

# Judicialization of Politics in Indonesia's Electoral System: Case Study Judicial Review on Threshold, Balloting Structure, and Simultaneous Election at Constitutional Court

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## Abstract

Why does the judicial review process highly influence the electoral system design in Indonesia at the Constitutional Court? Whose interests and what kind of interests are served by the judicial review process at the Constitutional Court towards the electoral system in Indonesia? By analysing constitutional court verdicts from its inception on August 13, 2003, until the beginning of 2020, this study tries to answer those two questions by using judicialization of political theory. This study found that the extension of the authority of the judicial institution to produce political decisions through the judicial review mechanism can be regarded as the opening of political opportunity structure as a new platform for political actors to achieve their interest in election regulations. For example, when a political party is underwhelmed to meet one of the electoral system variables like parliamentary threshold requirement as specified in the election law, they come to the Constitutional Court to request a judicial review on the threshold requirement and plead the Court to revoke the requirement. Meanwhile, civil society groups, which are not the direct participants of the election, will also utilize the medium provided by the Constitutional Court to challenge various provisions in the election law to create a more democratic electoral system. This study concludes that the Constitutional Court is seen as the guarding of constitutional law enforcement institutions and a power relations arena where different political actors strive to realize their political interests or agenda on election laws.

## Keywords:

Judicialization of Politics; Constitutional Court; Electoral Systems

## INTRODUCTION

Studies on electoral reform are always interesting to review. Aside from the fact that electoral systems are an essential institutional tool in democratic politics as they convert votes to seats, the power motives behind the reform on

strategic issues to be discussed in electoral reform studies. Leyenaar and Hazan (2011), in the study titled *Reconceptualizing Electoral Reform*, explained that thus far, electoral reform studies were divided into a dichotomy of approaches: electoral systems as an independent variable and electoral systems as a dependent variable.

Studies that use electoral systems as an independent variable observe the

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electoral system design are always

influence or impact of politics on the choice of electoral system design (Duverger 1986; Hutchcroft and ASPINALL 2020; Hutchcroft and HICKEN 2020b; Jones 1999; Samuels 2000). Duverger (1986) pioneered the study that used electoral systems as an independent variable, observing the relationship between electoral systems and party systems, which later on became known as Duverger's Law. Meanwhile, placing electoral systems as dependent variables focuses the study on the formation of electoral systems as the 'original design' of the differences between systems, and explains the reforms to electoral systems (Leyenaar and Hazan, 2011).

Allen Hicken (2020) states that there are three approaches to explain the meaning behind electoral system reform as a dependent variable: (1) as a systemic failure, i.e., the electoral system is reformed due to its failure to achieve its implementation goals; (2) electoral system reform happens as a response to a catalyzing crisis; (3) as a form of incumbent preference, as an attempt by the incumbent to achieve political benefits, e.g., reelection from the electoral system reform.

In Indonesia, after the downfall of the authoritarian regime of the New Order, a five-year agenda to reform electoral systems happened. For example, the 1999 Legislative Elections

used the closed list proportional election system, which was changed into the semi-open list proportional system, and finally into the open list proportional election system as used from the 2009 Elections to the 2019 Elections. The parliamentary threshold that was set in the 2009 Elections at 2.5% of the total votes to obtain a seat at the People's House of Representatives (Dewan Perwakilan Rakyat, DPR) was amended in the following three elections: 3.5% at the 2014 Elections and 4% at the 2019 Elections. The election timeline also changed; in the 2004, 2009, and 2014 Elections, the Presidential Election and the Legislative Elections were held separately, but in the 2019 Elections both races were run simultaneously on the same day.

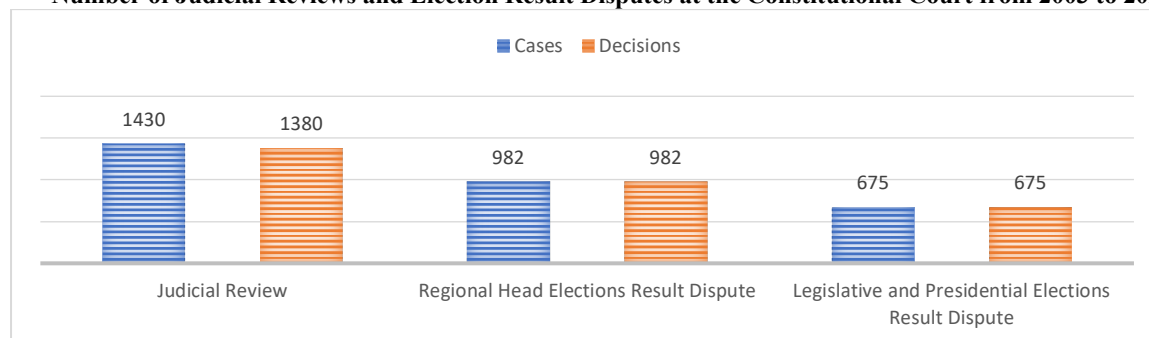
Interestingly, the origin of these changes to the technical variables of the electoral system was not only the parliament, being the institution authorized to amend election laws, but also the Constitutional Court. The implementation of the open list proportional representation on balloting structure in the 2009 Elections, the elimination of parliamentary threshold for the Provincial and Regency/Municipal House of Representatives (Dewan Perwakilan Rakyat Daerah, DPRD), and the simultaneous implementation of Legislative Elections and the Presidential Election were all

