⁸ *Ibid.*, p. 93.

parties participating in the 2014 General Election must be verified so that the requirements in Article 8 paragraph (2) of Law 8/2012 must be applied to all political parties that will participate in the 2014 General Election without exception.²⁹ Based on that consideration, the Constitutional Court Decision Number 52/PUU-X/2012 stated that several article provisions of Law 8/2012, namely Article 8 paragraph (1) and Article 8 paragraph (2) of Law 8/2012 were unconstitutional.³⁰

The content of the Constitutional Court Decision Number 53/PUU-XV/2017 is that Article 173 paragraph (1) along the phrase “has been established/” and the entirety of Article 173 paragraph (3) of Law Number 7 of 2017 concerning General Elections (Law 7/2017) is unconstitutional. Referring to the petition for a judicial review conducted by the Petitioner, the potential for constitutional loss from the enactment of Article 173 paragraph (1) as long as the phrase "has been stipulated" and Article 173 paragraph (3) of the Election Law is on the grounds that the applicant has the potential to not pass the factual verification by KPU.³¹

According to the Constitutional Court, these regulation means that there are differences between political parties participating in the election, which are categorized as having passed the verification with the specified conditions and there are political parties that have not passed the verification. With this rule, the two political groups of candidates participating in the election are regulated or treated differently.³²

Even though the 1945 Constitution allows for different enforcement by applying different norms, in the realm of political contestation, such as participation in elections, it cannot be justified at all. According to the consideration of the Constitutional Court, the different treatment of candidates participating in the General Election is contrary to Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution, thus causing injustice in the election itself.³³ Meanwhile, the DPR in formulating Article 173 paragraph (3) of the Election Law actually gives different treatment to political parties that have seats in the DPR based on the 2014 election results.³⁴ In addition to the considerations described, the Constitutional Court in its considerations emphasized four important things in the Constitutional Court's Decision Number 53/PUU-XV/2017:³⁵

- a. Justice for Every Election Contesting Candidates
- b. Creation of New Region and Demographic Progress
- c. Political Parties as Dynamic Legal Entities
- d. Complete Verification of the Eligibility of Election Contestants

After the decision of the Constitutional Court 53/PUU/XV/2017, the increasingly complex verification problem regarding the necessity of political parties participating in the 2014 elections must be re-verified so that the procedures for verifying political party membership are further regulated through General Election Commission Regulations (PKPU).³⁶ So that the KPU as a hierarchical institution from the top down to the Regency/City, of course applies the same verification rules. The Constitutional Court's decision regarding the verification of political parties in the 2019 general election caused all political parties participating in the 2019 election, both old and new, to be re-verified without

²⁹ *Ibid.*, p. 101.

³⁰ *Ibid.*, p. 101-103.

³¹ Putusan MK Nomor 53/PUU-XV/2017, *Op. Cit.* p. 103.

³² *Ibid.*, p. 109.

³³ *Ibid.*, p. 112.

³⁴ *Ibid.*, p. 112.

³⁵ *Ibid.*, p. 112.

³⁶ Aldho Syafriandre1, et. al., Malapraktik Dalam Proses Verifikasi Partai Politik Di Indonesia: Studi Pada Pemilihan Umum 2019, *Jurnal Wacana Politik Vol. 4, No. 1, 2019*, p. 22.

discrimination and differences in treatment. The consequences of the Constitutional Court's decision for the KPU are experiencing limited time, limited human resources and a limited budget.³⁷

After the 2019 Election, Article 173 paragraph (1) of the Election Law was again subjected to a judicial review by the Garuda Party as the Petitioner for the constitutionality of Article 28H paragraph (2) of the 1945 Constitution which reads, "Everyone has the right to receive special facilities and treatment to obtain opportunities and benefits together, to achieve equality and justice." The applicant in case Number 55/PUU-XVIII/2020 is a legal entity of a political party that is a participant in the 2019 General Election, so that it has legal standing to apply for a judicial review of the law as regulated in Article 51 paragraph (1) of the Constitutional Court Law. In addition, the Garuda Party is a new political party that has never been involved in formulating the tested norms. This is in accordance with the Constitutional Court Decision Number 35/PUU-XII/2014, which did not grant the petition of the Central Executive Board of the National Awakening Party (DPP PKB). In the *ratio decidendi*, it was said:³⁸

"A political party that has taken part and participated in institutional discussions and decision-making through its representatives in the DPR on the ratification of a law, the political party cannot submit an application for a judicial review of the law to the Constitutional Court against that law."

