

## Indonesia's Presidential Threshold: An Analysis of Legal and Political Dynamics

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**Abstract:** The presidential threshold is the nomination requirement employed by political parties to select the President and Vice President. In Indonesia, the regulation governing the presidential threshold is outlined in Article 222 of Law No. 7/2017 on General Elections. This article stipulates that candidate pairs must be proposed by political parties or a coalition of political parties participating in the elections, provided they meet the criteria of obtaining at least 20% of the total seats in the DPR (The House of Representatives of the Republic of Indonesia) or obtaining 25% of the national valid votes in the previous DPR elections

**Purpose:** This study aims to determine the political dynamics of threshold presidential regulation law in Indonesia.

**Design/Methodology/Approach:** The type used in this research is normative legal research, and uses several approaches, namely the statute approach, conceptual approach, and historical approach.

**Findings:** In principle, the regulation of the presidential threshold is an open legal policy or open legal policy of the legislator, but its application in Indonesia, the presidential threshold has shortcomings because first, it makes legislative elections a prerequisite for the presidential election, and second, the legislative elections that are used as requirements have occurred in the previous election period, which in terms of

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political configuration is certainly different from the elections that will take place or are taking place. The application of the presidential threshold in Indonesia is also inappropriate because 1) it eliminates independent Presidential candidates; 2) it excludes the participation of non-parliamentary political parties to determine their own Presidential candidates; 3) it only benefits established/large political parties; 4) it is not suitable if applied in a presidential system, because the President in this system is not responsible to parliament; 5) the emergence of transaction politics; and 6) the limited number of choices of Presidential candidates offered.

**Originality/Value:** There has not been much research on presidential threshold arrangements in their formation, especially based on the political dynamics of law that developed during the formation process.

**Keywords:** law; open legal policy; politics; presidential threshold

**Paper Type:** Journal Article

## **Introduction**

The Republic of Indonesia is a legal entity with a unitary state structure and a commitment to democratic principles. The implementation of democracy in Indonesia can be understood as a reflection of people's sovereignty, as articulated in Article 1, paragraph (2) of the 1945 Constitution of the Republic of Indonesia. According to the interpretation presented in this article, it can be argued that individuals possess full sovereignty as a normative principle, and legal frameworks govern its exercise.

In the context of a democratic system, general elections, commonly called elections, serve as a means to effectuate governmental changes or alter the composition of parliamentary members. Elections in democratic nations express popular sovereignty and necessitate a transparent execution, encompassing procedural and substantive aspects. The effective conduct of elections can significantly influence the calibre of democratic governance. According to Article 22E, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, the

principle of elections is "general elections are carried out directly, publicly, freely, secretly, honestly and fairly once every five years".

Democracy and elections are intricately interconnected, as the electoral process is a tangible expression of citizens' political engagement (Fikri et al. 2022). Elections hold significant importance as a manifestation of democracy, representing a nation's commitment to achieving democratic ideals. By the mandate of the 1945 Constitution of the Republic of Indonesia, ensuring the correct implementation of elections is imperative (Setiawan 2023).

In a democratic nation, alongside the overarching concept of elections, the presidential election is commonly referred to colloquially as "pilpres." The regulations governing the presidential election are detailed in Article 22E, paragraph (2) of the 1945 Constitution of the Republic of Indonesia. However, the process of selecting candidate pairs for the positions of president and vice president entails a transfer of authority from the electorate, who are the original holders of power, to political party organizations. These organizations are constitutionally empowered to nominate candidate pairs before the electoral event. According to Article 6A, paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the nomination of presidential and vice-presidential candidates is exclusively carried out by political parties or coalitions of political parties that participate in the general election before it takes place.

According to Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia, as previously stated, it is stipulated that the eligibility of a candidate pair for the presidential election is contingent upon their endorsement by a political party or a coalition of political parties that have been duly recognized as participants in the election by the General Election Commission (KPU) (Gobel 2019).

The provisions of Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia are expanded in Article 222 of Law Number 7 of 2017 Concerning General Elections (hereinafter referred to as Law No. 7/2017) which states "Candidate pairs are

proposed by political parties or a coalition of political parties participating in the election who meet the requirements for obtaining at least 20% of the seats in the DPR or obtaining 25% of the national valid votes in the election of members the previous House of Representatives". The provisions of this article reduce the opportunity for political parties that have been declared election participants by the KPU to nominate pairs of candidates for president and vice president. Even though Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia requires optionally that all parties political participants in the election may nominate pairs of candidates for President and Vice President individually or jointly (Gobel 2019).