results of Constitutional Court decisions. This face is inextricable from the authority that the Constitutional Court possesses to review laws against the constitution in order to correct, revoke, and create new policies from the political decisions made by the legislative bodies and the president, in the form of legislations.

Since its creation in 2003, regarding the 2020 annual report of the

Constitutional Court, the Court has reviewed laws in 1,430 cases encompassing social, political, cultural, and economic issues. One law that often went through judicial reviews is the election law. The Election Law and the Criminal Code have undergone a significant number of judicial reviews, each at 159 cases (Junaidi et al., 2019).

**Number of Judicial Reviews and Election Result Disputes at the Constitutional Court from 2003 to 2020**



Source: 2020 Annual Report of the Constitutional Court

The presence of a judicial body as the origin of electoral reform is not a new phenomenon. Tate and Valinder (GinsburgC 2003) state that after the cold war, a global expansion of judicial power in the formation of public policy occurred. This is inseparable from the trend of constitutional amendment in many countries to establish the fundamental rights of individual citizens, which the state cannot limit, and the establishment of Constitutional Courts tasked to safeguard those rights (GinsburgC 2003). In its development, Hirschl (2008) categorizes the

involvement of judicial bodies in the electoral process as the judicialization of mega-politics, where judicial bodies take part in deciding the rules of the elections as well as in resolving emerging conflicts.

Studies on the judicialization of politics in the context of elections focus more on the involvement of the Constitutional Court in election result dispute resolution or the strategy to win elections and the legitimacy of election results through election result disputes at the Constitutional Court (Aydın-Çakır 2014b, 2014a; Nogueira 2019; Smith and

Shortell 2007). In the context of reforms to the election system design, Richard Katz (2011) observes the Constitutional Court of Canada playing a significant part in ensuring the electoral system reform that happens prioritizes democratic principles and procedures to protect suffrage, a candidacy process that reflects diverse representation, and equal ballot access—which contrasts electoral system reform through the legislative avenue, which prioritizes the contest between political parties.

The question is: what about Indonesia? Does the practice of electoral reform through judicial reviews at the Constitutional Court result in a democratic electoral system (Dressel and Mietzner 2012; Faiz 2016, 2018; Mietzner 2010) or is it a new arena for political actors to articulate their interests? From those questions, this study attempts to explain the phenomenon of electoral system reform through the Constitutional Court using the approach of the judicialization of politics.

This study establishes its arguments through three stages of analysis. First, the paper will explain the theoretical framework of the judicialization of politics, which will become the analytical scalpel of this study. Second, the study will explain the institutional design of the Constitutional Court through the two approaches offered by Hirschl (2008, 2011):

institutional features where the constitution's design opens room for the Constitutional Court to correct and create political decisions, and the approach of political opportunity structure in the theory of political movement. Third, this study will explain the map of actors, from their background to the political interest they hold behind judicial reviews on the electoral system design, including decisions made by the Constitutional Court for those judicial reviews. This step is taken to observe the power relations as well as the motive behind the electoral reform resulting from the judicial review. However, the locus of this study is limited to three variables of electoral systems resulting from judicial reviews at the Constitutional Court: threshold, balloting structure, and the simultaneity of executive and legislative elections.

### **Theoretical Framework on the Judicialization of Politics**

The origins of the judicialization of politics are inextricable from the Constitutional Court's judicial review function. Ginsburg (GinsburgC 2003) explains that the origins of judicial reviews are inextricable from the constitutional amendments of a country, which itself is inseparable from the political interests of the politician designing the constitutional amendment, as a policymaker. As the

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designer of the constitution, politicians attempt to find an institutional design that benefits themselves and their institutions, including their short-term interests, as opposed to the long-term interests of the public (GinsburgC 2003).

Furthermore, Ginsburg (2003) explains two scenarios behind the function of judicial reviews held by judicial bodies. The first scenario is that if one political party believes that it will remain in power, it is unlikely to incentivize the creation of a judicial body authorized to resolve disputes through the judicial review, where it reviews the constitutionality of laws. They tend to instead maintain the flexibility to dictate laws without the constraints of the constitution (GinsburgC 2003).

