



Questioning Presidential Threshold in Indonesia: Constitutional Analysis and Democracy Implementation

Dani Amran Hakim¹, M. Yasin al Arif²

¹Faculty of Sharia, UIN Raden Intan Lampung, E-mail: daniamranhakim@radenintan.ac.id

²Faculty of Sharia, UIN Raden Intan Lampung E-mail: myasinalarif@radenintan.ac.id

ARTICLE INFO

Keywords:
Constitution; Democracy;
Presidential Threshold

How to cite:
Hakim, D. A., Arif, M.
Y. A. (2024).
Questioning
Presidential Threshold
in Indonesia:
Constitutional Analysis
and Democracy
Implementation. *Veteran
Law Review*. 7(1). 73-86.

Received:2024-03-05
Revised:2024-04-10
Accepted:2024-05-12

ABSTRACT

General elections serve as a democratic mechanism aimed to a lawful transition of power based on the constitution. The legal basis for general elections is found in Article 22E, while the election of the President and Vice President is governed by Article 6A of the 1945 Constitution of the Republic of Indonesia. There is no provision regarding the presidential threshold in the 1945 Constitution, as this regulation is an additional provision in Article 222 of Law Number 7 of 2017 concerning General Elections. The research methodology employs normative legal research with a juridical and conceptual approach by examining and studying relevant literature on the research topic. From a constitutional perspective, the presidential threshold provision lacks constitutional grounds. Constitutionally, every citizen has equal rights before the law and in governance. However, this limitation impacts an individual's right to be elected and to vote. From the democratic principle standpoint, political parties as representatives of the people will be restricted according to the regulations of the presidential threshold. This regulation, based on the previous general election results, eliminates the political rights of new or small parties to nominate candidates for President and Vice President.

1. Introduction

In democratic governance the focus is on a government that is created run and serves the people. Based on this principle, the highest authority in a democratic country lies with the people. According to Article 1 paragraph (2) of the 1945 Constitution of Indonesia the people hold sovereignty and it is exercised in accordance with the Constitution. In a democratic country taking part in and winning general elections can be seen as a departure from the people's sovereignty which is a basic right of all citizens (Sardini, 2011). In connection with this, in countries that identify themselves as democratic, organizing elections to choose public officials in the legislative and executive branches, both at the central and regional levels, is a common practice (Fadjar, 2009).

Indonesia, as a country with democratic principles, regularly conducts elections. General elections in a country are an integral part of implementing democratic principles, where the people can choose the leaders or representatives who are authorized to formulate policies based on the people's wishes (Hidayat, 2020). An election fundamentally serves as a democratic mechanism aimed at a lawful transition of power, organizing a government by the people, of the people, and for the people (Kwik, 2006). The people have the highest authority to elect representatives such as the President and Vice President, members of the People's Consultative Assembly, the Regional People's Representative Council, and the Regional Representative Council (Hardiansyah & Idami, 2017).

General elections are the embodiment of democratic principles, serving as a lawful means for the transition of power based on the constitution, namely the 1945 Constitution. According to the 1945 Constitution of the Republic of Indonesia, the rules regarding general elections are outlined in Article 22E, stipulating that general elections shall be conducted directly, openly, freely, secretly, fairly, and honestly every five years. As for the provisions regarding the election of the President and Vice President, the constitution regulates them in Article 6A of the 1945 Constitution (Hakim & Rusjana, 2023).

General elections are a fundamental pillar of democracy, and since the Indonesian reformation, presidential elections have been held four times in 2004, 2009, 2014, and 2019. A frequently discussed and contentious issue is the presidential threshold, which becomes a prominent topic of discourse during presidential elections (Seran, 2013). The presidential threshold was first implemented in the 2004 elections, where Law Number 23 of 2003 concerning the President and Vice President determined the candidacy threshold at 15%. In the 2009, 2014, and 2019 general elections, this threshold was increased to 20%, as stipulated in Article 222 of Law Number 7 of 2017 concerning General Elections, creating an ongoing problematic situation (Sumodiningrat, 2021).

