



ISSN 2809-672X (Online)
IUS POSITUM (Journal of Law Theory and Law Enforcement)

<https://journal.ifpublisher.com/index.php/jlte>

Vol. 3 Issue. 1, January 2024

doi.org/10.56943/jlte.v3i1.463

Human Rights Perspective on Implementing Presidential Threshold in Indonesia

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ABSTRACT

The current presidential election system has a threshold that must be met before being nominated as president and vice president. In Indonesia, the implementation of the presidential threshold concept began following the amendment of the 1945 Constitution, in which the President and Vice President are directly elected through public elections. This research aims to identify the implementation of the Presidential Threshold in Indonesia and the guarantee to fulfill human rights in its implementation. This research applies a normative juridical research method that discusses issues regarding the implementation of the presidential threshold and the extent to which human rights contribute to the presidential threshold in Indonesia. The findings of this research suggest that the implementation of the presidential threshold in the presidential and vice presidential elections is not considered a violation of human rights. Since human rights applied in Indonesia are not absolute human rights, the objective of implementing presidential thresholds in Indonesia is to generate leaders who receive majority political support to strengthen the presidential system. As a result, the government system is not prone to change.

Keywords: *Democracy, Human Rights, Presidential Threshold*

INTRODUCTION

The state of law concept in Indonesia is a combination of integrity in one idea and unity that is inseparable from understanding the political system in the constitution, as stated in the 1945 Constitution.¹ Both the legal state (*retchstaat*) and the rule of law emphasize the protection of human rights as the basic value and foundation of the state of law concept.² The provisions on human rights in the 1945 Constitution indicate that human beings are addressed, recognized, and protected by the state.³ Therefore, human right is a significant factor due to their wide scope in every aspect of human life, including the constitutional aspect.⁴

The study of the rule of law as the identity of a country and the democratic system as the political system of a nation cannot be separated, as both are considered a complementary unity. This is regulated in Article 28D Paragraph 3 of the 1945 Constitution, which states that “Every citizen has the same opportunity and right to be involved in the government.”⁵ This statement indirectly provides legitimacy by stating that every citizen has the right to participate in government, both individually and collectively through political parties. Political parties are present to facilitate candidates occupying certain positions based on fair competition through elections.⁶

Indonesia held its first election after the Fourth Amendment to the 1945 Constitution. In the past, Indonesia had experienced various improvements in its constitutional system. There was a change from a parliamentary system to a presidential system, including the process of electing the president and vice president. Prior to the amendment, the President and Vice President were elected by members of the People’s Consultative Assembly (MPR) through a voting process, and then it was changed to a direct election by the public.⁷

The election of the president and vice president is conducted under certain mechanisms and requirements. The first presidential and vice presidential

¹ Lita Tyesta Addy Listya Wardhani, Muhammad Dzikirullah H Noho, and Aga Natalis, “The Adoption of Various Legal Systems in Indonesia: An Effort to Initiate the Prismatic Mixed Legal Systems,” *Cogent Social Sciences* 8, no. 1 (December 31, 2022), <https://doi.org/10.1080/23311886.2022.2104710>.

² Dietmar von der Pfordten, “On the Foundations of the Rule of Law and the Principle of the Legal State/Rechtsstaat,” 2014, 15–28, https://doi.org/10.1007/978-3-319-05585-5_2.

³ Abd Muni, “Hak Asasi Manusia Dalam Konstitusi Indonesia,” *Al’adalah* 23, no. 1 (April 24, 2020): 65–78, <https://doi.org/10.35719/aladalah.v23i1.27>.

⁴ M. Amin Putra, “Perkembangan Muatan Hak Asasi Manusia Dalam Konstitusi Di Indonesia,” *Fiat Justisia Jurnal Ilmu Hukum* Vol. 9, no. No. 2 (2015): 18 (199-216), <https://jurnal.fh.unila.ac.id/index.php/fiat/article/view/597/536>.

⁵ Panitia Persiapan Kemerdekaan Indonesia, “Undang-Undang Dasar 1945 Pasal 28D Ayat 3,” 1945.

