

# HASIL CEK\_The Presidential Candidacy

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## The Presidential Candidacy Threshold in Indonesia and Its Implications

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### Abstract

The Presidential Election System in Indonesia is equipped with a unique mechanism that is not applicable in many other countries, namely the presidential nomination threshold by political parties or popularly known as the "Presidential Threshold". According to the Election Law, political parties need to have a minimum of twenty per cent of the Legislative House seats or twenty-five per cent of the votes cast in the most recent legislative member elections. Since this system was unconstitutional, it raised controversies because it limited the rights of established political parties and prevented new political parties from nominating presidential candidates. The purpose of this study is to ascertain the application of the Presidential Threshold process and its implications for the Indonesian general elections. This research is normative in nature. Three different approaches—the conceptual, legislative, and comparative ones—are employed. Legal primary and secondary sources of information were employed. A literature review was conducted to obtain data. Analysis of the data or legal materials is carried out by analytical prescriptive. The study concludes that raising the bar for presidential nominations results in several implications, including restricting political parties' ability to nominate candidates; weakening the essence of people's sovereignty; and contradicting the notions of justice and the presidential system. Because it does not pertain to the clauses outlined in the Republic of Indonesia's constitution, the regulation of the presidential nomination threshold in the Election Law should be deleted.

**Keywords:** *Presidential Threshold; Election; President; Constitutional Rights; Political Parties; Presidential System*

### Introduction

The presidential nomination threshold, also known as the PT, stipulates that a presidential candidate pair must be put forth by a political party or group of parties, that is running in the election and that occupies at least twenty per cent of the legislative house's seats or at least twenty-five per cent of the votes in the previous election of legislative members [1]. The Republic of Indonesia's

Constitutional provisions, which serve as the legal framework for presidential nominations, do not limit or specify the qualifications needed to be nominated. According to the Constitution, "A political party or coalition of political parties participating in the general election proposes the pair of candidates for President and Vice President prior to the implementation of the general election." [2].

Political parties have a choice in whom they nominate as their presidential candidates under the Constitution. The political parties that are taking part in the general election have the option to independently submit candidate pairs or ally themselves with other parties prior to the start of the poll. If the mechanism for the nomination of President merely adopts the wordings of these provisions, hence it opens the opportunity for all political parties to propose candidate pairs for President and VP (vice president) independently or by joining other political parties alternatively rather than obligatorily. In light of this, a problem arises when the General Election Law's PT mechanism restricts the nomination stage [5], effectively limiting the rights of political parties to propose nominees for President and VP.

Saldi Isra, who contends that the PT is not recognized in the constitution, asserts that maintaining the barrier would be tantamount to condoning constitutional defects in the conduct of the presidential election process [3]. The constitutional rights of the four political parties running in the election, namely the Partai Garuda (the Garuda Party), Partai Berkarya (the Working Party), Partai Perindo (the Party of Indonesian Unity), and Partai Solidaritas Indonesia (the Indonesian Solidarity Party), would be impacted by the PT's implementation at the 2019 Democratic Party [4]. The four political parties cannot propose a pair of presidential candidates even though the General Election Commission of the Republic of Indonesia has designated them as participants in the 2019 general election.

Because the 2019 General Election PT used the results of the previous election, namely the 2014 election, in which the four political parties had not yet registered as candidates, the participating political parties lost their constitutional rights. The 2019 General Election system simultaneously organized the Legislative and the Presidential Elections (concurrent elections) [5]. The Election Law still upholds PT, nevertheless. Even if the PT had put it into place at the time, this was distinct from the democratic events in 2014 [6], 2009 [6], and 2004 [7], since the legislative elections and the presidential elections were conducted independently, protecting the right to nominate a president from new political parties.

The formulators of Law 7/2017 assume that the implementation of PT is an effort to strengthen the Presidential government with a combination of a multi-party system. A president who is maximally supported by the parliament may easily govern and achieve development, and the PT can be a way to simplify political parties [8].

Syamsuddin Haris criticised the adoption of the PT in Indonesia. In the presidential framework, the President's source of legitimacy is not determined based on the parliamentary political configuration of the general election results. Both the president and parliament are independent institutions with their own distinct legitimacy systems. The president and the government under his control can work effectively without expecting full support from the legislative house [9].

