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**BENCOOLEN INTERNATIONAL  
CONFERENCE ON LAW STUDIES 2021 :  
RULE OF LAW, DEMOCRACY AND HUMAN  
RIGHTS AMIDST PANDEMIC ERA**

**PROCEEDINGS**

Proceedings of Bencoolen International  
Conference on Law Studies : Rule of Law,  
Democracy and Human Rights amidst  
Pandemic Era

**Bengkulu, 28 October 2021**

Faculty of Law  
Universitas Bengkulu  
2022

# Proceedings of Bencoolen International Conference on Law Studies : Rule of Law, Democracy and Human Rights amidst Pandemic Era

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## INTRODUCTION

This book contains the proceedings of Bencoolen International Conference on Law Studies : Rule of Law, Democracy and Human Rights amidst Pandemic Era which was Held by Graduate School of Law, Faculty of Law Universitas Bengkulu Virtually, 28<sup>th</sup> October 2021.

The main objective of this conference is to bring together academics, researchers, practitioners, students, and other group whose interests are in the issues of Constitutional, Administrative Law & International; International Economic & business Law; Criminal and Procedure; Adat, Customary & Islamic Law. In addition to circulate thinking and study findings, this conference is also intended to strengthen networking and collaboration among participants.

The conference had 5 invited speakers coming from Singapore Prof. Simon Chesterman (The National University of Singapore) ; Dr. Max Walden (University of Melbourne), Prof Muhammad Ekramul Haque (University of Dhaka), Prof. Madya. Dr. Zainal Amin bin Ayub (University of Utara Malaysia) and Indonesia Dr. Chandra Irawan.,S.H,M.H from Faculty of Law Universitas Bengkulu.

There were totally 41 papers selected for oral presentation. On the conference day, the committee categorized the presenters into 4 chambers based on topics of the papers. After the conference, the committee still give chances to the authors to revise their papers based on views or ideas they recorded during discussion before the papers finally published in this book. As the organizer, we would like to thank all parties involved in BICoLS every contributions and willingness to make this conference run well and well organized.

Head of Committee

Ari Wirya Dinata, S.H.,M.H

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# **IMPLICATION OF THE PRESIDENTIAL THRESHOLD TOWARDS THE CONSTITUTIONAL RIGHTS OF POLITICAL PARTIES AND THE PRINCIPLE OF PEOPLE'S SOVEREIGNTY**

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## **ABSTRACT**

The candidacy threshold of President and Vice President in Act Number 7 the Year 2017 concerning Elections causes the Political Party of Elections Participants unable to submit the President and Vice President candidates independently and the recent political parties that participated in 2019 elections. Political Parties have lost their constitutional rights as they cannot propose the candidates of President and Vice President. It is required to find an alternative mechanism of President and Vice President candidacy which grants more protection to the Political Parties' constitutional rights and achieves the essence of people's sovereignty. Article 222 of Act Number 7 the Year 2017 requires the Political Party to have a minimum of 20% seats in the House of Representatives or a minimum of 25% votes of the previous legislative election to submit presidential candidacy. Meanwhile, article 6A section (2) of the 1945 Indonesian Constitution does not govern regarding President and Vice President candidacy; thus, article 222 of Act Number 7 the Year 2017 contradicts the Constitution. The provision in the Elections Act has several implications, among others, limiting the freedom of political parties to submit president candidate, causing discrimination, injustice, and a material loss to the new political party. Moreover, the threshold is not in accordance with the essence of people's sovereignty as granted in the Constitution.

**Keywords:** *Implication, Presidential, Threshold, Constitutional, Political Party*

## **1. Introduction**

The candidacy threshold of President and Vice President under article 222 of the Act Number 7 the Year 2017 concerning Elections (State Gazette of Indonesian Republic Year 2017 Number 182, hereinafter is referred to as the "Elections Act") has caused the Political Parties unable to submit the President and Vice President candidates independently, and the new political parties participating in the 2019 election have lost their constitutional rights as entirely unable to submit the candidates of the President and Vice President. Thus, it is necessary to find an alternative mechanism of President dan Vice President candidates' nomination that gives more protection to the constitutional rights of the Political Party and achieves the essence of people's sovereignty.

