

IMPLICATION OF CHANGE THE VIEW CONSTITUTIONAL COURT IN JUDICIAL REVIEW ABOUT OPEN LEGAL POLICY THROUGH THE CONSTITUTIONAL COURT 'S DECISION NUMBER: 116/PUU-XXI/2023

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Abstract

The view of the Constitutional Court towards the judicial review, which is an open legal policy, has changed with the emergence of new arguments, about the understanding of one of the constitutional principles, namely the principle of proportionality. The Decision of the Indonesian Constitutional Court Number 116/PUU-XXI/2023 has stated that Article 416 paragraph (1) of Law Number 7 of 2017 concerning Conditional Unconstitutional General Elections. This paper examines the implications of this Constitutional Court decision on the implementation of Law Number 7 of 2017, especially with regard to Article 416 paragraph (1) and the possibility of changing the Constitutional Court's attitude towards the provisions of the Presidential Threshold (Article 222). This study is a doctrinal study, using primary and secondary legal materials, in the form of laws and regulations, Constitutional Court decisions, research results relevant to the study. The results of this study stated that the establishment of the Constitutional Court finally made changes, with new arguments being put forward when interpreting whether or not it was in accordance with the constitution. This change will open the opportunity for the repetition of test cases on the Presidential Threshold, which have been rejected by the Constitutional Court.

Keywords: change the view, Constitutional Court, open legal policy, Parliamentary Threshold

I. INTRODUCTION

The decision of the Constitutional Court Number 116/PUU-XXI/2023 submitted by the Association for Elections and Democracy, on the provisions in Article 414 paragraph (1) of Law Number 7 of 2017 concerning General Elections, relating to the Parliamentary Threshold of 4%, has been decided on Thursday, February 29, 2024. The Constitutional Court ruling states that the parliamentary threshold 4% norm is constitutional, as long as it is enforced for the 2024 elections, and unconstitutional conditionally, for the 2029 elections and subsequent elections as long as there has been a change in the parliamentary threshold based on predetermined requirements.

The argument is because the Constitutional Court did not find a rational basis in determining the number or percentage of at least 4% referred to in the Article. The parliamentary threshold figure also has an impact on the conversion of valid votes into the number of House of Representatives seats related to the proportionality of the general election results. For example, in the 2004 elections, 19,047,481 valid votes were cast, or about 18% of the valid votes nationwide. The parliamentary threshold policy is considered to have reduced people's rights as voters. The people's right to be elected is also educated when they get more votes but do not become members of the House of Representatives because their party does not reach the parliamentary threshold.

This is whether we realize it or not, whether directly or indirectly, it has harmed the sovereignty of the people, the principle of electoral justice, and fair legal certainty for all election contestants, including voters who exercise the right to vote, Based on this, the petitioner's argument that basically states the parliamentary threshold and/or the number or percentage of parliamentary threshold that is not prepared in accordance with the basis of adequate methods and arguments can basically be understood by Court. Constitutional Court Judge Enny Nurbaningsh explained that the Constitutional Court's decision did not eliminate the parliamentary threshold, but decided that the threshold or percentage figure was left to the framer of the law. The hope is that policymakers can determine rational thresholds with clear and comprehensive study methods and can minimize disproportionality that is getting higher and causing legitimate votes to be wasted.¹

The Constitutional Court's order to the framers of the law, to fix the size of the parliamentary threshold, with a number of signs. First, changes to parliamentary thresholds are designed to be used on an ongoing basis. Second, changes must maintain the proportionality of the proportional electoral system, especially to maintain the number of votes that cannot be converted into seats. Changes in the size of the parliamentary threshold must also be placed in order to realize the simplification of the number of political parties. In addition, changes to the parliamentary threshold must involve all groups who have concerns about the implementation of elections by applying the principle of public participation, which means including political parties participating in elections that do not have representation in the House of Representative. Changes must be completed before the start of the 2029 elections.²

¹ Kabar24. Dany Saputera, *Bisnis.com* Friday 1 March 2024, 12.43.

² Fitria Chusna Farisa, *Nasional.kompas.com*. March 1, 2024, at 10:46, viewed Sunday, at 21:02, March 3, 2024)

The purpose of this study is to find answers to the main problems: 1) why does the Constitutional Court test and rule on a legal norm that is an open law policy? 2) What are the implications of the Constitutional Court's decision on other open law policies? This study takes a comparative juridical historical approach. It has been on the substance of the data in the form of a number of Constitutional Court rulings containing open law policies, and then exploring and elaboratively measuring changes in the attitude of the Constitutional Court in deciding legal test cases containing open legal policy.

II. RESULT AND DISCUSSION

A. Legal Norm Hierarchy Theory (Stufenbau Theorie)

The theory of the hierarchy of legal norms as proposed by Hans Kelsen states that legal norms are tiered and layered in a hierarchy of arrangements, where a lower norm applies, originates and is based on a higher norm, and so on until a norm that cannot be traced further and is hypothetical and fictitious, namely the basic norm (*grundnorm*). The basic norm which is the highest norm is no longer formed by a higher norm but the norm is established first by society as a basic norm which is the main reference for the norm it carries.³ Adolf Merkel, who was a student of Hans Kelsen, introduced the concept that a legal norm has two faces. The first face is that when the norm concerned is located below a norm, then it must refer to, and source on the norm above it. The second face is that if a norm concerned is located higher or above other norms, then the relevant norm must be a source of reference, source of enforcement, or a reference norm/guideline of other norms.