Petitioners who are participants in the 2019 General Election as determined in the KPU Plenary Session feel that their constitutional rights have been impaired due to the enactment of Article 173 paragraph (1) of the Election Law, for reasons which are basically as follows:

- a. The implementation of re-verification of the Petitioner is contrary to the principle of fair legal certainty because the strength of the results of the investigative audit becomes meaningless and the legal interests of the Petitioner are disadvantaged, as referred to in Article 28H paragraph (2) of the 1945 Constitution.
- b. With the verification process followed by the Petitioner, it has required enormous costs because the Applicant must present at least 1000 (one thousand) members or 1/1000 of the total population in 75% of Regencies/Cities of all provinces. According to the Petitioner, the verification stage is very tiring because it is not easy to arrange a schedule for the 1000 (one thousand) people to be present when the KPU conducts the verification process.
- c. The problem that is very difficult for the Petitioner in verification is the necessity to present a complete management structure with a minimum structure of Chairman, Secretary, Treasurer. Sometimes one of the administrators cannot attend due to one reason or another, so that the verification process must be repeated. Even the requirement to include at least 30% of female administrators in the verification process, sometimes some female administrators are unable to attend, so that the verification process is postponed.
- d. According to the Petitioners, Article 173 paragraph (1) of the Election Law requires the Petitioners to re-enter the verification process, which is very tiring and costly if in the future they want to take part in the General Election again so this is very disadvantageous to the Petitioners.

³⁷ Sindonews.com, "Verifikasi Sampling Dinilai Melanggar Konstitusi", Available online <https://nasional.sindonews.com/read/1275239/12/verifikasi-sampling-dinilai-melanggar-konstitusi-1516424403/> date on 17th June 2022.

³⁸ Putusan Mahkamah Konstitusi Nomor 55/PUU-XVIII/2020, *Op. Cit.* p. 4-5.

According to the Constitutional Court, even though the petition is substantially grounded or not, it is formally in accordance with Article 60 paragraph (2) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (Constitutional Court Law) and Article 78 paragraph (2) of the Constitutional Court Regulation Number 2 of 2021 (*Peraturan MK Nomor 2 Tahun 2021*), so that the judicial review can be resubmitted because the arguments and the standing for testing in the Petition are different from the Constitutional Court Decision previous. Although some of the decisions have the same opinions regarding the verification of political parties against all political party candidates participating in the election, that is all political parties participating in the election must be verified. But with current considerations, the current facts are that the state budget for verifying political parties is not cheap, especially in the current state of the economy, which has to finance the handling of the COVID-19 pandemic, and by paying attention to the perspective of justice is to treat the same thing to something that should be treated the same, and to treat something differently to something that should be treated differently.³⁹

The Constitutional Court considered that although Article 28H paragraph (2) of the 1945 Constitution was not related to the political rights of citizens, if it's related to the verification of political parties, in fact the 1945 Constitution has guaranteed constitutional rights for citizens to participate in organizational and democratic life, especially in terms of participating in political contestations by establishing political parties through procedures or requirements that must be met by political parties, among others by requiring verification. Political parties that have participated in the General Election have passed the verification, which means they have qualifications and competencies based on certain requirements that are used as a benchmark for people's trust in the political party. This becomes very important in improving the quality, efficiency and effectiveness of elections.⁴⁰