The presidential threshold provision asserted that a Political Party or coalition of Political Parties participating in the elections might propose for Presidential candidates if it/they fulfill a minimum requirement of 20% of seats in the House of Representatives or obtaining a minimum of 25% of valid votes in the national level of previous legislative election (Elections Act, Art. 222). Meanwhile, article 6A section (2) of the 1945 Indonesian Constitution as a constitutional basis of Presidential candidacy does not restrain or regulate the threshold requirements in the nomination of President and Vice President. The article mentions that *“Each ticket of candidates for President and Vice-President shall be proposed prior to the holding of general elections by political parties or coalitions of political parties which are participants in the general elections.”*

Article 6A section (2) of the 1945 Indonesian Constitution governs an alternative-based mechanism of the candidacy of the President and Vice President. Election participants may propose the candidates independently or in a coalition with another political party prior to the election. This mechanism for any Political Party to propose the President and Vice President candidates either independently or in a coalition with other political parties would be as a choice and not an obligation. Therefore, problems arise when the candidacy mechanism is limited by the presidential threshold in the Election Act, which restrains the rights of political parties to propose the nomination of President and Vice President candidates.

Based on article 6A section (2) of the 1945 Indonesian Constitution, every political party participating in the election has the right to submit the candidates of President and Vice President (Isra, 2017: 21). The 1945 Indonesian Constitution does not recognize the presidential threshold; therefore, maintaining a presidential threshold would be similar to nurturing a constitutional flaw in the President and Vice President election (Isra, 2017).

The implementation of the presidential threshold impact on the constitutional rights of 4 (four) Political Parties participating in the 2019 General Election: *Partai Garuda, Partai Berkarya, Partai Perindo, and Partai Solidaritas Indonesia* (General Election Commission Decision Number 963/PL.02-Kpt/06/KPU/VII/2018 concerning the Seat Number or Valid Votes Number of Political Parties Participating in the 2014 General Election for the 2019 General Election of President and Vice-President, 2018). Those four political parties cannot propose the candidates of Presi-



dent and Vice President, even though the General Election Commission of Indonesia had established them as participants in the 2019 general election. They lost their constitutional rights as the 2019 election threshold was based on the previous election, which was the 2014 general election when those four political parties were not participants yet. Meanwhile, the 2019 general election was held in the concurrent election system, combining the legislative election (to vote for the members of the House of Representatives, the Regional Representatives Council, the Regional People's Representatives Assembly both in the province level and in the District/City Level) with the Presidential election at the same time, but the presidential threshold was also maintained. The concurrent election is the consequence of the Constitutional Court Decision No. 14/PUU-XI/2013 on 23 January 2014, by not annulling the provision of presidential threshold as stated in article 9 of the Act Number 42 the Year 2008 concerning the General Election of President and Vice-President. (Election Act, Art. 222). It is different to 2014, 2009, 2004 that even though there was a presidential threshold<sup>1</sup>, the legislative election and the presidential election were separated, thus there was no implication to the new political parties' rights to propose the candidates of President and Vice President.

Therefore, this article puts the problem statement and aims to analyze on how is the legal implication of the presidential threshold to propose the candidates of the President and Vice President towards the constitutional rights of political parties and the principle of people sovereignty.

## 2. Method

This research is normative legal research. It is a process to find out the legal regulation, legal principles, and legal doctrines overcome the legal problems, as in line with the legal science prescriptive character (Marzuki, 2005: 35). The legal sources are the primary source in the form of regulations related to the general election, secondary sources such as books, minutes of the meeting, journals, and research reports. This research looks after the legal source in a library research method and analyzes in the prescriptive analytics. The latter would be useful for

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<sup>1</sup> The presidential threshold in question was regulated under the Act No. 23 Year 2003 concerning Presidential Election for 2004 Election, and the Act No. 42 Year 2008 concerning Presidential Election for the 2008 and 2014 Election.

problem analysis using legal interpretations, legal concepts, legal values, and legal norms.

### 3. Analysis and Discussion

According to Online Black Dictionary, etymologically, threshold means “1. *Boundary if passed has different state of affairs existing.* 2. *Maximum or minimum value serving as a benchmark to compare and guide any breach that can cause a review of a situation or redesigning the system.*”(The Law Dictionary, 2020) Terminologically, threshold means the arrangement of the threshold level of legislative support, either in the form of votes number or seats number gained by the election participants, to make them able to propose the Presidential candidates from the political party in question or in a coalition with other political parties (Pamungkas, 2009). Generally in its implementation, there are 3 (three) terms of threshold functioned to determine or to limit: (1) rights to be the next election participant, namely electoral threshold; (2) political party’s rights in the votes count and converted to the seats in the parliament, called as a parliamentary threshold; and (3) rights to propose the President and Vice President candidates, that is the presidential threshold (Isra, 2017).

