

**VERIFICATION OF POLITICAL PARTIES PARTICIPATING IN
GENERAL ELECTIONS BEFORE AND AFTER THE DECISIONS
OF THE CONSTITUTIONAL COURT**

**VERIFIKASI PARTAI POLITIK PESERTA PEMILIHAN UMUM
SEBELUM DAN SESUDAH PUTUSAN MAHKAMAH KONSTITUSI**

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ABSTRACT

Political parties are the political superstructure of a democratic country, namely as a means for citizens to occupy political positions through general elections. The requirements for passing verification as election participants by the General Elections Commission must be met by political parties contained in the election law, by making it harder for political parties to pass verification as well as exceptions for several political parties that have met certain verification requirements so that they are immediately designated as participants to next elections. The exception is not in accordance with Article 27 paragraph (1), Article 28D paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution as unconstitutional through several decisions of the Constitutional Court. The purpose of this study is to determine the conditions for passing the verification of political parties participating in the General Election before and after the Constitutional Court Decision, and analyze the considerations of the Constitutional Court judges regarding the requirements to pass the verification of political parties participating in the General Election based on the principle of equal treatment before the law, using a normative approach. It can be concluded that the considerations of the Constitutional Court regarding the verification requirements of political parties participating in the general election are inconsistent because the material test of the 1945 Constitution used are different and there is not required for the Constitutional Court to use jurisprudence as a basis for consideration even though there are similarities in substance.

Keywords: Political Party, Constitutional Court Decisions, Political Parties Verification.

ABSTRAK

Partai politik merupakan supra struktur politik negara demokrasi yaitu sebagai sarana warganegara untuk menduduki jabatan politik melalui pemilihan umum (Pemilu). Persyaratan lulus verifikasi sebagai peserta Pemilu oleh Komisi Pemilihan Umum (KPU) harus dipenuhi oleh partai politik terdapat dalam undang-undang Pemilu, dengan memperberat partai politik dalam lulus verifikasi sekaligus terdapat pengecualian terhadap beberapa partai politik yang telah memenuhi syarat verifikasi tertentu sehingga langsung ditetapkan sebagai peserta pemilu berikutnya. Pengecualian tersebut tidak sesuai dengan Pasal 27 ayat (1), Pasal 28D ayat (1) dan Pasal 28D ayat (3) UUD 1945 sebagaimana telah dinyatakan inkonstitusional melalui beberapa Putusan Mahkamah Konstitusi. Tujuan penelitian ini untuk mengetahui pengaturan syarat lolos verifikasi partai politik peserta Pemilu sebelum dan sesudah Putusan Mahkamah Konstitusi, serta menganalisis pertimbangan hakim Konstitusi terkait syarat lolos verifikasi partai politik peserta Pemilu berdasarkan prinsip perlakuan sama di hadapan hukum, menggunakan pendekatan normatif. Dapat disimpulkan bahwa Pertimbangan Mahkamah Konstitusi terkait syarat verifikasi partai politik peserta Pemilu tidak konsisten karena batu uji UUD 1945 yang digunakan berbeda serta tidak ada kewajiban bagi Mahkamah Konstitusi untuk menggunakan yurisprudensi sebagai dasar pertimbangan meskipun terdapat kesamaan substansi.

Keywords: Partai Politik, Putusan Mahkamah Konstitusi, Verifikasi Partai Politik.

I. INTRODUCTION

The principle of people's sovereignty as stated in Article 1 paragraph (2) of the 1945 Constitution places the people as the holder of the highest sovereignty, so that the implementation of people's sovereignty according to the 1945 Constitution is carried out with a democratic mechanism based on the constitution (constitutional democracy).¹ The concrete manifestation of the implementation of people's sovereignty is the holding of general elections (elections), namely as a procedure for transferring people's sovereignty to certain people to occupy political positions.² In a democratic country, political parties are pillars of democracy because they play an important role as a liaison between citizens and state government.³

¹ Jimly Asshiddiqie. (2007). *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi*. Jakarta: Bhuana Ilmu Populer, 58.

² Veri Junaidi. (2009). Menata Sistem Penegakan Hukum Pemilu Demokratis: Tinjauan Kewenangan MK atas Penyelesaian Perselisihan Hasil Pemilu (PHPU). *Jurnal Konstitusi* 6(3), 106.

https://www.mkri.id/public/content/infoumum/ejurnal/pdf/ejurnal_JK%20edis%203-september

³ Jimly Asshiddiqie, *Op. Cit.*, 710.

After the amendment to the 1945 Constitution, political parties were given the authority to propose pairs of candidates for President and Vice President based on Article 6A paragraph (2) and to become election participants as stated in Article 22E paragraph (3) of the 1945 Constitution. Political parties can participate in elections are political parties that meet the requirements of passing verification by the General Election Commission (KPU), as stipulated in Article 173 of Law Number 7 of 2017 concerning General Elections (UU 7/2017).⁴

The process of verifying political parties by the KPU is an initial stage in the implementation of elections. In addition, verification is an effort to select the professionalism of political party institutions in meeting the requirements to participate in elections. Although, the provisions regarding verification requirements contained in each election law are always questioned by political parties by submitting requests for judicial review to the Constitutional Court (MK), because the applicant's constitutional rights are impaired to be able to participate in elections. Thus, in its development, there were 4 (four) Constitutional Court Decisions that decided on judicial review requests related to the verification of political parties participating in the election, namely, MK Decision Number 12/PUU-VI/2008, MK Decision Number 52/PUU-X/2012, MK Decision Number 53/PUU-XV/2017, and Decision of the Constitutional Court/PUU-XVIII/2020.