The presidential threshold system, regulated in Article 222 of Law Number 7 of 2017 concerning General Elections (hereafter abbreviated as the Election Law), dictates that candidate pairs are proposed by Political Parties or a Coalition of Political Parties participating in the General Elections, meeting the requirement of obtaining at least 20% (twenty percent) of the total seats in the DPR or obtaining 25% (twenty-five percent) of the valid votes nationwide in the previous General Elections for the DPR. The initial purpose of the presidential threshold was to emphasize the President's position as the executive branch, with the legislative branch acting as an overseer (Warjiyati, 2018). However, over time, this provision has led to numerous debates and controversies among the Indonesian public and academics. The primary issue revolves around Article 222 of the Election Law, which is perceived as conflicting with Article 6A paragraph (2) of the 1945 Constitution.

Regarding the above, in the subsequent development of election organization, the Constitutional Court of the Republic of Indonesia issued Decision Number 14/PUU-XI/2013 concerning the implementation of simultaneous general elections, which took place in the 2019 elections and continued for the following general elections. Simultaneous general elections represent the process of conducting elections on a single day, encompassing both executive and legislative elections. A legal issue arises when the implementation of simultaneous elections in Indonesia nonetheless maintains the provision of the presidential threshold for political events to nominate presidential and vice-presidential candidates, as stipulated in Article 222 of the Election Law (Mukhtarrija et al., 2017).

Several previous studies related to this research include one by Aprilian Sumodiningrat, who conducted a review of the Presidential Threshold provisions in Indonesia (Sumodiningrat, 2021). Furthermore, research by Yunka Novfriama and Achmad Edi Subiyanto explored the urgency of the Presidential Threshold concerning human rights in Indonesia (Novriama & Subiyanto, 2020). Additionally, a study by Mahesa Rannie and Laurel Heydir highlighted the problems associated with the vote threshold in general elections as a separate issue in Indonesia (Rannie & Heydir, 2020). In contrast to previous research, this study focuses on addressing the relevance of implementing the presidential threshold by examining the constitutional perspective and the organization of democracy in Indonesia.

2. Method

This study is a normative legal research using a juridical and conceptual approach. Normative legal research involves examining and analyzing literature studies or secondary data as the basis for research by conducting searches of regulations and literature related to the researched issues (Soerjono & Mamudji, 2001). Secondary materials include legislation, court decisions, legal theories, and opinions of scholars related to the issue of the Presidential Threshold in Indonesia.

3. Questioning Presidential Threshold in Indonesia

3.1. Development of Presidential Threshold in Indonesia

Every five years, Indonesia holds elections for the President and Vice President. Since 2004, Indonesia has adopted a new electoral system outlined in Article 6A of the 1945 Constitution, consisting of five paragraphs:

- (1) The President and Vice President are elected directly by the people.
- (2) Pairs of candidates for President and Vice President are proposed by way of political events or a coalition of political events collaborating within the general election before its implementation
- (3) Pairs of candidates who obtain more than fifty percent of the total votes in the general election, with at least twenty percent of the votes

in each province spread across more than half of the total provinces in Indonesia, are inaugurated as President and Vice President.

- (4) In the absence of a winning pair of candidates for President and Vice President, the two pairs of candidates with the highest and second-highest votes in the general election are directly chosen by the people. The pair receiving the most votes is then inaugurated as President and Vice President.
- (5) Further procedures for the implementation of the Presidential and Vice Presidential elections are regulated by law.

Previously, the President and Vice President were elected by the People's Consultative Assembly (MPR). However, since the enactment of Article 6A paragraph (1) of the 1945 Constitution, the authority of the MPR to elect the President and Vice President has been automatically revoked. The people are granted the right to directly elect the President and Vice President through general elections, signifying the people's freedom to choose their leaders. According to Saldi Isra, several fundamental reasons (*raison d'être*) underlie the shift to direct elections (Isra, 2009):

- 1) Directly elected Presidents receive a more tangible mandate and support, embodying a social contract between voters and the chosen leader. The will of the electorate (*volonté générale*) becomes the basis for the President in exercising their power.
- 2) Direct Presidential elections automatically avoid political intrigues in the representative system. Political intrigue is more likely to occur in a multi-party system, especially when general elections do not produce a majority-winning party, leading to unavoidable political bargaining.
- 3) Direct Presidential elections provide a broad opportunity for people to make choices directly without delegating to others. Representative systems tend to deviate from the people's aspirations, especially with the dominance of political parties transforming representatives into party representatives.
- 4) Direct elections create a balance between various powers in state administration, particularly in establishing checks and balances mechanisms between the President and representative institutions as both are chosen by the people.