The context above is commonly known as the presidential threshold or nomination threshold. Initially, it was employed to assess the level of party competition in securing seats within electoral districts under a proportional election system. This concept is associated with the size of the constituency, known as district magnitude, and the formula utilized to determine party seats through the quota method. It is observed that larger electoral districts require a smaller percentage of votes to obtain a seat, while smaller electoral districts necessitate a higher percentage of votes for seat acquisition (Mausili 2019).

Applying the presidential threshold in Indonesia has consistently sparked extensive debate and has been prone to complications. This is primarily due to the explicit constitutional provisions outlining the prerequisites for presidential candidature, which are further supplemented by additional norms specified in Law No. 7/2017 pertaining to the minimum requirements for nominating candidates for the positions of President and Vice President. Consequently, it becomes imperative to undertake legal research to comprehensively examine the legal and political dynamics surrounding the establishment of the presidential threshold in Indonesia's presidential elections.

### **Methods**

The research conducted in this study employs normative legal research methodology, incorporating many techniques such as the

statutory approach, conceptual approach, and historical approach (Marzuki 2016).

### **Discussion and Findings**

#### **Development of the Presidential Election in Indonesia**

The electoral procedure for selecting the President and Vice President in Indonesia is distinct from the process of electing members of representative institutions. In terms of conceptualization, general elections and presidential elections are distinct entities. The presidential election serves as a direct expression of popular sovereignty, enabling citizens to directly elect their leaders (direct democracy). Conversely, legislative elections function as a mechanism for appointing representatives who will exercise control and oversight over the government, thereby embodying the people's sovereignty through a representative system (indirect democracy) (Riswati 2009).

In the historical trajectory, the presidential election in Indonesia deviated from the direct election by the populace for the first time. Following reading the proclamation of independence, the Preparatory Committee for Indonesian Independence (PPKI) convened a session on August 18, 1945. The primary objectives of this session were to ratify the Constitution and elect the President and Vice President. During this session, Otto Iskandardinata proposed the appointment of Soekarno as President and Mohammad Hatta as Vice President through acclamation (Na'imah 2015). This proposal garnered majority approval from PPKI members, thereby establishing the first instance of a leader for the sovereign Indonesian nation to determine its course. Consequently, the initial election of the President and Vice President was conducted through acclamation.

During the United Republic of Indonesia (RIS) period, the second presidential election occurred on December 16, 1949. However, the implementation of this election appears somewhat unusual due to its basis on Article 69, paragraph (2) of the 1949 RIS Constitution. It is worth noting that, at the time, the RIS Constitution was not formally in effect. Nevertheless, the Draught Constitution of the RIS was

mentioned during the Round Table Conference in the Netherlands and subsequently accepted and approved by the People's Representative Council (Komite Nasional Indonesia Pusat) on December 14, 1949. Consequently, holding the presidential election during the RIS period was legally and constitutionally valid (Na'imah 2015). During this time, Sukarno was elected by acclamation and assumed office from December 27, 1949, to August 17, 1950.

Following its dissolution by President Soekarno on August 17, 1950, the Republic of Indonesia reverted back to its original structure as a Unitary State. During this period, the governing constitution was the Basic Law, also known as the 1950 UUDS (Undang-Undang Dasar Sementara). This constitutional framework remained in place until the issuance of the Presidential Decree on July 5, 1959. Notably, the regulations pertaining to presidential elections during this time were governed by Article 45, paragraph (3) of the 1950 UUDS, which stipulated that the President and Vice President were to be elected in accordance with the rules established by law. However, it is worth noting that during this particular period, there is a prevailing notion that the law in question has not yet been established. Similarly, following the 1955 election, the Constituent Assembly had not yet established a novel Constitution that would encompass regulations pertaining to the presidential election. Presidential elections were not conducted during President Soekarno's tenure until the Constituent Assembly's dissolution.

The commencement of guided democracy occurred on July 5, 1959, during which presidential elections had not yet been conducted. This was due to the implementation of guided democracy, which aimed to reinstate the 1945 Constitution of the Republic of Indonesia. According to Article II of the Transitional Regulations, President Soekarno continued to occupy the role of President. According to the current Constitution, all state bodies and regulations now in place remain valid, unless new ones have been established in accordance with the terms of this Constitution. Consequently, in reverting back to

the 1945 NRI Constitution, the provisions pertaining to the presidential election must be derived from the principles outlined in the 1945 NRI Constitution. According to Article 6, paragraph (2) of the 1945 NRI Constitution (before amendment), the election of the President and Vice President was conducted by the People's Consultative Assembly (MPR). However, upon the reinstatement of the 1945 Constitution of the Republic of Indonesia, it is worth noting that the MPR was not in existence at that particular juncture, and this esteemed institution was not recognized during the implementation of the 1950 Constitution. Applying Article 6, paragraph (2) of the 1945 Constitution of the Republic of Indonesia was found to be inapplicable to the conduct of the presidential election.

