

REDESIGNING THE ELECTION SYSTEM FOR MEMBERS OF THE HOUSE OF REPRESENTATIVES IN INDONESIA AS AN EFFORT TO REALIZE CITIZENS' CONSTITUTIONAL RIGHTS

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ABSTRACT

The research objective was to determine the current legislative electoral system arrangements in Indonesia and what kind of legislative electoral system can guarantee citizens' constitutional rights. The research method is normative using a statutory approach and a conceptual approach to analyze problems qualitatively. The results showed that Indonesia's legislative electoral system today is an open proportional system combined with a formula "based on most votes". This system, whether consciously or not, has the potential to injure the constitutional rights of citizens and political parties because the system is not yet in accordance with the mandate of the 1945 constitution. The results showed that using an open proportional system based on the majority of votes can at any time nullify or ignore the votes of minorities and women. Therefore, it is better if the electoral system for Indonesian parliament (DPR) members should be redesigned by adopting an electoral system like Germany and New Zealand, namely the mixed-member proportional (MMP System). Practically, this system is more able to provide constitutional guarantees for citizens, political parties, and the continuity of democracy.

Keywords: Election, Electoral System, Constitutional Rights, Affirmative Action, Indonesia.

INTRODUCTION

The constitutional rights of citizens are citizens' rights protected by the constitution. The most basic human rights of citizens in the political field are voting and being elected. The 1945 Constitution as the Indonesian constitution stipulates that sovereignty is in the people's hands and is exercised according to the constitution. It implies that citizens as holders of sovereignty have the right to determine their leaders and representatives through elections. In this case, the selection of the electoral system used must guarantee the constitutional rights of citizens as holders of sovereignty. The constitutional rights of citizens to be treated fairly in elections have been explicitly regulated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that everyone has the right to recognition, guarantees, protection and legal certainty that is just and equal treatment in before the law. Furthermore, Article 28D paragraph (3) states that every citizen has the right to equal opportunities in government.

The constitutional change from the New Order government (1966-1998) to the reformation era (1998-present) was initiated by making changes to the Constitution (Wisnaeni,

2020). Based on the 1945 Constitution of the Republic of Indonesia, a special article regulates the election, namely Article 22 E. This article explains that elections are held directly, publicly, freely, secretly, honestly and fairly every five years. This provision is the basis for the implementation of elections in Indonesia. At the beginning of the implementation of elections in the reform era there was debate among political parties, political experts, and even constitutional law experts, regarding what kind of electoral system design was appropriate to use. It was a proportional electoral system with an open list proportional representation (PR) or a closed list PR. However, since the reformation in practice, Indonesia tends to use open list PR in the 2004-2009-2014 elections until the last election in 2019.

Simultaneous elections were held in 2019 under the auspices of Law No.7 of 2017 concerning Elections, even though the Law uses an open proportional system as explicitly stated in the provisions of Article 168. However, in practice, the design of the electoral system chosen by Indonesia without realizing it can injure citizens' constitutional rights and the constitutional rights of political parties. For example, the case of the legislative elections in South Sumatra. There is a candidate for national parliament (DPR) member who gets the most votes in the electoral district. However, the person concerned cannot be sworn in because he has passed away. According to KPU Regulation No. 4 of 2019, for a candidate for the legislative member who dies but obtains the first most votes will be replaced by the second most votes' winner. However, the winner of the second most votes may come from a different political party bearing. So, that it could be detrimental to the party that carries the candidates who get the most votes first and die. For this reason, the KPU Regulation was canceled by the Supreme Court through Decision Number 57/P/Hum/2019 (Dahoklory & Wisnaeni, 2020). The Supreme Court in its legal considerations states that, if there is a candidate for DPR member who gets the most votes in an electoral district but cannot be inaugurated because of his death, then the legal vote concerned should be the discretionary authority of the political party leadership to make a replacement. The research objective was to determine the current legislative electoral system arrangements in Indonesia and what kind of legislative electoral system can guarantee citizens' constitutional rights.

LITERATURE REVIEW

Election is one of the benchmarks for a country to be categorized as a state of democracy. The substance of elections is nothing but a method or method used to convey the people's sovereignty with the sole purpose of realizing the goal of the state. One of the main objectives of holding elections is to elect representatives of the people who will later act for and behalf of the people as a whole. Indonesia's long journey of elections began with the first elections held during the old order government, which is 10 years since Indonesia declared its independence. The first election was held in 1955, apparently could not be followed by implementing elections every 5 years as mandated by the Constitution. The constitutional situation was not possible, namely the existence of various threats both from outside and within that disintegrated the nation. The next election could only be held again during the New Order government, namely in 1971, 1982, 1987, 1992, 1997. During the New Order government there were 2 political parties participating in the election, namely the Indonesian Development Party (PPP) and the Indonesian