First, a judicial review of the verification requirements for political parties in Decision Number 12/PUU-VI/2008 was carried out by the applicant consisting of 7 (seven) political parties as applicants, namely related to the constitutionality of Article 316 letter d of Law Number 10 of 2008 concerning Elections Members of the DPR, DPD and DPRD (UU 10/2008), namely "having seats in the DPR RI as a result of the 2004 elections". According to the Constitutional Court, in the absence of the provisions of the a quo article, all political parties that do not reach 3% of the number of seats in the DPR must be verified by the KPU. v So that the Constitutional Court in its decision declared Article 316 letter d of Law 10/2008 unconstitutional.

Second, as many as 17 (seventeen) political parties in Decision Number 52/PUU-X/2012 submitted a request for judicial review of Article 8 paragraph (1) of Law Number 8 of 2012 concerning the Election of Members of the DPR, DPD and DPRD (UU 8 /2012) throughout the phrase, "which meets the threshold of vote acquisition from the number of valid votes nationally" and Article 8 paragraph (2) throughout the phrase, "Political parties that do not meet the threshold of vote acquisition in the previous election". According to the petitioner, the a quo provision is considered to be contrary to the 1945 Constitution. In his consideration, the a quo provision is very unfair and discriminatory towards the applicant as a political party participating in the last election (2009 election) which did not meet the national threshold for obtaining valid votes in election participation. The next election (2014 election) went through very stringent factual verification requirements by the KPU, so that the Constitutional Court in its decision stated that the a quo article was unconstitutional.

⁴ Lembaran Negara Republik Indonesia (LNRI) Tahun 2017 Nomor 182, Tambahan Lembaran Negara Republik Indonesia (TLNRI) Nomor 6109.

Third, Decision Number 53/PUU-XV/2017 that the Peaceful Islamic Party (Idaman Party) submitted a request for judicial review of Article 173 paragraph (1) on the phrase "has been determined" and Article 173 paragraph (3) of Law Number 7 of 2017 on Elections (UU 7/2017). According to the petitioner, the a quo provision is unfair and discriminatory because the legislators only stipulate political parties participating in the last election to be automatically designated as participants in the next election without going through a factual verification process with more stringent conditions by the KPU. In addition, the a quo provision has created a double standard and contradicts the legal principle *ubi lex non distinguit, nec nos distinguere debemus*, which means that the law does not discriminate and should not discriminate, and therefore contradicts 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.⁵ So that in its decision, the Constitutional Court stated that Article 173 paragraph (1) in the phrase "has been stipulated" and Article 173 paragraph (3) Law 7/2017 is contrary to the 1945 Constitution and has no binding legal force.⁶ With the existence of an a quo decision, all political parties must be thoroughly verified for the fulfillment of the requirements as election participants.

Fourth, MK Decision Number 55/PUU-XVIII/2020, namely the Garuda Party as the applicant making a request for a judicial review of Article 173 paragraph (1) Law 7/2017. Even though the article being reviewed materially is the same as the one previously decided by the Constitutional Court, the Petitioner can conduct another judicial review of the a quo article because it is supported by different arguments and touchstones, namely Article 28H paragraph (2) of the 1945 Constitution,⁷ so that formally it has complied with the provisions of Article 60 paragraph (2) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (UU MK). In the a quo ruling, the Constitutional Court stated that Article 173 paragraph (1) of Law 7/2017 namely, "Election Contesting Political Parties are political parties that have passed verification by the KPU" is contrary to the 1945 Constitution as long as it is not interpreted:

*"Political parties that have passed the 2019 Election verification and passed/meet the Parliamentary Threshold provisions in the 2019 Election are still administratively verified but not factually verified, as for political parties that do not pass/do not meet the Parliamentary Threshold requirements, political parties that only have representation at the national level Provincial/Regency/City DPRD and political parties that do not have representation at the Provincial/Regency/City DPRD level are required to be re-verified administratively and factually, this is the same as the provisions that apply to new political parties."*⁸

The a quo ruling caused the political parties participating in the election to be divided into 2 (two) groups in the verification process. The first group,

⁵ *Ibid.* 105.

⁶ *Ibid.* 136.

⁷ 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, 8.

⁸ Putusan Mahkamah Konstitusi Nomor 55/PUU-XVIII/2020, *Op. Cit.* 64.

political parties that pass the parliamentary threshold, have seats in the DPR RI in the 2019 election, only administratively verified without the need for factual verification in the next election. The second group, 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/or do not have seats in the DPRD and new political parties must go through the administrative and factual verification stages in the 2024 Election.

The considerations of the constitutional judges in the Constitutional Court Decision Number 55/PUU-XVIII/2020 are different from previous MK decisions, namely the Constitutional Court Decision Number 12/PUU-VI/2008, the Constitutional Court Decision Number 53/PUU-XV/2017, 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. Equally verifying all political parties participating in elections, both political parties participating in previous elections and new political parties, is an injustice.⁹ Meanwhile, the Constitutional Court Decision Number 53/PUU-XV/2017 as well as the previous Constitutional Court decisions stated an indicator of fairness for each candidate participating in the Election, namely equal or equal treatment between Election participants.¹⁰

Thus, the classification of political parties in the stages required to pass the verification of political parties participating in elections in the next election is caused by the Constitutional Court Decision Number 55/PUU-XVIII/2020, even though the considerations of constitutional judges in previous decisions put forward the principle of equal treatment before the law especially equality in the verification of political parties participating in elections. Therefore, the authors conducted research on “Verification of Political Parties Participating in General Elections Before and After the Constitutional Court Decision”.