Article 6A of the 1945 Constitution does not explicitly mention the provision of a presidential threshold for the candidacy of the President and Vice President. However, according to Article 6A paragraph (5) of the 1945 Constitution, which states, "The procedures for the implementation of the election of the President and Vice President shall be further regulated by law." Subsequently, laws regarding the election of the President and Vice President, incorporating the concept of the presidential threshold, were enacted. The first legal instrument in this regard was Law Number 23 of 2003 concerning the Election of the President and Vice President. Subsequently, Law Number 42 of 2008 concerning the Election of the President and Vice President served as the second legal instrument. The most recent legal basis

related to elections, as enacted, is Law Number 7 of 2017 concerning General Elections.

The presidential threshold is a rule established by the competent authority to serve as a reference in the nomination process for the President and Vice President. This reference takes the form of limitations based on support from the Regional Representative Council (DPR) in the form of ballot results or seat acquisitions (Pamungkas, 2009). Political parties or party alliances must meet these limitations to appoint candidates for President and Vice President in the general elections.

The legal basis for the presidential threshold was further solidified with the enactment of Law Number 7 of 2017 concerning General Elections (Fuqoha & others, 2017). According to Article 222 of the Election Law, it stipulates the conditions for the presidential threshold (Mufti et al., 2023). Presidential candidates must be proposed by a Political Party or a Coalition of Political Parties participating in the election, meeting the requirement of acquiring at least 20% of the total seats in the DPR or obtaining 25% of the valid votes nationally in the previous DPR election.

Since the introduction of direct presidential elections, the issue of the presidential threshold, regulated by Article 222 of Law Number 7 of 2017 concerning General Elections, has consistently emerged each time elections are held. For instance, in 2004, the presidential nomination threshold was set at 10 percent, increasing to 20 percent in 2009, 2014, 2019, and continuing to the present (Ghoffar, 2018).

The provision of the presidential threshold is not inherently present in Article 6A paragraph (2) of the 1945 Constitution. This article states that "Presidential and Vice-Presidential candidates are proposed by political parties or coalitions of political parties participating in the election before the election is held." The presidential threshold is an additional provision used as part of the requirements for the nomination of President and Vice President candidates, aiming to regulate and limit political parties as intermediaries between citizens and the state in nominating their representatives during elections (Susdarwono & others, 2022). The specifics are further detailed in subsequent laws due to Article 6A paragraph (5) of the 1945 Constitution.

The policy of the presidential threshold is related to the parliamentary threshold, acting as a refinement of the electoral threshold (Gaffar & Budiarti, 2012). The implementation of the presidential threshold is a policy aimed at strengthening the presidential system by simplifying political parties (Al-Arif, 2015), fostering stability between the government and the legislative body to facilitate policymaking (Nurhasim, 2014).

According to the Constitutional Court through Decision Number 14/PUU-XI/2013, the presidential threshold is considered an open legal policy. Open

legal policy grants full authority to lawmakers in determining legal policies (Wijaya, n.d.). While the application of the presidential threshold is an open legal policy, it does not negate potential influences on democracy. The implementation of the presidential threshold becomes a crucial element in assessing the fulfillment of societal freedom to choose their representatives.

3.2. The Presidential Threshold in Indonesia: Constitutional Perspectives and Democratic Governance

The amendments to the 1945 Constitution have solidified the active role of the Indonesian people in the state system. Article 1 paragraph (2) of the 1945 Constitution states, "Sovereignty is in the hands of the people and is exercised according to the Constitution." Subsequently, the results of the amendments to the 1945 Constitution clearly mandate that the election of the President and Vice President be conducted directly by the people. According to Article 22E paragraph (1), "General elections are conducted directly, publicly, freely, secretly, honestly, and fairly every five years," and Article 22E paragraph (2) of the 1945 Constitution, which states, "General elections are held to elect members of the People's Consultative Assembly, Regional Representative Council, President and Vice President, and Regional People's Representative Council" (Almanar & Rusnin, 2021).