However, the applicability of the rules stated in Article III of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia to conduct presidential elections is also deemed invalid. This assertion is based on the following reasons (Na'imah 2015):

1. This article applies only to the election of the President and Vice President for the first time, which was held on 18 August 1945, and
2. According to Article III of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia, namely the PPKI, the state institution that had the authority to carry out the election of the President and Vice President was declared valid again on 5 July 1959.

Presidential elections were conducted. This circumstance can be attributed to the presence of TAP MPRS No III of 1963, which stipulated the designation of President Soekarno as the lifelong President of the Republic of Indonesia. Nonetheless, President Soekarno's tenure was brief, as his lifelong governance ended during the Special Session convened by the MPRS on March 12, 1967. At this Special Session, TAP MPRS No. XXXIII of 1967 which determined and decided:

1. Revoke state power from President Soekarno and withdraw the MPRS mandate from President Soekarno as well as all state

government powers regulated in the 1945 Constitution of the Republic of Indonesia

2. Appointed the administrator of TAP MPRS No. IX in 1966 General Suharto as Acting President so that the MPR chose the President due to general elections.

The New Order era in Indonesia commenced in 1968, characterized by General Suharto's designation as the successor to Soekarno, assuming the position of President of the Republic of Indonesia. Initially, President Soeharto held the position of Acting President, which was limited to one year starting in 1967. Subsequently, on March 27, 1968, he was officially appointed President during the MPRS General Session. President Soeharto was formally designated and entrusted with the authority by the MPRS to assume the position of the definitive President for the subsequent five-year tenure (Pratiwi, Salama, and Ulfah 2021).

The selection of the President and Vice President during the New Order era was conducted through the electoral process facilitated by the People's Consultative Assembly (MPR). This particular mechanism was in place for many terms, namely spanning from 1973 to 1998, with elections taking place in 1973, 1978, 1983, 1988, 1993, and 1998. The constitutional foundation for the authority of the People's Consultative Assembly (MPR) to elect the President and Vice President prior to the amendment was derived from Article 6, paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which stipulates that "The MPR shall elect the President through a majority vote." The president, who assumes office through the appointment by the MPR, is subject to the MPR's authority to demand accountability, as stipulated in the general explanation of the 1945 Constitution of the Republic of Indonesia about the state government system. The president, who is chosen and appointed by the MPR, is considered subordinate to the assembly rather than merely a secondary figure. This is due to the fact that the MPR carries out the president's election and appointment, and

the MPR also possesses the authority to dismiss the president (Efriza 2018).

The presidential election process conducted by the MPR concluded in 1999, with the subsequent election taking place in the year 2004. The direct holding of the presidential election signified the conclusion of the MPR's authority as the representative of the populace. This direct presidential election validated the restoration of the citizens' autonomy in exercising their voting preferences, without the need for intermediaries or parliamentary representatives. The individual who assumed the presidency of Indonesia after the 1999 election by the MPR was Abdurrahman Wahid. It is worth noting that BJ Habibie cannot be classified as having been selected by the MPR, as his assumption of the presidency during the transitional period was a result of President Suharto's decision to step down. According to constitutional provisions, in the event of a presidential vacancy, the Vice President assumes the responsibilities of the presidency. In the interim, Megawati Soekarnoputri assumed the presidency after the dismissal of President Abdurrahman Wahid by the MPR at a Special Session on July 23, 2001.

In 2004, a significant milestone was achieved in the constitutional history of Indonesia as the electorate gained the ability to elect the President and Vice President directly (Maychellina, Sabina, and Wibisono 2023). This development was enshrined in Article 6A, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which explicitly states that "The President and Vice President are elected as a pair directly by the people." The procedural framework for the 2004 presidential election was established by Law No. 23 of 2003, commonly known as the General Election of President and Vice President Act. The determination about the nomination of the President is contingent upon the provisions outlined in Article 5, paragraph (4) of Law No. 23/2003. This particular article stipulates that individuals aspiring to assume the role of President or Vice President must be put forth as candidates by political parties or coalitions of political parties that have achieved a minimum of 15% of the total number of seats in

the DPR (The House of Representatives of the Republic of Indonesia) or 20% of the valid votes nationwide in the election for members of the DPR. The nomination threshold, sometimes referred to as the first presidential threshold, is a requirement implemented in the Indonesian presidential election. The 2004 elections did not coincide; they were conducted in two stages. The electoral process commenced with parliamentary elections on April 5, 2004, followed by presidential elections on July 5, 2004.