⁶ Mitzi Waltz and Alice Schippers, “Politically Disabled: Barriers and Facilitating Factors Affecting People with Disabilities in Political Life within the European Union,” *Disability & Society* 36, no. 4 (April 21, 2021): 517–40, <https://doi.org/10.1080/09687599.2020.1751075>.

⁷ Miriam Budiardjo, *Pengantar Ilmu Politik*, Edisi 1 (Tangerang Selatan: PT Gramedia Pustaka Utama, 2017).

elections in 2004 in Indonesia implemented a presidential threshold system, with the threshold that must be met being 3% (three percent) of the total number of legislative assembly (DPR) seats or 5% (five percent) of the national valid votes in the legislative elections.⁸

Presidential threshold is considered an open legal policy of the legislator. It is one of several approaches to strengthening the presidential system through the simplification of political parties. On the other hand, the implementation of presidential threshold raises pros and cons in the public. Moreover, the implementation of Presidential Threshold in Indonesia seems discriminatory in terms of the democratic system. The presidential threshold is perceived as reducing the value of democracy and hampering the fulfillment of the constitutional rights of political parties. The provisions regarding the presidential threshold mechanism also eliminate the right of citizens to vote efficiently.

In the 2009 elections, the threshold percentage for candidacy for President and Vice President was changed to 20% (twenty percent) of legislative assembly seats and twenty-five percent of the national valid votes from the legislative elections, and this system remains in 2014 and 2019 elections. However, in 2019, the implementation of presidential threshold experienced a polemic since the presidential and vice presidential elections were held concurrently, as stated in Law No. 7/2017.

The presidential threshold has sparked numerous debates, especially when it is perceived from the perspective of human rights. The provisions regarding the conditions that must be met to qualify a person to become a candidate for president or vice president are considered to have violated the political rights of citizens. Certain rights possessed by each individual without the involvement of a political party will not be fulfilled. The opportunity to become president and vice president independently without the support of the House of Representatives will be diminished. In addition, both new and existing political parties are not entitled to nominate and cannot meet the threshold due to the applicable provisions, making them unable to be elected as a pair of presidents and vice presidents. At this point, the Presidential Threshold provision appears to violate human rights, especially political rights that should be guaranteed and upheld by the democratic system. The idea of freedom of choice is a fundamental right that characterizes a democratic state, where citizens hold the highest sovereignty.⁹

At first glance, the implementation of the presidential threshold concept may seem to violate human rights that have been stipulated in the constitution. However, there are other official provisions that must be considered, such as the one stated in Article 28J Paragraph 2 of the 1945 Constitution: “in carrying out their rights and obligations, every citizen shall be subject to restrictions stipulated

⁸ Al Mas'udah, “The Presidential Threshold as An Open Legal Policy in General Elections in Indonesia,” *Prophetic Law Review* 2, no. 1 (2020), <https://doi.org/10.20885/PLR.vol2.iss1.art3>.

⁹ Budiardjo, *Pengantar Ilmu Politik*.

by law, with the sole purpose of ensuring recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with moral considerations, religious values, security, and public order in a democratic society.” This statement emphasizes that there are restrictions on human rights by the constitution. On the other hand, there is also a guarantee of human rights possessed by every citizen in government, as stipulated in 1945 Constitution Article 28D Paragraph 3. In relation to the current situation, the Presidential Threshold and Law No. 7/2017 on General Elections may lead to a long debate.

There are several research related to the implementation of presidential threshold in the perspective of human rights in Indonesia. et. al. conducted their related research by analyzing the reconstruction of the Indonesian presidential threshold system and comparing Indonesian and Brazilian presidential threshold systems.¹⁰ Another research on presidential threshold implementation was conducted by Anggara, who examined the dynamics of presidential threshold in Indonesian presidential system.¹¹ Moreover, Anggara’s research was emphasized on ideal position of pros and cons regarding Indonesian presidential threshold during elections, which was considered as a reinforcement of Indonesian presidential system.

Compared to the previously mentioned relevant research, this research has its’ own novelty and meanings since there has been no research was conducted that specifically attempts to analyze the implementation of presidential threshold from the perspective of human rights in Indonesia, along with the guarantees for the fulfillment of human rights in implementing the presidential threshold. Therefore, this research aims to identify the implementation of presidential threshold from the perspective of human rights in Indonesia. Besides that, this research will also analyze the guarantees for the fulfillment of human rights in implementing the presidential threshold in Indonesia.