When compared to various democratic states which implement direct presidential elections, it is difficult to find another state that implements the Presidential Threshold like Indonesia. If people talk about general elections related to the "Presidential Threshold," then what is meant by that is the requirements of a presidential candidate to be elected as President, according to J. Mark Payne et al in their book "Democracies in Development: Politics and Reform in Latin America," quoted by Pipit R. Kartawidjaja. For instance, in Brazil it is 50% plus 1, in Ecuador, it is 50% plus 1 or 45% as long as it differs by 10% from the strongest competitor, in Argentina it is 45% or 40% as long as it differs by 10% from the strongest competitor, and so on [10]. As a result, in many countries, the PT is not defined

as the presidential candidacy threshold for political parties before participating in the general election. The definition of PT used in many countries is the electability threshold, which is a requirement for a presidential candidate to be elected based on the votes cast in the general election.

In light of the passage of the provisions on the presidential nomination threshold in Law Number 7 of 2017 concerning General Elections in Indonesia, the author will now discuss a number of legal ramifications.

### Methods of Research

This research is normative legal research. This study is normative in nature. Three (three) different approaches—conceptual, legislative, and comparative—are employed. The secondary data, also known as legal materials in legal research, is the main type of data that was employed as a source. Laws and regulations are utilized as primary legal resources, whereas encyclopedias, scholarly journals, and research papers are used as secondary legal resources. In order to collect data, a literature search is necessary. The prescriptive analysis is the process of analysing data or legal sources.

### Results and Discussion

In this study, it is shown that including or connecting a number of legal considerations is the intended result of establishing the presidential pair nomination threshold in the Election Law in Indonesia. The legal matters listed include those governed by the Indonesian Constitution of 1945, the General Election Law, and the Political Party Law. The following outlines the legal repercussions of basing the criteria for president and VP nominees on the results of this study.

#### 1. Legal Implications on the Constitutional Rights of the Political Parties

The regulation of the PT in the Election Law [1] unfairly and flagrantly violated the constitutional rights of political parties taking part in the 2019 election. According to the rule, political parties must hold at least twenty per cent of the legislative house seats or twenty-five per cent of the valid national votes from the 2014 legislative house elections in order to be eligible to nominate presidential candidates in the 2019 general election. Political parties that have lost their candidacy rights are listed in table 1 below.

Table 1. Participants of the 2019 General Election and Results of the 2014 Legislative Election

No.	Participants of the 2019 Election	Results of the 2014 Legislative Election		Notes
		Percentage of the 2014 Seats	Percentage of the 2014 votes	
1.	<i>Partai Kebangkitan Bangsa</i> (The National Awakening Party)	8,39%	9,04%	
2.	<i>Partai Gerindra</i> (The Movement of the Great Indonesia Party)	13,04%	11,81%	
3.	<i>Partai Demokrasi Indonesia Perjuangan</i> (The Party of Indonesia's Democratic Struggle)	19,46%	18,95%	
4.	<i>Partai Golkar</i> (The Working Group Party)	16,25%	14,75%	
5.	<i>Partai Nasdem</i> (The National Democratic Party)	6,25%	6,68%	



First, it is evident from the information above that no political party has attained the required percentage of seats or votes (20% or 25%, respectively) to be qualified to independently propose president and VP candidates for the 2019 presidential election. In light of these results, political parties are left with little choice but to come together or form a coalition.

Second, since these political parties—*Partai Garuda*, *Partai Berkarya*, *Partai Perindo*, and *Partai Solidaritas Indonesia*—were not listed as eligible participants in 2014, they were unable to nominate a pair of candidates for President and VP either independently or in collaboration with other political parties. They have neither the seats nor the votes from the 2014 legislative house election. Since they were chosen to be election participants, they have forfeited their constitutional ability to suggest candidates for President and VP.

Contrarily, no such obstacle is outlined in Article 6A section (2) of the 1945 Indonesian Constitution that would prevent political parties from nominating a pair of candidates for President and VP. I Dewa Gede Palguna asserted that [12], constitutional rights are expressly or impliedly guaranteed by the Constitution. The constitutional rights in the Constitution are part of the Constitution. So, all branches of state powers are obliged to respect them [12]. Therefore, the recognition and respect for constitutional rights as part of the Constitution also means restrictions on state powers [12].