In Indonesian regulation and its implementation, the presidential threshold aims to be the threshold of candidacy, not the threshold of electability. The former concept is different from the common practice in some other countries. J. Mark Payne et al. in his book entitled *Democracies in Development: Politics and Reform in Latin America*, cited by Pipit. R. Kartawidjaja asserted that “if people discussing general election-related to the presidential threshold, it shall refer to the requirements of the presidential candidates to be elected as the President. For example, in Brazil, the requirement stands for 50% plus one, Equador 50% plus one or 45% with 10% deviation with the other strongest competitor, Argentina 45% or 40% with 10% deviation with other strongest competitor (Kartawidjaja, 2016). The Election Act regulator assumed that implementing the presidential threshold would strengthen the presidential governmental system combined with the multi parties system. President who has maximum support from the parliament would find it easier to execute the governmental system for development purposes, and also the presidential threshold would be the way to simplify political parties (Kartawidjaja, 2016).

Syamsuddin Haris criticize the implementation of the presidential threshold in Indonesia. In the presidential framework, the legitimation source of the President shall not be determined based on the political configuration of parliament resulting from the election. President and parliament shall be separated institutions and have different legitimate bases, and also have no dependency. President and the government under his control can work effectively without expecting any support from the legislative (House of Representatives) (Amalia, 2016).

Post to the enactment of the Election Act, the presidential threshold provision has been filed for judicial review to Constitutional Court frequently. The applicants asserted that article 222 of the Election Act contradicts the Constitution, especially article 6A section (2) of the 1945 Indonesian Constitution, which is the constitutional basis of the nomination of President and Vice-President candidates. However, from all judicial reviews towards article 222 Election Act, none of them are granted by the Constitutional Court. The Court held to reject or declare the request inadmissible based on many reasons.

In Constitutional Court Decision Number 53/PUU-XV/2017, the Court considers that: *first*, the legal arrangement of a minimum requirement of votes count or political parties' seats to nominate the President and Vice-President candidates is an open legal policy brought by the regulator; thus it is not under the authority of the Court to annul as it is an open legal policy, and the regulator may determine unreservedly concerning the procedure of President and Vice-President election. *Second*, the threshold requirements to propose the President and the Vice-President candidate is not based on the logical basis of the unification or separation of the general election but on strengthening the presidential system.

In line with Syamsuddin Haris, Saldi Isra declared his disapproval of the strengthening issue of the presidential system due to the presidential threshold in the presidential candidacy. By citing Alan R. Ball and B. Guy Peters in their book *Morden Politics and Government*, Saldi Isra discusses the presidential governmental system characteristic that is not always limited to the adversary of presidential and legislative bodies, but also the nature of the executive and legislative bodies, which are separated (Isra, 2010). Therefore, putting base the legislative election results as the requirements to propose the President and Vice-President candidates on the ground of strengthening the presidential system is incorrect and unjustified.

Fortifying the presidential system with a mindset that the President shall gain majority legislative support would trap the authoritarian governmental system (Isra, 2017).

Sulardi also criticizes this presidential threshold issue. He claimed that Indonesia implements a double presidential threshold, as there are two regulations of presidential threshold: from its candidacy and electability (Sulardi, 2018). Constitution only acknowledges the presidential threshold in terms of the electability phase in the second round of the presidential general election<sup>2</sup>, while the threshold of candidacy is a mechanism governed by the Election Act. The practices in some countries, presidential threshold shall substantially mean as requirements of certain candidates to be elected as President, not as the requirements to be the candidate of President and Vice-President.

### **3.1. Implications of the Presidential Threshold arrangement on the Constitutional Rights of Political Parties**

The presidential threshold percentage approach in article 222 of the Election Act causes some problems. *First*, constraint the freedom of political parties to propose the President and Vice-President candidates independently or in a coalition. Meanwhile, Constitution does not restrain the political parties from proposing the candidates. The requirements of 20% seats or 25% votes in the Election Act narrow the freedom of political parties to submit the President and Vice-President candidate, even negates the rights of new political parties to participate in the 2019 general election.

