
Judicial Review Analysis of the General Election Law Number 42 of 2008 and Implications for the 2019 Simultaneous Elections

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Abstract

The Constitutional Court (MK) is a high state institution in the Indonesian constitutional system that holds judicial power with the Supreme Court according to Law No. 4 of 2003 article 1. It executes independent judicial power for the administration of justice for law enforcement and equity. As stated by the 1945 Constitution, the Constitutional Court has the authority to adjudicate to examine laws toward the Constitution or, in other words, it functions as a guardian of the Constitution. General Elections are held once every five years to elect pairs of candidates for president/vice president and legislative members. Indonesia currently holds elections simultaneously between these two elections in one day, in contrast to the elections in previous years. One thing that catches the public's attention is that the holding of simultaneous elections in 2019 is felt to have not met their expectations. The origin of the simultaneous elections was caused by the number of activists and circles requesting the Constitutional Court to cancel the norm. The presidential and legislative elections were held separately. Then, the Constitutional Court decision Number 14/PUU-XI/2013 affirms that the legislative and presidential elections must be concurrent and interprets the elections held separately as Unconstitutional stated by the 1945 Constitution. Several Constitutional Court considerations were also given in line with various decision aspects, but the expectation of these considerations did not reach an upright and correct general election in 2019. Therefore, the author is interested in writing about the analysis of the Authority of the Constitutional Court in Judicial Review of General Election Implementation Materials and Implications for the 2019 Election.

INTRODUCTION

In a democratic country like Indonesia, general elections, which are abbreviated as *pemilu*, are a pivotal agenda to execute. Elections are a prerequisite for a democratic country, and democracy itself is a system that respects citizens' voices.¹ Robert Dahl also mentioned

¹ Miriam Budiarto, *Dasar-Dasar Ilmu Politik* (Jakarta: Gramedia, 2008), 46.

that a country that adheres to a democratic system must embody participation and contestation. It manifests in holding a multiparty system and free and fair elections.²

With the holding of elections, the values of democracy itself can be employed as in elections; citizens will be actively involved in politics. As part of democracy, an election should be done with a trustworthy administration system that can positively impact changes in the country, including the state administration as the foundation a country can run. When the election has a virtuous administration system, it will bind legitimacy power among citizen and their government.³ The meaning of the general election must first interpret the democratic system as the background. The relationship between the two is very close, that is, *pemerintahan dari rakyat, oleh rakyat dan untuk rakyat* (democracy is a government from the people, by the people, and for the people)⁴. This meaning implies that the power is in citizens' hands and must act on behalf of them. For this reason, elections are used to elevate the people's existence as the holder of the highest sovereignty in a country.⁵ Due to the strong influence of democracy in the world, general elections are accessible for the people to exert their sovereignty. According to Manuel Kaisiepo (Bintar R. Saragih), a general election is essential in exercising power since it is where the ruler acquires power legitimacy.⁶

In 2019, Indonesia made history by holding simultaneous general elections, including presidential/vice-presidential and legislative elections, namely DPR, DPD, Provincial DPRD, and Regional DPRD. It is regulated in Law No. 7 of 2017 concerning General Election, stated explicitly in Article 347 paragraph 1, namely "Election voting is held simultaneously." The simultaneous interpretation is also not explained explicitly, what the concept and technical implementation are. The simultaneous elections were held on the same day, different from the previous one. For instance, people who have the right to vote are provided with five types of ballot papers. This election was caused by the issuance of the Constitutional Court's decision Number 14/PUU-XI/2013 on the material examination requested by several people and groups, particularly concerning the implementation of separate elections. The Constitutional Court granted the demand by asserting that elections

² Kacung Marijan, *Sistem Politik Indonesia* (Jakarta: Kencana, 2010), 118.

³ Sigit Pamungkas, *Perihal Pemilu* (Jogjakarta: JIP, 2009), 13.

⁴ Istilah yang digunakan oleh Abraham Lincoln (1808-1865) Presiden Amerika Serikat ke-16.

⁵ Muhadam Labolo dan Teguh Ilham, *Partai Politik dan Sistem Pemilihan Umum di Indonesia* (Jakarta: Rajawali Pers, 2015), 45.