Democratic Party (PDI) and 1 functional group (Golkar). However, during the election of the New Order era, the Golkar party always came out as the absolute winner so that there was a tendency for party oligarchy (Effendi, 2016; Ristyawati & Saraswati, 2018). The existence of various abuses carried out during the New Order government resulted in demands for reforms in all areas of the life of the nation and state. The history of Indonesian constitutionality notes that in 1998 Indonesia entered a new era of government, namely the reform era (Wisnaeni & Herawati, 2020). However, the legislative electoral system allied in Indonesia at this time is still very far from ideal (Herawati & Sukma, 2019; Diamantina & Tyesta, 2019). As a result, it has unconsciously injured the constitutional rights of citizens, political parties and has the potential to damage the foundations of democracy in the future because the electoral system regulation is still not in accordance with the mandate of the 1945 Constitution. It gives all eligible citizens the same vote and be elected (Utami et al., 2019; Silalahi et al., 2020; Ramadhan, 2021).

The problems in the current legislative electoral system are illustrated by the design of Law No. 7 of 2017, among others: First, Law No. 7/2017 too closes the space for political parties in the context of a democratic country based on the constitution. Meanwhile, the constitutional design of Article 22E paragraph (3) provides constitutional guarantees for political parties to become election participants. The original intent of the 1945 Constitution, the drafters have never thought to negate the function of political parties in determining a person's electability to become a member of the legislature. Because the drafters thought the proportional electoral system for the election of national/local parliament (DPR/DPRD) members of the 1945 Constitution was to place political parties in strategic positions. The people are only allowed to vote for political parties. That is why it is formulated in the Constitution that the election participants for DPR/DPRD members are political parties.

Second, the existence of Parliamentary institutions causes the unclear function of representation. Asshiddiqie (2006) argued that the DPR has a political representation function. It means that on the one hand the members of the DPR represent the aspirations and interests of certain political parties. On the other hand, the DPR members are elected directly by the people, not by political parties. Thus, the aspirations and interests of the people they represent should be the people in general, not political parties. Besides, parliamentarians' unclear representation function has implications for the procedure for the interim replacement of DPR/DPRD members or what is often called the recall system. Juridical, Article 240 of the MD3 Law provides room for political party leaders to recall DPR members. Logically, if the people elect a legislative candidate, the people should also be involved in the recall process for DPR/DPRD members. Therefore, Asshiddiqie (2006) argued that the party recall system should be eliminated and replaced with a constituent recall system.

Third, the combination of an open proportional system based on the majority of votes, is treated to an inappropriate or unreasonable parliamentary threshold. Logically, if a candidate has obtained the highest number of votes in an electoral area, then the candidate concerned must automatically be declared the winner or the elected candidate in that electoral district. However, the party that carries the legislative candidate in question must meet the parliamentary threshold figure. For example, person A gets the most votes in electoral A, but unfortunately, he cannot be appointed because the supporting party has not reached the parliamentary threshold. It means that implicitly the presence of PT norms has eliminated the principle of "most votes". At the

same time, whether the legislators realized it or not, the formulation of PT norms in the Election Law had killed the people's sovereignty. Therefore, the open list proportional system logic with the most votes is not quite right if combined with a parliamentary threshold. PT logic is only suitable if the electoral system is a closed list proportional. When the people elect a certain political party, it is very appropriate that the relevant political parties are still required to obtain the number of supports, what percentage of the valid votes are to occupy a parliamentary institution.

Fourth, the logic of determining the elected legislative candidates based on the most votes in the proportional electoral system has unwittingly been confused with determining the elected candidate in the district system. For example, in the practice of electing members of the House of Representatives in the United States and Australia, it determines that a majority vote must support each candidate for member of the representative institution. Or in other languages, the determination of the elected candidate should be based on the majority votes in the electoral district concerned. It means that the current electoral system for DPR/DPRD members in Indonesia is not pure in adopting an open list proportional system. The current system still uses a formula usually practiced in the district system. In a proportional system, the determination of the elected candidate as a member of a representative institution is always combined with two propositions/formulas, and they are quotas and Parliamentary Threshold (PT). Quota in an electoral district a legislative candidate must need at least 700 thousand votes to obtain one seat; the quota provision is practiced in the Australian Senator electoral system. Almost all countries that use a proportional system combine with the parliamentary threshold requirements. For example, Germany and New Zealand set the PT rate at 5 percent. Thus, the logic of determining the votes of elected candidates based on the majority of votes is rarely used in countries that use a proportional electoral system.