These principles and concepts are as formulated in a legal adagium that reads *lex superiori derogat legi inferiori*. With regard to the content material of laws and regulations, the hierarchical pyramid contains the character that the lower the level of a norm, the norm is intended to contain more detailed and more concrete content material. Conversely, a norm is that the higher the degree position, the more conceptual and abstract the material will be.⁴ In addition to dealing with the material of laws and regulations, the theory of norm hierarchy is also interpreted as an effort to obtain legal certainty where the core of legal certainty is its predictive nature. Hierarchical theory guarantees the achievement of legal certainty because by knowing the content and intent of basic norms or higher norms, one can know for sure or get guarantees that the norms or derivative laws and regulations will not

³ Maria Farida Indrati Soeprapto, 1998, Ilmu Perundang-undangan Dasar-dasar Pembentukannya, Yogyakarta: Kanisius, p. 25.

⁴ Dardji Darmodihardjo and Sidharta in Anthon F. Susanto, Ilmu Hukum Non Sistematis: Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia, Yogyakarta: Genta Publishing, 2010, p. 170

deviate from higher norms. Hamid S. Attamimi developed Hans Kelsen's theory and then the norms in the ranking from top to bottom are arranged as follows:

1. Fundamental Norms of the State (*Staatassfundamental Norm*).
2. Basic rules of the state (*staats grundgesetz*).
3. Formal legislation (*Formell Gesetz*).
4. Execution rules and autonomous rules (*Verordnung en Autonome Satzung*).

If translated into the theory of hierarchical norms to be applied in the system of laws and regulations in Indonesia, there are several norms whose regulations are contained in laws and regulations such as the following:

1. The Provisional People's Consultative Assembly Decree Number: XX/MRS/1966 concerning the House of Representative Gotong Royong memorandum concerning the Source of Orderly Law of the Republic of Indonesia and the Order of the Laws and Regulations of the Republic of Indonesia.
2. The Provisional People's Consultative Assembly Decree Number: III/MPR/2000 concerning the Source of Law and Order of Laws and Regulations.
3. The Law Number 10 of 2004 concerning the Establishment of Laws and Regulations.
4. The Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. This law has been amended by The Law Number 15 of 2019 concerning Amendments to The Law Number 12 of 2011 and by The Law Number 13 of 2022 concerning the Second Amendment to The Law Number 12 of 2011.

In this study, we will describe what are the legal forms of the laws and regulations according to The Law Number 12 of 2011, which are still in force, as formulated in Article 7 paragraph (1):

1. The 1945 Constitution of the State of the Republic of Indonesia;
2. The Provisional People's Consultative Assembly Decree;
3. Laws and Government Regulations in Lieu of Law;
4. Government Regulation;
5. Presidential Regulation;
6. Provincial Regulation;
7. Regency/City Local Regulation.

In article 8 paragraph (1), it is stated that in addition to the above types of laws and regulations, it also includes regulations stipulated by: People's Consultative

Assembly, House of Representatives, Regional Representative Council, Supreme Court, Constitutional Court, Audit Board, Judicial Commission, Bank Indonesia, Ministers, Agencies, Institutions, Commissions at the same level established by Law or Government by order of the Law, Provincial People's Representative Council, Governor, Regency/City People's Representative Council, Bupati/Mayor, Village Head or equivalent

Specifically regulating the existence of People's Consultative Assembly Decrees, the explanation of this law explains that what is meant by "People's Consultative Assembly Decrees", is the Provisional People's Consultative Assembly Decrees and People's Consultative Assembly Decrees that are still in force as referred to in Article 2 and Article 4 of the People's Consultative Assembly Decree Number 1/MPR/2003 concerning Review of the Material and Legal Status of the Provisional People's Consultative Assembly Decrees and Decrees of the People's Consultative Assembly from 1960 to 2002, dated August 7, 2003.

This can be interpreted that in the future, the People's Consultative Assembly will no longer have the authority to issue the People's Consultative Assembly Decrees that are regulatory in nature, so that the existence of the People's Consultative Assembly will not exist and the hierarchy of laws and regulations no longer needs to include their existence.

B. Testing Legislation.

In a country that upholds the rule of law, the norms that must always be upheld and must be controlled are those contained in the Constitution of a country. To ensure that the values and norms formulated are not challenged, or not interpreted deviantly by the laws and regulations below, there must be a mechanism to control them, to praise them. Indonesia until the third constitutional amendment in 2001, adhered to an anomalous understanding, on the one hand stated that the 1945 Constitution must be implemented purely and consequently, as well as the determination of the New Order stated by the People's Consultative Assembly that it would not make changes to the 1945 Constitution, but on the other hand did not provide adequate control mechanisms to maintain the supremacy of the constitution itself. This means that if there is a law that is considered opposed, opposed or reduces the values contained in the constitutional norms, then there is no constitutional control mechanism. The legal system adopted by Indonesia seems to let it go if there is a law that contains a norm that opposes the constitution, or that reduces constitutional norms or that deviates the direction of a constitution.

