

# Judicial Restraint Law Politics of the Constitutional Court Against Parliamentary Threshold: A Comparison of Indonesia and Philippines

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Received: February 18, 2025	<b>The Purpose of this Research</b> is to examine 1) Legal construction of the Judicial Review of Parliamentary Threshold No. 44/PUUXV/2017 and No. 62/PUU-XXII/2024 on Judicial Restraint of Constitutional Court Judges in Indonesia and 2) Legal politics of the regulation and application of parliamentary thresholds in the Philippines. <b>The Research Method</b> was a literature review in the form of normative research, which employed the qualitative method. The research approach was in the form of legislation using the statute approach, namely Constitutional Court Decisions No. 44/PUUXV/2017 and No. 62/PUU-XXII/2024 on Parliamentary Thresholds. It applied the comparative approach by comparing the parliamentary thresholds of Indonesia and the Philippines. Then, it also employed the conceptual
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approach, namely the theory of legal politics, the theory of judicial restraint, and the theory of the independence of the judiciary and analytical tools.

**The Results of the Research** found: 1). Legal political construction of the Judicial Review of Parliamentary Threshold No. 44/PUUXV/2017 and No. 62/PUU-XXII/2024 on the Judicial Restraint Judge of the Constitutional Court of the Republic of Indonesia, namely: Constitutional limitation, policy limitation, doctrine limitation, and simplifying the multi-party system through the simplification of political parties, i.e., reducing the number of political parties. 2) Concerning the legal politics on the regulation and implementation of parliamentary threshold regulations in the Philippines, this country does not have a Constitutional Court. Thus, one cannot file a judicial review of election laws in the Philippines. Therefore, the Philippines is only subject to and obeys the regulations of the Philippine Constitution, which regulates the parliamentary threshold. Meanwhile, the implementation of the Philippine parliamentary threshold refers to the rules of the 1987 Constitution of the Republic of the Philippines, which applies a parliamentary threshold of 20%, by dividing the total list of voters to obtain one seat in parliament.

**Study Application:** In Judicial Restraint Law Politics of the Constitutional Court Against Parliamentary Threshold: Through Decision No. 62/PUU-XXII/2024, the Indonesian government carried out an open legal policy on the presidential threshold provision to remove the parliamentary threshold. The Constitutional Court judge argued that there was an imbalance between the older (larger) political parties and the newer (smaller) political parties. Thus, small parties could be allowed to nominate presidential candidates, which follows the principle of equality in democracy guaranteed by the 1945 Constitution. Meanwhile, in the Philippines, the judicial restraint law politics of the constitutional court against parliamentary threshold refers to the 1987 Constitution of the Republic of the Philippines, which is 20%.

**Usefulness of Research:** First, academically, it is hoped that this research can become a reference for future research regarding the judicial restraint law of the constitutional court against the parliamentary threshold, a comparison between Indonesia and the Philippines. Second, practically, in the judicial restraint, the threshold of the Indonesian parliament, judges can provide considerations in making decisions without intervention from any party, so that they can uphold the dignity of Constitutional Court Judges and create just decisions. Then,

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the application of the Philippine parliamentary threshold must comply with the rules of the 1987 Constitution of the Republic of the Philippines.

**Keywords:** Judicial Restraint, Constitutional Court, Parliamentary Threshold.

#### ABSTRAK

***Tujuan penelitian** ini adalah untuk mengkaji 1) Konstruksi hukum Judicial Review terhadap Parliamentary Threshold No. 44/PUUXV/2017 dan No. 62/PUU-XXII/2024 tentang Judicial Restraint Hakim Mahkamah Konstitusi di Indonesia dan 2) Politik hukum pengaturan dan penerapan ambang batas parlemen di Filipina.*

***Metode penelitian** yang digunakan adalah kajian pustaka berupa penelitian normatif dengan metode kualitatif. Pendekatan penelitian berupa legislasi dengan menggunakan pendekatan perundang-undangan, yaitu Putusan Mahkamah Konstitusi No. 44/PUUXV/2017 dan No. 62/PUU-XXII/2024 tentang Parliamentary Threshold. Penelitian ini menggunakan pendekatan komparatif dengan membandingkan ambang batas parlemen Indonesia dan Filipina. Kemudian, penelitian ini juga menggunakan pendekatan konseptual, yaitu teori politik hukum, teori judicial restraint, serta teori independensi peradilan dan perangkat analisisnya. Hasil Penelitian menemukan: 1). Konstruksi politik hukum Perkara Judicial Review Parliamentary Threshold No. 44/PUUXV/2017 dan No. 62/PUU-XXII/2024 tentang Kekangan Hakim Mahkamah Konstitusi Republik Indonesia, yaitu: pembatasan konstitusional, pembatasan kebijakan, pembatasan doktrin, dan penyederhanaan sistem multipartai melalui penyederhanaan partai politik, yaitu pengurangan jumlah partai politik. 2) Mengenai politik hukum pengaturan dan pelaksanaan ketentuan ambang batas parlemen di Filipina, negara ini tidak memiliki Mahkamah Konstitusi. Dengan demikian, seseorang tidak dapat mengajukan uji materi undang-undang pemilu di Filipina. Oleh karena itu, Filipina hanya tunduk dan patuh pada ketentuan Konstitusi Filipina, yang mengatur ambang batas parlemen. Sementara itu, penerapan ambang batas parlemen Filipina mengacu pada aturan Konstitusi Republik Filipina tahun 1987, yang menerapkan ambang batas parlemen sebesar 20%, dengan membagi seluruh daftar pemilih untuk memperoleh satu kursi di parlemen.*