In this decision again consider the political parties that will take part in the next general election, both old political parties (which have been verified and declared to have passed the election) and new political parties (political parties that have never been verified and have never participated in the general election or have been verified but did not pass) and contemporary considerations and pay attention to the perspective of justice, namely treating the same thing to something that should be treated the same and treating something differently to something that should be treated differently.⁴¹ The Constitutional Court's position requires verification of all political parties that have passed the parliamentary threshold or those that have not passed this provision but have participated in the previous election and new political parties that will take part in the next election are efforts to uphold the principle of equality before the law but tend to ignore the enforcement of the principle of justice because they look the same towards something that should be treated differently.⁴² Looking at the dynamics and vote acquisition achievements and the level of representation of a political party in an election contest, it is unfair if the three variants of the vote acquisition achievements and level of representation of a political party are equated with new political parties that will take part in the election in the next election verification.⁴³ Therefore, Article 173 paragraph (1), which states, election Contesting Political Parties are political parties that have passed the verification by the KPU” is contrary to the 1945 Constitution as long as it is not interpreted:

“Political parties that have passed the verification of the 2019 General Election and have passed/qualified the provisions of the parliamentary threshold in the

³⁹ *Ibid.*, p. 58.

⁴⁰ *Ibid.*, p. 58.

⁴¹ *Ibid.*, p. 59-60.

⁴² *Ibid.*, p. 61.

⁴³ *Ibid.*, p. 62

*2019 Election are still administratively verified but not factually verified, as for political parties that do not qualify/do not meet the provisions of the parliamentary threshold, political parties that only have representation at the Provincial/Regency/City DPRD level and political parties that do not have representation at the Province/Regency/City DPRD level, are required to re-verify administratively and factually”.*⁴⁴

3. Analysis of The Constitutional Court's Decision Regarding Verification of Election Contesting Political Parties Based on The Principle of Equality Before The Law

The Constitutional Court's decision is final, binding, and there is no further legal action as stated in Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) and Article 47 of the Constitutional Court Law. Therefore, all subjects of legal action are still considered valid before the decision of the constitutional court that will contain new legal subjects. In addition to containing new laws, the Constitutional Court's decision also creates desired law (*ius constituendum*) in the Indonesian constitutional system. So that the Constitutional Court's decision is final, which means:⁴⁵

- a. Directly obtain permanent legal force (*inkracht van gewijsde*);
- b. This decision has legal consequences for all parties without exception, and all parties must implement the decision of the Constitutional Court; and
- c. There are no other legal remedies that can be taken.

As the highest norm, the 1945 Constitution must serve as a guide and be implemented by all state elements, both state administrators and citizens, so that it must be upheld and function as a source in finding solutions to solve state and national issues that arise.⁴⁶ However, it is possible that there is disobedience to the Constitutional Court's decision, such as the will of the legislators to re-enter articles that have previously been annulled by the Constitutional Court.⁴⁷

The main substance of this discussion is the Constitutional Court's decision which regulates the requirements for verification of political parties participating in the election that was born based on a request for judicial review by the applicant, in this case several non-parliamentary political parties. Before the Constitutional Court Decision Number 55/PUU-XVIII/2020, there were several Constitutional Court Decisions, including the Constitutional Court Decision Number 12/PUU-VI/2008, Decision Number 52/PUU-X/2012, Decision Number 53/PUU-XV/2017 always consistently stated that testing the law against norms that contained different treatment of political parties participating in the election in terms of verification in various election laws was unconstitutional. The *rechtstaat* concept has several elements in it. Julius Stahl explained that there are four important elements in the *rechstaat* law concept, including:⁴⁸

- a. Human rights protection;
- b. Power sharing;
- c. Government based on the Constitution; and
- d. State Administrative Court.

⁴⁴ *Ibid.*, p. 63

⁴⁵ Fajar Laksono, dkk., Implikasi dan Implementasi Putusan Mahkamah Konstitusi Nomor 52/PUU-X/2012 tentang SBI atau RSBI, (*Jurnal Konstitusi*, Vol. 10 No. 4, 2013), p. 739.

⁴⁶ *Ibid.*, p. 741.

⁴⁷ *Ibid.*,

⁴⁸ Muhammad Ishar Helmi, Penerapan Asas Equality Before the Law Dalam Sistem Peradilan Militer, *Jurnal Cita Hukum*. Vol. 1 No. 2, 2013, p. 304.

Meanwhile, A.V. Dicey explained that there are three characteristics of a rule of law state which he termed the Rule of Law, including:⁴⁹

- a. Supremacy of Law;
- b. Equality Before the Law; and
- c. Due Process of Law.