Such an interpretation is formulated in the explanation of Law No. 14 of 1970 concerning Judicial Power which states that the authority to review the law is material and provisions that must be contained in a constitution and not in a law. Since the 1945 Constitution does not contain that provision, it is impossible for this law to authorize the review of the law to a state institution with that power. This was interpreted by Bagir Manan⁵ that because existing laws such as The Law Number 14 of 1970 concerning Judicial Power, The Law Number 14 of 1985 concerning the Supreme Court, the People's Consultative Assembly Decree Number VI/MPR/1973 which was later replaced by the People's Consultative Assembly Decree Number III/MPR/1978 only authorized the Supreme Court to test laws that were lower than the law on the grounds that they were contrary to higher laws and regulations. Thus, the People's Consultative Assembly Decree, Laws and Government Regulations in lieu of Laws, cannot be tested and therefore cannot be canceled even if they contradict the 1945 Constitution. As a consequence, the People's Consultative Assembly Decree, Laws or Government Regulations in Lieu of Law; will remain in force even though they contradict the 1945 Constitution. This means that the 1945 Constitution can be overridden by the People's Consultative Assembly Decree, Law and Government Regulations in Lieu of Law. Under these circumstances, the 1945 Constitution is not the highest legislation. This should be recognized as a kind of incongruity. On the one hand, it is said that the 1945 Constitution is the highest legislation, but on the other hand, the 1945 Constitution cannot be used as a test of the People's Consultative Assembly Decree, Law or Government Regulations in Lieu of Law.

Such a peculiarity as Bagir Manan said above, will turn into a grave danger, when laws are produced and issued by an arbitrary ruling regime, with a view to maintaining and extending power, in ways that violate human rights and violate constitutional norms. According to Hans Kelsen, as explained by Benny K. Harman, the rulers of countries in Europe during World War I and World War II, tended to act cruelly and arbitrarily and used laws to legitimize regime policies that clearly violated human rights and violated constitutional norms. This fact prompted Hans Kelsen to initiate the creation of a special court that had the authority to examine the law. In the Austrian constitution drafted by Kelsen it established a constitutional court outside the Supreme Court, which was given special powers to examine laws drafted by parliament as a legislative body.⁶

⁵ Bagir Manan, 1992, *Dasar-Dasar Perundang-undangan Indonesia*, Jakarta: Ind-Hill.Co. p. 27.

⁶ Benny K. Harman, 2013, *Mempertimbangkan Mahkamah Konstitusi, Sejarah Pemikiran Pengujian UU terhadap UUD*, Jakarta: Kepustakaan Populer Gramedia, p.69.

In the history of the formation of laws and regulations in Indonesia, especially after Indonesia re-enacted the 1945 Constitution, through a President Decree of the Republic of Indonesia on July 5, 1959, and not through a constituent decree which according to the applicable constitution was indeed given the task of drafting a new constitution to replace the provisional 1950 Constitution. In its journey after the 1945 Constitution came into force, disobedience or defiance to the 1945 Constitution was actually shown by the President of the Republic of Indonesia. For example, through the issuance of President Decree Number 2 of 1959 concerning the Establishment of the Provisional People's Consultative Assembly Decree, Presidential Decree Number 7 of 1959 concerning the Requirements for Party Simplification, Presidential Decree Number 3 of 1960 concerning the Renewal of the House of Representative⁷ and President Decree Number 4 of 1960 concerning the Establishment of the House of Representative Gotong Royong.⁸

The issued Presidential Regulation regulates material that according to the 1945 Constitution is ordered to be formulated in the form of laws, and not formulated in the form of other laws and regulations. For example, regarding the People's Consultative Assembly Decree, Article 2 of the Constitution states that the MPR consists of House of Representative members plus representatives from regions and groups, according to the rules established by law. Then about the House of Representative, article 19 states that the composition of the House of Representative is determined by law. As for those relating to political parties, ordered by Article 28 to be established by law. Freedom of association and assembly, expressing thoughts verbally and in writing and so on are stipulated by law.

During the New Order era, laws whose material contradicted the 1945 Constitution such as Law Number 3 of 1975 concerning Political Parties and Working Groups, this law did not provide opportunities for citizens to form political parties, because this law only recognized United Development Party, Indonesian Democratic Party, and Working Group as political party.

The opinion of an expert, on the symptoms of President Soekarno's deviation from the 1945 Constitution in the issuance of legal products of the Presidential Regulation, is stated as follows ...There must be a conformity of the form or type of legislation with the regulated material, especially if ordered by higher level

⁷ Efriza dan Syafuan Rozi, 2010, *Parlemen Indonesia, Geliat Volksraad hingga DPD*, Jakarta: Penerbit Alfabeta, p. 36. See also juga Harmaily Ibrahim, 1979, *Majelis Permusyawaratan Rakyat*, Jakarta: Penerbit Sinar Bakti, p. 49

⁸ Abdul Mukti Fajar, 2013, *Partai Politik Dalam Perkembangan Ketatanegaraan*, Malang: Setara Press, p. 147

legislation or equivalent. This form of non-conformity can be a reason to cancel the legislation. For example, if the 1945 Constitution states that something material must be regulated by law, then *only* in the form of law must it be regulated. If regulated in another form, such as a Presidenti Regulation, the regulation can be canceled (*vernietigbaar*).⁹

The reforms that took place in 1998, ending the reign of President Suharto, through the statement of resignation as president, opened up opportunities for freedom, including the freedom to discuss changes or amendments to the constitution, which the New Order regime had prohibited discussing openly. Political reform also agendas constitutional reform, and one of them is the problem of how the mechanism that must be formulated in a constitution so that a law does not get the opportunity to contradict or oppose constitutional norms. In Hans Kelsen's opinion, a regime should not use laws to widen and expand power in ways that are contrary to constitutional principles. To maintain and control the constitution, a mechanism is needed to test a law so that it is guaranteed that there is no violation of the constitution, through a special judicial mechanism, in which case the power is given to the Constitutional Court. In the 3rd amendment in 2001, a constitutional amendment was issued, which gave the Constitutional Court the authority to review laws. Article 24C paragraph 1 states that the Constitutional Court has the authority to adjudicate at the first and last instance whose decision is final to test the law against the Basic Law. To implement the provisions of this Constitution, the framer of the law issued Law Number 24 of 2003 concerning the Constitutional Court.