The Constitution has clearly protected the constitutional rights of political parties in nominating presidential candidates, but these rights have been degraded by the General Election Law. As part of the constitution, constitutional rights should be protected. There needs to be legal action as a mechanism to realize such protection so that rights owners can defend their rights in the event of a violation [12]. However, this does not appear in the regulation of the General Election Law. On the contrary, the PT provisions do not protect rights. They eliminate rights, so the arrangement is not in accordance with or contrary to the 1945 Constitution.

Then, the notion of constitutional rights is often associated with human rights and the rights of citizens. According to A. Ahsin Thohari, constitutional rights are usually stated as legal rights of citizens (and possibly citizens of other states who are under other jurisdiction) protected by the constitution of a sovereign country (legal rights of its citizens, and possibly others within its jurisdiction, protected by a sovereignty's constitution [13]).

If the theory of constitutional rights above is related to the existence of political parties, do political parties have constitutional rights in return? Political parties are legal entities, meaning that they are holders of rights and obligations or are called legal subjects. They can act legally like humans as legal entities (*naturalijke* persons). Thus, political parties can also enjoy constitutional rights if those rights are regulated in the constitution.

Political parties are allowed to put forth two candidates under the Law on Political Parties [14]. This law stipulates that one of the political parties' rights is to nominate candidate president and VP as well as candidate regional leaders according to the legislation [14]. Thus, theoretically and juridically, political parties have constitutional rights just like humans or citizens.

As a result, the PT requirements have eliminated (new) political parties' constitutional powers to nominate the president. The phrase "The procedure for conducting the election of President and VP is further regulated in legislation" found in the Constitution was exploited in the creation of the PT rule [15]. The article clearly stipulates "procedures" not "requirements", while what is regulated in the Election Law [1] is a "requirement." According to the Indonesian Dictionary, the meaning of a procedure is (1) rules (means) according to customs; and (2) traditions. [16]. Legislators have carried out extensive interpretations of the meaning of procedures, becoming requirements that have

implications for the rights of eligible participants. Thus, these political parties lost their rights as eligible participants. Therefore, the rights of political parties in the nomination of the President need to be restored.

## 2. Legal Implications on the Essence of the Sovereignty of the People

The PT stipulation is incompatible with the constitution's guarantee of the essence of people's sovereignty. The constitution [17] states, "Sovereignty resides with the people and is exercised in accordance with the Constitution". The formulation is derived from the preamble of the constitution's notion of people's sovereignty. The People's Consultative Assembly had exclusive control over people's sovereignty prior to the shift, hence understanding people's sovereignty turned into understanding state sovereignty [18].

Following the constitutional amendments, the people's sovereignty is no longer solely institutionalized in the People's Consultative Assembly; rather, it is dispersed among several state institutions and partially appears in the political rights of the people through elections. The functions, authorities, duties, rights, and obligations of governmental institutions, commissions, agencies, and other institutions governed by the constitution are examples of how the sovereignty of the people is expressed [18]. This includes the constitutionally granted rights of political parties to nominate the president. Elections are a means of expressing people's sovereignty. Therefore, in essence, political parties are expressing people's sovereignty by nominating presidential candidates. As a result, if the presidential nomination, which in actuality has constitutional rights from political parties, is restricted, the character of the people's sovereignty is genuinely curtailed.

It is confirmed that the presidential election's purview has transferred from the realm of parliamentary rights to the realm of the political rights of the people by the change in the method for electing the president from the parliament (the People's Consultative Assembly) to direct election by the people. The President and Vice President are directly elected by the people in a pair, according to the Constitution [19]. Political parties' rights in this election procedure only extend to the stage of suggesting paired presidential candidates, which is completed prior to the election. Additionally, how many people support the presidential candidate and how his votes are distributed among the different areas determine who will be chosen. Thus, the people become the central point of the Presidential Election process and will determine the election of candidate pairs to become President and VP.

The implementation of PT at the nomination stage appears to deny the people's right to obtain more alternative presidential candidates than all political parties taking part in the general election, while simultaneously giving the political parties the right to choose first who will run in the general election. Although in reality there may not be many contenders, for instance, more than two, as it actually relies on the political alignment of the parties who are now in power. However, at least the PT is not preventing the appearance of candidates from parties that are running in the general election, giving the electorate a variety of presidential candidates to choose from. Table 2 below details the impact of adopting the PT on the number of candidate pairings, voter turnout, and invalid votes during the 2004 to 2009 presidential elections.