Regarding the principle of equality before the law in the 1945 Constitution is contained in Article 27 paragraph (1) which states that “All citizens have the same position before law and government and are obliged to uphold law and government without exception.” In addition, Article 28D paragraph (1) of the 1945 Constitution states, “Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law.” The recognition of the principle of equality before the law in the 1945 Constitution shows the importance of protecting human rights.⁵⁰ Therefore, this regulation is in accordance with one of the principles of the rule of law, namely the principle of equality before the law, which means that the government must not take sides or specialize in certain people or groups of people or discriminate against certain people or groups.⁵¹

That principle when related to the requirement for verification of political parties participating in elections, they have the same things. Because political parties are a form of people, the freedom of association to be able to participate in political contestation is a general election. Throughout the history of the election after the amendment to the 1945 Constitution, the number of political parties participating in the election has fluctuated, evidenced by the 24 political parties participating in the 2004 Election. Then, in the 2009 Election, there was an increase of 38 political parties (plus 6 local Acehese political parties), the 2014 Election was reduced to 12 political parties and 3 Acehese local political parties, and in the last Election, namely the 2019 Election, political parties participating in the general election again increased to 16 political parties participating in the election as well as 4 Acehese local political parties.⁵²

The process of political parties becoming election participants must go through several stages. Article 3 of Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 concerning Political Parties is the legal standing for the establishment of political parties that must be fulfilled by every political party in order to be legalized as a legal entity of a political party by the Ministry of Law and Human Rights.⁵³ And then political parties must go through the stages of verification to determine whether the legal entity political parties can meet the requirements in the Articles of the Election Law so that they can pass verification by the KPU and become election participants. Although several election laws have been applied as the legal basis for elections, there are rules that especially the requirements for verification of election participants for political parties in previous elections.

Several election laws, namely Article 316 letter d of Law 10/2008, Article 8 paragraph (1) of Law 8/2012 and Article 173 paragraphs (1) and (2) of Law 7/2012 are a series of regulations that cannot be separated from requests for judicial review to The Constitutional Court whose decisions are always declared unconstitutional, although there is an exception to the Constitutional Court Decision Number 55/PUU-XVIII/2020 which states conditionally

⁴⁹ *Ibid.*

⁵⁰ Dede Karina, Hak Asasi Perempuan dalam Peraturan Perundang-Undangan Di Indonesia, (*Jurnal Konstitusi, Volume 12, Nomor 4, Desember 2015*), p. 717.

⁵¹ M. Beni Kurniawan, Politik Hukum Mahkamah Konstitusi Tentang Status anak di Luar Nikah: Penerapan Hukum Progresif Sebagai Perlindungan Hak Asasi Anak, (*Jurnal Hak Asasi Manusia, Volume 8 No. 1, 2017*), pg. 17.

⁵² Rokiyah dan M. Iwan Satriawan, Desain Pemilu Multi Partai Sederhana (Kritik terhadap Pelaksanaan Verifikasi Partai Politik), (*Sang Pencerah: Jurnal Ilmiah Universitas Muhammadiyah Buton, Volume 8 Nomor 2 Tahun 2022*), pg. 303-304.

⁵³ LNRI Tahun 2011 Nomor 8, TLNRI Nomor 5189.

unconstitutional. The consideration of the Constitutional Court declaring it unconstitutional refers to the jurisprudence of the previous Constitutional Court decisions relating to the requirements for verifying political parties participating in the General Election. and then the reason is based on the Constitutional Court Decision Number 105/PUU-XIV/2016 as contained in the Constitutional Court Decision number 53/PUU-PUU-XV/2017 namely:

*“As an institution that is given constitutional authority by the constitution to review the laws against the 1945 Constitution, steps that may be taken by the Court to respond and at the same time anticipate all kinds of disregard for norms or certain parts of a Law which have been declared contrary to the 1945 Constitution but revived in a revised Law or in a new Law, then for the Court, such matter will be irrefutable evidence to declare that the norms of the Law in question are contrary to the 1945 Constitution”.*⁵⁴