II. METHOD

The type of research used is normative legal research, namely studying written law from various aspects, namely aspects of theory, history, philosophy, comparison, composition, scope and material, consistency, general explanation, and article by article.¹¹ The data used are secondary data consisting of primary legal materials consisting of laws and regulations related to the object of research, and secondary legal materials consisting of books, journals and legal scientific writings related to the object of research.¹²

III. ANALYSIS AND DISCUSSION

a. Arrangements for Verification of Political Parties as Election Contestants Prior to the Constitutional Court Ruling

⁹ *Ibid.* 62.

¹⁰ Putusan Mahkamah Konstitusi Nomor 53/PUU-XV/2017, *Op. Cit.* 113.

¹¹ Abdulkadir Muhammad. (2004). *Hukum dan Penelitian Hukum*. Bandung: PT. Citra Aditya Bakti, 20

¹² Zainuddin Ali. (2014). *Metode Penelitian Hukum (cetakan kelima)*. Jakarta: Sinar Grafika, 176.

Political parties according to Carl J. Friedrich are a group of people who are organized in a stable manner with the aim of seizing or maintaining control of the government for their party leaders and based on their control to provide party members with ideal and material benefits.¹³ Then, according to Jimly Asshiddiqie, the task of political parties is to collect, channel, and organize people's aspirations to then become a more systematic and structured public policy. In addition, political parties function as a super structure between the people (civil society) and the state (state). Therefore, it can be concluded that democracy cannot work without political parties.¹⁴

Based on the definition of expert opinion, political parties according to Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 concerning Political Parties (Political Party Law) are national organizations, formed by a group of Indonesian citizens voluntarily on the basis of the common will and aspirations to fight for and defend the political interests of members, society, nation and state, as well as maintaining the integrity of the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia (1945 Constitution). experts, political parties according to Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 concerning Political Parties (Political Party Law) are organizations that are national in nature, formed by a group of Indonesian citizens voluntarily on the basis of a common will and ideals - aspires to fight for and defend the political interests of members, society, nation and state, as well as maintaining the integrity of the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia (1945 Constitution).¹⁵

After the amendment to the 1945 Constitution, the law which became the legal basis for holding elections has undergone several changes, including Law Number 12 of 2003 concerning the Election of Members of the DPR, DPD and DPRD (UU 12/2003), UU 10/2008, UU 8/ 2012, and the law that is currently in force, namely Law 7/2017. Regulations regarding the requirements for verifying political parties participating in the Election were first contained in Articles 7 and Article 9 of Law 12/2003 which were the legal basis for the implementation of the 2004 Election. The following are provisions of Article 7 of Law 12/2003, namely:¹⁶

Article 7

- (1) Political parties can become election participants if they meet the following requirements:
 - a. their existence is recognized in accordance with the Law on Political Parties;
 - b. have complete administrators in at least 2/3 (two-thirds) of the total number of provinces;

¹³ Yusdiyanto. (2013). Telaah Rezim Partai Politik Dalam Dinamika Ketatanegaraan Indonesia. *Fiat Justisia Jurnal Ilmu Hukum* 7(2), 161. <https://doi.org/10.25041/fiatjustisia.v7no2>

¹⁴ *Ibid.* 161.

¹⁵ LNRI Tahun 2011 Nomor 8, TLNRI Nomor 5189.

¹⁶ LNRI Tahun 2003 Nomor 37, TLNRI Nomor 4277.

- c. has complete administrators at least in 2/3 (two-thirds) of the number of regencies/cities in the province as referred to in letter b;
 - d. has members of at least 1000 (one thousand) people or at least 1/1000 (one thousandth) of the total population in each political party management as referred to in letter c as evidenced by a political party membership card;
 - e. administrators as referred to in letters b and c must have a permanent office;
 - f. submit names and symbols of political parties to the KPU.
- (2) Political parties that have been registered but do not meet the requirements referred to in paragraph (1) cannot become election participants.
 - (3) KPU determines research procedures and conducts research on the validity of the requirements referred to in paragraph (1).
 - (4) Determination of procedures for research, implementation of research, and determination of the validity of the completeness of the requirements referred to in paragraph (1) is carried out by the KPU and is final.

Then, with regard to participation in the next election, it is regulated in Article 9 of Law 12/2003 which contains the requirements that must be met by political parties participating in the 2004 election to become participants in the 2009 election as follows:

- (1) To be able to take part in the next election, the political parties participating in the election must:
 - a. obtain at least 3% (three percent) of the seats in the DPR;
 - b. obtain at least 4% (four percent) of the seats in the Provincial DPRD spread over at least ½ (half) the number of provinces throughout Indonesia; or
 - c. obtain at least 4% (four percent) of the seats in Regency/Municipal DPRD spread across ½ (half) of the number of regencies/cities throughout Indonesia;
- (2) Election participating political parties that do not fulfill the provisions referred to in paragraph (1) must be able to take part in the next Election if:
 - a. join a political party participating in the election that fulfills the provisions referred to in paragraph (1);
 - b. join a political party that does not meet the conditions referred to in paragraph (1) and then use the name and symbol of one of the political parties that join so as to meet the minimum number of seats acquired; or
 - c. join a political party that does not meet the provisions referred to in paragraph (1) by establishing a new political party with a new name and symbol so that it meets the minimum number of seats acquired.