Table 2. Number of Candidate Pairs, Participation of Voters, and Invalid Votes in the Presidential and Vice-Presidential Elections of 2004-2019

Description	2004 Presidential Election		2009 General Election	2014 Presidential Election	2019 Presidential Election
	Round I	Round II	One Round	One Round	One Round
Rounds	5	2	3	2	2
Candidate Pairs	5	2	3	2	2
Numbers of Voters	152.534.922	152.246.184	171.265.442	193.944.150	199.987.870
Voters exercising their voting rights	119.769.706	115.041.705	127.165.035	134.953.967	158.012.506
Voters not exercising their voting rights	31.241.078	35.583.479	49.212.161	58.990.183	41.975.364
Valid Votes	118.656.868	114.257.054	121.504.481	133.574.277	154.257.601
Invalid Votes	2.636.976	2.405.651	6.479.144	1.379.690	3.754.905
Percentage of voters not exercising their voting rights	<b>20,48%</b>	<b>23,37%</b>	<b>28,37%</b>	<b>30,42%</b>	<b>20,99%</b>
Percentage of Invalid Votes	<b>2,22%</b>	<b>2,11%</b>	<b>5,33%</b>	<b>1,02%</b>	<b>2,38%</b>

Source: processed by the authors from the General Election Commission.

Based on the table above, the 2014 Presidential Election saw the highest number of "Golput" (*golongan putih*, or the white faction) voters, or those who did not exercise their right to vote, at 30.42 per cent. Two candidate teams were vying for the positions of president and VP at the time. Compare this to the first round of the 2004 presidential election, which had five candidate pairs for President and VP. The abstention rate was lower at 20.48 per cent. As a result, the number of candidate pairings affects the turnout for the presidential and VP elections. The quantity of PT affects the number of candidate pairs. In the 2004 presidential election, the PT of 3% of the vote or 5% of the legislative house seats produced 5 (five) candidate pairs. However, in the 2014 presidential election, the PT of 20% of the vote or 25% of the legislative house seats produced 2 (two) candidate pairs.

Even though two candidate pairs were running for president in the 2019 election, there were fewer ballots cast than expected (20.99%). The concurrent election model, which was adopted to simultaneously hold the presidential and parliamentary elections in 2019, contributed to the rise in voter turnout in the 2019 presidential election, with the participation rate in the legislative election also rising to 81.69 per cent [20].

The highest invalid vote rate occurred in the 2009 presidential election at 5.33%. At that time, three pairs of presidential candidates competed, while the lowest invalid vote rate occurred during the 2014 presidential election at 1.02%. But the abstention rate in the 2014 presidential election was very high, equal to 30.42%. If observed as a whole, in the aspects of the level of community participation and the level of invalid votes, the best was Round I of the 2004 General Election, with the abstention rate of a mere 20.48% and the invalid votes of 2.22%. There was also a total of 5 (five) presidential candidate pairs. If interpreted from these facts, the increasing number of candidate pairs for President



and VP due to the low PT affects the level of voters' participation and invalid votes. The participation rate increased because there were many alternative choices of presidential candidates presented that represent the aspirations of the majority of the people. The level of vote validity was also high, due to the strong voter motivation to make the desired candidate pairs become elected.

### 3.The Legal Implications of the Principle of Justice for Political Parties

Prejudice, injustice, and actual harm have been brought about by the PT regulation in Law 7/2017 for new political parties in 2019, which incidentally were founded by the established political parties participating in the 2014 Election. *Nullus/nemo commundus capere potest de injuria sua propria*, on the other hand, is a legal principle that forbids anybody from profiting from an offence or crime they themselves committed. This principle also forbids anyone from suffering harm as a result of another person's offence or crime [21]. Regarding the PT, the utilization of the outcomes of the last election in 2014 as a criterion for submitting a pair of presidential candidates will prevent the new political parties contesting in the 2019 election from nominating their presidential and vice-presidential candidate pairs.

John Rawls said that justice is fairness or equality. The PT formulation contained in Article 222 of Law 7/2017 is not following the concept of justice presented by John Rawls which is based on two principles, namely:

“First, each person has an equal right to the most extensive total system of basic liberties similar to an equal system of liberties towards basic liberties similar to a system of liberties for all” [22].