The filling of the position of constitutional judges, first based on President Decree No. 147/M/2003 dated August 15, 2003, where they are Jimly Asshiddiqie, Ahmad Roestand, I Dewa Gede Palguna (based on the proposal of the House OF Representative); Laica Marzuki, Sudarsono, Maruarar Siahaan (based on the proposal of Supreme of Court) : HAS Natabaya, A. Mukthie Fajar, Harjono (based on the proposal of the President).¹⁰

Some notes regarding the frequency of judicial review examined, tried and decided by the Constitutional Court, as an exercise of one of the powers of the Constitutional Court, can be read in Table as follows:

⁹ Bagir Manan, op.cit., p. 14. See also Maria Farida Indrati Soeprapto, 2007, Science of Legislation Volume 1, Types, Functions, Contents Material, Yogyakarta: Kanaisius Publishers, p.234.

¹⁰ Hadi Setia Tunggal, 2006, Regulations for the Implementation of the Constitutional Court Law, Jakarta: publisher Harvarindo p. vi

Table 1
Testing of the First Sewindu Law/Year 2003-Year 2011

Nu.	Types of Constitutional Court Decisions	Sum
1.	Granted	90 cases
2.	Rejected	111 cases
3.	Not accepted	99 cases
4.	Pull Back	37 cases
5.	The rest of the things that are still in progress	55 cases
	Number of laws heard	166 cases

Source : Coustitutional Court Report 2010

Table 2.
The Most Testing Frequency in the First Sewindu Constitutional Court (2003-2011)

No.	Name of Act	Frequency
1.	Law Number 32 of 2004 concerning Government Area	24 x
2.	Law Number 10 of 2008 concerning the General Election of Members of the House of People's Representative, Regional Representative Council, and Regional People's Representative Council	24 x
3.	Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Local Government	11 x
4.	Law Number 30 of 2002 concerning the Corruption Eradication Commission for Corruption Crimes	11 x
5.	Law Number 8 of 1981 concerning the Code of Criminal Procedure	10 x

Source: Coustitutional Court Report 2010

Martitah in his study regarding the decisions of the Constitutional Court which contains positieve legislature, both categorized *conditionally constitutional* as well as categorized; *conditionally unconstitutional* concluded that the function and role of the Constitutional Court has shifted to become a limited legislative institution, through its rulings that provide interpretation of the constitution. The verdict *conditionally constitutional* This means that a norm in the law is considered in accordance with the constitution or not contrary to the constitution if interpreted in accordance with what is formulated by the Constitutional Court. While the verdict that *conditionally unconstitutional* means that a norm in a law is considered contrary to the constitution when it is not in accordance with what is formulated or determined by the Constitutional Court.¹¹ As an illustration, in case Number: 102/PUU-VII/2009, concerning the Examination of Law Number 42 of 2008

¹¹ Martitah, 2023, Mahkamah Konstitusi, Dari Negative Legislature ke Positive Legislature, Jakarta: Konpres, p. 134.

concerning the General Election of the President and Vice President, it is stated by the Constitutional Court decision as follows:

Declaring Article 28 and Article 111 of Law Number 42 of 2008 to be constitutional insofar as it is interpreted to include citizens who are not registered in the Permanent Voters List with the following conditions and methods:

1. In addition to Indonesian Citizens registered in the Permanent Voters List, Indonesian State Waraga who are not registered in the House of Representative by exercising their voting rights by showing Indonesia Identity Card or Valid passport for Indonesian citizens abroad :
2. Indonesian citizens who use Indonesia Identity Card must be equipped with a Family Card or similar name;
3. The use of voting rights for Indonesian citizens who use Indonesia Identity Card can only be used at Polling Stations located in Neighborhood Harmony/Hamlet or similar names according to the address listed on their Indonesia Identity Card;
4. Indonesian citizens as mentioned in number 3 above before exercising their right to vote, first register with the local Voting Organizing Group;
5. Indonesian citizens who will exercise their right to vote with an ID card or passport are carried out on 1 (one) hour before the completion of voting at the local polling station or overseas polling station.

C. Open Legal Policy and Changes in the Attitude of the Constitutional Court.

Since the transfer of cases from the Supreme Court to the Constitutional Court, from October 15, 2003 to 2016, the Constitutional Court has conducted legal review of 940 cases. Of the many cases, arguments were found from Constitutional Court decisions that explicitly used the term open legal policy, and in many cases formulated their arguments with a meaning that when concluded would be material as the understanding of Open Legal Policy. It can be exemplified that in the 1945 Constitution Article 18 paragraph (4) it is stated that the Governor, Regent and Mayor respectively as heads of provincial, regency and city local governments are democratically elected. In political theory, a democratic system in choosing a head of government can be in the form of elections by parliament or people's representatives (indirect democracy) and can also be in the form of direct elections by the people. The choice of the framer of the law to conduct the election of the Governor through the Province Regional People's Representative Council or through direct election by

the people is an open legal policy, where the Constitutional Court cannot assess the constitutionality. This is because the 1945 Constitution has given delegates the authority to legislators to choose an electoral system as long as it is within democratic corridors. Therefore, Law Number 22 of 1999 concerning Regional Government chooses the Governor election model through the Province Regional People's Representative Council, while through Law Number 32 of 2004 concerning Regional Government the Governor election model has changed and is held directly by the people and no longer by the Province Regional People's Representative Council. Ten years later, on the grounds that direct elections by the people are directly correlated with the number of Regional Heads entangled in corruption cases, Law Number 23 of 2014 concerning Regional Government formulated that regional elections were changed again to elections by the Regional People's Representative Council¹². But previously, for months there had been a strong reaction from the public¹³ over the change in the electoral system, finally President Susilo Bambang Yudoyono, 2 (two) days later after Law Number 22 of 2014 and Law Number 23 of 2014 were signed as a ratification process, a Government Regulation emerged in lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayors which stated that regional elections were carried out by the DPRD declared abolished and this means that it will be implemented directly by the people¹⁴.