The second scenario is the opposite of the first, which is that no one political party believes that it would continue to win in future elections, and other political parties that vie for power exist, which means it is highly likely for an independent judicial body with a judicial review function to exist. The distributed power among many political parties opens room for alternative channels to give a guarantee for election participants that are projected to lose or to win only a minority number of legislative seats in an election to still challenge or even change the policies within laws created by the majority in legislative bodies (GinsburgC 2003). The

judicial review function enshrined in a judicial body such as the Constitutional Court continues to be an avenue for losing political parties to still exert their influence in formulating policies. Ginsburg (2003) calls this scheme 'insurance model judicial review', to challenge the government's actions through judicial reviews that ensures political parties projected to lose still can have a hand in bargaining with policies.

Both these scenarios became the origins of the 'judicialization of politics' concept, with the context of an institutional approach. Hirschl (2011) says "the existence of a constitutional framework that facilitates judicial activism may provide political actors who are unable or unwilling to advance their policy preferences through majoritarian decision-making arenas with an alternative institutional channel (the courts) for accomplishing their policy goals." In this case, the institutional approach views the judicialization of politics as an authority possessed by judicial bodies to be intentionally created and arranged by political actors as an avenue to form policies based on their preferences when the policies offered/intended by those political actors fail in the formulation stage at the legislative or executive bodies. Simply put, the judicialization of politics is a quick shortcut for political actors to form policies without dispute

with other political actors, such as in the parliament (where different political parties have different policy preferences).

Judicialization of politics itself is defined as the reliance on courts and judicial means for addressing core moral predicaments, public policy question, and political controversies. In this case, judicial bodies become a new branch of political institution in also formulating public policies to respond the issues faced by a nation. Furthermore, Hirschl (2011) defines judicialization of politics in two forms: (1) the abstract definition of judicialization of politics as a broadening of discourse and legal jargon in the political process; (2) the concrete definition of judicialization of politics as a broadening of the judiciary's authority to determine public policy outcome.

As public trust in the judiciary's and judges' affairs in mega-politics (referring to high-profile political controversy) continues to rise, the concept of the judicialization of politics develops into the judicialization of mega-politics (Hirschl 2008, 2011). There are four subcategories of issues that fall under the judicialization of mega-politics. First, the judicialization of mega-politics as an expansion to a judicial body's authority beyond the prerogative authority of the legislative and executive bodies in foreign affairs, fiscal policies, and national security

(Hirschl 2011). An example of this subcategory is the case in the Russian Constitutional Court which reviewed the constitutionality of three presidential decrees that ordered the military to invade the Chechen Republic.

Second, the increased involvement of the judiciary in the judicialization of mega-politics is to justify or support a regime change. The clearest example of this subcategory is the Constitutional Court's dismissal in South Korea for the impeachment of President Roh Moo-hyun by the South Korean legislative body, which became modern precedence for the impeachment of a president by a legislative body to be annulled/dismissed by the judiciary (Hirschl 2011)

Third, the judicialization of mega-politics concerns the increased role of the judiciary to supervise the election process, or as Miller (2004) called it, "the law of democracy". The most common form of this subcategory is the authority of the judiciary in deciding or governing the activities or even the design of an election before it commences (Hirschl 2011). In several cases, the judiciary is actively involved by intervening several electoral provisions such as party finances, campaign funding, voter registration, campaign advertising, redistricting, and the approval to disqualify election participants. The expansion of judiciary authority in

elections also applies in adjudicating disputes between political parties and determining who wins and who loses. A real example of the involvement of the judiciary in electoral disputes is the American Supreme Court resolving the dispute between Bush and Gore which resulted in Bush's victory as the American President-elect.

Fourth, the judicialization of mega-politics is restorative justice or quasi-judicial "truth commissions" or also often called special judicial bodies that pertain to judiciary transition (Hirschl 2011). A manifestation of this subcategory according to Hirschl (2011) is the formation of the International Criminal Court (ICC) in 1998 as an international judicial body with jurisdiction over genocide crimes against humanity, and other transnational issues.

#### *The Institutional Design of the Constitutional Court*

The initial idea to build a judicial body with the authority to review the constitutionality of laws emerged at the Indonesian Investigating Committee for Preparatory Work for Independence (Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia, BPUPKI), proposed by Mohammad Yamin. He suggested that the "Supreme Hall", i.e., the Supreme Court, to be given a function to resolve disputes on

the implementation of the constitution, among others through judicial reviews of laws, which was commonly known as *constitutioneele geschil* (Gaffar 2009).