LITERATURE REVIEW

Presidential Threshold

The term presidential threshold consists of two words, presidential and threshold. Presidential is an adjective in English language relating to a president or presidency, while threshold means the acceptable standard that must be exceeded for a certain result.¹² In simple terms, the definition of Presidential Threshold can be defined as a rule regarding the threshold of votes obtained by a

¹⁰ Sinta Devi Ambarwati, M. Roziq Saifulloh, and Stella M. S. Aritonang, “Reconstruction of the Presidential Threshold System in the Election System in Indonesia: (Comparative Study of the Presidential Threshold System of Indonesia and Brazil),” *Jurnal Hukum Lex Generalis* 1, no. 5 (2020): 80–95, <https://doi.org/10.56370/jhlg.v1i5.213>.

¹¹ Vanni Anggara, “Dinamika Presidential Threshold Di Indonesia,” *Jurnal Transformatif* 5, no. 2 (2019): 17–36, <https://doi.org/10.21776/ub.transformatif.2019.005.02.2>.

¹² Rianisa Dwi, “Anomali Presidential Threshold Dalam Sistem Pemerintahan Indonesia: Reduksi Parlementer Dalam Sistem Presidensial Indonesia,” *Jurnal Bappenas Working Papers* Vol II, no. No. 1 (2019).

political party or a coalition of political parties participating in an election to nominate a President and Vice President from their party in the election.¹³ Dwi suggests that the Presidential Threshold to be interpreted as the threshold of support obtained from the House of Representatives, both in the number of valid votes and the number of seats that must be obtained by a political party participating in the election to be able to nominate a pair of candidates for President and Vice President from the political party or a coalition of political parties.¹⁴

The regulation regarding concept of Presidential Threshold was enacted since the enactment of Law No. 23/2003 on General Election of President and Vice President, which was applied in 2004 Presidential and Vice Presidential Elections. However, the rules regarding Presidential Threshold were amended by Law No. 42/2008 to be applied to the implementation of 2009 Presidential Election and 2014 General Election, and changed to Law No. 7/2017 concerning general elections which became the latest law used in the implementation of the 2019 General Election. The statement regarding the Presidential Threshold contained in Law No. 7/2017 is elaborated in Article 222 which states “candidate pairs are proposed by a political party or a coalition of political parties participating in the elections that meet the requirements of obtaining at least 20% (twenty percent) of the total seats in the legislative assembly or obtaining 25% (twenty-five percent) of the total valid votes nationwide in the previous elections for members of the House of Representatives.”

The Presidential Threshold provision will continue to be applied in the Presidential and Vice Presidential Elections as long as there is no new law to replace it.¹⁵ The purpose of applying the Presidential Threshold is an effort to elect the best and qualified President and Vice President. In addition, presidential thresholds also aim to obtain solid support from the legislators in order to create an effective presidential system of government.¹⁶

Human Rights

Human rights can be interpreted as the fundamental authority possessed by human-beings.¹⁷ Human rights are a set of rights inherent in human soul as a creature of God Almighty that must be respected, supported, and defended by state, government, law, and respect for human dignity.¹⁸ This is stated by Locke's

¹³ Alfa Fitri, “Presidential Threshold Dalam Pemilihan Umum Serentak: Kemunduran Demokrasi Konstitusional?,” *Jurnal Legislasi Indonesia* 19, no. 1 (2022): 68-82, <https://doi.org/10.54629/jli.v19i1.900>.

¹⁴ Dwi, “Anomali Presidential Threshold Dalam Sistem Pemerintahan Indonesia: Reduksi Parlemeter Dalam Sistem Presidensial Indonesia.”

¹⁵ Muhammad Fahmi, “Perspektif HAM Tentang Presidential Threshold (Analisis Undang-Undang Nomor 7 Tahun 2017)” (UIN Syarif Hidayatullah, 2021).

¹⁶ Saldi Isra, *Pemilihan Umum Dan Pemilihan Daulat Rakyat* (Jakarta: Themis, 2017).