*Second*, the presidential threshold arrangement has caused discrimination, injustice, and an actual loss to the new political parties in 2019, which the regulation in question was formulated by the former political parties participating in the 2014 election. Meanwhile, the law recognized the principle of *nullus/nemo commundur capere potest de injuria sua propria*, which means no one shall drive an advantage from his own wrong, and no one shall suffer damage from the wrong of others (Harun, 2016: 265). Therefore, the presidential threshold arrangements formulated by the former political parties in the House of Representatives have breached the said principle as it injures the new political parties in participating in the 2019 general election.

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<sup>2</sup> Indonesia implements two round system or run-off system in the Presidential election.

*Third*, the presidential threshold triggers the political parties to prioritize building a coalition based on the sufficient percentage number of seats or votes, rather than the resemblance of ideology, vision, and mission during the candidacies process. This condition would complicate the political parties to achieve a democratic and open process in determining the candidates of President and Vice-President in its internal mechanism. Meanwhile, article 223 of the Election Act affirmed that “*Establishing a presidential and/or vice-presidential candidate shall be conducted in a manner that is democratic and open in accordance to the internal mechanism of the political party in question.*”

### **3.2. Implications of the Presidential Threshold arrangement on the Principle of People's Sovereignty**

*First*, the arrangement of the presidential threshold is not in line with the essence of people's sovereignty granted in the Constitution. Article 1 section (2) of the 1945 Indonesian Constitution stated that “Sovereignty is in the hands of the people and is implemented according to this Constitution.” This article directly elaborates the people's sovereignty concept in the fourth paragraph of the 1945 Constitution preamble. Prior to the amendment, the people's sovereignty was implemented absolutely by the People's Consultative Assembly; thus, the people's sovereignty was altered into the state's sovereignty (Majelis Permusyawaratan Republik Indonesia, 2006). After the amendment of the 1945 Indonesian Constitution, the people's sovereignty was no longer implemented by the People's Consultative Assembly but was then implemented in any kinds of functions, authorities, duties, rights, and obligations of states' institutions, commissions, bodies, or any other kinds of an institution regulated under the Constitution (Majelis Permusyawaratan Republik Indonesia, 2006). In this regard, the implementation includes the political parties' rights to propose the President and Vice-President candidates under the Constitution (1945 Constitution, Art. 6A (2)). The political parties manifest the people's sovereignty concept within the electoral context of the President and Vice-President, as an election is the means of people's sovereignty (Election Act, Art. 1(1)). Therefore, when there is a limitation of political parties' rights to nominate the Presidential candidacy, there is a constraint to the notion of people's sovereignty.

*Second*, the implementation of the presidential threshold has restrained the people's rights to have more alternative candidates of President, as the determination of President and Vice-President candidates is bound to the percentage number of political parties' voting counts and seats. Meanwhile, the Constitution does not recognize the candidacy threshold; instead, it recognizes the electability threshold as stated in article 6A section (3) of the 1945 Indonesian Constitution, and all in all, it shall be based on the people's will.<sup>3</sup> Furthermore, the common practice in the presidential system-based states is implementing a minimum requirement of electability threshold of the President (Amalia, 2016).

#### **4. Conclusion**

The Presidential candidacy threshold under article 222 of Act Number 7 the Year 2017 is preferable to be eliminated as it contradicts article 6A section (2) of the 1945 Indonesian Constitution governing the President and Vice President candidacy. The threshold mechanism under the Elections Act has damaged the constitutional rights of the New Political Party and undermined the principle of people's sovereignty. In the future, the elimination of Presidential nomination in the Elections Act will grant freedom to the Political Party of Elections to submit presidential and Vice President candidates both independently or in a coalition. Furthermore, as voters, people will have a higher number of President and Vice President alternative candidates and be able to determine the best choice of the Indonesian Republic of Presidential candidate.

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<sup>3</sup> Article 6A section (3) of the 1945 Indonesian Constitution states that. *“Any ticket of candidates for President and Vice-President which polls a vote of more than fifty percent of the total number of votes during the general election and in addition polls at least twenty percent of the votes in more than half of the total number of provinces in Indonesia shall be declared elected as the President and Vice-President.”*

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