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**Aplikasi Studi:** Dalam Politik Hukum Pembatasan Yudisial Mahkamah Konstitusi terhadap Ambang Batas Parlemen: Melalui Putusan No. 62/PUU-XXII/2024, pemerintah Indonesia menjalankan kebijakan hukum terbuka mengenai ketentuan ambang batas presidensial untuk menghapus ambang batas parlemen. Hakim Mahkamah Konstitusi berpendapat bahwa terdapat ketidakseimbangan antara partai politik yang lebih tua (lebih besar) dan partai politik yang lebih baru (lebih kecil). Dengan demikian, partai-partai kecil dapat diizinkan untuk mengajukan calon presiden, yang mengikuti prinsip kesetaraan dalam demokrasi yang dijamin oleh Konstitusi 1945. Sementara itu, di Filipina, politik hukum pembatasan yudisial Mahkamah Konstitusi terhadap ambang batas parlemen mengacu pada Konstitusi Republik Filipina tahun 1987, yaitu sebesar 20%.

**Kegunaan Penelitian:** Pertama, secara akademis, penelitian ini diharapkan dapat menjadi referensi bagi penelitian selanjutnya mengenai hukum pembatasan kekuasaan kehakiman Mahkamah Konstitusi terhadap ambang batas parlemen, perbandingan antara Indonesia dan Filipina. Kedua, secara praktis, dalam pembatasan kekuasaan kehakiman, ambang batas parlemen Indonesia, hakim dapat memberikan pertimbangan dalam mengambil keputusan tanpa intervensi dari pihak mana pun, sehingga dapat menjunjung tinggi martabat Hakim Mahkamah Konstitusi dan menciptakan putusan yang adil. Selanjutnya, penerapan ambang batas parlemen Filipina harus sesuai dengan aturan Konstitusi Republik Filipina tahun 1987.

**Kata Kunci:** Pembatasan Kehakiman, Mahkamah Konstitusi, Ambang Batas Parlemen

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## INTRODUCTION

In the process of their implementation, the contestation of the presidential and vice-presidential general election, as well as the legislative elections in 2024, which were held simultaneously, received reflections and notes that were considered to have violated democratic values and principles. Thus, there needs to be legal improvement and enhancement regarding this matter. Political actors and election organizers experienced new thought dynamics as some election activists submitted a request for judicial review to the Constitutional Court.

As explained in Article 1, numbers 27 to 30 of Law No. 7 of 2017 on Elections, those who can participate in the elections are the presidential candidates and vice-presidential candidates, as

well as legislative election participants who are supported by political parties and political party coalitions. Article 222 states that candidate pairs are proposed by political parties or coalitions of political parties participating in the election that meet the requirements of obtaining at least 20% (twenty percent) of the total number of Legislative House seats or obtaining 25% (twenty five percent) of valid votes nationally in the previous period of Election of Legislative Members. This impacts the election of the President and Vice President as stated in Article 6A clause (2) of the 1945 Constitution, which states that presidential and vice-presidential candidate pairs are proposed by political parties or coalitions of political parties participating in the general election before the implementation of the general election. The regulation of these two articles requires constitutional restrictions by judges.

The principle that requires judges or the court to carry out this constitutional restriction is called judicial restraint. A form of restriction by judges is that they refrain from forming new norms that are not within their authority, that can interfere with other branches of power (Maslul, 2022). The concept of judicial restraint in the Indonesian judicial system is the limitation of judges' policies to protect judges from the influence of various parties filing cases at the Constitutional Court.

As an institution that protects the constitution, the title "Guardian of the Constitution" deserves to be given to the Constitutional Court. The Constitutional Court has the authority to test the constitutionality of laws and regulations against regulations that conflict with the 1945 Constitution (Rasyid, Wantu, & Nggilu, 2020). The testing is intended to ensure that the legal rules of the law are higher than and do not conflict with the constitution (Kamis, 2014). The Constitutional Court can cancel legal regulations if they conflict with the constitution (Assiddiqie, Mohamad, & Edi, 2020).

In addition to testing laws, the Constitutional Court can dissolve political parties that are considered dangerous in the Unitary State of the Republic of Indonesia and resolve disputes over election results. In the Indonesian government system, the Constitutional Court is part of the judicial institution whose power is fully held by the President as stated in Article 4, clause 1 of the 1945 Constitution. Meanwhile, the government system in the Philippines is stated in Article 2, clause 1 of the 1987 Constitution of the Republic of the Philippines, which states that sovereignty

lies in the hands of the people and all government authority comes from the people (Kusuma, 2023).

In the Philippines, the presidential and vice-presidential elections are carried out separately, either through political parties or independently (Kawanaka, 2010, p. 90). The Philippine election mechanism uses the first-past-the-post plurality system, submitted to the Presidential Electoral Tribunal, led by the Supreme Court as the chief justice (Natasyah, 2024, p. 80). Article VI Section 2 of the 1987 Constitution of the Philippines and Article VI Section 5 No. 1 of the 1987 Constitution of the Philippines explain that members of the House of Representatives can be elected through general elections held based on region (Kuncoro & Wijiningsih, 2024, p. 17).

Meanwhile, the Republic of Indonesia regulates legislative elections in Article 19 of the 1945 Constitution, where members of the People's Representative Council can be elected through general elections. Then, Article 22C of the 1945 Constitution states that each member of the Regional Representative Council is elected through elections for a five-year term.