¹⁷ Budiardjo, *Pengantar Ilmu Politik*.

¹⁸ Syafrinaldi and Syafriadi, “The Concept of Human Rights, Democracy and the Rule of Law,” in *Internationalization of Islamic Higher Education Institutions Toward Global Competitiveness* (Semarang, 2018), 275–84.

belief that human rights are granted directly by The Creator.¹⁹ Therefore, there is no other power has the authority to revoke it because it is a human right from birth. Meanwhile, Law No. 39/1999 Article 1 Paragraph 1 interprets human rights as “a set of rights inherent in the nature and existence of man as a creature of God Almighty and is part of His grace that must be respected, upheld, and protected by the state, law, government, and everyone for the sake of honor and protection of human dignity.”²⁰ Based on the definition above, it can be comprehended that human rights are rights owned by an individual since birth, thus, allowing them to have the same opportunities in living the best of their lives.

Looking back at its history, the implementation of human rights in Indonesia began to be guaranteed since the provisions on the importance of Human Rights were included in the 1945 Constitution after the country's independence.²¹ The regulation of human rights guarantees has experienced some post-reform advancements where many specific legal instruments were issued that provide guarantees, protection and enforcement of human rights, such as the issuance of the People's Consultative Assembly (MPR) Decree No. XVIII/MPR/1998 on Human Rights, Law No. 39/1999 on Human Rights, Law No. 26/2000 on Human Rights Courts, as well as the post-amendment 1945 Constitution which is contained in articles 28A-28J which addresses the guarantee of human rights for every citizen.

RESEARCH METHODOLOGY

The method in this research is normative juridical. The normative juridical method is a research method that focuses on analyzing and applying applicable laws and regulations to legal issues.²² This method aims to understand, interpret, and apply existing legal rules. This research is also an analytical descriptive research, which describes any legal issues to be examined and analyzed. This research is a legal research that conducts the statute approach, conceptual approach, and case approach. In order to apply the statutory method, all applicable laws and regulations are reviewed in relation to the legal issues under discussion. The conceptual approach is an approach that comes from views or doctrines that have developed in law. The case approach is a method that involves finding court

¹⁹ Akmal, *Hak Asasi Manusia (Teori Dan Praktik)*, ed. Tim editor UNP Press, 2015th ed. (Padang: UNP Press Padang, 2019), <http://repository.unp.ac.id/id/eprint/14545>.

²⁰ Pemerintah Pusat, “Undang-Undang No. 39 Tahun 1999 Tentang Hak Asasi Manusia” (Jakarta, 1999).

²¹ Sunarso, *Membedah Demokrasi (Sejarah, Konsep, Dan Implementasinya Di Indonesia)*, ed. Ibnu Santoso, Ed. 1 (Yogyakarta: UNY Press, 2015).

²² Achmad Subagyo, Moh Saleh, and Saiful Abdullah, “Legal Protection for Taxpayers Participants of Voluntary Disclosure Program in the Law on Harmonization of Tax Regulations,” *IUS POSITUM (Journal of Law Theory and Law Enforcement)* 1, no. 4 (2022).

cases that are pertinent to the subject under study.²³ The primary law and regulations that were used in this research consist of 1945 Constitution of the Republic of Indonesia, Law No. 23/2003 on the General Election of the President and Vice President, Law No. 42/2008 on the General Election of the President and Vice President, Law No. 7/2017 concerning General Elections. Meanwhile, secondary legal materials consist of books and journal articles related to the topic of presidential threshold and human rights.

RESULT AND DISCUSSION

Implementation of Presidential Threshold in Indonesia

Since the 1945 Constitution was amended to include direct popular election of President and Vice President, Indonesia has been implementing the presidential threshold concept. The provisions of the presidential threshold are then outlined in Law No. 23/2003 concerning the General Election of the President and Vice President stated in Article 101 as follows: For the 2004 presidential and vice presidential elections, political parties or a combination of political parties that meet the requirements for votes in the legislative election at least three percent of the number of legislative assembly seats or five percent of national valid votes of the 2004 election, may nominate a pair of candidates for the presidential and vice presidential.