This idea was rejected by Soepomo, as he considered it to be irrelevant. Soepomo stated three main reasons he considered it irrelevant for the Supreme Hall to be given judicial review authority. First, giving the Supreme Hall that authority contradicts the distribution of power concept embodied in the 1945 Constitution; second, the task of a judge is to implement laws, not reviewing them; third, the authority of judges in reviewing laws are in contradiction with the supremacy of the People's Consultative Assembly (Majelis Permusyawaratan Rakyat, MPR) (Pan Mohamad Faiz and Lutfi Chakim 2020). As a result, since the independence and until the 1998 reformation, Indonesia did not have a judicial body authorized to conduct judicial reviews on laws.

The notion of a Constitutional Court rose higher when the constitution was amended. Four waves of constitutional amendment happened after the fall of the authoritarian New Order regime: 1999, 2000, 2001, and 2002. Discourse on the creation of a judicial body with a judicial review function emerged at the third amendment in 2001. In an assembly between the MPR RI Working Group Ad Hoc Committee I,

which was tasked to amend the constitution, there were two proposals for the institutional design of the Constitutional Court: first, without creating a new judicial body, where the judicial review authority would be bestowed to the Supreme Court; second, where the Constitutional Court would be an independent body separate from other judicial bodies, and authorized to resolve disputes between state agencies, between the central government and the regional government, and between regional governments (Gaffar 2009).

In the end, the third constitutional amendment decided to establish a Constitutional Court that was separate from other judicial bodies. The Constitutional Court has the authority to be the first and last court with final and binding decisions for four types of cases: (1) reviewing the constitutionality of laws; (2) resolving disputes on the authority of state agencies whose authority is bestowed by the constitution; (3) deciding the disbandment of political parties and resolving election result disputes; (4) deciding the impeachment of the President or Vice President by the People's House of Representatives (Dewan Perwakilan Rakyat, DPR) over suspected violations of law (Articles 24C Paragraph (1) & (2) of the 1945 Constitution of the Republic of Indonesia).

The constitutional amendment changed the design of the judiciary, which had formerly been a negative legislator, into a positive legislator. From the start, Kelsen (Sweet 2004), a founding father of the Constitutional Court, placed it as a negative legislator to minimize omnipotent super legislators, or the authority of the judiciary going beyond that of the legislative. However, with the authority to review the constitutionality of laws through judicial reviews filed by individual plaintiffs, civil society organizations, and even political actors, the Constitutional Court is authorized to strengthen or even reformulate laws created by the legislative.

Furthermore, Hirschl (2011) explains that the existence of a constitutional framework that facilitates judicial activism may provide political actors who are unable or unwilling to advance their policy preferences through majoritarian decision-making arenas with an alternative institutional channel (the judiciary/Constitutional Court) for accomplishing their policy goals. In this case, the formal political avenue, which is through a political party at the legislative, is no longer the only big arena for the formulation and advocacy of policies, particularly for non-state actors such as civil society organizations. This is in line with what Ginsburg (2003) states, which is that the popularity and sovereignty of elected legislators slowly



decline and become replaceable, which is proven in Indonesia's case where there's an increase of judicial reviews caused by discontent or even a sense of being harmed by the legislations produced at the parliament.

The nine constitutional judges are chosen to represent the three branches of power: the President, the parliament, and the Supreme Court, with three allotted judge seats each. The composition of judges coming from those three institutions can minimize possible domination and monopoly of one single institution at the Constitutional Court and creates a healthy balance between the executive, legislative, and judiciary when appointing judges (Dressel and Mietzner 2012).

Viewed from the perspective of political movement, the Constitutional Court is a new avenue for extra-parliamentary political movement by non-state actors—where previously they advocated for policies by lobbying the parliament and conducting protests, now they go to the Constitutional Court with a collection of arguments to try and change the policies in a legislation. In other words, judicial review becomes a new political opportunity structure for policy formulation. If in the classic approach, political opportunity structure occurs due to dissent and imbalance among political elites within a closed

political system (Gamson and Tarrow 1999; Mcadam, Tarrow, and Tilly 2003), in the contemporary context, political opportunity structure exists to broaden political participation channels in consolidating a democratic political system.

Judicial review at the Constitutional Court is relatively easy to do. The Constitutional Court Law explains that the procedure for a judicial review begins by preparing a petition which at the very least contains the name of the plaintiff and an explanation of the underlying issue of the petition. When the plea is for a judicial review on the constitutionality of a law, then the petition must explain the arguments on what dimension of the law is in contradiction with the constitution and therefore causes constitutional harm to the plaintiff. Furthermore, the judicial review plaintiff can attach evidence in the form of letters or writing, witness testimonies, expert testimonies, testimonies of involved parties, instructions, and other evidence in the form of information that are said, sent, received, or stored electronically through an optical recorder or similar devices (Article 36, Paragraph (1), Law 24/2003) to support the arguments in the petition for a judicial review filed to the Constitutional Court.