The previous political parties do not seem to have considered equality for all political parties that would later take part in the 2019 Election when drafting the Law of Election in the Republic of Indonesia's Legislative House. It can be predicted that the PT legislation will affect political parties, especially new ones. The General Election Commission has selected new political parties as 2019 election candidates. However, even though they are able to hold a percentage of 20 or 25 per cent, they will not be able to propose the President and VP. According to John Rawls' theory, equality is one of the key components of justice. Such is not upheld in this situation.

Second, social and economic inequalities are structured in such a way that they can: (a) provide the greatest benefits to the less fortunate, according to the principle of fair savings, and (b) be attached to government offices and positions that are open to all based on conditions of equality that are fair to opportunity [22, p. 53].

In the framework of the procedure for nominating the President and Vice, the chosen design should be capable of aiding both established and emerging political parties running in the general election. According to the principle of distinction, the General Election Law's regulations should fulfil the wishes of all political parties and benefit them equally. Inequalities in political freedom are acceptable because they can be explained by the undeniable existence of objective differences among the citizens (political parties) themselves [23]. Meanwhile, from the point of view of democratic equality that produces the principle of difference, it is understandable that the advantages of the more fortunate groups (being the old political parties) should not cover the opportunity for those who are less fortunate to gain equal access [23, p. 104]. Therefore, the PT arrangement should not close the opportunity for new political parties who were less fortunate because they did not participate in the previous election and were not part of formulating the rules for the election. They should be able to nominate pairs of presidential candidates even though they are candidates for the election.



#### 4. Legal Implications on the Presidential Government System

The application of the PT in the stage of presidential nomination in forming a government is not acceptable for the presidential system and more in keeping with parliamentary custom. In a presidential system, the people elect the president and members of the legislature separately in two general elections (legislative-executive), giving the two approximately equal power [23, p. 104]. In contrast to the presidential system, a parliamentary form of government requires real support from parliament for the Prime Minister to lead his administration because the Prime Minister is accountable to the house and is subject to dismissal at any time. Therefore, political parties must form a coalition or cooperate in order to sustain and uphold the Prime Minister's position inside the government. In the Parliamentary system of government, the tradition of coalition or coalition of parties is so well-known and is essential.

The presidential system is dependent on the power of the president, unlike the parliamentary system. Bagir Manan asserts that there is only one kind of executive recognized by the Presidential Government System. The head of state serves as the government's top executive, making them both one autonomous executive. Because they are chosen directly by the electorate or through the electoral college, the only executive powerholder in a presidential system is accountable to the electorate rather than the body that represents the electorate [24]. As a result, in a presidential system, the President need not entirely rely on the legislative house's backing when acting as head of state. Although several powers of the President require consideration or approval from the legislative house, this does not mean that this can reduce the President's authority in leading the government.

The establishment of the presidential nomination threshold might be interpreted as demanding the fusion of two institutional frameworks because the candidates for president and Vice initially hoped to be independent and not be restricted by many political parties [25]. The implementation of the PT causes political parties to prioritize building coalitions based on the adequacy of the percentage of seats or votes, compared to considerations of ideological similarity, visions, and missions in nominating. As a result, political parties may be less able to establish a democratic and open process for selecting candidates for President and VP inside their own parties. Meanwhile, General Election Law [26] states, "The selection of the presidential and/or vice-presidential candidates is carried out democratically and openly in accordance with the internal process of the relevant political party." These provisions cannot be carried out optimally by political parties because they must first determine whether the candidate pairs to be proposed have a sufficient percentage of votes or seats to nominate candidate pairs. Therefore, the PT provisions make it difficult for political parties to implement an internal nomination mechanism democratically and openly. In fact, this mechanism is needed to select presidential candidates, from the best party cadres and outside the party to be promoted to become President, so that they can produce quality leaders to run the government in a presidential system.

#### Conclusion

The constitutional rights of political parties, the essence of popular sovereignty, the rule of justice for political parties, and the presidential form of government are just a few of the issues that could be affected by establishing a threshold for the nomination of the President and VP. Because it does not pertain to the clauses outlined in the Republic of Indonesia's constitution, Law No. 7 of 2017 concerning the General Election should be repealed. This law regulates the threshold for the nomination of the President and VP for Indonesia's general election system.

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