⁶ Bintar R. Saragih, *Lembaga Perwakilan dan Pemilihan Umum di Indonesia* (Jakarta: Gaya Media Pratama, 1998), 167.

held separately are unconstitutional, so they must be held simultaneously instead. Then the consideration of the decision is as follows:

1. The presidential election held simultaneously with the election for representative body members may reduce time wastage and conflicts in society.
2. The right of citizens to vote perceptively in this general election is associated with their rights to build a map of checks and balances of the presidential government with their own beliefs. For this reason, citizens can consider their options to elect members of the DPR and DPRD who come from the same party as the presidential and vice-presidential candidates. Only with simultaneous general elections, the citizens can use their rights to vote intelligently and efficiently. Thus, the enforcement of presidential and representative institution members' elections that are not simultaneous is not in line with the constitutional principles which require efficiency in government administration and the rights of citizens to vote judiciously.
3. In the 2004 and 2009 presidential elections conducted after the legislative elections, political facts were found to support an election as president. The presidential candidates were forced to negotiate politically with political parties, which greatly affected the running wheels of government in the future.⁷

There are several deliberations for the decision, from budget, time, reducing community conflicts, and preventing political lobbies between parties and presidential/vice-presidential candidates. Some of these points are aimed at the efficiency of the election policies enforcement. Yet, over time, the decision's impact has not met the intended expectations, and there have been numerous criticisms from several NGOs and the public. For several times, activists and NGOs have applied to the Constitutional Court toward the decision but have been rejected.

The General Elections were held simultaneously in 2019 with both legislative and presidential and vice-presidential elections. However, its implementation leaves some issues ranging from alleged violations, administrative, procedural errors, and many victims' death. The fact is that the budget for simultaneous elections is much more expensive than separate elections. It was previously estimated that the first simultaneous election in Indonesia was the most challenging/complicated because it combined the legislative and presidential elections simultaneously. This election model is commonly called the five box election (five ballots)

⁷ laman web <https://news.detik.com/berita/>, Andi Saputra, "Tiga Alasan MK perintahkan Pemilu Serentak" diakses pada tanggal 12 Juli 2019 pukul 19.15.

according to Law no. 7 of 2017 concerning Elections, except for General Election in DKI Jakarta.

Conceptually, the notion of establishing the Constitutional Court is to administer fairness to uphold law and justice. To adjudicate at the first and final levels, the decisions are final in examining the law toward the 1945 Constitution and other authorities.⁸ Discussing the simultaneous election system, it cannot be parted from the Constitutional Court's decision no. 14/PUU-XI/2013 entreated by political communication expert Effendi Gazali et al. On Thursday, January 23, 2014, the Assembly of the Constitutional Court chaired by Hamdan Zoelva annulled Article 3 paragraph (5), Article 12 paragraph (1) and (2), Article 14 paragraph (2) and Article 112 of Law no. 42 of 2008 about the Presidential Election which regulates the implementation of the presidential election three months after the election or not simultaneously. However, the Constitutional Court's decision ordering simultaneous elections can only be applied in the 2019 election. From the initial intent point of view, the main reason is the original meaning of the formulator of the amendment to the 1945 Constitution. There has been a visionary picture of the mechanism for holding the presidential election simultaneously with the legislative (five boxes elections/ballots) following Article 22E paragraph (2) and the systematic interpretation of Article 6A paragraph (2). In addition, the financing of presidential and legislative elections simultaneously will be efficient and save more on the budget and reduce conflicts between the citizen.

1. Finally, the DPR with the government accommodated the Constitutional Court's decision on the simultaneous elections through Article 167 paragraph (3) and Article 347 paragraph (1) of Law no. 7 of 2017. Article 167 paragraph (3), in conjunction with Article 347 paragraph (1) of the Election Law, affirms that voting will be held simultaneously on holidays or national holidays. That is, the implementation of simultaneous elections combines the presidential and legislative elections altogether.⁹

ANALYSIS AND DISCUSSION

If traced simultaneous election design, it has been mentioned in the Constitutional Court's Decision No. 51-52-59/PUU-VI/2008. This plea was submitted by Partai Bulan Bintang, Partai Hati Nurani Rakyat, Partai Demokrasi Pembaruan, Partai Indonesia Sejahtera, Partai Buruh, Partai Peduli Rakyat Nasional, and Partai Republika Nusantara. They requested

⁸ Ahmad Syahrizal, 2006, *Peradilan Konstitusi, Suatu Studi tentang Adjudikasi Konstitusional Sebagai Mekanisme Penyelesaian Sengketa Normatif*, Pradnya Paramita: Jakarta, 263.