Fifth, an open list proportional system based on majority votes could nullify women's representation in representative institutions. For example, the Election Law stipulates that each political party can only be designated as a participant in the election for members of DPR/DPRD if at least 30% female candidates are included. Without realizing it when the formulation of norms that determine candidates' determination based on "most votes" can eliminate women's representation in the parliamentary institution. In every electoral district, there are women candidates, but it cannot guarantee that female candidates will be elected as members of parliament (Harjanto & Ramadhan, 2019). If only one or two female candidates were elected based on the majority of votes, the detrimental effect is if only one or two female candidates had met these conditions. Automatically, the 30% quota for women's representation in the parliament would not have been possible. Simultaneously, without realizing it by the creators of the Election Law, such designs have hurt the spirit of the original intent formulation of the 1945 Constitution. The formulation of Article 22E of the 1945 Constitution, however, does not explicitly state what electoral system to use, the drafters the 1945 Constitution mandates that legislators in the future be able to design an electoral system that is able to accommodate interest groups such as women who want to become members of the parliamentary institution (Pinilih, 2020).

RESEARCH METHODS

This research is normative, using a statutory approach by examining all laws and regulations relating to the legal issues studied, especially Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, Law No.7 of 2017 concerning Elections, KPU Regulation No. 4 of 2019, Supreme Court through Decision Number 57/P/Hum/2019. This study also used a conceptual approach which departs from doctrines, legal principles and judges' decisions needed to explain the issues to be studied.

This research is a novelty because it has significant differences with several previous studies, national researchers and international researchers. Pahlevi (2014) focuses on the discussion of the dynamics of transitional election system in Indonesia. Riwanto (2014) examined the incompatibility of election system regulatory principles with the presidential government system in Indonesia, while Simarmata (2017) focused on finding solutions to doubts about the right election system in Indonesia. Meanwhile, there is also international research such as that conducted by Smrek (2020), which focuses on female legislators benefit from incumbency advantage by taking the discussion of incumbent renomination in a flexible-list-PR system, while Oscarsson & Rosema (2019), focuses on the consideration set models of electoral choice. For this reason, this study focuses on two main issues, namely how the current legislative election system is organized in Indonesia, and what kind of legislative electoral system can guarantee the constitutional rights of citizens.

RESULT

Regulation of the Legislative Election System in the Design of the Election Law

Baidowi (2018), as a member of the DPR legislative body (Special Committee for the 2017 Election Bill) noted that there are at least four crucial issues that are in direct contact with the legislative elections. They are the electoral system; voice conversion method; parliamentary threshold and allocation of electoral seats (Baidowi, 2018). Regarding the crucial issues above, debates that arise in the trial are always colored with each party's interests.

For example, the debate in choosing an electoral system that suited the Indonesian people's needs at that time, at least the debate between factions in parliament was divided into two groups. First, groups of small parties wish to maintain an open list proportional system, because according to them the system is more democratic than a closed list proportional system. Second, big party groups like to want to implement a closed list proportional system, because according to them the system is more in accordance with Article 22E paragraph (3) of the 1945 Constitution, besides this system can limit artists/celebrities, comedians, etc. the political world because these professions have not followed party regeneration. Meanwhile, the government has taken a middle ground by proposing a limited open proportional system, this system is the same as the electoral system implemented in 2004.

After going through a long debate, in the end the four crucial issues above were agreed upon, and the agreement was contained in the formulation of Law No. 7 of 2017, among others

consistently using an open list proportional system, as formulated normatively in Article 168 paragraph (2) of Law No. 7 of 2017, changing the conversion method of votes, from quota to divisor method, is explicitly formulated in Article 420 letter b of Law No. 7 of 2017, and increasing the number of Presidential Threshold (PT) from 3.5% to 4% as stated in the provisions of Article 414 paragraph (1) of Law No. 7 of 2017. It is also needed that the elected candidates' determination is not based on a specific serial number or quota, but based on the most votes. The normative provisions are contained in Article 422 of Law No. 7 of 2017, and increasing the number of members by 15 members (a total of 575 members) is explicitly stated in Article 186 of Law No. 7 of 2017.

Related to the elected candidate's determination based on "most votes", this norm was born from the Constitutional Court Decision No. 22-24/VI/2008. In its consideration, the Constitutional Court confirmed that the DPR/DPRD member election system is an open list proportional system in which the determination of the elected candidates is based on the majority of votes. For example, there are four contested seats in an electoral district, so each candidate who gets the first, second, third, and fourth most votes is automatically determined as the winner. In order to prevent this from happening in the future there is a recall because one of the four candidates concerned may have died, was sentenced to 5 years in prison, and so on. So, the KPU is obliged to provide replacement candidates, namely by determining the winner of the greatest number of votes in the fifth, sixth, seventh, eighth, and so on. Hence, to prepare replacement candidates and so on, the KPU is obliged to form a KPU Regulation which serves as an implementing guideline.

