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Analysis of the constitutional court's decision on the age limit of presidential and vice-presidential candidates in the perspective of Rechtstaat

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Abstract
Purpose: This study aims to determine the application of the concept of obedience and application of the concept of the Rule of Law (Rechtstaat) and the concept of Trias Politica to the Constitutional Court Decision Number 90/PUU-XXI/2023 concerning the age limit for presidential and vice-presidential candidates and how the implementation and principles of individual freedom in the rule of law are implemented in Indonesia.
Method: The research was conducted using normative research methods (doctrinal research) and a conceptual approach.
Results: The research results show that the Constitutional Court's decision requires an approach to the concept of the Rule of Law (Rechstaat) and the Trias Politica concept so that there is no deviation from power and it is able to face the dynamics of change that occur in society, as well as making laws that are more autonomous from intervention by other authorities, such as political interests. Thus, the implementation of the rule of law in the context of a rule of law can be interpreted and followed by all citizens.
Limitations: The main aim of applying the concept of the rule of law (Rechtstaat) and the concept of Trias politica is to limit the power of authority so as to produce legal science teaching centered on rights.
Keywords: *Constitutional Court Decision, Concept of Rechtsstaat and Trias Politica*
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1. Introduction

The idea of the rule of law has long been developed by philosophers in Ancient Greece. Plato, early on in "the Republic, " argued that it is possible to realize the ideal state to achieve goodness, which is based on goodness. For this reason, power must be held by a person who knows the good, namely, a philosopher (the philosopher king). But in his books "the Statesmen" and "the Law," Plato states that what can be realized is a form of the second best that places the rule of law. The government by law can prevent the decline of one's power. In line with Plato, the purpose of the state, according to Aristotle, is to achieve the best life possible, which can be achieved by the rule of law. Law is a form of collective wisdom of citizens, so the role of citizens

is required for its formation. Therefore, as a state concept, the rule of law is not new to the discussion of how the state is run and managed. In the 19th century, the idea of limiting government power through the creation of a constitution, both written and unwritten, was known to be contained in what was called a constitution. The Constitution contains the limits of government power and guarantees of the political rights of the people, as well as the principle of checks and balances between existing powers. Constitutionalism is a constitutional limitation of state powers. Constitutionalism then gave rise to the concept of rechstaat (from Continental European jurists) or the rule of law (from Anglo Saxon jurists),

which in Indonesia is translated as the rule of law. A state that has a limited role is often dubbed a nachtwachterstaat (night watchman state) (Mahfud, 1999). Indonesia, a country born in the 20th century, adopted the concept of the rule of law in accordance with the principles of constitutionalism. This can be seen from the consensus of the Indonesian people since the 1945 Constitution, when the Indonesian state constitution was established. The state of law rechtsstaat and the rule of law are terms that, although seemingly simple, contain a relatively long history of thought. The background to the emergence of the idea of the rule of law is a reaction to arbitrariness in the past. This agreement is what in its development transforms into a common ideal, which is also commonly called the philosophy of the state or staatsidee (state ideals), which functions as a philosophische grondslag and common platforms or kalimatun sawa among fellow citizens in the context of state life (Marzuki, 2010). It has been explained that the idea of the rule of law is not just to emphasize the difference between Machtstaat and Rechtstaat, but most importantly, the concept of a state that is no longer run by using power but must be organized based on law. In the view of Imer (Flores, 2013), the classical distinction between these two legal regimes is always a conventional problem that connects law, freedom, and the rule of law, as stated by the classical problem, because the assertion of separation between law and power is sometimes difficult. Power is necessary to enforce this law. The concept of Rechtstaat or State of Law is often identified with the Rule of Law. However, there are clear differences between the two concepts. "State of Law" consists of two syllables, state and law, which, if interpreted separately, would have different meanings. A state is usually assumed to be a diplomatic form of a real entity (society) that has laws to maintain order, while law is always understood as a product of a state that aims to maintain legal order (rechtorder). It is just that at the beginning of the emergence of the discussion of the rule of law, the concept was still only intended to be limited to efforts or struggles to oppose the king's power, which was so absolute. This means that the horizon of understanding the rule of law at that time was still limited to efforts to control the movement of the king's enormous power. At that time, the power of a country always rested on the king, so it was very vulnerable to giving birth to arbitrariness.

Based on the Constitutional Court Decision Number 90/PUU-XXI/2023 concerning the age limit of candidates for the President and Vice President.

Based on the title above about the Constitutional Court Decision on the provisions of Article 169 letter q of Law Number 7 Year 2017 concerning General Elections. The article reads that the requirement to be a presidential candidate and vice presidential candidate is at least 40 (40 years old), where there is a concurrent opinion (different opinion) and Disenting Opinion (different reasons) so that there is a polemic in the community because the Constitutional Court has decided 9 (nine) lawsuits.
Of the 9 (nine) lawsuits submitted to the Constitutional Court and have been decided by the Constitutional Court and one lawsuit has been granted, which has become a Polemic in the Community, which has become a public conversation, namely Decision Number 90 / PUU-XXI / 2023, where the Constitutional Court partially granted the Lawsuit of the Applicant on behalf of Almas Tsaqibbirru Re A as a Surakarta university student where there were 8 (eight) lawsuits, the Court argued that it was an Open Legal Policy, namely an open Legal Policy for lawmakers. The Constitutional Court positions itself as a Negative Legislator.