According to Mukthie Fajar, when the Constitution mandates the regulation of certain norms in the form of a law but only provides directions in outline, and when the law regulates it in more detail, the authority of the framer of the law is

¹² Law Number 23 of 2014 was passed by President Susilo Bambang Yudhoyono, on September 30, 2014

¹³ See consideration letter (c) of Government Regulations in Lieu of Law Number 1 of 2014 which states that Law Number 22 of 2014 concerning the Election of Governors, Regents and Mayors which regulates the mechanism for indirect election of regional heads through the Regional People's Representative Council has received widespread rejection by the people and the decision-making process has caused problems and compelling urgency in accordance with Constitutional Court Decision Number 138/PUU-VII/2009.

¹⁴ Government Regulation in Lieu of Law Number 1 of 2014 was passed on October 2, 2014, or 2 (two) days after the enactment of Law Number 23 of 2014 concerning Regional Government by the President of the Republic of Indonesia on September 30, 2014. Government Regulations in Lieu of Law Number 1 of 2014 was later ratified into Law Number 1 of 2015 and signed by the President of the Republic of Indonesia Joko Widodo on February 2, 2015. Government Regulations in Lieu of Law Number 1 of 2014 basically states that the provisions regarding regional head elections through Regional People's Representative Council, as contained in Law Number 22 of 2014 concerning the Election of Governors, Regents and Mayors, are declared revoked or deleted. The same formulation on the Election of Governors, Regents and Mayors was followed by Law Number 23 of 2014 concerning Regional Government.

open to enter the area of open legal policy with a note as long as it is still within the outline frame determined by the constitution. In other words, as Mahfud said, the Constitutional Court is not authorized to examine the choice of the framer of the law regarding the electoral system (whether using a proportional system or a district system, using an open or closed proportional system, for example) but rather assessing whether the choice of the framer of the law (with details of its formulation and procedures and requirements) is fair or not to all parties. What is publicly submitted by the Constitution to be regulated by law based on the political choice of the legislature cannot be canceled by the Constitutional Court unless it clearly violates the 1945 Constitution. In the 1945 Constitution itself, many issues are submitted to be regulated based on the needs and political choices of the legislature which certainly cannot be interfered with or tested by the Constitutional Court.¹⁵

After providing a description regarding the definition or limitation of the definition of open legal policy, the requirement for a norm to be considered as an open legal policy, Mardian Wibowo stated the constitutionality requirements of legal norms that have the value of open law policies, and about the ability to test legal norms that have the value of open legal policy or categorized as test requirements as follows. The following table shows the 2 categories.

Table 3
Constitutionality and Conditions for Testing of Open Legal Policy

No.	Terms of Constitutionality of open legal policy	Conditions for the Constitutional Court to test open legal policy
1.	Does not violate morality	-
2.	Does not violate rationality	-
3.	Not an intolerant injustice	Does not meet the sense of justice even though the formulation meets procedural requirements
4.	Does not exceed the authority of the framer of the law	Exceeding the authority of lawmakers (detournement de pouvoir)
5.	It is not an abuse of authority	Constitutes abuse of authority
6.	Not contrary to the 1945 Constitution	Manifestly Contrary to the Constitution
7.	It does not negate the principles of the 1945 Constitution.	-
8	Not contrary to the political right	-
9	Does not contradict the sovereignty of the people	-
10	Not done arbitrarily (willekeur)	Done arbitrarily
11	Not exceeding and/or abusing authority (detournement de pouvoir)	-
12.		Causing institutional problems

¹⁵ Mardian Wibowo, 2019, Kebijakan Hukum Terbuka, Dalam Putusan Mahkamah Konstitusi, Konsep Dan Kajian dalam Pembatasan Kebebasan Pembentuk Undang-Undang, Jakarta: PT Raja Grafindi Persada, p. 103.

		(unenforceable, causing legal deadlock, hampering the performance of the state institution concerned.
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Source: Mardian Wibowo (2019), table compiled by author.

Although if we look at the table above, it turns out that the Constitutional Court has 2 (two) views that on open legal policy, first that open legal policy cannot be tested constitutionally by the Constitutional Court, and second: open law policies can and even must be tested for constitutionality For the record, that in the history of legal testing, especially those containing open law policies, starting from Case No. 51-52-59 / PUU-VI / 2008, as of February 18, 2009, there has never been an open legal policy norm declared by the Constitutional Court as contrary to the 1945 Constitution or declared unconstitutional and therefore has no binding legal force.¹⁶

If you pay attention, one of the interesting political issues is related to the selection of open legal policies by the framer of the law in order to simplify the number of political parties that can enter the national parliament juxtaposed with the presidential system of government¹⁷. The law requires that political parties that contest elections cannot automatically be included in the vote count to determine how many seats they get for the national parliament. This open legal policy is indeed followed by a number of countries such as Turkey and Germany. Turkey's laws governing elections require that a new political party be included in the counting of seats in parliament if it obtains at least 10 percent of the valid votes nationwide. The electoral system in Turkey uses a proportional system. However, there are a number of seats, contested through the district system, which are not subject to a parliamentary threshold, as participants must be individuals.