Despite the occurrence of presidential elections, the inclusion of independent candidates as presidential candidates remains undesirable. This is due to the provision outlined in Article 9 of Law No. 42 of 2008 on the Election of the President and Vice President, which states that "a pair of candidates for President and Vice President must be proposed by a political party or a coalition of political parties participating in the election, meeting the requirements of obtaining at least 20% of the seats in the DPR or obtaining 25% of the national valid votes in the previous DPR member elections." Initially, the presidential threshold only required 15% of the number of seats in the DPR during the 2004 elections. However, this threshold has been increased by 5% to 20% in the present year, allowing political parties to nominate candidates for President and Vice President. It is important to note that these provisions regarding the presidential threshold will continue to be enforced in subsequent presidential elections from 2014 to 2019 (Tamrin 2013).

#### **The Establishment of Presidential Threshold in Political Law for Presidential Elections**

The term "presidential threshold" is derived from the English language and consists of two words, namely "presidential" and "threshold". According to the Oxford Dictionary, the word "presidential" refers to something that is related to a president or presidency. On the other hand, the word "threshold" is defined as the sill of a doorway, the entrance to a house or building, or any point of entry or beginning. In the context of the Big Indonesian Dictionary,

"threshold" is described as the level of limit that is still acceptable or tolerated (Baskoro 2019).

The threshold can be conceptualized as a mechanism of proportional representation, whereby a minimum number and proportion of voters are required for individuals to qualify as representatives or envoys in parliament. Furthermore, the term "threshold" is also employed to denote a minimum barrier or threshold, commonly utilized to establish the parliamentary or presidential threshold. According to Gotfridus Goris Seran, the presidential threshold is defined as the minimum number of votes a political party must secure in an election to be eligible to nominate a candidate for the position of President (Sabrina and Saad 2021).

The Indonesian constitution does not explicitly outline the specifics of the presidential threshold in the 1945 Constitution of the Republic of Indonesia. Article 6A, paragraph (2) of the constitution merely states that political parties or coalitions of political parties propose pairs of presidential and vice-presidential candidates prior to general elections. The constitution does not provide further details on the implemented procedures and systems, primarily focusing on establishing principles. However, the additional arrangements concerning the presidential election are addressed in legislation, as stated in Article 6A, paragraph (5) of the 1945 Constitution of the Republic of Indonesia, which stipulates that the procedures for conducting presidential and vice-presidential elections are further regulated by law.

The application of the presidential threshold was initially introduced during the presidential election 2004. The regulations pertaining to the presidential threshold can be found in Article 5, paragraph (4) of Law No. 23/2003, which stipulates that candidates for President and Vice President can only be nominated by a political party or a coalition of political parties that secures a minimum of 15 percent of the total seats in the DPR or 20 percent of the national valid votes in the election for members of the DPR. This provision was implemented

for the first time during the aforementioned presidential election, as simultaneous elections were not yet in place (Setiawan 2023)

In the presidential election of 2009, there was a modification made to the parameters governing the presidential threshold, increasing from 15 percent in the 2004 election to 20 percent. The specifications pertaining to the presidential threshold can be found in Article 9 of Law No. 42/2008, which stipulates that political parties or coalitions of political parties participating in the election must meet the criteria of securing a minimum of 20 percent of the seats in the DPR or obtaining 25 percent of the valid votes in the national election for members of the DPR (Setiawan 2023).

Currently, the regulations pertaining to the presidential threshold are outlined in Article 222 of Law No. 7/2017. This article states that candidate pairs must be proposed by political parties or coalitions of political parties participating in the election and must meet certain requirements. These requirements include obtaining a minimum of 20% of the total seats in the DPR or securing at least 25% of the valid votes nationally in the previous DPR member elections. From a legal standpoint, it can be observed that the regulation concerning the presidential threshold is a flexible legal policy that falls under the jurisdiction of the legislators, specifically the DPR. However, it is imperative to consider the legal and political dimensions in this particular scenario.

The fundamental premise behind legal politics is that politics inherently influence law. Specifically, law is perceived as the formal embodiment of the ruler's or legislator's political volition. In practical terms, establishing a legal norm is inherently intertwined with the evolving dynamics, particularly within the parliamentary domain. Specific political arrangements can influence a legal product's features and nature (Mahfud 2020).