Jurisprudence is a previous judge's decision on the same problem or case, which is often followed and used as the basis for a decision by a later judge on the same issue.⁵⁵ According to C.S.T. Kansil, jurisprudence is included in one of the sources of formal law, namely, including laws, customs, jurisprudence, and treaties.⁵⁶ Then according to Jimly Asshiddiqie mentions that there are seven types of sources of constitutional law namely:⁵⁷

- a. Unwritten constitutional values;
- b. The Constitution, both its preamble and its articles;
- c. Written laws and regulations;
- d. Jurisprudence;
- e. Constitutional conventions;
- f. A doctrine that has become *ius commission is opinion doctorum*;
- g. International law that has been ratified or has been enacted as customary international law.

The judge follows the decision of the previous judge because he agrees with the contents of the decision. Besides that, it is only used as a guide in making a decision regarding a similar case, so jurisprudence is a separate source of law.⁵⁸ According to Yahya Harahap, if jurisprudence indeed contains the fundamental values of the ideals of the Pancasila and the 1945 Constitution, which combine to produce rational legal formulations, practical and actual, then it is proper for judges to follow them.⁵⁹ Given the position of Pancasila as the legal ideals of the Indonesian nation, according to Maria Farida Indrati, Pancasila positively provides guidelines and provides the content to each statutory regulation and negatively is a framework that limits the space for the contents of the legislation.⁶⁰ And then, according to Sudikno Mertokusumo, in a judicial review at the Constitutional Court, the validity of the decision on reviewing the law is *erga omnes*, which means that it applies to all parties, not just the Petitioners since the decision is read out by the constitutional judge.⁶¹ So that it is not only binding on the parties to the dispute but binding on all parties without exception to acknowledge the existence of the decision.

⁵⁴ Putusan MK Nomor 53/PUU-XV/2017, *Op. Cit.*, p. 119.

⁵⁵ C.S.T. Kansil, *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia*, (Jakarta: Balai Pustaka, 1982), pg. 47.

⁵⁶ Adi Rizka Permama, Peranan Yurisprudensi Dalam Membangun Hukum Nasional di Indonesia, (*Jurnal Khazanah Multidisiplin*, Vol. 2 No. 2, 2021), p. 74.

⁵⁷ Enrico Simanjuntak, Peran Yurisprudensi dalam Sistem Hukum di Indonesia, *Jurnal Konstitusi*, Vol 16, No 1, 2019, p. 86.

⁵⁸ Fence M Wantu, *Pengantar Ilmu Hukum*, (Gorontalo: UNG Press, 2015), p. 21-22.

⁵⁹ Mirja Fauzul Hamdi, Kedudukan Yurisprudensi Putusan Mahkamah Konstitusi Dalam Merekonstruksi Hukum Acara, (*Jurnal Legislasi Indonesia Vol 16 No. 3 - September 2019*), p. 316.

⁶⁰ Bayu Dwi Anggono, Telaah Peran Partai Politik untuk Mewujudkan Peraturan Perundang-Undangan yang Berdasarkan Pancasila, *Jurnal Konstitusi*, Vol 16, No 4, 2019, p.. 702.

⁶¹ Oly Viana Agustine, Keberlakuan Yurisprudensi Pada Kewenangan Pengujian Undang-Undang dalam Putusan Mahkamah Konstitusi, *Jurnal Konstitusi Vol. 15, No. 3, 2018.*, p. 648.

*“Even though the 1945 Constitution allows for different enforcement by applying different norms, in the realm of political contestation, such as participation in elections, it cannot be justified at all. According to the consideration of the Constitutional Court, the different treatment of candidates participating in the General Election is contrary to Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution, thus causing injustice in the election itself”.*⁶²

On the considerations of the Constitutional Court in Constitutional Court Decision Number 53/PUU-XV/2017, that the difference in treatment of political parties participating in the previous election in qualified the verification requirements to become election participants is contrary to the 1945 Constitution and does not have a binding legal position. Based on several decisions, namely Decision of the Constitutional Court Number 12/PUU-VI/2008, Decision of the Constitutional Court Number 52/PUU-X/2012 and Decision of the Constitutional Court Number 53/PUU-XV/2017, the Constitutional Court consistently stated that the provisions in the Election Law were unconstitutional until the current Election Law is Law 7/2017. From these constitutional issues, it can be seen that the Constitutional Court has enforced jurisprudence by following existing previous decisions on the same constitutional issues. This shows that the Constitutional Court believes that the previous decision is still relevant, so this decision is currently being followed by constitutional judges in deciding cases. Although according to Sudikno Mertokusumo, in the Indonesian legal system, a judge is not bound by previous judges' decisions regarding cases or legal issues similar to those to be decided.⁶³