In simple terms, it can be comprehended from the provisions of the article that only a political party or a combination of political parties that have met the presidential threshold in the 2004 legislative elections can nominate the president and vice president. In 2004, the people directly conducted the presidency and vice-presidential elections, and the process proceeded well in spite of the numerous disputes that had previously occurred in Indonesia..

Furthermore, Law No. 42/2008 was used as a foundation to hold the presidential and vice-presidential elections in 2009 with the provision that presidential and vice-presidential candidates can be elected once they meet the threshold requirements as stated in Article 9 as follows: "Candidate pairs that can be proposed by political parties or a combination of political parties participating in the election must meet the requirements of obtaining seats at least twenty percent of the number of legislative assembly seats or obtaining twenty-five percent of the national valid votes in the legislative election before the presidential and vice presidential elections started."

The provisions have new regulations regarding the percentage threshold for the candidates of the president and vice president. Furthermore, Law No. 42/2008 about the general election of President and Vice President in 2014 is in use for the general election of President and Vice President with provisions still the same as

²³ Moch. Muslihuiddin and Yahman, "Law Enforcement Against Health Protocol Covid-19 Violations In Indonesia (Case Study Decision Number: 173/PID.SUS/2021/PT.DKI)," *IUS POSITUM (Journal of Law Theory and Law Enforcement)* 1, no. 3 (2022): 62–71.

the concept of regulating in the general election in 2009. However, there are slight regulatory differences regarding the implementation of the elections in 2019. The 2019 presidential election is based on Law No. 7/2017 concerning General Elections, where the regulation on the Presidential Threshold is contained in the provisions of Article 222 as follows: “Presidential and vice-presidential candidate pairs proposed by political parties or a combination of political parties participating in the general election that meet the requirements of obtaining at least twenty percent of the number of legislative assembly seats or obtaining twenty-five percent of national valid votes in the previous legislative election.”

The implementation of the Presidential Threshold percentage in Law No. 7/2017 still has similarities with Law No. 42/2008 concerning the general election of the President and Vice President. However, the execution is slightly different. Since the issuance of the Constitutional Court Decision No. 14/PUU-XI/2013 stated that the general election is held simultaneously between the legislative election and the presidential election. In Law No. 7/2017 it is also explained that because the elections are held simultaneously, the presidential threshold for the president and vice president candidates is taken based on the results of the legislative election of the previous period, which is the legislative general election of 2014, as an indicator of the presidential threshold of the 2019 election.

Human Rights in the Implementation of Presidential Threshold

Article 1, Paragraph 2, of the 1945 Constitution affirms that sovereignty is in the hands of the citizens. The citizens play a very important role in the country’s political system. This concept later became known as the democratic system. A country that adheres to democracy, such as Indonesia, is upholding the human rights of every citizen. The general election is one form of the democratic system. Elections are then used as an indicator of democracy’s success in a country.

In Indonesia, general elections are held using the presidential threshold idea, which states that a political party or a combination of political parties must meet in order to propose candidates for president and vice president. This is in line with Article 222 of Law No. 7/2017, the latest provisions regarding the implementation of general elections, which states that the condition for the threshold must obtain 20% support from legislative assembly seats or 25% support from valid national votes for legislative elections.

The presidential threshold that must be met for presidential and vice presidential candidates has the potential to violate human rights, especially the right to politics and to participate in elections. The concept of the presidential threshold has been applied since the amendment of the 1945 Constitution with different percentage provisions. In the 2004 presidential and vice presidential elections, the threshold was set at 3% of the legislative assembly seats or 5% of the national valid votes from the legislative elections. However, in the 2009, 2014,

and 2019 presidential elections, the threshold was set at 20% of the legislative assembly seats or 25% of the national valid votes from the legislative elections. In addition, the guarantee of the political rights of every citizen has been regulated in the 1945 Constitution, Article 28D, Paragraph 3, which reads as follows: “Every citizen has the right to equal opportunity in government.”