The participation of political parties in the next election, namely the 2009 election, is regulated in Article 8 of Law 10/2008. in which there are additional requirements that must be met by political parties to be able to participate in elections, namely that there is 30% representation of women in

the management of political parties at the central level. In addition, Article 8 paragraph (2) of Law 10/2008 stipulates that political parties participating in previous elections can become election participants in the next election. The following are the provisions of Article 8 of Law 10/2008, namely:¹⁷

- (1) Political parties can become election participants if they meet the following requirements:
 - a. having the status of a legal entity in accordance with the Law on Political Parties;
 - b. has management in 2/3 (two-thirds) of the number of provinces;
 - c. has management in 2/3 (two-thirds) of the number of regencies/cities in the province concerned;
 - d. include at least 30% (thirty percent) of women's representation in the management of political parties at the central level;
 - e. has members of at least 1000 (one thousand) people or 1/1000 (one thousandth) of the total population in each political party management as referred to in letters b and c as evidenced by ownership of a membership card;
 - f. has a permanent office for management as referred to in letter b and letter c; And
 - g. submit names and symbols of political parties to the KPU.
- (2) Political parties participating in the election in the previous election can become election participants in the next election.

In addition, Law 10/2008 contains transitional provisions contained in Articles 315 and Article 316, namely the conditions that must be fulfilled by political parties participating in the 2004 election to be able to participate in the 2009 election. One of the conditions that must be met to become participants in the 2009 election is to have the acquisition of seats in the DPR as a result of the 2004 election as stated in Article 316 letter d of Law 10/2008. The following are the provisions of Articles 315 and 316 of Law 10/2008, namely:

Article 315:

Political parties participating in the 2004 Election that won at least 3% (three percent) of the seats in the DPR or won at least 4% (four percent) of the seats in the Provincial DPRD spread across at least ½ (half) of the provinces throughout Indonesia, or obtain at least 4% (four percent) of the seats in Regency/Municipal DPRD spread over at least ½ (half) of the total regencies/cities throughout Indonesia to be declared as political parties participating in the General Election after the 2004 General Election.

Article 316:

Political parties participating in the 2004 Election that do not comply with the provisions of Article 315 may take part in the 2009 Election with the following provisions:

- a. *join the election contesting political parties that meet the provisions referred to in Article 315; or*
- b. *join a political party that does not meet the provisions referred to in Article 315 and then use the name and symbol of one of the political*

¹⁷ LNRI Tahun 2008 Nomor 51, TLNRI Nomor 4836.

- parties that join so as to meet the minimum number of seats acquired;*
or
- c. join a political party that does not meet the provisions referred to in Article 315 by establishing a new political party with a new name and logo so that it meets the minimum number of seats acquired; or*
 - d. has a seat in the DPR RI as a result of the 2004 election; or*
 - e. meet the requirements for verification by the KPU to become political parties participating in the Election as stipulated in this Law.*

Then, in Article 8 paragraph (1) of Law 8/2012, political parties that meet the parliamentary threshold in the 2009 Election can be determined as participants in the 2014 Election if they meet the threshold for obtaining votes from the number of valid votes nationally in the previous Election, so this provision does not apply to political parties that do not meet the parliamentary threshold or new political parties as stipulated in Article 8 of Law 8/2012, namely:¹⁸

- (1) Political parties participating in the election in the last general election that meet the threshold for obtaining votes from the number of valid votes nationally are determined as political parties participating in the election in the next general election.
- (2) Political parties that do not meet the vote acquisition threshold in the previous election or new political parties can become election participants after fulfilling the following requirements:
 - a. having the status of a legal entity in accordance with the Law on Political Parties;
 - b. have management throughout the province;
 - c. has management in 75% (seventy five percent) of the number of regencies/cities in the province concerned;
 - d. has management in 50% (fifty percent) of the number of sub-districts in the relevant regency/city;
 - e. include at least 30% (thirty percent) of women's representation in the management of political parties at the central level;
 - f. has members of at least 1,000 (one thousand) people or 1/1,000 (one thousandth) 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. has a permanent office for management at the central, provincial and district/city levels until the last election stage;
 - h. submit names, symbols and symbols of political parties to the KPU; And
 - i. submit the election campaign fund account number in the name of the political party to the KPU.

Based on the provisions of Article 8 paragraph (2) of Law 8/2012, there is a change in the increase in the percentage of management positions at each regional level and there are additional management requirements in 50% of the number of sub-districts in the district/city concerned which were not previously regulated in the law previously. Political parties at the central level are required to have management in all provinces. At the provincial level,

¹⁸ LNRI Tahun 2012 Nomor 117, TLNRI Nomor 5316.

political party management compliance increases to 3/4 or 75% of the number of districts/cities in a province.

Ahead of the 2019 Election, Law 7/2017 was passed as the legal basis for holding elections which is still valid today. The existence of Law 7/2017 is to implement the Constitutional Court Decision Number 14/PUU-XI/2013 which states that the separation of the implementation of legislative elections and presidential elections is unconstitutional, so that in the 2019 elections, the holding of the two elections must be synchronized.¹⁹ Thus, it needs to be unified and simplified into one law as the legal basis for elections simultaneously.²⁰ The requirements for political parties to become election participants are regulated in Article 173 of Law 7/2017:

- (1) Election participating political parties are political parties that have been determined/passed verification by the KPU.
- (2) Political parties can become election participants after fulfilling the following requirements:
 - a. having the status of a legal entity in accordance with the Law on Political Parties;
 - b. have management throughout the province;
 - c. has management in 75% (seventy five percent) of the number of regencies/cities in the province concerned;
 - d. has management in 50% (fifty percent) of the number of sub-districts in the relevant regency/city;
 - e. include at least 30% (thirty percent) of women's representation in the management of political parties at the central level;
 - f. has members of at least 1,000 (one thousand) people or 1/1,000 (one thousandth) 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. has a permanent office for management at the central, provincial and district/city levels until the last election stage;
 - h. has a permanent office for management at the central, provincial and district/city levels until the last election stage;
 - i. include the election campaign fund account number on behalf of the political party to the KPU.
- (3) Political parties that have passed the verification with the conditions referred to in paragraph (2) are not re-verified and are determined as election contesting political parties.