However, a subject of debate arises regarding the mechanisms and requirements for presidential and vice-presidential candidates, particularly the presidential threshold stipulated in Article 222 of Law Number 7 of 2017 concerning General Elections. The presidential threshold is defined as the regulation of the threshold level of support from the People's Consultative Assembly (DPR), whether or not in the form of the number of votes (ballots) or the range of seats (seats) that a political party taking part within the election should attain to appoint a President from that political party or a coalition of political parties (Pamungkas, 2009). The presidential threshold is an additional provision concerning the regulation of the requirements for the nomination of the President and Vice President in Article 6A paragraph (2), which states, "Presidential and Vice-Presidential candidates are proposed by political parties or coalitions of political parties participating in the election before the election is held." (Ansori, 2015).

Conceptually, the mechanism of directly electing the President and Vice President by the people provides an insight into the existence of a social contract between the electorate and the elected officials. This social contract is articulated by John Locke through the theory of a social contract. According to Locke, before the formation of the state, humans endowed with various rights by nature could freely exercise their rights according to their desires. Because humans possess reason, they enter into a social contract to form a civil society and appoint political rulers. A President and Vice President elected through direct elections will receive a more tangible mandate and support from the people, and the will of the voters (*volonte*

generate) will guide the President and Vice President in exercising their authority in governing the country (Thaib & Puspitasari, 2009).

Returning to the discussion of the presidential threshold, there are four arguments that underlie the enactment of laws regulating the presidential threshold in the Election Law: First, the importance of developing a presidential system with power from the early stages of candidacy. Support from political parties is crucial, starting from the electoral process. Second, the presidential threshold aims to identify pairs of Presidential and Vice Presidential Candidates from the beginning (similar to a preliminary election) before the actual election. Third, the significance of developing an efficient government. By obtaining a minimum of 20% support in the DPR, the goal is to strategize so that the elected President and Vice President can secure strong support in the parliament. Fourth, the purpose of the presidential threshold is to reduce the party system. The practice of party mergers is believed to align with Indonesia's political culture that prioritizes mutual cooperation (Warjiyati, 2018).

Contrary to initial considerations, the strengthening of the presidential system doesn't seem to be achievable through the presidential threshold in simultaneous general elections. The presidential system will gain strength, meaning it will receive significant support from the DPR, with the simultaneous conduct of elections for the DPR and President without the existence of a presidential threshold (Hidayatullah, 2018). As explicitly formulated by the norm in Article 6A paragraph (2) of the 1945 Constitution, where Presidential and Vice Presidential candidates are proposed by political parties or coalitions participating in general elections, it is clear how many DPR members are acquired by way of a celebration or coalition of several events, and how many valid votes they receive nationally. In such a practical scenario, the existence of the presidential threshold becomes impractical. In this situation, the position of all political parties participating in general elections is the same (Cahyono et al., 2023), namely, they all do not have or have not yet obtained seats in the DPR. Political parties, either individually or collectively, have the right to propose Presidential and Vice Presidential candidates who will be directly elected by the people simultaneously with the people choosing candidates for the DPR, DPD, and DPRD.

General elections (*pemilu*) are a crucial instrument in a democratic state that adheres to a representative system. Hence, there is no rational reason to claim that a 20% (twenty percent) threshold of DPR seats or 25% of the valid national vote in the general elections for DPR members correlates with efforts to strengthen the presidential governance system. The presidential system would, in fact, strengthen if general elections were conducted simultaneously, and all political parties either joined forces or were not granted the right to propose their respective Presidential and Vice Presidential candidates (Gobel, 2019).

Upon constitutional scrutiny, the provision of the presidential threshold lacks constitutional foundation. Constitutional rights encompass all rights regulated in the constitution, including both human rights and other rights (Roestandi, 2006). Human rights are fundamental rights inherent to human beings, universal, and everlasting. Therefore, these rights must be protected, respected, and upheld, and they should not be neglected, reduced, or seized by anyone. Article 6A paragraph (2) of the 1945 Constitution explicitly mandates that "Presidential and Vice Presidential candidates are proposed by political parties or coalitions participating in general elections before the implementation of general elections." The phrase "political parties participating in general elections" in this sentence leads to various interpretations.

If legal logic and an original intensive interpretation are applied, political parties participating in general elections can be understood as all political parties designated as participants in general elections based on the decision of the General Election Commission. This implies that there is no clause mandating the use of the presidential threshold mechanism in the election of the President and Vice President. In principle, Article 6A paragraph (2) of the 1945 Constitution only mandates that political parties or coalitions of political parties have the right to propose Presidential and Vice Presidential candidates.