⁹ laman web <https://www.hukumonline.com/berita/baca/>, Aida Mardatillah, "Membedah Putusan MK soal Pemilu Serentak", diakses pada tanggal 21 Maret 2019 pukul 23.31.

an appraisal of Article 9 of the Presidential Election Law related to the presidential threshold. Article 3 paragraph (5) about the implementation of the presidential election was held after the legislative elections (DPR, DPD, DPRD). In the Constitutional Court Decision No. 51-52-59/PUU-VI/2008, the Court rejected the applicant's plea. However, three constitutional judges submitted a dissenting opinion, Abdul Mukthie Fadjar, Maruarar Siahaan, and M. Akil Mochtar. They presumed that simultaneous elections could be held at the national level, namely the DPR, DPD, and the President and Vice President. Meanwhile, simultaneous regional elections are used to elect candidates for DPRD members and heads of the district.¹⁰

This means that the decision has defined what is meant by "simultaneous elections," detaching the national and regional (local) elections. However, in contrast to the Constitutional Court decision No. 14/PUU-XI/2013, which does not provide a clear definition of the simultaneous electoral system. The Constitutional Court, which Hamdan Zoelva then chaired, seemed to leave it to the legislators to serve an understanding of simultaneous elections. When compared with the decision of the Constitutional Court No. 51-52-59/PUU-VI/2008, it states that the presidential and legislative elections will be held separately, remains constitutional. The decision of the Constitutional Court No. 14/PUU-XI/2013 does not explain and provide instructions for the simultaneous elections. Instead, the Court left it to the lawmakers to interpret the phrase "simultaneously" in the Election Law.¹¹

The Constitutional Court is inconsistent since the two decisions are contradictory. The assessed rules are similar to the election rules for DPR, DPR, DPR, DPRD members, the president, and vice president. In its decision, 14/PUU-XI/2013 should be consistent with number 51-52-59/PUU-VI/2008. In its consideration, the 2014 Constitutional Court Decision should have used the postulate written in the 2008 Constitutional Court Decision. Considering the Constitutional Court Decision, number 51-52-59/PUU-VI/2008 as regards the election schedule contained in Article 3 paragraph (5) reads, "The Presidential and Vice-Presidential Elections are held after the elections for DPR, DPRD, and DPD." The Court assumed that this is a method or procedural issue of implementation that does not conflict with the law and the Constitution. This consideration is similar to the three judges' opinion about the Constitutional Court, which submitted a dissenting opinion. The presidential and vice-presidential elections held after the legislative elections were not contrary to the 1945 Constitution.

¹⁰ Risalah Sidang Perkara No. 51/PUU-VI/2008, Perihal "*Pengujian Undang-Undang No. 42 Tahun 2008 tentang pemilihan umum presiden dan wakil presiden terhadap Undang-Undang Dasar 1945*"

¹¹ Lembaran Putusan Mahkamah Konstitusi Nomor 14/PUU-XI/2013, bagian "*Pendapat Mahkamah [3.15] tentang permohonan pengujian konstitusional*"

Nevertheless, in Constitutional Court decision No. 14/PUU-XI/2013, the Constitutional Court argues that Article 3 paragraph (5) of the Presidential Election Law is otherwise declared contrary to the Constitution (unconstitutional). Yet, the decision applies to the 2019 General Election. They should only be tasked with determining that the law is contrary or not and is effective since it was declared in the hearing. However, the Constitutional Court has set a time limit for enacting a law, which this rule should be the authority of the legislature.

B. Judicial Review and Aspects of Institutional Authority

In some democratic countries in general, a constitutional review system exists to control and balance power between state institutions. The Judicial Review concept is seen as the outcome of the modern developments on a democratic government system based on the notion of the rule of law, the principle of separation of power, and the protection and elevation of human rights (fundamental rights)¹²

As attested by Article 24C of the 1945 Constitution paragraph 1, the Constitutional Court (MK) has the authority to judge the first and last instances whose decisions are final to examine the Act against the 1945 Constitution¹³. While paragraph 2 states that "constitutional judges must have integrity and personality that is not blameworthy, fair, a statesman who controls the constitution and state administration and does not double as a state official." The Constitutional Court is a Negative Legislator, therefore the authority of the Constitutional Court in particular regarding the judicial review is inadequate, examining the constitutionality of a norm or part of the Act towards the Constitution, as the Constitutional Court is part of the judicial power, not legislative or executive.¹⁴ The Constitutional Court should not take over the DPR authority since it will disrupt the constitutional system and the check and balances mechanism. There is no mandate and authority of the Constitutional Court to expand its interpretation to consider Article 3 paragraph 5 of the Election Law no. 42 of 2008 towards the Constitution or unconstitutional due to the elections are held separately. Even the Constitutional Court must submit to the Constitution itself.