Re-Designing the Legislative Election System to Ensure Citizens' Constitutional Rights

Seeing the problems in the design of the current legislative election system, it can be said that in fact it is still far from ideal because it contradicts the principle of fairness as referred to in Article 28D paragraph (1) of the 1945 NRI Constitution which states: *"Everyone has the right to recognition, guarantee, and protection and fair legal certainty and equal treatment before the law deviates from Article 28D paragraph (3) which states: every citizen has the right to equal opportunities in government."* So, the question that arises is what kind of indicators the design of the legislative electoral system is in accordance with the constitution's mandate? This question deserves to be raised because it is the key to solving the problems previously discussed. To answer this question, some indicators of a constitutional electoral system are installed. First, the design of the electoral system must not harm the principles of election as mandated by Article 22E of the Constitution, namely directly, publicly, freely, secretly, honestly and fairly, and periodically. Secondly, the electoral system's design must be able to maintain a balance between the people's constitutional rights and the constitutional rights of political parties. Thirdly, the design of the electoral system should guarantee the representation of minority groups/women in people's representative institutions.

Related to the three indicators, only one electoral system approaches or even fulfills these indicators, namely the Proportional Election System with Mixed Member Proportional variants (herewith abbreviated as the MMP system). First, concerning the electoral system design indicators, the MMP system does not violate these principles of direct, fair and secret election.

For example, there is no need to worry the principle of direct election because actually in this system, the people are even more profitable because the people will be given two ballots, one of which is aimed at selecting candidates who will represent their interests. The other chooses a particular political party that will represent their interests. That way, the people have alternatives in voicing their aspirations and interests. Besides, if the first ballot which is intended to elect a particular candidate but the person concerned does not succeed in getting a seat in the parliament because it does not get a majority vote, at the same time the second ballot which is aimed at electing a certain party succeeds in obtaining a seat in the parliamentary institution. It means that the people still hope to channel their aspirations and interests through the political parties they have chosen.

Second, concerning the electoral system indicators that can maintain a balance between the people's constitutional rights and political parties' constitutional rights. It should be emphasized that only the MMP system can provide assurance and certainty for this. In one side, using an open list proportional system has negated the role of political parties as a pillar of democracy as mandated by the original spirit of the formulation of Article 22E paragraph (3) of the 1945 Constitution. On the other side, a closed list proportional system cannot adapt to the times and in particular developments related to the principle of people's sovereignty. Without being based, at the same time, this system has provided the clarity of the representation functions. For example, there are 560 members of parliament, then on the one hand, half (280 members) represent the interests of the people according to their respective regions. On the other hand, the other half (280 members) represent society in general and in particular represents the interests of the political parties (Zulfan et al., 2021).

Third, concerning the last indicator, it must be emphasized that only the MMP system can accommodate minority groups/women as intended/mandated by the drafters of the 1945 Constitution. Within reasonable limits of reasoning, for example when voters use the first ballot to choosing the candidate that they want, without realizing it, when determining seat acquisition, none of the female candidates won a seat in the parliament because they did not get a majority vote. However, in this chance, the second ballot can guarantee women's representation in the parliament. For example, 30% representation, as long as a rather strict regulation is made, becomes a guideline for political parties in their efforts to send qualified female cadres to parliament. The MMP system has been successfully implemented by other countries such as Germany, New Zealand, Mexico, and others (Tanjung et al., 2020; Boucek, 2003; Reddy, 2005). However, the MMP system is considered difficult for the community to understand. However, the government should conduct socialization and education first before implementing this system.

CONCLUSION

The regulation of the legislative electoral system currently implemented by Indonesia is an open list proportional system combined with a formula based on the "most votes". It means that, if the "first" majority vote winner cannot be inaugurated for certain reasons that can be justified according to law, then the person concerned must be replaced by the winner of the "second" most votes and so on. However, the Supreme Court has a different opinion in its

decision Number 57/P/HUM/2019. To replace the legislative candidate concerned is the discretionary authority of the political party's leadership. So, it can be said that the current electoral system is still far from ideal, because its implementation is not in accordance with the mandate of the 1945 Constitution, among others, the open proportional system has the potential to nullify women's representation in parliamentary institutions.

For this reason, in the future the Indonesian state must have the courage to change the proportional electoral system with other variants, namely the Mixed Member Proportional variant (abbreviated as the MMP system). In simple terms, this system requires that when elections occur, each voter is given "two ballots", meaning one letter to elect a political party nationally, and one letter to have a representative according to their electoral district. That way, the people will increasingly have choices to prevent the votes from being wasted. Simultaneously, the position of people's representatives will be visible.

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