The discourse surrounding the establishment of the presidential threshold inside parliament was influenced by a range of factors, including alliances, interest groups, withdrawals, as well as instances

of consensus and dissent. During the DPR Plenary Meeting, a significant event occurred when the discussion about the Draught Law (RUU) No. 7/2017 reached a critical point. This event was characterised by the departure of four factions from the meeting due to their disagreement with the decision to ratify Law No. 7/2017. In July 2017, the four factions that emerged via the process of voting were identified as the Partai Gerindra, the Partai Demokrat, the Partai Keadilan Sejahtera (PKS), and the Partai Amanat Nasional (PAN). The primary factor contributing to the rejection of the four groups was their failure to reach a consensus on the presidential threshold, which required a minimum of 20% of seats and 25% of votes. The political parties that have reached a consensus on the 20% presidential threshold are the Partai Demokrasi Indonesia Perjuangan (PDI-P), Partai Golkar, Partai Hanura, Partai Nasdem, Partai Persatuan Pembangunan (PPP), and Partai Kebangkitan Bangsa (Setiawan 2023).

Three justifications are supporting the application of the presidential threshold by the DPR, namely (Saifulloh 2022):

1. To enhance the efficacy of the presidential system from the onset of the nomination process;
2. The primary objective is to evaluate potential candidate pairings prior to the commencement of the election process; and
3. In order to establish an effective governance system, it is imperative for the President to garner legislative backin.

However, further examination is required to ascertain its significance in relation to the aforementioned presidential system. Applying the presidential threshold to enhance the presidential system lacks justification for two reasons. *Firstly*, it requires legislative elections to precede the presidential election. *Secondly*, the legislative elections used as prerequisites have already transpired during the previous election cycle, which inherently differs in political configuration from the upcoming or ongoing elections.

This arrangement will inherently be incongruous if the linkage between the presidential threshold and a presidential system exists.

The executive and legislative institutions are distinct entities with divergent foundations of legitimacy. It is vital to comprehend that the president is not accountable to the parliament within a presidential system. The utilization of the presidential threshold is better suited for a parliamentary system because the Prime Minister is accountable to the parliament in such a system.

The application of the presidential threshold in Indonesia is associated with a minimum of six disadvantages, which include:

1. The exclusion of independent candidates in presidential elections;
2. Excluding the involvement of non-parliamentary political parties in the process of selecting their respective presidential nominee;
3. The advantages of established and powerful political parties are prioritized;
4. The application of this method in a presidential context is deemed unsuitable due to the lack of accountability of the President to the parliament;
5. The phenomenon of transactional politics has come to the forefront;
6. a restricted range of options is available to voters when selecting candidates for the position of President.

Establishing the presidential threshold setting is a transparent legal policy that should be formulated in accordance with established policies, devoid of moral conflicts, and free from discriminatory practises. The legislation pertaining to the presidential threshold can be regarded as a procedural rule within the political system. However, applying these regulations does not necessarily prioritize the values of fairness and equality, potentially resulting in democratic shortcomings. According to Mukhtarrija, Handayani, and Riwanto (2017), a universal legal maxim declares that "*nullus commodum capere potest de injuria sua propria*" exists. It can be argued that the state's formulation of regulations that involve deviations and breaches of the political rights of some

groups while benefiting others cannot be justified (Mukhtarrija, Handayani, and Riwanto 2017).

Legal policies that embody the concept of injustice require prompt rectification or modification in accordance with the principles of justice. The authorities responsible for establishing legal policies must conduct a thorough assessment of the practicality of these regulations before implementation, ensuring that they do not infringe upon the civil rights of individuals or the political rights of specific groups.

### **Conclusion**

The arrangement concerning the presidential threshold is a legal policy openly deliberated by legislators. However, its implementation in Indonesia exhibits certain shortcomings. Firstly, it mandates that legislative elections precede presidential elections. Secondly, the legislative elections used as a reference occurred during the previous election cycle, which may differ from the current or upcoming election in terms of political configuration.

The use of the presidential threshold in Indonesia is considered inappropriate for several reasons. First, it results in the exclusion of independent presidential candidates from the electoral process. Second, it restricts the involvement of non-parliamentary political parties in selecting their own presidential candidates. Third, it primarily favors well-established and prominent political parties. Fourth, its implementation in a presidential system is unsuitable since the President, in this system, is not accountable to the parliament. Fifth, it leads to the emergence of transactional politics. Lastly, it limits the number of presidential candidates available for selection.

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