### *Judicial Review on Indonesia's Election System*

Election laws are one of the parliament's legislation products with a relatively high judicial review intensity at the Constitutional Court. From 2003 to 2020, the Constitutional Court conducted 201 judicial reviews on election laws. The elections laws that underwent the most judicial reviews were the Regional Head Election Law; the Omnibus Law which combined the

Legislative Election Law, the Presidential Election Law, and the Election Management Body Law for the 2019 Elections; and the Legislative Election Law. Before the 2019 Elections, the Legislative Election Law, the Presidential Election Law, and the Election Management Body Law were separate acts. However, as the presidential and legislative elections were held simultaneously in 2019, the three laws were codified as one Election Law.

**Table on the Frequency of Judicial Reviews on Election Laws at the Constitutional Court in 2003-2020**

<b>Election Laws Undergoing Judicial Review</b>	<b>Frequency</b>
Legislative Election Law	48
Presidential Election Law	24
Election Management Body Law	14
Regional Head Election Law	61
Codified Law for Legislative Elections, Presidential Election, and Election Management Body (Law 7/2017)	54
<b>Total</b>	<b>201</b>

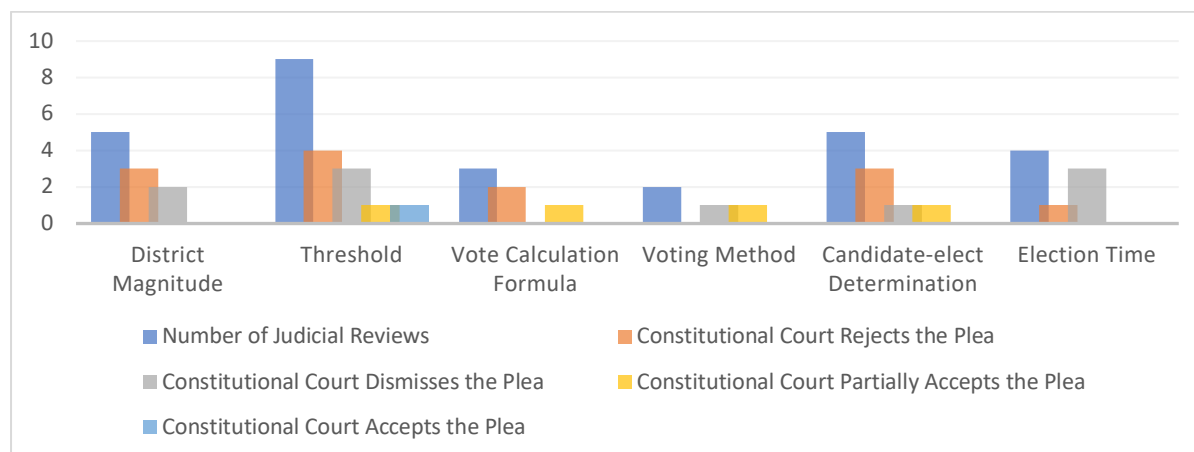
Source: study of Constitutional Court decisions from 2003 to 2020 by the author

Electoral system is an object governed by election laws that often undergo judicial reviews at the Constitutional Court. Electoral systems are simply defined as a group of technical variables that work to convert votes to seats. The technical variables of an electoral system include the mathematical formula used to calculate seat allocation, such as the size of electoral districts, vote calculation formula, threshold, balloting structure

(are votes given to candidates or parties, preferential ballots) (Reynold et.al 2016: 5). Furthermore, Mark Pyne Jones (Jones 1994, 1999) added election time as a design variable that affects the result of the vote-to-seat conversion in a presidential government. Therefore, there are at least seven variables that form an election system: district magnitude (the number of allotted seats per electoral district), candidacy method, threshold, electoral formula (vote-to-seat

formula), voting and candidate-elect determination method, and election time.

**Frequency of Judicial Reviews on Six Election System Variables**



Source: Constitutional Court Decisions on Election Laws

Out of 201 judicial reviews on election laws at the Constitutional Court, 26 were on the electoral system. Electoral system variables that often become the subject of judicial reviews are threshold (nine times), candidate-elect determination method (five times), and the time to hold legislative and executive elections (four times).

#### *Judicial Reviews on Threshold*

The concept of threshold was first introduced in the Indonesian electoral system as a minimum requirement for political parties to obtain seats at the parliament and to be a participant in the next election, known as electoral threshold. The first electoral threshold was introduced in the regulations

governing the 1999 Elections with the provision of at least 2 percent of DPR seats or at least 3 percent for Provincial DPRD or Regency/Municipal DPRD spread in half the number of provinces and half the regencies/municipalities in Indonesia to participate in the next election. Meanwhile, political parties that did not have seats at the parliament had to must join a different political party to become election participants. As a result, only 5 political parties achieved more than 2 percent of DPR seats to participate in the 2004 Elections and 24 political parties participating in the 1999 Elections were declared ineligible for the 2004 Elections.