Based on the background description above, the author is interested in writing a title on "Analysis of the Constitutional Court Decision on the age limit of the presidential and vice presidential candidates from the perspective of Rechtsstaat."

1.2. Problem Formulation

1. How is the Constitutional Court Decision Number 90/PUU-XXI/2023 concerning the Age Limit for Nomination as Candidates for President and Vice President seen from the Perspective of Rechtsstaat?
2. Is there a deviation from the concept of Trias Politica in the Constitutional Court Decision Number: 90/PUU-XXI/2023 seen from the perspective of Rechtsstaat?

1.3. Research Objectives

1. To find out the Constitutional Court Decision Number: 90/PUU-XXI/2023 concerning the Age Limit for Nomination as Candidates for President and Vice President seen from the Perspective of Rechtsstaat
2. To find out whether there is a deviation from the concept of Trias Politica in Constitutional Court Decision Number: 90/PUU-XXI/2023 seen from the perspective of Rechtsstaat

2. Literature review

2.1 The concept of Rechtstaat

The term rechtsstaat, as discussed earlier, is used as the concept of the rule of law for Continental European countries. However, there are other opinions that equate the use of the concept of rechtsstaat with the rule of law, including W. Friedmann. In his opinion, W. Friedman stated that rechtsstaat refers to the limitation of state power by law (Friedmann, 1941). However, in general, the term rechtsstaat is used by a group of Continental European countries. This is clarified by the difference in the concept of state law proposed by Frederick Julius Stahl (rechtsstaat) and the A.V. Dicey (rule of law), as described earlier in this paper. According to Azhari, rechtsstaat was originally a night-watchman state (nachtwachterstaat), in which the state was only a guarantor of order and defense of security. A new state acts when order and security are disturbed. But then the use of rechtsstaat is used as a formal legal state concept (Azhari, 1995).

According to Friedrich Julius Stahl, the formal rule of law has four elements: the protection of human rights, separation or division of powers, the existence of government based on regulations (wetmatigheid van bestuur), and the existence of a free judiciary (Azhari, 1995). The formal rule of law then changed again into a material rule of law, in which the state's duties in organizing public interest became broader. Finally, in the next development, the concept of rechtsstaat is used as a welfare state (verzorgingstaat).

The term "Rechtsstaats" in Germany was coined at the dawn of German constitutionalism in the early 19th Century. Staatsrecht is a law relating to the administration of the state and its government and the relationship between individuals and public power (Paulovics & Stipta, 2008). In contrast, in Indonesia, Rechtsstaat is not interpreted directly as a state of law, but the term rechtsstaat is understood as a state based on law, as stated in the explanation of the 1945 Constitution.[9] Therefore, the concept of Indonesian rechtsstaat cannot be categorized directly into the Continental European concept of rechtsstaat or cannot be identified with the Anglo Saxon concept of the rule of law, before first understanding what the elements are and how the purpose of the state is based on law. There are seven elements in the concept of the rule of law: four elements in the concept of rechtsstaat and three elements in the concept of the rule of law. According to Azhari, six of the seven elements have been fulfilled by the Indonesian state as requirements of a state of law. However, these elements were modified in accordance with the ideals of the Pancasila State of Law. This is special for the Indonesian state of law when compared to other concepts of the state of law. Thus, rechtsstaat is a state based on law in accordance with the ideals of Pancasila; in other words, it is not included in the European Continental or Anglo Saxon concepts. The meaning of rechtsstaat in the Indonesian state must be in accordance with the state's purpose (Azhari, 1995).

Since the time of the Ancient Greeks, thinking about the rule of law has been ongoing, until several doctrines of the rule of law emerged in the conception of "rechsstaats" in Germany, "etat de droit" in France, "rule of law" both in England and in America, "estado de derecho" in Spain, and "stato di diritto" in Italy. Pietro Costa states that the term and concept of the rule of law eventually became very popular, both in the development of scientific literature and in legal and political journals. In some of these countries, the term "rule of law" is an idea that is proposed for a number of purposes, depending on the interests to be realized by each country, which of course differs from one country to another. The meaning of the term "rule of law" cannot be separated from its long history because it is strongly influenced by the historical and conceptual specificities of the underlying national tradition. In other

words, the idea of "rule of law" has marked the entire historical span of a notion that cannot be separated from the national culture where the idea is located and actually used. It relates to law and politics and carries a plurality of intrinsic meanings, hence its importance and ideological value (Costa, 2007).