The limitation of the parliamentary threshold also affects the threshold for the presidential election. Previously, several studies on the threshold in general elections have been conducted. First, Isnaini and Wahyudi (2024, p. 70) conducted a study entitled “Presidential System Through the Application of Parliamentary Threshold in the 2024 General Election in Indonesia.” This was a type of normative research which employed the statutory approach on the evaluation of the parliamentary threshold. The problems studied were the pros and cons of the parliamentary threshold regulations applied to the presidential threshold. Results showed that the strengthening of the presidential threshold originated from the parliamentary threshold, with the pros and cons of the threshold implementation. Isnaini and Wahyudi (2024, p. 70) sought the need for an evaluation of the parliamentary and presidential thresholds in the democratic political system of general elections in Indonesia. Although both this previous study and the author’s current study researched the parliamentary threshold, there is a difference between the two, namely, concerning the focus of the research. The author of the current study researched the legal politics of the constitutional court's judicial restraint on the parliamentary threshold, while the previous research studied the presidential system through the application of the parliamentary threshold in the 2024 general election in Indonesia.

Second, Putri and Sofwan (2024) studied “The Form of Parliamentary Threshold and the Future of Multipartyism in Indonesia: Analysis of Constitutional Court Decision No. 116/PUU-

XXI/2023.” This was a type of normative research which examined the Constitutional Court Decision No. 116/PUU-XXI/2023. It studied the implementation of the parliamentary threshold for the upcoming election and the legal impact of the Constitutional Court Decision No. 116/PUU-XXI/2023. The results of the study show that the implementation of the parliamentary threshold does not have a significant effect on the reduction in the number of political parties in parliament as regulated in Article 414 clause (1) of Law Number 7 of 2017 on General Elections (Putri & Sofwan, 2024, p. 212). Although the author's research examines the same decision of the Constitutional Court, there are differences in the formulation of the problem. The authors of the current research examine the urgency of the judicial review of the parliamentary threshold No. 44/PUUXV/2017 and No. 62/PUU-XXI I/2024 on Judicial Restraint of Constitutional Court Judges, as well as the legal political construction of judicial restraint of constitutional court judges on the parliamentary threshold. Meanwhile, Putri and Sofwan (2024, p. 212) examined the implementation of the parliamentary threshold for the upcoming election and the legal impact of the Constitutional Court's Decision No. 116/PUU-XXI/2023.

Third, Nurman (2023, p. 80) conducted a study entitled “The Legal Review of the Implementation of the Parliamentary Threshold in the General Election.” It studied the implementation of the parliamentary threshold in the Indonesian elections and its implications. This library study employed the statutory approach and the conceptual approach. The results of the study show that the legislative members who have met the parliamentary threshold can still gain 4% of seats in parliament, while those who failed to reach the threshold but obtained support in the regions will still serve as legislators (Nurman, 2023, p. 80). There are similarities in this previous study's method as well as that of the author of the current research, although the two used different theories. In this case, the authors of the current research used the theory of legal politics and judicial restraint by the Constitutional Court judges, while Nurman only used the theory of general elections.

Fourth, Arawi and Haura (2016) studied the “Comparison of Women's Representation in the Indonesian and Philippine Parliaments.” The focus of the study was the differences in political rights of men and women in Indonesia and the Philippines. Results showed that in the legislative election in the Philippines, known as the Philippine parliamentary election, the percentage of women reached 27.96%. Meanwhile, in Indonesia, in the 2019 Election, the percentage of women

in parliament was only 17.39%. In Indonesia and the Philippines, the nomination of parliamentary members is still dominated by men, as in the patriarchal culture, women are positioned last in the parliament. This research employed library research through a comparative approach (Arawi & Haura, 2016). Although this previous study and the authors' current study have similarities in terms of carrying out a comparative approach between Indonesia and the Philippines, there are differences in the focus of the research. In this case, the authors focused on the legal politics of the Constitutional Court's judicial restraint on the parliamentary threshold of Indonesia and the Philippines.

Fifth, the study of Purnama (2019) was entitled "Parliamentary Threshold in the 2019 Legislative Election Reviewed from the Theory of People's Sovereignty." The problem studied was the application of the parliamentary threshold in Indonesian legislative elections from the perspective of the people's sovereignty theory. This thesis was qualitative research which utilized the legislative approach on the 1945 Constitution and Law No. 7 of 2017. The results of this study show that concerning people's representatives participating in general elections, the parliamentary threshold is applied to determine their size (Purnama, 2019). The fundamental difference from the authors' current study is that the authors analyze the parliamentary threshold decision rather than the application of the parliamentary threshold in the 2019 election.

The search of previous studies of the same topic shows that the authors' current research on the legal politics of the constitutional court's judicial restraint against the parliamentary threshold is unique research that offers novelty. This paper aims to analyze the judicial review of the parliamentary threshold No. 44/PUUXV/2017 and No. 62/PUU-XXII/2024 against the judicial restraint of constitutional court judges, as well as the construction of the legal politics of constitutional court judges' judicial restraint against the parliamentary threshold. The authors used the theories of legal politics and judicial restraint of constitutional court judges. This paper offers novelty as no previous study has studied and researched the judicial restraint of constitutional court judges against the parliamentary threshold.

In making its decision, the Constitutional Court requires legal principles to provide a fair decision for the disputing parties. Legal politics as a legal policy or line of policy formation and renewal of laws, which has an important role in refreshing the articles in the Law on Elections (Hamzah, 2019, p. 90). Renewal by constitutional court judges has implications for changes in the election system and participants. The constitutional court, as a court, is the last legal remedy for



judicial review of laws and election disputes, especially in the judicial review of Article 222 of the Election Law, which requires urgency and legal political construction. For this reason, the author is interested in further studying and discussing the judicial restraint law politics of the constitutional court against the parliamentary threshold and comparing it in Indonesia and the Philippines. The formulation of the author's research problems is as follows:

1. How is the construction of legal politics against the judicial review of the Parliamentary Threshold No. 44/PUUXV/2017 and No. 62/PUU-XXII/2024 on the Judicial Restraint Rights of the Republic of Indonesia's Constitutional Court?
2. How is the legal policy of the parliamentary threshold regulation and implementation in the Philippines?