While the electoral system in Germany, although it also uses two models of electoral systems, the proportional system and the district system, still applies the requirement of the minimum number of votes that must be achieved, if the election participant wants to be included in the calculation of the number of seats he will get. That limit is set at least 5 percent of the valid national vote.¹⁸

Indonesia, the first time the open legal policy was called *electoral threshold* where a party if in the 1999 general election did not reach at least 2% of the total national valid votes, then the party could still count for its seats in parliament, but

¹⁶ Ibid., p. 134.

¹⁷ Yogo Pamungkas, 2014, Tinjauan Ambang Batas Perolehan Suara Berdasarkan Undang-Undang Nomor 8 Tahun 2012 terhadap UUD 1945, Jurnal Rechts Vinding, EdisiNo. 1 Volume 3 April 2014, p. 34.

¹⁸ BN Marbun, 1983, *Demokrasi Jerman, Perkembangan dan Masalahnya*, Jakarta: Penerbit Sinar Harapan, p. 186

the party was not entitled to participate in the next general election in 2004 on behalf of that party. To contest the 2009 general election, Electoral Threshold was increased to at least one political party obtaining 3% of the national vote. The choice of law using Electoral Threshold, by the framers of the law then changed to Parliamentary Threshold and was applied in the 2009 General Election where it was formulated that each party participating in the election was entitled to be included in the calculation of votes that would determine the number of seats obtained in parliament, if the party obtained at least 2.5% of the votes from the national valid vote¹⁹. This provision was changed to 3.5% for the 2014 general election²⁰, and then raised again to 4% for the 2019 and 2024 general ²¹elections.

Table 4
Use of Open Legal Policy on Electoral Threshold and Parliamentary Threshold

	Election 1999	Election 2004	Election 2009	Election 2014	Election 2019	Election 2024
Law	Law Number 3 1999	Law Number 12/2003	Law Number 10/2008	Law Number 8/2012	Law Number 7/2017	Law Number 7/2017
Open Legal Policy	Open Legal Policy Electoral Threshold	Open Legal Policy Electoral Threshold	Open Legal Policy Parliamentary Threshold	Open Legal Policy Parliamentary Threshold	Open Legal Policy Parliamentary Threshold	Open Legal Policy Parliamentary Threshold
%	2 %	3 %	2,5 %	3 %	4 %	4 %
Party In the House of Representatives	6 Political parties (> 10) 13 political parties (< 10)	10 political parties (> 10) 6 Political parties (< 10)	9 Political parties	8 Political parties	9 Political parties	8 Political parties

Source: Drafted under 5 Electoral Laws

The Open Legal Policy, where the framer of the law enforces a policy called the Parliamentary Threshold, has been submitted for review of Law Number 10 of 2008 3 times, namely in 2009, 2012 and 2013. In case Number 3/PUU-VII/2009 concerning the examination of Law Number 10 of 2008 where the applicant was submitted by the Garuda Party through Chairman Ahmad Ridha Sabana and Secretary General Abdullah Mansuri. In its ruling, the Constitutional Court stated

¹⁹ See Law Number 10 of 2008.

²⁰ See Article 208 of Law Number 8 of 2012.

²¹ See Article 414 paragraph (1) of Law No. 7 of 2017 concerning General Elections

that it rejected the petitioner's application on the grounds that the open legal policy is constitutional as long as it does not negate the principles contained in the 1945 Constitution such as the principle of popular sovereignty, the principle of equality, the principle of justice and the principle of non-discrimination. The Open Legal Policy in terms of determining the parliamentary threshold number is the authority of the framer of the law to determine without interference by the Constitutional Court as long as it does not conflict with political rights, people's sovereignty and rationality. Other tests may be noted as follows:

1. Constitutional Court Decision Number 52/PUU-X/2012 with a judgment stated that it granted the petitioners' request in part by stating that the parliamentary threshold provision of at least 3.5% (stipulated in Article 208 of Law Number 8 of 2012 only applies to House of Representative seats and has no legal effect on determining/calculating the acquisition of political party seats in provincial and district/city Regional People's Representative Council.
2. Constitutional Court Decision Number 51/PUU-X/2012 with ammar verdict cannot be accepted.
3. Constitutional Court Decision Number 56/PUU-XI/2013 with a judgment rejecting the petitioner's application.
4. Constitutional Court Decision Number 20/PUU-XVI/2018 with ammar the decision of the petitioner's application cannot be accepted because the applicant's application *ne bis in idem*.
5. The Constitutional Court Decision Number 48/PUU-XVIII/2020 with the judgment of the petitioner's application cannot be accepted because the applicant does not have legal standing.

The attitude and views of the Constitutional Court, declared to have undergone renewal or amendments, with respect to Case Number 116/PUU-XXI/2023, which states that the parliamentary threshold requirement is declared a conditional constitution. Previously, in recent times, test applications always ended in rejection or inadmissibility (the Court held that the threshold requirement was constitutional). This change at least shows that the parliamentary threshold test, which is an open legal policy, which has always seemed to be absolutely not a testing area of the Constitutional Court's powers, has now changed. But as outlined above, not all legal policies are open that cannot be tested. Open legal policy that according to the Constitutional Court that are open to test are those carried out arbitrarily (*willekeur*), which exceed the authority of lawmakers (*detournement de pouvoir*), constitute abuse of authority, are manifestly contrary to the 1945

Constitution, do not meet the sense of justice even though the formulation meets procedural requirements, which creates institutional problems (cannot be implemented, the rules cause legal deadlock and hampering the performance of state institutions concerned).