In Article 173 paragraph (2) of the Election Law, there is no change in the requirements for political parties to participate in elections so that they are similar to the previous law. Regarding participation in the next Election, Article 173 paragraph (3) of the Election Law stipulates that a political party can be declared as an Election participant if it has passed the verification with the conditions referred to in paragraph (2) so that it does not need to be re-verified by the KPU.

¹⁹ Kementerian Dalam Negeri. (2016) *Naskah Akademik Rancangan Undang-Undang tentang Pemilihan Umum*, Jakarta: Direktorat Jenderal Politik dan Pemerintahan Umum, 338.

²⁰ LNRI Tahun 2017 Nomor 182, TLNRI Nomor 6109.

b. Arrangements for Verification of Political Parties as Election Contestants after the Constitutional Court Ruling

Setting the requirements for verifying election participating political parties in each Election Law, both currently in force, namely Law 7/2017 and previous laws, cannot be separated from the existence of requests for judicial review to the Constitutional Court made by political parties that do not pass the parliamentary threshold or political parties that do not pass the parliamentary threshold. not a participant in the election. In relation to the regulation on verification of political parties participating in elections, several MK decisions accepted petitioners whose decisions declared unconstitutional, including MK Decision Number 12/PUU-VI/2008, MK Decision Number 52/PUU-X/2012, MK Decision Number 53/PUU -XV/2017, as well as conditionally unconstitutional, namely the Constitutional Court Decision Number 55/PUU-XVIII/2020.

The Constitutional Court Decision Number 12/PUU-VI/2008 is a decision declaring Article 316 letter d of Law 10/2008 unconstitutional. In the substance of the request, it is stated that Article 316 letter d of Law 10/2008 is declared contrary to the 1945 Constitution and also stated that it does not have binding legal force, with the following reasons:²¹

- 1) Whereas according to the applicant, Article 316 letter d of Law 10/2008 contradicts Article 1 paragraph (3) of the 1945 Constitution, namely "Indonesia is a state based on law", because in a state based on law all citizens, including legislators, must comply with the law, in this is the provision of the law regarding the enactment of the electoral threshold policy which has been declared constitutional by the Constitutional Court according to Decision Number 16/PUU-V/2007. Apart from that, a rule of law must also uphold human rights, including equal treatment before the law for all citizens or groups of people.
- 2) Article 316 letter d Law 10/2008 contradicts Article 28D paragraph (1) of the 1945 Constitution, namely, "Every person has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law", because Article a quo has failed to provide fair legal protection and certainty, and has provided unequal treatment to political parties which are actually declared by law to not meet the electoral threshold, simply because of the reasons of whether or not seats are obtained in the DPR.
- 3) Whereas Article 316 letter d Law 10/2008 contradicts Article 28I paragraph (2) of the 1945 Constitution, namely "Every person 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 Petitioner, Article 316 letter d of Law 10/2008 has discriminated against political parties which both do not meet the electoral threshold, there are political parties which, because they have representatives in the DPR, even if they only have one seat, can directly take part in the 2009 Election, while on the

²¹ 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, 119-120.

contrary the Petitioners , that is, political parties that do not have representatives in the DPR, even though their vote acquisition is greater than political parties that have won one seat in the DPR, cannot directly participate in the 2009 elections.

In its considerations, the Constitutional Court conveyed that Article 316 letter d of Law 10/2008, the ratio of the legislature is not clear and its consistency as a setting for the transition period from the principle of the electoral threshold to the principle of the parliamentary threshold which is to be realized through Article 202 of Law 10/2008. The existence of Article 316 letter d of Law 10/2008 has given unequal treatment and created legal uncertainty and injustice to fellow political parties participating in the 2004 Election who did not comply with the provisions of Article 315 Law 10/2008 so that the application is quite reasonable to granted.²²

Then, the decision of the Constitutional Court Number 52/PUU-X/2012 states that several provisions of the articles of Law 8/2012 namely Article 8 paragraph (1), Article 8 paragraph (2) of Law 8/2012 are contrary to the 1945 Constitution and do not have permanent legal force.²³ Testing Article 8 paragraph (1) of Law 8/2012 on the phrase, "those that meet the threshold of vote acquisition from the number of valid votes nationally" and Article 8 paragraph (2) on the phrase, "Political parties that do not meet the threshold of vote acquisition in general elections before or"; considered contrary to the 1945 Constitution.²⁴ In the a quo petition, it is stated that the constitutional rights of the applicant have been harmed and violated by the entry into force of Article 8 paragraph (1) and paragraph (2) of Law 8/2012 in essence as follows:²⁵

- a. Whereas the a quo provision is detrimental to the applicants because it stipulates provisions which are very unfair and discriminatory in nature against applicants as political parties participating in the last Election (2009 Election) which did not meet the national threshold for obtaining valid votes in the participation of the next Election (2014 Election), namely through very heavy factual verification requirements by the KPU, on the other hand the KPU only stipulates political parties participating in the 2009 Election that meet the legal vote threshold nationally are automatically declared as participants in the 2014 Election without going through factual verification, this is clearly contrary to Article 27 paragraph (1) , Article 28D paragraph (1), Article 28 paragraph (3), and Article 28I paragraph (2) of the 1945 Constitution;
- b. Whereas the enactment of the a quo article resulted in the failure of the Petitioners to pass factual verification by the KPU, therefore the Petitioners' constitutional rights would be hindered in terms of advancing themselves in fighting for their rights collectively to

²² *Ibid.* 129.