## RESEARCH METHOD

This was normative legal research, which is also known as doctrinal legal research. This legal research was carried out by examining literary materials (library research) which concerned the study object, such as literary materials consisting of books, research, journals and regulations related to the problem being discussed. The approach methods which were used to answer the problem formulations were the statutory approach, the comparative approach, and the conceptual approach (Fajar & Achmad, 2019, pp. 153–154). To collect data, the authors used data triangulation. The authors analyzed the data in an inductive or qualitative manner. Then, the results of this qualitative research placed a greater emphasis on meaning rather than generalization (Sugiyono, 2010, p. 90).

This normative research employed a literature review using qualitative methods. The authors employed the statutory approach in the Constitutional Court Decision No. 44/PUUXV/2017 and No. 62/PUU-XXII/2024 on the Parliamentary Threshold. Then, the authors employed the comparative approach by comparing the parliamentary threshold and the regulation of the parliamentary threshold in Indonesia and the Philippines. Next, the authors applied the conceptual approach to the theory of legal politics, the theory of judicial restraint, and the theory of judicial independence, where they were used as analytical tools. The legal materials used in this research consisted of: (1) Primary legal materials, consisting of Constitutional Court Decision No. 62/PUU-XXII/2024 as well as related laws and regulations; (2) secondary legal materials,

consisting of works in the form of books, journals, and research articles related to the theory of judicial restraint and the theory of judiciary independence. This study aims to examine the judicial review of the Constitutional Court Decision No. 44/PUU-XV/2017 and No. 62/PUU-XXII/2024 on the Parliamentary Threshold. Then, it also aims to construct a legal policy of constitutional court judges' judicial restraint against the parliamentary threshold.

## **RESEARCH RESULTS AND ANALYSIS**

### **A. Construction of Legal Politics Against the Judicial Review of Parliamentary Threshold No. 44/PUU-XV/2017 and No. 62/PUU-XXII/2024 Against the Judicial Restraint of Constitutional Court Judges in Indonesia**

Constitutional Court judges are statesmen who have the qualifications and are experts in the field of state administration and the constitution as a whole. Their position lies between the state and citizens. When deciding cases, constitutional judges often give rise to conflicts of opinion. For Kentridge, interpretation in the constitution cannot be done arbitrarily, because it can lead to manipulation of the constitution against the decision (Manan, 2014, p. 76). Therefore, it is necessary to be careful in interpreting the applicant's application to minimize errors in making decisions in court. This applies to all courts formulated in Article 24 clause (1) of the 1945 Constitution and is emphasized in Article 2 of Law No. 24 of 2003 on the Constitutional Court. Both regulations emphasize that as an independent judicial institution, the Constitutional Court must be able to carry out trials that guarantee the enforcement of law and justice (Lamataro, Bire, & Ermalinda, 2022, p. 56)

Meanwhile, regarding the duties and functions of judges and constitutional judges as regulated in Article 3 clause (1) of Law No. 48 of 2009 on Judicial Power, it is mandatory to maintain judicial independence. In making a decision, a Constitutional Judge must emphasize the balance between justice and transparency. Constitutional Court Judges only have a limited time to decide objective cases. The Constitutional Court's decision can be interpreted broadly while prioritizing substantive justice. The decision must not be related to self-serving interests or blindly serve elite groups and stakeholders.

**a. Material Examination of Parliamentary Threshold No. 44/PUU-XV/2017 and Number 62/PUU-XXII/2024 Against Judicial Restraint of the Republic of Indonesia's Constitutional Court Judges**

The Constitutional Court has made a major contribution in providing constitutional interpretation of policies formed by legislators. Several Constitutional Court decisions show their attitude of not being involved in changing the norm. Constitutional Court Judges show an attitude of self-restraint when testing a policy that is not within their authority (Heryansyah & Nugraha, 2020, p. 71). Constitutional Court Judges must ensure that a policy formed by legislators does not conflict with the Republic of Indonesia's 1945 Constitution (Amnan, 2023, p. 55). When deciding a case, Constitutional Court judges have an attitude of judicial restraint. At certain times, Constitutional Court judges may highlight an attitude of judicial activism.

The testing of Article 222 and Article 6a clause (2) of the law in 2017 has been carried out 35 times until 2024 since its enactment. However, the author will limit the discussion of the material review of Article 222 of Law No. 7 of 2017 on Elections, namely the Constitutional Court Decision No. 44/PUU-XV/2017 and the Constitutional Court Decision No. 62/PUU-XXII/2024.

First, the applicant of the Constitutional Court Decision No. 44/PUU-XV/2017 was Habiburokhman, an advocate. The reason for applying was that Article 222 of the Election Law has not been stated in the State Gazette, and it regulates the acquisition of legislative election seats supporting the presidential election that are contrary to the presidential system. The obtainment of valid votes in the legislative election is used as a requirement for nominating presidential and vice-presidential candidates, which weakens the presidential threshold. The consideration of the applicant for a new party cannot reach 20% of seats or 25% of valid votes. Article 222 is contrary to Article 6 A clause (2), and Article 22 E of the 1945 Constitution, which limits small parties and new parties in obtaining votes of 20%-25%. Habiburokhman's application was rejected by the Constitutional Court Judge. In the Constitutional Court Decision No. 44/PUU-XV/2017, the judge argued that the applicant did not include the law number, only mentioning the Election Law or the 2017 law. The Constitutional Court Judge asked the applicant to revise his application, but the applicant argued that the application was still valid even though it did not have the intended law number. Thus, the judge considered that the formal requirements had not been met.