The novelty stated in this Constitutional Court ruling shows a different approach from previous times. In case Number 116/PUU-XXI/2023, the petitioner submitted a theory-based method or argument to determine the parliamentary threshold. The Constitutional Court considered that the parliamentary threshold was a method to simplify political parties that were followed by many parties. Based on this, it can be ascertained that the Constitutional Court's decision considers the parliamentary threshold cannot be said to be something that is forbidden, especially when applied to countries that adhere to multi-party.

The decision of the Constitutional Court Number 116 is related to the absence of rationality in the application of the number or percentage contained in the Election Law. Based on the search of the Academic Paper of the 2016 Election Bill made by the Government, the theory or basis for making parliamentary threshold decisions does not exist. The Academic Paper only discusses the importance of setting parliamentary thresholds. In addition, the government's answer to the judicial review of the Election Law also does not explain the theory or method used in making decisions regarding parliamentary thresholds.²²

The theory or study underlying the imposition of numbers on parliamentary thresholds is needed, because there are impacts arising from the existence of these parliamentary thresholds. The determination of the parliamentary threshold number that is not based on adequate methods and arguments will give rise to *Disproportionality* the number of seats in the House of Representatives with valid votes nationwide. The existence of a parliamentary threshold in fact causes many voter votes that cannot be converted into seats in the House of Representative. Based on this, the Constitutional Court then considered that there were things that hurt the meaning of people's sovereignty, the principle of electoral justice, and fair legal certainty for all election contestants, including voters who used the right to vote.

The threshold followed by Law Number 7 of 2017 is 4%, requiring a separate academic study. This means that if academically the parliamentary threshold can be maintained, then the 4% figure may still be usable. The Constitutional Court does not mandate to use any particular method in taking a decision on parliamentary thresholds. Therefore, the framer of the law is given the freedom to use any theory as

²² Denico Doly, 2024, Putusan Mahkamah Konstitusi tentang Ambang Batas Paralemen, Jurnal Info Singkat, Kajian Singkat Terhadap Isu Aktual dan Strategis, Volmen XVI, No. 51/i/Pusaka/Maret 2024, p.3

a basis for making decisions, parliamentary thresholds as long as they can be maintained. This is in accordance with the Constitutional Court Decision which did not grant the petitioner's request to point to a certain method of making parliamentary threshold decisions.

Furthermore, in the ruling, there was an order from the Constitutional Court to the framer of the law, to fix the amount of the parliamentary threshold, with a number of signs. First, changes to parliamentary thresholds are designed to be used on an ongoing basis. Second, changes must maintain the proportionality of the proportional electoral system, especially to maintain the large number of votes that cannot be converted into seats. Changes in the size of the parliamentary threshold must also be placed in order to realize the simplification of the number of political parties. In addition, changes to the parliamentary threshold must involve all groups who have concerns about the implementation of elections by applying the principle of public participation, which means including political parties participating in elections that do not have representation in the House of Representative. Changes must be completed before the start of the 2029 elections.

Table 5
Novelty in Constitutional Court Decision Number 116/PUU-XXI/2023

Nu.	Constitutional Court Ruling on Parliamentary Threshold Before Decision Number 116	Novelty on Constitutional Court Decision Number 116
1.	That the Parliamentary Threshold is an Open Law Policy chosen by the framer of the law that cannot be tested by the Constitutional Court or in other words the Legal Policy is Constitutional	Open Law Policy over Parliamentary Threshold of 4% declared conditionally unconstitutional Because there is no rationality basis in the imposition of magnitude. Violating the principle of disproportionality, the principle of popular sovereignty, the principle of justice.
2.	The applicant's application is declared rejected or not accepted	The Petitioner's application was granted in part
3.		Orders to amend laws relating to parliamentary thresholds with the basis of rationality

Source: Processed from Constitutional Court Decision Number 116

This Constitutional Court Decision number 116 applies to the 2029 general election, and does not apply to the 2024 General Election, which is actually very likely to be applied. But this is understandable, because the Constitutional Court Decision Number 116 ordered the framers of the law to make improvements and in no way stated that this parliamentary threshold was unconstitutional. This is

different from case number 90/PUU-/2023 whose decision is valid since it was determined by the Court, and can apply to the 2024 presidential election.

The implication of the decision of the Constitutional Court Number 116, especially regarding parliamentary threshold, may be that later the Academic Paper of the Bill of Amendments to Law Number 17 of 2017 concerning parliamentary thresholds, finds an argumentative method or way so that the imposition of parliamentary threshold numbers is found. If they can find a reason for the imposition of the parliamentary threshold in Turkey which is 10 percent or in Germany which is 5 percent, then it is very likely that the framers of the law will actually raise the parliamentary threshold to higher than 5 percent. This is very likely to happen, if you look at the developments that exist after decision number 116 was read.