²³ 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, 101-103.

²⁴ *Ibid.* 67-68.

²⁵ *Ibid.* 68.

develop 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.

Thus, according to the Constitutional Court's consideration that all political parties must be subject to the same requirements for the same political contestation or election, namely the 2014 election based on the principle of equality before law and government. New political parties may not be treated differently from old political parties (which have participated in the 2009 elections) or if a political party is subject to certain conditions, then other political parties must also be subject to the same conditions.²⁶ For the sake of fair legal certainty, the Constitutional Court has determined that all political parties participating in the 2014 Election must take part in the verification so that the conditions stipulated in Article 8 paragraph (2) of Law 8/2012 must be applied to all political parties participating in the 2014 Election without exception.²⁷

Then, the Constitutional Court Decision Number 53/PUU-XV/2017 is a decision declaring Article 173 paragraph (1) throughout the phrase "has been determined/" and the entire Article 173 paragraph (3) of Law 7/2017 is unconstitutional. Based on the request for judicial review carried out by the applicant, that the potential for constitutional harm to the enactment of Article 173 paragraph (1) as long as the phrase "has been determined" and Article 173 paragraph (3) of Law 7/2017 "Political parties that have passed the verification with the conditions referred to in paragraph (2) was not re-verified and determined as a political party participating in the Election", on the grounds that the applicant has the potential to fail factual verification by the KPU.²⁸ According to the Constitutional Court, this provision means that there are political parties participating in elections that are categorized as having passed verification with predetermined conditions and there are political parties participating in elections that have not passed verification. With this provision, different treatment is regulated or applied to the two groups of political parties who are candidates for election contestants.²⁹

Even though the 1945 Constitution allows for different enactments through the application of different norms, in the realm of political contestation such as participation in elections this cannot be justified at all, because this is contrary to Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution, besides that Different treatment causes the election injustice itself.³⁰ To ensure that there is no different treatment for each candidate participating in the election, the court through the Constitutional Court Decision Number 52/PUU-X/2012 has determined that by verifying all political parties participating in the 2014 election. Meanwhile, the DPR in formulating Article 173 paragraph (3) The Election Law actually provides different treatment to political parties that have seats in the DPR based on the results of the 2014 election.

²⁶ *Ibid.* 93.

²⁷ *Ibid.*

²⁸ Putusan MK Nomor 53/PUU-XV/2017, *Op. Cit.* 103.

²⁹ *Ibid.* 109.

³⁰ *Ibid.* 112.

In addition, the Constitutional Court in its considerations considered it important to emphasize four things in the Constitutional Court Decision Number 53/PUU-XV/2017, namely:

- 1) Justice for Every Election Contestant Candidate
- 2) Regional Expansion and Demographic Development
- 3) Political Parties as Dynamic Legal Entities
- 4) Comprehensive Verification of the Eligibility of Election Contestants' Requirements

In post-2019 election developments, the provisions of Article 173 paragraph (1) of Law 7/2017 by the Garuda Party as the applicant again are requested to review the constitutionality of Article 173 paragraph (1) of Law 7/2017 against Article 28H paragraph (2) of the 1945 Constitution which reads, "Every person has the right to get facilities and special treatment to obtain the same opportunities and benefits in order to achieve equality and justice".

The Garuda Party is a new political party that has never been involved in the drafting of the norms being tested, so it has legal standing in submitting a petition for judicial review of Article 173 paragraph (1) of the Election Law. This is in accordance with the Constitutional Court Decision Number 35/PUU-XII/2014 which did not grant the request of the National Awakening Party's Central Leadership Council (DPP PKB), in the ratio decidendi stated:

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

The petitioner, as determined in the KPU Plenary Session as a participant in the 2019 Election, feels that his constitutional rights have been impaired by the entry into force of Article 173 paragraph (1) of the Election Law for reasons which are principally as follows:³¹

- 1) Whereas according to the applicant, the re-implementation of verification against the Petitioner is contrary to the principle of fair legal certainty because the strength of the investigative audit results is meaningless and detrimental to the legal interests of the applicant as referred to in Article 28H paragraph (2) of the 1945 Constitution.
- 2) Whereas having the verification process followed by the applicant requires a lot of enormous costs because the applicant must present at least 1000 (one thousand) members of the applicant or 1/1000 of the total population in 75% of Regencies/Cities of all provinces. The verification process, according to the applicant, was very tiring because it was not easy to schedule the 1,000 (one thousand) people to be present when the KPU carried out the verification process.
- 3) Whereas the thing that makes it very difficult for the applicant in verification is the obligation to present a complete management composition with a minimum structure of Chair, Secretary, Treasurer. Sometimes one of the administrators is unable to attend due to one reason or another so the verification process has to be

³¹ *Ibid.*

repeated again. Coupled with 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 delayed;

- 4) Whereas according to the applicant Article 173 paragraph (1) of the Election Law requires the applicant to re-take part in the verification process which is very tiring and costly if he wants to re-take part in elections in the future and this is very detrimental to the applicant.

Although in several Decisions the Constitutional Court has had views related to the verification of political parties, namely verification of all political parties who are candidates for election. Formally, the applicant's application complies with the provisions of Article 60 paragraph (2) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (UU MK) and Article 78 paragraph (2) of the Constitutional Court Regulation Number 2 of 2021 , so that the application can be resubmitted because the arguments and basis for testing in the application for the Constitutional Court Decision Number 53/PUU-XV/2017 are different from the Constitutional Court Decision Number 55/PUU-XVIII/2020.