Elections held separately are not unconstitutional due to the interpretation given by the Constitution in Article 22E paragraph 1 states, "General Elections are held in a direct, general, free, confidential, honest and fair manner every five years." This means it is legal if

¹² Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara* (Jakarta: Sinar Grafika, 2010), 8.

¹³ Ni'matul Huda, *Hukum Tata Negara Indonesia* (Depok: Rajawali Pers, 2018), 212.

¹⁴ Ali Abdurahman dkk, *Ilmu Perundang-undangan* (Bandung: Kalam Media, 2015), 30.

the elections are separated between the legislative and presidential elections as long as they are held once every five years. Even under its implementation, the legislative and presidential elections are held every five years and in the same year as the 2019 election. The problem here is why the Constitutional Court considers this to be unconstitutional. There is misleading in this case. As previously explained, "The Constitutional Court examines the Act to the Constitution" did not even examine the 1945 Constitution itself, even to the article's interpretation and verses contained therein. In the Constitutional Court Law of 2011. The assumption is that if the Constitutional Court dares to examine the interpretation, norms, and content of the Constitution, the legitimacy of the Constitutional Court itself is questioned whether it is subject to the Constitution or not¹⁵.

Another problem from the Judicial Review of the Election Law material, the Constitutional Court granted the request to abolish separate elections with aspects outside the realm of Constitutional Court authority itself. The considerations given by the Constitutional Court include aspects of the budget, technical management, sociological society (citizens' rights to vote intelligently), even the political realm. The budget aspect should be the scope of the government's and DPR's review as these two institutions recognize the state financial budget better than the judiciary. How can a judicial institution better understand things such as budget efficiency than an executive agency in charge of the budget every day? Then regarding the technical aspects of management, it is not wise for the Constitutional Court to issue regulations affect the technical management of the election administration while "overpassing" the KPU, Executive, and Commission II DPR, where the duties and functions of the three institutions are considerate and mastery. Lastly, the Constitutional Court gave considerations based on political aspects such as "prevention of bargaining or political lobbying between the executive and political parties and members of the legislature." The Constitutional Court should only focus on the scope of constitutional justice and the interpretation of related material, articles, or paragraphs of law, not interpreting the consequences or political dynamics. The Constitutional Court must be free from political perspectives, both ideological and practical politics. Politics is not a scope that the Constitutional Court can control even with its capabilities.

In that decision, the Constitutional Court also violated the Laws concerning the Constitutional Court of 2004 and 2011. As explained in Law no. 08 of 2011 Article 57a paragraph 2a point B, mentions that "The Constitutional Court's decision: does not contain:

¹⁵ Dahlan Thaib dkk, *Teori dan Hukum Konstitusi* (Jakarta: Rajawali Pers, 2017).

orders to legislators, and point C, does not contain: formulation of norms as a substitute for norms from laws which are declared contrary to the Constitution Republic of Indonesia in 1945. In the decision, the Constitutional Court handed over the simultaneous interpretation to the legislators, which did not explicitly explain the simultaneous meaning. Besides, the Constitutional Court also stated that the next election must be held simultaneously, which means that the Constitutional Court provides a new norm in its decision.

C. Implications for the 2019 Simultaneous Elections

From a theoretical point of view, experts' debates, for example, have been seen since the 1980s, especially in looking at the benefits or impacts of simultaneous elections. It is true that simultaneous elections will create suits-tail effect and voter intelligence so that they who have specific references to elect the president will simultaneously, they might elect members of the legislature from the party that holds the president. Campbell (1960) has debated this hypothesis by stating that there are symptoms - waves of decline and surge in simultaneous elections because it only functions as "political stimulation" to increase participation. Indeed, this stimulation will bring voters to the voting booth, but voters who do not choose in other elections will tend to abstain or not use their votes.¹⁶

There are several considerations for the decision due to the abolition of the norms for implementing the presidential election after three months. Such as from the aspect of budget, time, to reduce community conflicts, and prevent political lobbies between parties and presidential/vice-presidential candidates. Some of these points are aimed at the efficiency of election policies implementation. However, over time, the decision's impact has not met the intended expectations, and there have been many criticisms from several NGOs and the public. Several times, activists and NGOs have applied to the Constitutional Court against the decision but have been rejected.