The percentage of electoral threshold was then increased for the

2004 Elections (Law 12/2003) to at least 3 percent of DPR seats and at least 4 percent of Provincial DPRD and Regency/Municipal DPRD seats spread in at least half the number of provinces in Indonesia. Leading up to the 2009 Elections, Law 12/2003 was revised into Law 10/2008 which added provisions for political parties that didn't have 3 percent at the DPR and 4 percent at the DPRD to be eligible as election participants as long as they had a seat at the DPR. Political parties that did not have a single seat at the DPR could still be eligible to be an election participant by joining an eligible political party or by going through an administrative and factual verification process conducted by the General Elections Commissions (Komisi Pemilihan Umum, KPU).

Leading up to the 2009 Elections, the electoral threshold was abolished by the Constitutional Court as an outcome of a judicial review filed by seven political parties impacted by the provision. Through decision Number 12/PUU-VI/2008, the Constitutional Court believed that: First, the requirement to have a seat at the DPR to become an election participant did not clearly fit the ratio legis concept in relation to the shift from electoral threshold to parliamentary threshold (Constitutional Court 2008). The 2009 Elections regulation outlined two types of threshold: electoral threshold as an

eligibility requirement for political parties in elections and a parliamentary threshold of 2.5 percent as a minimum requirement for political parties to obtain a legislative seat.

In its views, the Constitutional Court questioned the purpose of a minimum threshold of one DPR seat to become an election participant: was it a form of lenience for participants of the 2004 Elections that did not fulfil the determined electoral threshold so they could still participate in the 2009 Elections, or was it that because the consideration that Law 10/2008 contained parliamentary threshold, political parties with seats at the DPR were afforded a limited lenience (Constitutional Court 2008)? If the main purpose of that provision was to give a lenience, the Constitutional Court believed that ever political parties participating in the 2004 Elections should automatically be election participants again without re-verification. If the main purpose was to provide a limited lenience, then the lenience should be in line with the parliamentary threshold of 2.5 percent of national votes in the 2004 Elections, instead of the number of seats won (Constitutional Court 2008).

Second, the Constitution Court explained that the requirement of having a DPR seat was unfair and discriminatory treatment to the political

parties. This was considered discriminatory in that there were political parties with only one DPR seat that received fewer votes than political parties that did not have any DPR seat but could easily be a participant in the 2009 Elections without having to undergo verification. Meanwhile, the political parties with more votes but did not manage to win a DPR seat after the vote-to-seat formula had to go through administrative and factual verification to become a participant in the 2009 Elections (Constitutional Court 2008).

The Indonesian National Populist Fortress Party, which obtained 1,230,455 votes (1.08%) and Pancasila Patriot's Party, which obtained 1,073,139 votes (0.95%), as the two plaintiffs of the judicial review, did not manage to win any seats in the DPR. Meanwhile, three other political parties that obtained fewer votes than either of those two political parties managed to obtain seats. The three political parties were Indonesian National Party of Marhaenism with 923,159 votes (0.81%), Pioneers' Party with 878,932 votes (0.77%), and Indonesian Democratic Vanguard Party with 855,811 (0.75%). As such, based on these two arguments the Constitutional Court granted the judicial review filed by the plaintiff and erased the electoral threshold requirement, thus requiring every political party to go through re-verification.

Aside from eliminating the electoral threshold, the Constitutional Court eliminated the provision of parliamentary threshold for Provincial and Regency/Municipal DPRD Elections. Previously, Law 8/2012 which governed the 2014 Elections mandated a parliamentary threshold of 3.5 percent for political parties to obtain seats at the DPR and DPRD. In this case, if there was a political party that won less than 3.5 percent of votes, they would not be included in the vote-to-seat conversion process. This provision was filed for judicial review by 17 political parties that did not have seats at the DPR but had seats at the DPRD as a result of the 2009 Elections. In their petition, they considered the implementation of the parliamentary threshold to be discriminatory to small political parties and caused a high number of votes to be wasted or a disproportional result to the election.

In its opinion, the Constitutional Court considered the 3.5 percent parliamentary threshold at the Provincial and Regency/Municipal DPRD meant there was a possibility for not even one political party participating in the election to achieve the parliamentary threshold of 3.5 percent in one particular region, both province and regency/municipality, thus not a single political party member would sit at the DPRD (Mahkamah Konstitusi Republik

Indonesia 2012). According to the Constitutional Court, this was likely assuming there were 30 political parties, and the votes were equally distributed at 3.3 percent. Besides, there was also the likelihood of only one political party reaching the parliamentary threshold of 3.5 percent, and therefore only one party sat at the DPRD (Mahkamah Konstitusi Republik Indonesia 2012).