Although theoretically, deviations from the jurisprudence of the Constitutional Court's decisions can be understood because judges have the freedom to examine and decide on cases reviewing laws by being accountable for their decisions to the public and the concept of the living constitution which describes the constitutionality of norms as dynamic and not rigid.⁶⁴ Judges are free to examine and decide a case. However, this freedom is not absolute because the task of the judge is to uphold law and justice based on Pancasila by interpreting the law and looking for the basics and principles on which it is based through the cases before him so that his decision reflects a sense of justice.⁶⁵ So that the Constitutional Court's decision, which is inconsistent in deciding the application for a judicial review which is substantially the same is due to the provisions of Article 5 paragraph (1) of the Law Number 48 of 2009 concerning Judicial Power, namely “Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice in society.” Based on these provisions, constitutional judges can explore the values of law and justice that live in a society based on the 1945 Constitution and Pancasila.

C. Conclusion

Based on the discussion from above it can be concluded that the regulations for verifying political parties in each Election Law before the Constitutional Court's decision are to provide privileges or affirmations to political parties that have met the parliamentary threshold requirements in the previous election, namely contained in the norms of the Election Law so that political parties that have fulfilled these requirements can participate in the next election automatically without going through the verification stages carried out by the KPU. The affirmation of membership in political parties, especially the requirements for meeting

⁶² Putusan MK Nomor 53/PUU-XV/2017, p. 111-112.

⁶³ Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, (Yogyakarta: Liberty Yogyakarta, 2003), p. 93.

⁶⁴ Oly Viana Agustine, *Ibid.*, p. 652-653.

⁶⁵ *Ibid.*, p. 655.

parliamentary thresholds or having seat limits in the DPR as stipulated in the Election Law, certainly creates a sense of discrimination against certain political parties, especially political parties that did not pass the parliamentary threshold in the previous election or new political parties that wish to participate. In an election.

This is evidenced by the four decisions of the Constitutional Court since the decision of the Constitutional Court Number 12/PUU-VI/2008, the Constitutional Court Decision Number 52/PUU-X/2012, the Constitutional Court Decision Number 53/PUU-XV/2017, up to the Constitutional Court Decision Number 55/PUU -XVIII/2020, three of them granted the applicant's request to state that the norms containing affirmations on the political rights of election participants in the Election Law are unconstitutional and do not have binding legal force based on Article 27 paragraph (1), Article 28D paragraph (1) and (3) The 1945 Constitution which is essentially equal before the law, has the right to fair legal certainty and equal treatment before the law and is entitled to equal opportunities in government. Except for Constitutional Court No 55/PUU-XVIII/2020, the core of the ruling is to classify political parties into two groups in the verification process. First, parliamentary political parties are only administrative verification. Both non-parliamentary political parties must be verified administratively or factually.

The considerations in Constitutional Court decision No. 55/PUU-XVIII/2020 differ from what the applicant requested in his considerations, which is that political parties that participated in the 2019 elections not be verified again in the next 2024 elections. The court in Constitutional Court Decision No. 55/PUU-XVIII/2020 ignores the principle of equality before the law and equal opportunity for all parties, so it is different from the three previous MK decisions. This is inseparable from the applicant's application, which uses a different legal basis and petite, and the court does not use jurisprudence as a basis for considering the decision. There is a provision in Article 5 paragraph (1) of the Judicial Powers Law that gives constitutional judges the authority to explore and understand legal values and a sense of justice that lives in a society based on the 1945 Constitution and Pancasila as the basic norm. Thus, it is natural that the considerations in the decision are different, even though there are similarities in the substance or norms being tested and the jurisprudence of the Constitutional Court's decision.

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