The state's expectation of becoming more budget-efficient was not as expected from the 2019 election budget, and the figure increased by 60% from 2014. In 2014, the budget spent on elections was 15.79 trillion, while in 2019, the budget for implementation was 25.7 trillion, 4.85 trillion for the supervision sector, and 3.29 trillion for the security budget. About the aspect of reducing conflict, what happened was the opposite, where the two camps and their supporting communities experienced prolonged conflicts that formed an extreme polarization. The dichotomy also led to viscous stereotypes; even after the election was over,

¹⁶ Mengenai hal ini dapat dilihat pada Lukas Rudolph dan Arndt Leininger, "Concurrent elections lead to coattails and electoral spill-overs: Quasi-experimental evidence from German municipalities," hlm. 2., Diakses pada tanggal 12 September 2020.

the heated nuances of the presidential election had not subsided. It also harms democratic parties, especially the Indonesian people who have constitutional rights. In other words, the state, or an electoral system like this, does not guarantee them to get their rights in whole since a lack of knowledge about the figures who will serve in the future.

As a result of the simultaneous elections, the polarization of society is focused on the presidential/vice-presidential candidates only, plus not all Indonesians are politically literate. Thus,¹⁷ the voting election directly is a society that has fulfilled the requirements for voters (Yandra, 2017). They do not concern or prioritize legislative elections, especially candidates, so many of them do not notice the candidates who will be elected in terms of capability, integrity, track record, and competence. Obviously, this will affect the quality of representation of parliament or essential state institutions. Then another important is the elections are held simultaneously take much efforts, causing many deaths (527) and illness (11,239), even though the initial concept of simultaneous elections was aimed at "saving costs" but being a "waste of lives."

How risky it is if the legislative institutions at the central and regional levels are filled with people who cannot become legislators, even though the legislature is a state body that is as crucial as the president in execute state life. Here, we see the loss of the state's obligation and role in educating the nation's life by not fully guaranteeing the people's political rights or constitutional rights to recognize legislative candidates as a form of representation. Yandra (2016) added that people are the subject of social change in which they become the center, creating and as the controller at the same time.¹⁸ From the perspective of an election, participants also raises to a pseudo-democratic party/biased. The party and presidential campaigns were not optimal, or to illustrate, concentration was broken.

There are two possibilities as a simultaneous election outcome, particularly in affecting political parties. First, parties and legislative candidates are too focused on campaigning for their respective parties and candidates. They do not run optimally to win the presidential/vice-presidential candidate promoted by the party. Second, in contrast, the supporting parties are too absorbed in winning their presidential/vice-presidential candidates, they ignore the legislative candidates from their parties. Accordingly, the extreme polarization of the presidential candidates and the unclear electability of legislative candidates have been explained above. The political machine becomes a dilemma in making movements to win the

¹⁷ Yandra, Aleksander. "Penyelamatan Hak Pilih Warga Perbatasan Jelang Pilkada." *Politik* 13, no. 1 (2017).

¹⁸ Yandra, Aleksander. "Partisipasi Masyarakat dalam Penyusunan Rencana Pembangunan Jangka Menengah Daerah (RPJMD) Kota Pekanbaru 2012-2017." *Publika: Jurnal Ilmu Administrasi Publik* 2, no. 1 (2016): 48-58.

legislature and the presidential/vice-presidential candidates. If this happens to every election participant, incompetence will arise in pivotal state institutions such as the executive and legislature, which results in bad wheels of government or the running of a country as the synergy among state institutions has been damaged since the beginning of the general election. As a result of this democratic defect, it harms the 1945 Constitution elements as well, which has been explained in the opening section on promoting public welfare and educating the nation's life.

CONCLUSION

In keeping with the writing, several conclusions are generated from the paper to answer the formulation of the problem described previously. The conclusions are as follows:

1. Judicial Review of the Election Law no. 42 of 2008 conducted by the Constitutional Court, one of which is relate to the holding of distinct general elections between the President/Vice President and the legislature. The petition submitted is about simultaneous elections by several parties and groups as per budget considerations, transactional politics, and the right of citizens to vote intelligently.
2. Constitutional Court Decision No. 14/PUU-XI/2013 1945 generates ambiguity in terms of judicial review and the authority of the Constitutional Court Institution, specifically about the implementation of elections because the Constitution should be a touchstone, not interpreted to determine the Constitutional Court's decision and raise a new norm. Elections must be held simultaneously between the President/Vice President and Legislature. Then the interpretation was not regulated and specific, yet indirectly the Constitutional Court handed over the definition of simultaneous elections to the makers of Law no. 07 of 2017.
3. The impacts caused by holding simultaneous elections in 2019 include not achieving its budget efficiency, burdening the technical, and disrupting the political dynamics between political parties and candidates. Besides, the number of citizens who do not understand the simultaneous election system and do not know the candidates who will be elected affects the representation of state institutions in the next period.

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