Several political parties have responded to the Constitutional Court decision Number 116. As it could not accept the decision of the Constitutional Court Number 116/OUU-XXI/2023 which canceled the 4% parliamentary threshold provision for the 2029 general election, and ordered the framers of the law to revise the 4% parliamentary threshold formulation, the Nasdem party and the Working Group party actually proposed that the amount of the parliamentary threshold raised to 7%. National Democratic Party Central Leadership Council Chairman Sugeng Suparwoto wants the parliamentary threshold to be raised from 4 percent to 7 percent in the 2029 election. The existence of nine parties in the People's Representative Council is ideal. Parties in Indonesia have no significant differences from an ideological aspect. According to him, the discourse of raising the parliamentary threshold is important so that the patai in parliament can be simplified. Ideally, 9 parties with various separation of ideas, only 9 parties are enough. Deputy Chairman of the Working Group Party, Melchias Markus Mekeng stated that the size of the new parliamentary threshold must go through a comprehensive discussion. Many factors must be considered in deciding the size of the parliamentary threshold that is considered ideal to apply to the future. So far, the magnitude has always varied. Both proposals below 4% and above have been popping up for a long time. In contrast to the National Democratic Party, Democratic Party Upper House Member Syarif Hasan disagrees with the National Democratic Party. If there is a view to improve again, you should not jump to 7%. In principle, the application of the threshold is to get political party representation in a more democratic and quality parliament. According to him, the parliamentary threshold of 4 percent implemented today is very moderate.

As an illustration of the disproportionality postulated by the Constitutional Court, it can be seen as follows; In the 2009 election, when the parliamentary threshold implemented 2.5 %, the valid votes were 104,099. 785, votes represented in the House of Representatives 85,061,132 (81.71%), and unrepresented/wasted votes 19,099,785 (18.29%). However, the results of the 2014 election gave rise to an interesting number, because after the parliamentary threshold was raised to 3.5 percent, it made the unrepresented votes only 2,968. 844 or only 2.37%. The votes represented in the House of Representative amounted to 122,003,647 votes (97.73%), out of a total of 124,972,491 valid votes. When viewed from the results of the 2019 election, the number of wasted votes rose again, when parliamentary threshold was raised to 4%, which is 13,595,142 votes (9.71%). The votes converted into seats in the house of representative amounted to 126,376,118 votes (90.29%) of the total valid votes amounting to 139,971,260 votes. Likewise, the results of the 2024 legislative election, which resulted in 17,304,303 wasted votes (11.40%).

Table 6
Disproportionality of Parliamentary and Non-Parliamentary Votes

Parliamentary Threshold	Election	Valid Voice	Votes in the House of Representatives	Party	Non House of Representatives	Party	Information
2,5 %	2009	104.099.785	81.128.262 81.71 %	9	22.971.523 18.29 %	29	People's Conscience Party successfully entered
3,5 %	2014	124.972.491	122.003.647 97.73 %	10	2.968.844 2.37 %	2	The National Democratic Party made it into the House of Representatives
4 %	2019	139.971.260	126.376.118 90.29 %	9	13.595.142 9.71 %	5	People's Conscience Party fails to enter the House of Representatives
4 %	2024	151.796.631	134.492,328 88.60 %	8	17.304.303 11.40 %	10	United Development Party fails to enter House of Representatives

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Source: compiled and processed from General Election Results by the General Elections Commission

Another implication of Constitutional Court Decision Number 116/PUU-XXI/2023 is that it also relates to the issue of thresholds that are not related to parliament, but the threshold for political parties to be able to nominate pairs of presidential and vice presidential candidates²³. As far as the petitioner's application for parliamentary threshold testing, the threshold test for presidential candidacy always leads to the Constitutional Court's decision stating that it is an open legal policy that cannot be interfered with by the Constitutional Court (the Constitutional Court's decision in the form of the applicant's application is not accepted or rejected). If analogous to the case of Case 116/PUU-XXI/2023, then of course it can be traced whether the determination of the 20% threshold for a political party or a combination of political parties to have the right to nominate a pair of presidential and vice presidential candidates, also has a rationality basis? Doesn't this provision result in injustice and violate the sovereignty of the people and oppose the 1945 Constitution? Doesn't this provision clearly lead to the phrase in article 6A paragraph (2) which reads.... The pair of presidential and vice presidential candidates is proposed by a political party or a combination of political parties participating in the general election before the general election.

Isn't it impossible for a contestant to vote, which is a party participating in the new election, to obtain his constitutional right to propose a pair of presidential and vice-presidential candidates, because the political party has no seats in parliament at all? The rationality that overrides the constitutional right of new political parties to propose pairs of presidential and vice presidential candidates is not found in the academic text of Law Number 17 of 2017. Likewise, there is no rationality of the Academic Manuscript in the imposition of a 20% threshold for proposing presidential and vice presidential candidates.

III. CONCLUSION

From the description above, it is concluded that Constitutional Court Decision Number 116/PUU-XXI/223 has made updates and changes. The Constitutional Court's decision so far on the Open Legal Policy of Imposition of 4% Parliamentary Threshold, which has always led to the Constitutional Court's stance that the use of

²³ M. Husnu Abadi, 2014, Presidential Threshold Sebagai Instrumen Proteksi, Jurnal Mahkamah, FH UIR, Volume 6 Number 1, April 2014, p. 29.

parliamentary threshold instruments for the purpose of simplifying parties as constitutional and therefore not the authority of the Constitutional Court to test it, is now being updated. The Constitutional Court did not declare the 4% parliamentary threshold unconstitutional, but the imposition of a parliamentary threshold that does not exist has any argument, or the methods used for it are not found in academic texts at all, thus violating the principle of popular sovereignty, the principle of justice and causing disproportionality. The order to the framers of the law to improve academic texts that support the principle of proportionality, the principle of popular sovereignty and the principle of justice, is a condition that must be fulfilled. Especially for the threshold for proposing political parties for the nomination of presidential and vice presidential candidates, which is regulated in Law Number 7 of 2017, it is very open to re-examination applications based on the novelty in the Constitutional Court decision Number 116/PUU-XXI/2023. This is because the imposition of a threshold for proposing presidential and vice presidential candidate pairs with a magnitude of 20% is also not found rational in the academic text of the Law.

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