#### Judicial Review on Balloting Structure

Ahead of the 2009 Elections, the applicable election regulations contain the following provisions regarding the determination of elected legislative members: (1) Elected legislative election candidate is any candidate who obtains at least 30% of the voter's division number (seat quota); (2) In the event when there are two or more candidates who win more than 30% of the voter's division number, then seats shall be allocated according to the candidate's candidacy number; (3) In the event when there is no candidate who win more than 30% of the voters division number, then seats shall be allocated according to the candidate's candidacy number (Article 214 of Law No. 10/2008). These provisions imply that the legislative election in Indonesia is classified as an election with a semi-open list proportional system.

These provisions were challenged by legislative candidates who ran for

office in 2009 Election. The Constitutional Court considers these provisions unfair and discriminative. The philosophy of determining a winner in an election is based on who wins the most votes. Thus, we should determine the elected candidates based on which candidates win the most sequentially, not on the smallest candidacy number specified previously. Therefore, the determination of the winners in the legislative election should not be based on two different standards, namely the candidacy number and the total votes of each candidate (Mahkamah Konstitusi Republik Indonesia 2008). Through its decision, the Constitutional Court decided to revoke the provisions requiring candidates to win at least 30% of voters' division number and allocation of seats according to candidacy number. Since the revocation, the legislative election system in Indonesia has become a pure open list proportional representation election system.

#### Judicial Review on the Timeline of Presidential and Legislative Elections

The next variable in Indonesian electoral system that is influenced by the decision made by the Constitutional Court is the implementation time of the legislative and presidential elections. There were two requests made against two different provisions in the elections law submitted by two different actors with resulted in the decision to

implement both legislative and presidential elections concurrently. Interestingly, the two requests to judicial review the provision at the time of the election were submitted by an individual and a civil society organization, respectively. Effendi Ghazali requested the first judicial review in 2013 towards the provision contained in Law No. 42 of 2008 on the presidential election.

Gazali provided three arguments as the basis for the review request: First, implementing legislative and presidential elections separately has resulted in the violation of people's political right to participate in elections easily, efficiently, and intelligently. Since the implementation of the legislative election on April 5, 2004, and the presidential election on July 5, 2004, the applicant (as a voter) was almost unable to execute his right to cast a vote in the election because he had to attend to his study abroad (Mahkamah Konstitusi Republik Indonesia 2013). Second, separating the implementation time of the legislative and presidential elections has hindered voters from participating intelligently. Political efficacy, in which citizens can ensure check and balances mechanism to the presidential government through presidential coattail effect, where voters vote for the political party in a legislative election that supports their presidential candidate of choice in the presidential

election (straight ticker) (Mahkamah Konstitusi Republik Indonesia 2013). Third, separating the time of legislative and presidential election implementation has resulted in the more costly and inefficient state budget expenditure for elections.

The Constitutional Court decided to implement both presidential and legislative elections in 2019 simultaneously, that voters will receive five different ballots: presidential ballot, national parliament ballot, lower house (senate) of the representative ballot, regional parliament ballot for province level, and regional parliament ballot for regency/municipality level) on the election day. In its statement, the Constitutional Court stated that the purpose of concurrent election is to strengthen and make the presidential system in Indonesia more effective and make election management more efficient.

After implementing concurrent elections in 2019 as the result of the Constitutional court granting Effendi Gazali's judicial review, Perludem submitted their request to judicial review Law 7/2017 on elections and Law 10/2016 on the election of regional heads. Perludem argued that the five ballots election as mandated by the Constitutional Court's decision has failed to meet its objectives and instead generated some new problems.

Furthermore, Perludem argues that implementing the five ballots election in 2019 was contradictory with the Constitutional Court's mandate to encourage voters to vote more intelligently and ensure more effective checks and balances to the presidential government and a more effective presidential system.

Perludem provided three arguments as the basis for their petition to the Constitutional Court to conduct a constitutional review against implementing the five ballots election in 2019 Election. First, the five ballots election has failed to strengthen the presidential system of government in Indonesia. Implementing the five ballots election has instead weakened the president's position to align the government's agenda on development with the legislative bodies' agenda since the regional elections are not implemented concurrently (Mahkamah Konstitusi Republik Indonesia 2020). Second, the five ballots election of 2019 was unmanageable and contradictory with its initial purpose to make the election management more efficient. In the 2019 Election, there were 2,249 electoral areas unable to implement the voting process due to logistic problems. Moreover, according to the data of the Health Ministry on May 6, 2019, 527 members of the Election Implementation Committee died on duty due to

overwork (Mahkamah Konstitusi Republik Indonesia 2020). In addition, the implementation of five ballots election has failed in its mission to safeguard people's right to vote and increase people's participation due to the high number of invalid votes.