Second, the Constitutional Court Decision No. 62/PUU-XXII/2024 was carried out by three students of the Faculty of Law and Sharia, Kalijaga State Islamic University, Yogyakarta, in 2024, i.e., Enika Maya Oktavia, Rizki Maulana Syafei, and Faisal Nasirul Haq. The argument was that the tested Article 222 of Law No. 7 of 2017 on Elections was contrary to Article 6A clause (2) of the 1945 Constitution, which states, "The presidential and vice-presidential candidate pairs are proposed by political parties or a coalition of political parties participating in the general election before the general election is held". The regulation of this article has consequences for open legal policy for lawmakers. The applicant believes that the implementation of a presidential threshold of 20 percent in the presidential election does not follow the principles of inclusive and transparent democracy. The requirement for a threshold of 20%-25 % is a violation of the legal policy of morality, rationality, and intolerable injustice. The applicant's request for the elimination of the presidential threshold parliamentary requirement, with the elimination of a 0% parliamentary threshold for the most votes, can encourage new political parties or small parties to participate in competing to choose the best candidate.

The application from Enika Maya Oktavia, Rizki Maulana Syafei, and Faisal Nasirul Haq was granted by judges Saldi Isra, M. Guntur Hamzah, Arsul Sani, Usman Nur, Arief Hidayat, and Enny Nurbaningsih. The verdict stated that members of the legislature can revise Article 222 of Law No. 7 of 2017 by conducting constitutional engineering by considering the following matters:

1. All political parties participating in the election have the right to propose presidential and vice-presidential candidate pairs;
2. The proposal is not based on the percentage of the number of seats in the Legislative House or the national acquisition of valid votes;
3. Presidential and vice-presidential candidate pairs of political parties participating in the election can join as long as the combination of political parties participating in the election does not cause the dominance of political parties or a combination of political parties;
4. Political parties participating in the election that do not propose presidential and vice-presidential candidate pairs are subject to sanctions in the form of being prohibited from participating in the next election period; and
5. Involving the participation of all parties by implementing the principle of meaningful public participation.

However, there is a dissenting opinion from two Constitutional Justices, namely Anwar Usman and Daniel Yusmic P. Foek, who stated that the testing of the norm of Article 222 of Law No. 7 of 2017 is not *a quo* "immune" to be tested, but because there is no constitutional loss for the applicant or the Indonesian people. The testing *in casu* by *a quo* applicants and not the party who is directly harmed.

The implementation of the election always leads to pros and cons. Therefore, in some cases, the opposing party will conduct a judicial review. The party that files a judicial review application has certain political interests to be able to win the election. The parties who have an interest will try to influence the Constitutional Court Judges by leading an opinion so that their application can be accepted. Political interests from certain parties, which influence the Constitutional Court judges, can harm the dignity of these judges. Thus, the resulting decision is not based on the right argument, decreases the public trust, and gives rise to a motion of no confidence due to the partiality of the Constitutional Court's Chief Justice. If such a thing is allowed within the scope of the Constitutional Court, the Constitutional Court will lose its image as an authoritative judicial institution (Nugroho, 2016, p. 75)

Thus, in exercising their authority, Constitutional Court judges must be given limitations known as judicial restraint. The attitude of judicial restraint should be closely attached to Constitutional Court judges in the legal considerations of their decisions. James B. Thayer's book "The Origin and Scope of the American Doctrine of Constitutional Law" first introduced the concept of judicial restraint, which provides self-limitation of judges or court institutions, especially the Constitutional Court. Thus, it is only allowed to examine and decide cases that are within its authority, placing it as a negative legislator. The power to create laws is left to the legislative and executive institutions (Sari & Raharjo, 2022, p. 54). The author interprets judicial restraint as the limitation or restraint of a judge in giving a decision in a trial.

Posner conveys judicial restraint to judges in court to limit their judicial will. Or, in trying legislative cases, judges must pay attention to ethical and legal limitations (Nurhalimah, 2017, p. 33). Aligning with the previous opinion, Rebecca Zietlow defines judicial restraint as a main principle of a constitutional judge (Dramanda, 2014, p. 28). Judicial restraint, according to Aharon Barak, is the view that recognizes and respects the authorized institution in formulating a legal policy, so as not to intervene in the legal politics of the law in depth. In the context of the judicial

institution, in examining and trying a case, Constitutional Court judges may not be influenced by any party with any interest. This is so that the issued decision does not show bias towards one of the parties to the case, or is impartial. Justice Brandels explained that when trying constitutional matters, judges use several types of judicial restraint, including textual restraint, doctrinal restraint, institutional restraint, procedural restraint, originalism, and minimalism (Latipulhayat, 2017, p. 60). In trying a case, judges can anticipate the formation of new legal norms, which have not yet been regulated in positive law.

The authors conclude that judicial restraint limits judges in responding to the political interests of laws, especially cases related to general elections such as the requirements for presidential candidacy, disputes of election results, and the size of the parliamentary threshold, and separation of powers as a form of separation of powers. The purpose of judicial restraint is so that judges do not try cases outside their authority (limited jurisdiction) based on applicable laws. Furthermore, the author will analyze the urgency of a material review of the parliamentary threshold in Decision No. 44/PUUXV/2017 and No. 62/PUU-XXII/2024 regarding the Judicial Restraint of Constitutional Court Judges as follows:

- a. Constitutional Limitation. This limitation is based on norms in the constitution, which provide limitations on the authority or jurisdiction of the court. The author interprets this limitation in Article 24 clause (1) of the 1945 Constitution, which explains that the Constitutional Court has absolute authority to examine and decide at the first and final levels, and its decision is final. Article 24, clause (1) of the Republic of Indonesia's 1945 Constitution provides limited authority to the Constitutional Court so as not to interfere with other branches of power. The Constitutional Court has the authority to constitutionally accept and test statutory regulations, one of which is testing Article 222 of Law No. 7 of 2017 on Elections. Article 222 contains a parliamentary threshold of 20%-25%. The provisions of this limitation create a status quo and legal uncertainty, so that it has the potential to create a dominant coalition for the largest political party, as only two pairs of presidential election candidates are followed.
- b. Policy-based limitations (policy limitations). Limitations require judges to know the original intent of the norms being tested before interpreting it to determine the constitutionality of the norm. Decision No. 44/PUUXV/2017 on Parliamentary Threshold was rejected by judges. Meanwhile, Decision No. 62/PUU-XXII/2024 was accepted by

Constitutional Court Judges. The Constitutional Court Judges' judicial restraint on the provisions of the decision is that they can accept or reject the decision, which cannot be intervened in by any party.

- c. Limitation based on doctrines (doctrine limitation). The Constitutional Court Judges' judicial restraint must be based on the doctrine of expert opinion. Then, when deciding a case, they must implement judges' prudential principles. In the case of Decision No. 44/PUU-XV/2017 and No. 62/PUU-XXII/2024 on the Parliamentary Threshold, before giving a decision, Constitutional Court Judges considered the doctrine of expert opinion on the election during the trial. The Constitutional Court Judges carried out a careful deliberation with the panel (the prudential principle) in giving a decision on the parliamentary threshold. In decision No. 62/PUU-XXII/2024, Constitutional Court Judges' judicial restraint carried out an open legal policy on the presidential threshold provisions, accepting the applicant's request to remove the parliamentary threshold. Constitutional Court Judges accepted the applicant's request on the grounds of an imbalance between the older (larger) political parties and the newer (smaller) political parties. Constitutional Court Judges' judicial restraint aims so that small parties can nominate presidential candidates, which follows the principle of equality in democracy guaranteed by the 1945 Constitution.

#### **b. Legal Political Construction of the Constitutional Court Judges' Judicial Restraint Against the Parliamentary Threshold in Indonesia**

Historically, the Implementation of the parliamentary threshold aims to simplify political parties in Indonesia. It was finally realized after the birth of the Election Law. The simplification of political parties indeed became a very controversial issue because after the Reformation in 1998, the general election system used a multi-party system.

Therefore, the discussion of the 2008 Election Law in Senayan sparked heated debate. Despite all the debates and differences of opinion that developed in each political party elite at that time, in the end, the simplification of political parties was formulated through the 2008 Election Law, which contextually made the parliamentary threshold and electoral threshold provisions for reaching the threshold. So far, some institutional engineering has been carried out, including the implementation of the electoral threshold mechanism, which limits political parties with a certain

minimum vote acquisition to participate in the next election. It was later realized that the electoral threshold mechanism implemented for the 2004 Election was considered ineffective in reducing the number of effective political parties in parliament, so it was replaced with the parliamentary threshold mechanism. Unlike the electoral threshold, which limits political parties from participating in the next election, the parliamentary threshold mechanism actually aims to limit the number of effective political parties in the parliament through the requirement of obtaining a minimum vote nationally for all political parties participating in the 2009 election (Haris, 2014).

With the freedom to establish a political party, regulations are needed to control the existing political parties. Efforts to simplify the number of parties began to appear due to the length of the verification process that a political party must go through to become an election participant. In addition, efforts to simplify parties were also realized through the existence of a parliamentary threshold policy. The tendency for many political parties to emerge is indeed a reflection of the democratic values adopted by Indonesia (Erfandi, 2014, pp. 126).

Political parties are considered a forum and a tool for the authorities to carry out their power functions to achieve state goals. Constitutional Court judges have the authority of judicial restraint and judicial activism, i.e., the authority of Constitutional Court judges when proposing at the Constitutional Court constitutional hearing. There are at least two determining parameters for Constitutional Court judges to make decisions, including contextual reasons for choosing between restraint and activism. As well as explaining the reasons for the interpretation method used, the parliamentary threshold decision is made through the judicial restraint attitude of Constitutional Court judges. Constitutional Court judges only have the right to try constitutional cases in the form of limited jurisdiction (limited authority). When reviewing the law, Constitutional Court judges are neutral and do not side with any political party (Madan, 2023, p. 93).

The Constitutional Court judges try to minimize political tensions as well as respect other institutions that have more competence to make policies (deference). Constitutional Court judges constitutionally apply legal principles.

Limiting the size of the parliamentary threshold is part of the politics of simplifying the party system. The percentage of the threshold is the discretion of the institution that forms the law, as a legal policy that has the competence to determine the existence of political parties. According to Mahfud MD, legal politics is a written and official policy made by government officials, by changing the law or replacing old regulations with new policy regulations (Mahfud MD, 2012, p.



55). The author interprets Mahfud MD's opinion regarding the parliamentary threshold as the Constitutional Court judge granting part of the applicant's request regarding the threshold, but the provisions in Article 222 are constitutionally conditional for the 2029 election and beyond.

The requirements for the provisions in the article have been changed by lawmakers. Constitutional Court judges handed over the authority to revise or change the magnitude of the parliamentary threshold's figure or percentage to the makers of the law, namely the legislative house and the president. The change in the parliamentary threshold for the 2029 Election is coming. The submission of a judicial review related to the threshold has been carried out since the issuance of Law No. 42 of 2008 on the General Elections of the President and Vice President. It is explained in the Constitutional Court Decision No. 51-52-59/PUU-VI/2008 that the urgency of the presidential threshold begins with people's support for the presidential and vice-presidential candidate pairs.