From a normative standpoint, Article 222 of the General Election Law (UU Pemilu), which regulates the presidential threshold for political parties or coalitions of political parties to nominate candidates for President and Vice President, appears illogical. The stipulated presidential threshold is 20% of the total seats in the Indonesian People's Consultative Assembly (DPR RI) or 25% of the valid votes nationwide in the previous DPR election. This regulation seems to be problematic, as political parties elected in the 2014 election did not receive a mandate from new voters who participated in the 2019 election and subsequently in the 2024 election. This situation has the potential to infringe on the constitutional rights of new voters to determine the candidates for President and Vice President. The inclusion of the presidential threshold in the Election Law obstructs the fundamental rights of individuals to be elected and to vote.

The provision of the presidential threshold for the nomination of President and Vice President based on the results of the previous general election, as outlined in Article 222 of the Election Law, is evidently illogical and compromises the constitutional rights of citizens to vote and be elected. Referring to the theory of popular sovereignty by Jean-Jacques Rousseau, who asserted that the highest power (sovereignty) lies with the people, elected rulers are meant to protect human rights. If rulers fail in their duties, the will of the people can remove them, and new rulers will be chosen by the people (Roestandi, 2006). In simple terms, the provision of the presidential threshold that limits these rights is arbitrary and inconsistent with the principles of democratic people's sovereignty based on Pancasila.

From a constitutional standpoint, every citizen is entitled to equal rights before the law and in governance, as emphasized in Article 27, paragraph (1) of the 1945 Constitution (Maimun & Hakim, 2023). Similarly, Article 28C, paragraph (2) of the 1945 Constitution asserts that "everyone has the right to advance oneself collectively in fighting for their rights to build their society, nation, and state." Furthermore, Article 28D, paragraph (1) of the 1945 Constitution states that "everyone has the right to recognition, guarantees, protection, and fair certainty as well as equal treatment before the law." These principles are further regulated by Law Number 39 of 1999 concerning Human Rights, Article 43, which stipulates that: 1) Every citizen has the right to be elected and to vote in general elections based on equal rights through direct, free, secret, honest, and fair voting in accordance with the provisions of the legislation; 2) Every citizen has the right to participate in governance directly or through representatives they freely choose, according to the procedures determined in the legislation.

In the concept of democracy, sovereignty lies with the people themselves to determine the direction of governance. The realization of the principle of people's sovereignty in governance is reflected in the intensive involvement of the people in deciding the direction of government policies. The measure of people's sovereignty can be seen in the extent of the role played by the people and the increasing alignment of their interests with strategic public policies (St Laksanto Utomo, 2018). Therefore, public involvement in state affairs is a crucial part of a good democratic process when choosing and determining leaders, as well as setting the direction of state or public policies (Hoesein, 2018).

Political participation of citizens thru political events is an accountability of the fundamental rights of each citizen (Priyanto et al., 2024), as stated in Article 28E, paragraph (3) of the 1945 Constitution: "Everyone has the right to freedom of association, assembly, and expression." The provision in Law Number 7 of 2017 concerning General Elections that requires the presidential threshold or the qualification criteria for the nomination of the President and Vice President constitutes a violation of citizens' rights that ought to now not exist in a democratic nation like Indonesia (Almanar & Rusnin, 2021).

According to Ramlan Surbakti, there are at least seven criteria that must be fulfilled to achieve fair and integrity elections. The seven criteria include (Surbakti, 2014); 1) Equality among citizens, this encompasses both the voting and vote-counting processes, as well as the allocation of seats in the DPR (People's Consultative Assembly) and regional legislative councils (DPRD), and the formation of electoral districts; 2) Legal certainty, this is formulated based on the principles of democratic elections; 3) Free and fair competition, ensuring an open and fair competition among election participants.; 4) Participation of all stakeholders, involving all stakeholders in all stages of the election process; 5) Professional, independent, and impartial

election organizers; 6) Integrity in voting, counting, tabulating, and reporting of votes; 7) Fair and timely resolution of election disputes.

General elections serve as a filtering tool for "politicians" who will represent and carry the voice of the people in representative institutions. Those elected are considered individuals or groups with the ability or responsibility to speak and act on behalf of a larger group through political parties. Therefore, the existence of political parties is a necessity in modern democratic political life. This is intended to activate and mobilize the people, represent specific interests, provide a compromise for opposing opinions, and provide a legitimate and peaceful means of political leadership succession based on the constitution (MD, 2017).