In their judicial review, Perludem appealed to the Constitutional Court to amend the provision in Article 167 paragraph (3) of Law 7/2017 to become "voting shall be implemented concurrently, which is consisted of national elections to elect members of the national House of Representatives, president, and members of the lower-house of the House of Representatives, and two years after the national concurrent election, there shall be concurrent regional elections to elect the members of the regional House of Representatives at province, regency/municipality level, governor, regent, and city mayor" (Mahkamah Konstitusi Republik Indonesia 2020). Thus, there should be two types of concurrent elections, namely the national concurrent election to elect government officials at the national level (president, members of the House of Representatives, and members of the lower house of representatives) and concurrent regional election to elect the government officials at regional level (governor, regent, city mayor, and



members of the regional House of Representatives).

The Constitutional Court rejected the entire request by Perludem but recommended lawmakers to choose one of the types of concurrent election out of

six models recommended by the Constitutional Court (see table below). In other words, the Constitutional Court improved its own previous decision to only allow five ballots election as the only valid model for concurrent election.

**Decision of the Constitutional Court towards Perludem's Judicial Review**  
(Mahkamah Konstitusi Republik Indonesia 2020)

Model	Design for Concurrent Election
1	Concurrent election to elect members of the national House of Representatives, lower-house of the parliament, president/vice president and members of the regional House of Representatives
2	Concurrent election to elect members of the national House of Representatives, lower-house of the parliament, president/vice president and regents/city mayors
3	Concurrent election to elect members of the national House of Representatives, lower-house of the parliament, president/vice president, members of the regional House of Representatives, and regents/city mayors
4	National concurrent election to elect members of the national House of Representatives, lower-house of the parliament, president/vice president; and sometimes after that there should be regional concurrent election to elect members of the regional House of Representatives at province level, members of regional House of Representatives at regency/municipality level, governors, and regents/city mayors
5	National concurrent election to elect members of the national House of Representatives, members of the lower-house of the parliament, president/vice president; and sometimes after that there should be regional concurrent election to elect members of the regional House of Representatives at province level and governors, sometimes after that there should be regional concurrent election at regency/municipality level to elect members of the regional House of Representatives of regency/municipality and regents and city mayors.
6	Other alternatives as long as they maintain the idea of concurrent election to elect the members of national House of Representatives, lower-house of the parliament, and president/vice president

## CONCLUSION

Indonesian Constitutional Court has played a significant role in the reformation of electoral system design. The fourth amendment to the Constitution of the Republic of Indonesia was building the Constitutional Court with the authority to review and assess the constitutionality of laws as legislation products. This role has

provided more access in the political opportunity structure for political actors to exert their influence to change the electoral system design even though the system has been implemented as laws by the legislative branch of the government.

The increasing trend of political actors such as political parties and civil society to try to change elections law through the Constitutional Court after

the 2004 Election until the 2019 Election has significantly changed the electoral system in Indonesia. Starting from the revocation of the electoral threshold, the parliamentary threshold for regional House of Representatives election, the change from closed-list proportional representation system to open list proportional representation system, until the implementation of the concurrent legislative and presidential election.

The judicial review of the electoral system design request has come chiefly from political parties who have not participated in the law-making process in parliament because they do not have a seat at the parliament. In addition, their feel cheated by the electoral system design made by parliament, such as the adoption of electoral threshold as a requirement for political parties to participate in elections and the implementation of parliamentary threshold in the local legislative election. Thus, the judicial review requests submitted to the Constitutional Court were intended to increase the chance for those political parties to win in the election.

Interestingly, the requests to judicial review on elections law were not only coming from political parties as to the prominent actors in the election. They also came from an individual citizen or civil society organizations who

wanted to change the elections law to realize their ideals of the best election for Indonesia. For example, the implementation of simultaneous presidential and legislative elections resulted from civil society requests to review specific provisions in the elections law to the Constitutional Court.

However, it is essential to note that every decision made by the Constitutional Court on the electoral system is highly influenced by the judge's interpretation towards certain ideals of electoral system design. For example, the five ballots election implemented in the 2019 Election resulted from the Constitutional Court's decision made in 2014. However, after implementing concurrent elections in 2019, the Constitutional Court issued new political decisions regarding the implementation of simultaneous elections following a request to review that exact implementation of the concurrent election. The new decisions allow different models of concurrent election to be implemented as they all are considered constitutional. In other words, the Constitutional Court corrected their own decision regarding implementing the five ballots election. Therefore, we can conclude that the requests made to review the election system at the Constitutional Court are filled with power relations and political motives from the applicants.

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