Guntur Hamzah believes that the law is always in line with the dynamics of society (external dynamics) and dynamics in the law. The decision of the Constitutional Court judges harmonizes the relationship between facts, norms, morals, and legal doctrines in the consideration of the judges' decision in implementing good court governance. The function of the Constitutional Court as a guardian of the constitution cannot cancel laws and other regulations if the norms can be determined as legal policies by the legislators. In *a quo* case, the Court still cannot cancel the provisions of the presidential threshold. However, if the laws and regulations are contradictory and violate morality, rationality, and intolerable injustice, the Constitutional Court can cancel the material test (Respationo & Hamzah, 2013, p. 82).

The authority of legislators in determining the parliamentary threshold, including the amount or percentage, can be justified as long as it does not conflict with political rights, people's sovereignty, and rationality. The Constitutional Court needs to exercise self-control (restraint) and review the constitutionality of *a quo* norms of the parliamentary threshold. Judicial restraint for Constitutional Court judges against judicial review of laws is very necessary. Constitutional Court judges consider the submission of lawsuits from the parties and apply judicial restraint in providing a just decision. Thus, the authors' legal political construction of Constitutional Court Judges' judicial restraint in Decision No. 62/PUU-XXII/2024 on the Parliamentary Threshold is as follows:

1) The parliamentary threshold can be simplified in a multi-party system by reducing the number of political parties. The large number of political parties in Indonesia (multi-party system) leads to political complexity.

2) The legal policy of the Constitutional Court Judges' Decision on the parliamentary threshold restores the image of the court and public trust, namely, as an authoritative and independent constitutional guardian institution.

## **B. Legal Politics of the Parliamentary Threshold Regulation and Implementation in the Philippines**

The Unitary State of the Republic of the Philippines has 76 provinces, with a presidential governmental system. The executive branch has a cabinet of ministers, which is tasked with assisting the President. As the highest court, the Judicial Institution in the Philippines, namely the Chief Justice and 14 associate judges, were directly appointed by the President based on the recommendation of the Judicial Council. The Senate and the House of Representatives are part of the legislature. The legislature of the Philippines is bicameral, consisting of 24 members, with a term of office of 2 years. The lower house, namely the House of Representatives, has a maximum of 260 members has a term of office of three years. The Philippine Commission, led by the Governor General, serves as the upper house of parliament (Oktaviany, 2017).

The history of the Indonesian and Philippine governments has similarities as these countries were once colonized. In addition, they both have executive, legislative and judicial institutions. The difference lies in the judicial institution; in the Philippines, there is no Constitutional Court or Judicial Institution. The Philippines only has a Supreme Court, and the judiciary consists of two chambers or bicameral, namely the Legislative House and the Regional Legislative House. This is different from Indonesia, which consists of three chambers or is tricameral, namely the Indonesian House of Representatives, the Regional People's Representative Council, and the Regional Representative Council.

### **a. Parliamentary Threshold Regulation in the Philippines**

The Constitution of the Republic of the Philippines, Article VI, Legislative Department, Section 1, regulates that the legislative power in the Philippines consists of the House of Representatives and the Senate. Members of the House of Representatives are elected through

districts throughout the provinces of the Philippines. Philippine Senate members are chosen by a general election. The Philippines also recognizes the autonomy of special regions, namely Muslim Mindanao and the Cordilleras, which are regulated in Article X. The Philippines enforces elections for members of regional governments, which have the aim of decentralizing regional government power responsibly, as regulated in Article X Section 3 of the Commission on Elections in 2017.

The Indonesian election still uses manual voting, unlike the Philippines, which uses electronic voting. The Philippine election adopts a bicameral system (Senate and Congress), which is held simultaneously in local and national legislative elections. The threshold for valid votes for legislative elections in Indonesia is 4.5 per cent for members of the Legislative House and Regional Legislative House. Meanwhile, in the Philippines, 20 percent of the House of Representatives members support their members in the legislative election. The valid vote count in the Philippines is divided by the number of seats available to obtain one seat in parliament. However, the threshold setting in Indonesia is different from that in the Philippines.

Threshold setting boundaries in the Philippines through elections organized by the Commission on Elections, abbreviated as COMELEC. It is independent of the executive, legislative, and judicial bodies of the Philippine Government. COMELEC was formed in 1940 after the amendment of the Philippine Constitution in 1935. Before the COMELEC was established, the implementation and supervision of elections were carried out by the Secretary of Interior or the Minister of the Interior (Setiawan, 2012, pp. 77). Thus, the Constitutional Court is not owned by the Philippines, which cannot file a judicial review of election laws in the Philippines. Therefore, the Philippines is only subject to and obedient to the regulations of the Philippine Constitution, which regulates the parliamentary threshold.

#### **b. Legal Politics of the Implementation of the Parliamentary Threshold in the Philippines**

Elections in the Philippines are held independently or through a party list system or a coalition of political parties. In the Philippine elections, there is no presidential threshold and no parliamentary threshold. Each party can nominate presidential candidates and legislative candidates. The One Round System applies to the presidential and legislative election system in the Philippines, where votes exceeding 50% are elected as president and vice president. This also

applies in legislative elections. Split-Ticket Voting applies to the Philippine presidential and legislative elections and is carried out separately (Darmansyah & Sulistyowati, 2024, p. 70). For the legislative election, women from the election candidates are 30% in each electoral district, which is regulated in the Magna Carta of Women, namely, affirmative action regulated in Republic Act No. 9710. This regulation promotes gender equality for women and men. Affirmative action applies to every political party.