The tendency of people to choose a presidential and vice-presidential candidate and simultaneously choose the political party that nominates that pair means that political parties participating in general elections will nominate figures liked by the people. Because any candidate nominated will influence the party's seat acquisition in the DPR, fulfilling the right of political parties participating in general elections to propose presidential candidates will significantly contribute to significant political changes in our country. Therefore, there is insufficient rationale to maintain the presidential threshold as regulated by Article 222 of Law Number 7 of 2017. This article should be subject to amendment or annulment by the Constitutional Court (Hoesein, 2018).

The presidential threshold, restricting the rights of small political parties, is deemed inconsistent with the essence of Indonesian democracy. Each nation has its own conception and aspirations in line with its conditions, challenges, and characteristics (Latif, 2015). Given that Indonesia is a nation consisting of various minority groups (racial, ethnic, religious, etc.) that have come together to form a state, the state should play a role in accommodating all societal aspirations, including those of minority groups.

The application of the presidential threshold in simultaneous standard elections lacks clean benchmarks. Setting the presidential threshold based on previous preferred election result would eliminate the political rights of new parties participating in simultaneous general elections to nominate presidential and vice-presidential candidates. Therefore, the presidential threshold is deemed unnecessary. The current threshold minimizes the people's choices in finding and electing their leaders. People should be provided with as many choices as possible to ensure the selection of qualified and good leaders. The elections in 2014 and 2019, where the people were presented with only two pairs of candidates, illustrate the need for expanding choices.

Reflecting on the first direct presidential election in 2004, the SBY-Kalla pair was supported by smaller parties such as the newly formed Democratic Party, the Crescent Star Party, and the Prosperous Justice Party (PKPI). In

contrast, their competitors were supported by larger parties. The people chose the SBY-Kalla pair, indicating that people vote for the president not solely based on the supporting party but also on the candidate's character. Therefore, increasing the number of candidates will broaden the people's choices, while having fewer candidates diminishes the chances of electing a good leader.

The presidential threshold, set as a requirement for political parties to nominate presidential and vice-presidential candidates, claiming that the elected president will receive full support from the parliament in implementing their programs, is argued to be unnecessary. This is because there is already a parliamentary threshold for the election of DPR members. If a party is represented in the parliament, it should have the right to nominate or endorse a presidential candidate from its own cadre without having to form coalitions with other parties to meet additional threshold requirements.

4. Conclusion

Constitutionally, the provision regarding the presidential threshold isn't always inherently present in the Indonesian constitution. However, Article 6A paragraph (5) specifies that the techniques for accomplishing the election of the President and vice chairman could be further regulated with the aid of law. This serves as the idea for the enactment of a law that elaborates on the criteria for the threshold for the nomination of the President and Vice President, known as the presidential threshold.

The presidential threshold system is stipulated in Law Number 7 of 2017 concerning General Elections, which states that a candidate pair is proposed by a political party or a coalition of political parties participating in the General Elections, meeting the requirements of obtaining at least 20% of the total seats in the DPR or securing 25% of valid votes nationally in the previous General Elections for the DPR. The objective of this regulation is to limit political parties in endorsing candidates for President and Vice President. As intermediaries between the people and the government, the addition of provisions regarding the threshold for the nomination of the President in the Election Law, namely the presidential threshold, is considered to hinder the fundamental rights of individuals to be elected and to vote. From a democratic perspective, this seemingly restricts the participation of political parties as representatives of the people, especially smaller or newer parties, in nominating candidate pairs for President and Vice President.

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Regulation:

Undang-Undang Nomor 25 Tahun 2007 tentang Penanaman Modal. Lembaran Negara Tahun 2007 Nomor 67. Tambahan Lembaran Negara Nomor 4724.

Peraturan Pemerintah (PP) Nomor 23 Tahun 2020 tentang Pelaksanaan Program Pemulihan Ekonomi Nasional dalam Rangka Mendukung Kebijakan Keuangan Negara untuk Penanganan Pandemi Corona Virus Disease 2019 (COVID-19) dan/atau Menghadapi Ancaman yang Membahayakan Perekonomian Nasional dan/atau Stabilitas Sistem Keuangan serta Penyelamatan Ekonomi Nasional. Lembaran Negara 2020 Nomor 131. Tambahan Lembaran Negara Nomor 6514.