According to the Constitutional Court, verification of political parties is still needed at this time with current considerations. There are facts on the ground that state costs to verify political parties are not cheap, especially in the current economic situation and condition of the country which has to finance the handling of the COVID-19 pandemic, and pay attention to the perspective of justice, namely treating things that should be treated equally and treating them differently. something that should be treated differently.³²

Political parties that have passed verification, which means that political parties actually have qualifications and competencies based on certain requirements that are used as a measure of people's trust in these political parties.³³

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 vote acquisition results and the level of representation of a political party are equated with new political parties that will become election participants in the verification of the next election contestation.³⁴ The Constitutional Court's position requires verification of all political parties, both those that have passed the parliamentary threshold and those that have not passed, 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 upholding of the principle of justice because they look the same towards something that should be treated differently.³⁵

Based on the legal considerations of the Constitutional Court, the applicant's application has legal grounds in part. Thus Article 173 paragraph (1) which states, "An Election Contesting Political Party is a political party that

³² *Ibid.* 58.

³³ *Ibid.*

³⁴ *Ibid.* 59-60.

³⁵ *Ibid.* 61.

has passed verification by the KPU" is contrary to the 1945 Constitution as long as it is not interpreted:

"Political parties that have passed the 2019 Election verification and passed/meet the parliamentary threshold requirements in the 2019 Election are still administratively verified but not factually verified, as for political parties that do not pass/do not meet the parliamentary threshold requirements, political parties that only have representation at the Provincial/Regency/City DPRD and political parties that do not have representation at the Provincial/Regency/City DPRD level are required to be re-verified administratively and factually, this is the same as the provisions that apply to new political parties."³⁶

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

Regarding the main substance of the discussion, namely the Constitutional Court's decision which regulates the requirements for verification of election contesting political parties that were born based on a request for judicial review conducted by several non-parliamentary political parties. Before the Constitutional Court Decision Number 55/PUU-XVIII/2020, the Constitutional Court in several decisions namely, 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 has always consistently stated that it is unconstitutional for norms that contain different treatment of political parties participating in elections in the conditions for verification of the Election Law.

The principle of equality before the law is contained in Article 27 paragraph (1) of the 1945 Constitution, "All citizens have the same position in law and government and are obliged to uphold this law and government without exception". In addition, Article 28D paragraph (1) of the 1945 Constitution states "Every person has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law". He admitted that the principle of equality before the law in the 1945 Constitution shows the importance of protecting human rights.³⁷ This provision is in line with one of the principles of a rule of law, namely the principle of equality before the law, which means that the government may not give preference to certain people or groups of people, or discriminate against certain people or groups of people.³⁸

The process for political parties to become election participants must go through several stages, namely they must meet the requirements in the Political Party Law which is the legal basis for the establishment of political parties in order to be legalized as a political party legal entity by the Ministry

³⁶ *Ibid.* 63.

³⁷ Dede Karina. (2015). Hak Asasi Perempuan dalam Peraturan Perundang-Undangan di Indonesia. *Jurnal Konstitusi*, 12, (4), 717. <https://doi.org/10.31078/jk1243>

³⁸ M. Beni Kurniawan. (2017). Politik Hukum Mahkamah Konstitusi Tentang Status anak di Luar Nikah: Penerapan Hukum Progresif Sebagai Perlindungan Hak Asasi Anak. *Jurnal Hak Asasi Manusia*, 8(1), 17. <http://dx.doi.org/10.30641/ham.2017.8.67-78>

of Law and Human Rights as stipulated in Article 3 of the Political Party Law.³⁹ Then after a political party has the status of a legal entity it must meet the requirements in the Election Law so that it can pass verification by the KPU as an election participant. Even before the Constitutional Court's ruling, several election laws contained provisions that specified the requirements for verifying election participants for political parties participating in previous elections.

Throughout the history of post-amendment to the 1945 Constitution, the number of political parties participating in elections has experienced dynamics. This is evidenced by the political parties participating in the 2004 election, which totaled 24 political parties. Then, the 2009 election added 38 political parties (plus 6 local Acehese political parties), the 2014 election reduced to 12 political parties and 3 Acehese local political parties, and in the 2019 election, the number of political parties participating in the election again increased to 16 political parties participating in the election and 4 local Acehese political parties.⁴⁰ So, if the principle of equality before the law is associated with the verification requirements of political parties participating in elections, it certainly has a connection.

Several provisions including Article 316 letter d of Law 10/2008, Article 8 paragraph (1) of Law 8/2012 and Article 173 paragraphs (1) and (3) of Law 7/2017 are a series of provisions that have been declared unconstitutional by the MK. The basis for consideration in declaring unconstitutional refers to jurisprudence in the previous Constitutional Court decisions related to the regulation of verification of political parties participating in elections and is strengthened by the existence of the Constitutional Court Decision Number 105/PUU-XIV/2016 contained in the considerations in the Constitutional Court Decision Number 53/PUU-PUU-XV /2017 namely:

*“As an institution granted constitutional authority by the constitution to review laws against the 1945 Constitution, the possible steps for 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 revision law or in a new law, then for the Court such matter will be irrefutable evidence to state that the norm of the law in question is contrary to the 1945 Constitution”.*⁴¹

According to C.S.T. Kansil, jurisprudence is included in one of the sources of formal law, namely, including laws, customs, jurisprudence (judge decisions), and treaties.⁴² Jurisprudence is the decision of a previous judge regarding the same case and is used as the basis for a decision by a later

³⁹ LNRI Tahun 2011 Nomor 8, TLNRI Nomor 5189.