Women's representation in parliament is regulated by the Party-List System Act, Republic Act 7941. The state fully guarantees that parties are open and free to female candidates in parliament (Arawi, 2016, pp. 85). The regulation of the election system in the Philippines is adjusted to the dynamics of society, where the dynamics of society in a country will affect different perspectives or opinions. The parliamentary threshold affects the number of wins in the presidential election. The parliamentary threshold is 20% of seats in the Legislative House or 25% of various factions in parliament. The parliamentary threshold in Indonesia is very different from countries that adopt a presidential system, such as the United States, Brazil, Peru, Mexico, Colombia, and Kyrgyzstan, which do not recognize the presidential threshold. In countries that do not have a presidential nomination threshold, the government system remains stable. The following is data from the Economist Intelligence Unit (EIU). It measures the democracy index in the world as follows:

Table 1. Economist Intelligence Unit (EIU) Democracy Index (“Democracy Index,” 2024)

No	Country	Number of Democracies and Constitutional Arrangements
1	Uruguay	Full Democracy 8.8513, Constitution Article 151
2	Chile	Full Democracy 8.22 19, Constitution Article 26
3	Costa Rica	Full Democracy 08.0723, Constitution Article 138
4	United States of America	Full Democracy 78530, Constitution Article 2
5	Panama	Flawed Democracy 07.0546, Constitution Article 177
6	Brazil	Flawed Democracy 6.8647, Constitution of 1988 Article 7736
7	Dominican Republic	Flawed Democracy 6.7251, Constitution Article 24
8	Philippines	Flawed Democracy 6.5155, Constitution of 1987 Article VII Part 4
9	Argentina	Flawed Democracy 4551, Constitution Article 91

From the table above, the presidential system of the United States, Brazil, Peru, Mexico and Colombia does not apply the presidential threshold. Without a threshold, the country remains stable. It is not an absolute requirement for political stability. In Asian countries, the presidential threshold is not applied in Nepal and the Philippines, so that more people compete in the presidential election. One of the countries that the author chose for the parliamentary threshold is the Philippines because it is the closest country to Indonesia. Besides that, the Philippines has similarities in terms of the hegemony of large parties to win the election. Thus, the application of the Indonesian parliamentary threshold is regulated by Law No. 7 of 2017 on General Elections. Article 222 states that the election system in Indonesia applies a proportional election system with the requirement of obtaining 20% of legislative house seats or 25% of valid national votes. The presidential election system is a Round System of 50% (fifty percent) of the number of votes, with a minimum of 20% (twenty percent). The voting system in Indonesia uses the Single-Transferable-Vote system. In addition, the election facilities in Indonesia include the usage of papers that display the faces of election participants (Dixon & Landau, 2021, p. 68). The election system in Indonesia is very different from the election system in other countries, especially in the Philippines.

Although the Philippines is a Republic that has a Presidential system of government, it is the same as the Indonesian government system through the Presidential election. The President's term of office is 6 years, and the Vice President and ministers are directly elected by the President. The Philippine judiciary is chaired by 1 Supreme Court and 14 Supreme Court Justices, who are directly appointed by the President. (Leksono & Andriyanti, 2023, p. 45). The Philippines does not have a judicial institution like the Constitutional and Judicial Courts in Indonesia, as it only has a Supreme Court.

The fundamental difference between the Indonesian and Philippine governments is that Indonesia uses a tricameral system, where there are the People's Deliberation Council, the Legislative House, and the Regional Legislative Council. The People's Deliberation Council consists of people's representatives who originate from political parties. The Legislative House is part of the people's representatives in the Indonesian Legislative House and the Regional Legislative House, while the Regional Legislative Council is a regional representative. The Philippine government system is bicameral with two government institutions. Bicameral is included in the members of Congress, consisting of 250 House of Representative members and 24

Senate members or Senators. The term of office of Parliament is 3 years with a maximum limit of 3 periods or a maximum of 9 years (Darmansyah & Sulistyowati, 2024, p. 55).

The 1987 Constitution of the Republic of the Philippines applies a parliamentary threshold of 20%, by dividing the total list of voters to obtain one seat in parliament. The Philippine elections are made more open by implementing an open proportional system. For example, in Cavite, Philippines, there are 3,800,000 permanent voters registered with the COMELEC. The threshold in the Philippines is 250,000 to obtain 1 (one) seat in parliament. For the allocation of seats in Cavite, Philippines, there are 14 seats, so if 3,600,000 is divided by the threshold, then the electoral district must get at least 250,000 valid votes to get 1 seat. The Philippine election uses an Election Machine called the Precinct Count Optical Scan (PCOS). With this machine, the results can be known faster, and fraud can be minimized. The Philippine Election Commission has placed more than 70,000 PCOS units in all polling stations (Nohlen, 2008, p. 50). The device is supplied by a joint venture between Smartmatic and Total Information Management.

#### **D. CONCLUSION**

The construction of legal politics regarding the urgency of the judicial review of the parliamentary threshold in Decision No. 44/PUU-XV/2017 and Number 62/PUU-XXII/2024 on judicial restraint of Constitutional Court Judges includes constitutional limitation, policy limitation, and doctrine limitation. First, the parliamentary threshold can simplify the multi-party system by simplifying political parties or reducing their number. Second, the legal politics of the Constitutional Court Judges on the parliamentary threshold decision by restoring the image of the court and public trust, namely as an authoritative and independent constitutional guardian institution. Third, the Constitutional Court needs to exercise self-control (restraint), reviewing the constitutionality of *a quo* norm of the parliamentary threshold.

The legal politics of the regulation and application of the parliamentary threshold in the Philippines is that it does not have a Constitutional Court, which cannot file a judicial review of election legislation in the Philippines. Therefore, the Philippines is only subject to and obeys the regulations of the Philippine Constitution, which sets the parliamentary threshold. The 1987 Constitution of the Republic of the Philippines applies a parliamentary threshold of 20%, by dividing the total number of voters to obtain 1 seat in parliament.

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