Thus, the presidential and vice presidential nomination thresholds, when viewed from a human rights perspective, may seem to violate the following political rights: First, the implementation of the presidential threshold deprives every individual of the political right to be elected as president or vice president independently without the involvement of a political party or a coalition of political parties. Second, the loss of political rights owned by new political parties or coalitions of political parties that have not met the percentage of the presidential threshold to nominate the president and vice president in the general elections.²⁴

However, upon further analysis, the application of the presidential threshold does not eliminate the basic values of human rights possessed by each individual. These basic human values remain attached to themselves as human beings and to their constitutional rights as Indonesian citizens. Every Indonesian citizen has the same opportunity to become a candidate for President and Vice President together with other political parties. The nomination of the President and Vice President is open to anyone, both individuals and groups, that can fulfill certain requirements, such as the provisions of the presidential threshold, as a form of initial support from the legislative assembly.

Anyone who wants to nominate themselves as the president and vice president candidate, whether it is from existing or new political parties, must abide by the terms and conditions of the General Election Law because there is no discrimination against certain groups or special treatment for a particular person or group. All political parties must compete in legislative elections to demonstrate their support from the House of Representatives in order to adhere to the concept of democratic country. Existing or new political parties that cannot fulfill the presidential threshold might provide support for presidential and vice-presidential candidates by announcing that they are still able to support the candidates chosen by certain coalitions. Thus, they still have their political rights and can be channeled, because all political parties have the same opportunity and are in equal positions.

However, the nomination of the president and vice president cannot be conducted if there is an independent party. This is due to the statement in 1945 Constitution Article 6A Paragraph 2 that reads “the president and vice president candidate pairs are nominated by political parties or a combination of political parties participating in the general election before the event of the election itself.”

²⁴ Fahmi, “Perspektif HAM Tentang Presidential Threshold (Analisis Undang-Undang Nomor 7 Tahun 2017).”

Thus, the implementation of the Presidential Threshold deprives citizens of their political rights. Every Indonesian citizen still owns the right to the same opportunity to nominate themselves as president and vice president candidates. However, the candidates must meet the criteria of general elections, such as the presidential threshold requirement. The presidential threshold concept did not emerge overnight because it has gone through the running democratic process in Indonesia. This threshold has become the will of lawmakers to regulate the course of elections to create a better democratic life in Indonesia.

Human rights are stipulated in the 1945 Constitution, which serves as the supreme law. Indonesia is a democratic country that upholds human rights that have been implemented in the name of law. After the amendment, the 1945 Constitution has widely accommodated the guarantee and protection of human rights as stated in Article 26A to Article 28J. This constitution is the highest foundation; therefore, the regulations under it must not conflict with the regulations above it.

Therefore, the implementation of the presidential threshold does not violate human rights for citizens who intend to nominate themselves as president or vice president candidates. There are legal provisions in constitutional law that regulate more comprehensively the process of nominating the president and vice president. In this case, the legal principle known as *Lex specialis derogat legi generali* applies, which means that laws that regulate more specifically will override more general legal rules. Therefore, there is no discrimination in the implementation of the Presidential Threshold in Indonesia, considering that all parties can nominate themselves and the implementation of the Presidential Threshold does not violate the socio-cultural values of the Indonesian people.

Thus, the concept of presidential threshold is not contrary to human rights and the 1945 Constitution. Furthermore, if there is a violation of human rights and constitutional rights, then the parties concerned can submit a judicial review to the Constitutional Court. As a democratic country, Indonesia upholds the principles of democracy, as evidenced by the existence of a judicial power that is independent and free from interference of other powers.

CONCLUSION

The implementation of the presidential threshold does not eliminate the basic values of human rights owned by each individual, especially political rights. Every Indonesian citizen has an equal opportunity to run for president and vice president as long as they meet the requirements outlined in the laws and regulations. Political parties that cannot propose candidates for president and vice president because they do not meet the threshold are still allowed to form coalitions with other political parties to meet the threshold requirements because

the enactment of the presidential threshold is an open legal policy of the House of Representatives as the legislator.

The presidential threshold could still be implemented in Indonesia by paying attention to the diverse cultural values and human rights of the country. However, it is suggested to the House of Representatives to lower the threshold below fifteen percent, so that the opportunities for lower-middle-class people might open up. The government shall also pay attention to the threshold of the presidential threshold, so that all Indonesian citizens may obtain the same right to nominate themselves as president and vice president. Political parties that cannot nominate candidates for president and vice president because of the threshold are suggested to form coalitions with other political parties.

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