⁴⁰ Rokiyah dan M. Iwan Setiawan. (2022). Desain Pemilu Multi Partai Sederhana (Kritik terhadap Pelaksanaan Verifikasi Partai Politik). *Jurnal Ilmiah Universitas Muhammadiyah Buton* 8(2), 303-304. <https://doi.org/10.35326/pencerah.v8i2.1976>

⁴¹ Putusan MK Nomor 53/PUU-XV/2017, *Op. Cit.*, hlm. 119.

⁴² Adi Rizka Permana. (2021). Peranan Yurisprudensi Dalam Membangun Hukum Nasional di Indonesia. *Jurnal Khazanah Multidisiplin* 2(2), 74. <https://doi.org/10.15575/kl.v2i2.13166>

judge regarding the same matter.⁴³ Then, according to Jimly Asshiddiqie, there are at least seven different sources of constitutional law, namely:⁴⁴

- 1) Unwritten constitutional values;
- 2) Constitution;
- 3) Legislation;
- 4) Judicial jurisprudence;
- 5) Constitutional conventions or constitutional conventions;
- 6) The doctrine of law science which has become *ius commissionis opinio doctorum*;
- 7) International law that has been ratified or has been enacted as customary international law.

According to Yahya Harahap, if a jurisprudence really contains the basic values of the ideals of the Pancasila and the 1945 Constitution, which then combines to produce a rational, practical and actual legal formulation, it is proper for a judge to follow it.⁴⁵ A judge follows the decision of the previous judge because he agrees with the contents of the decision and is only used as a guide in making a decision regarding a similar case so that jurisprudence is a separate source of law.⁴⁶

According to Sudikno Mertokusumo, a court's decision is law from the time it is passed until it is implemented. The court decision has binding force for the parties to the dispute, binding the parties to acknowledge the existence of the decision. In reviewing the law against the 1945 Constitution at the Constitutional Court, the validity of the decision on review of the law is *erga omnes*, meaning that it applies to everyone, not just the parties to the case, since the decision was read out by the constitutional judge.⁴⁷

Constitutional Court Decisions Number 12/PUU-VI/2008, Number 52/PUU-X/2012 and Number 53/PUU-XV/2017, constitutional judges consistently declared the provisions in the Election Law unconstitutional which were discriminatory. In these decisions, the Constitutional Court uses jurisprudence by following previous decisions that already exist on the same constitutional issues because the previous decisions are still relevant to current constitutional issues, so that decisions are followed by constitutional judges in deciding cases. Even though in the Indonesian legal system, judges are not bound by the decisions of previous judges regarding cases or legal issues similar to those they will decide.⁴⁸

Theoretically, deviations from the jurisprudence of the Constitutional Court's decisions can occur because judges have the freedom to examine and

⁴³ C.S.T. Kansil. (1982). *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia*. Jakarta: Balai Pustaka, 47.

⁴⁴ Jimly Asshiddiqie. (2014). *Pengantar Ilmu Hukum Tata Negara, cet. ke-5*. Jakarta: RajaGrafindo Persada, 121.

⁴⁵ Mirja Fauzul Hamdi. (2019). Kedudukan Yurisprudensi Putusan Mahkamah Konstitusi Dalam Merekonstruksi Hukum Acara. *Jurnal Legislasi Indonesia* 16(3), 316. <https://doi.org/10.54629/jli.v16i3.508>

⁴⁶ Fence M Wantu. (2015). *Pengantar Ilmu Hukum*. Gorontalo: UNG Press, 21-22.

⁴⁷ Oly Viana Agustine. (2018). Keberlakuan Yurisprudensi Pada Kewenangan Pengujian Undang-Undang dalam Putusan Mahkamah Konstitusi, *Jurnal Konstitusi* 15(3), 648. <https://doi.org/10.31078/jk1539>

⁴⁸ Sudikno Mertokusumo. (2003). *Mengenal Hukum (Suatu Pengantar)*. Yogyakarta: Liberty, 93.

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.⁴⁹ However, the freedom of the judge is not absolute, because the judge's job is to uphold law and justice based on Pancasila, by interpreting the law and looking for the foundations and principles on which it is based, through the cases before him, so that his decision reflects a sense of justice.⁵⁰ With the provisions of Article 5 paragraph (1) of the Judicial Powers Law, namely "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society", then constitutional judges can explore legal values and a sense of justice. justice that lives in society is of course based on the 1945 Constitution and Pancasila. Thus, jurisprudence can be used as a reference when constitutional judges believe that previous decisions are still relevant to current constitutional issues, even though this is the realm of consideration for constitutional judges in issuing decisions that are final and binding.

IV. CONCLUSION

Based on the discussion above, the decisions of the Constitutional Court except for the Decision of the Constitutional Court Number 55/PUU-XVIII/2020 have consistently declared unconstitutional, especially provisions relating to the provisions of verification requirements which contain different treatment of fellow political parties participating in the General Election, namely by maintaining the principle of equality in before the law by considering the jurisprudence of previous MK decisions. However, the Constitutional Court's Decision Number 55/PUU-XVIII/2020, in its ruling which is essentially political parties that have seats in the DPR are still administratively verified but not factually verified while non-parliamentary political parties and political parties have only been verified administratively or factual, giving rise to two groups of political parties in the verification process. This is inseparable from the provisions of Article 5 paragraph (1) of the Judicial Powers Law which gives constitutional judges the authority to explore, understand legal values and a sense of justice that lives in society based on the 1945 Constitution and Pancasila as the basic norm, and there is no obligation for constitutional judges use jurisprudence even though the substance of the cases have similarities.

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⁴⁹ Oly Viana Agustine. (2018). *Op. Cit.*, 652-653.

⁵⁰ *Ibid.* 655.

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