Satjipto Rahardjo believes that the emergence of several terms and conceptions is due to different backgrounds and thoughts, as well as due to the separation between the rule of law as a political structure and as a legal organisation. The rule of law should only be constructed as a whole and as a complete legal building; in this case, it has a political structure. The rule of law with this political structure ultimately makes politics an important determinant of the content of a state of law (Rahardjo, 2009).

2.2 The concept of Trias Politica

John Locke was a Greek philosopher (1632-1704). He wrote a book titled Twi Treatises on Civil Government in 1690. It was written to criticize the Stuart kings for their absolute power. This also justifies the 1688 revolution that was eventually won by the British Parliament (Syamsudin, 2018). John Locke argued that the division of power should consist of 3 powers, namely executive, legislative and federative (foreign relations) where in his book it is stated that the Judiciary is sufficient in the ranks of the Executive Institution only because in principle it also implements the Law.

The second concept of Trias Politika was proposed a few years later by Montesquieu in 1748, when his thoughts were still influenced by John Locke. He stated that the separation between the executive and legislative functions to regulate matters relating to interstate law, while judicial power is related to matters relating to civil law. This was stated in his book The Sprit of Law (Anwar 2019). Montesquieu's thinking also states that a country's independence will be guaranteed if state power is held not only by one ruler but also by three separate bodies of power. Montesquieu considers that if executive and legislative powers are united in one person or in one institution, there will be no independence (Gusmansyah, 2017).

The thing that makes the difference between the thought of Trias Politika proposed by John Locke and Montesquieu can be seen from the way the separation of powers of the Judiciary, where according to John Locke that the task of deciding the case of a legal problem is part of the duties of the Executive Institution because it includes the function of implementing the Act. However, according to Montesquieu, judicial power must be an independent institution that cannot be intervened by anyone, including the executive and legislative branches.

Besides John Locke, the view of Trias Politika was also put forward by Montesquieu. His views tend to be followed by the Indonesian state, where Montesquieu divides power into three important parts: Executive, Legislative and Judiciary. Montesquieu believed that the judiciary should not be united with the executive because it would cause havoc in the country. If it is run by the same person, then there is no more freedom at that time because it will give birth to a sad thing where the powerful person runs public decisions at the same time and also tries crimes and individual problems (Gusmansyah, 2019).

The application of Montesquieu's concept in Indonesia can already be seen in the separation carried out by dividing judicial power into separate institutions. However, there is a modification of the concept that the executive (president) can propose draft laws to the House of Representatives, which is not recommended by Montesquieu. In addition of a new institution, the Examinative Institution (BPK) is a new division of power in the Trias Politika concept implemented by the Indonesian government (Jasir, 2020).

3. Research Methods

The type of research that the author used was normative legal research. According to Soerjono Soekanto and Sri Mamudji, normative legal research or library research is legal research conducted by examining library materials or secondary data. (Soekanto, 2007)

4. Result and Discussion

4.1. Constitutional Court Decision Number: 90/PUU-XXI/2023

The Constitutional Court is a judicial institution in Indonesia. The Constitutional Court is a high state institution in the constitutional system that holds judicial power together with the Supreme Court.

Constitutions in a broader sense are not only about the regulation of existing provisions but also about extra-legal aspects, including sociological and political as a whole. Of course, the state has executive subjects in its government called state institutions. The implementation of the constitution is left to state institutions with duties and authority (Safitri & Wibowo, 2023).

The Constitutional Court is one of the state institutions that exercises independent judicial power to organize courts to uphold law and justice. Judges in the Constitutional Court. The maximum number of Constitutional Court judges is nine, with a system of three people proposed by the DPR, three proposed by the President, and three proposed by the Supreme Court with the determination of the president.

The Constitutional Court of RI has 4 (four) authorities and 1 (one) obligation, as stipulated in the 1945 Constitution.

1. The Constitutional Court has the authority to hear cases at the first and last instances, and its decision is final.
2. Testing laws against the 1945 Constitution of the Republic of Indonesia.
3. Ruling on Disputes over the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia
4. Deciding on the dissolution of political parties, and Deciding on disputes about the results of general elections
5. The position of the Constitutional Court is that the replacement of the division of power system with the separation of powers has resulted in fundamental changes to the format of state institutions after the amendment of the 1945 Constitution.
6. [15]Basically, the presence of the Constitutional Court in Indonesia is a manifestation of the Indonesian state increasingly realizing the importance of protecting the constitutional rights of citizens. This is reflected in the Constitutional Court, which always seeks to strengthen its role as guardian of the Constitution and protector of the constitutional rights of citizens. In terms of its authority to hear law review cases, the Constitutional Court has registered 1,966 cases and issued 1,266 decisions. The higher number of applications submitted to the Constitutional Court has an impact on various kinds of unresolved constitutional events that have been answered by the Constitutional Court through its decisions. The decision of the Constitutional Court as a ‘deadlock breaker’ of state administration is, of course, not always supported by the community. The pros and cons always complement the decisions issued by the Constitutional Court in this country. The Constitutional Court cannot necessarily fully accept a high number of applications submitted to the Constitutional Court. This is due to the occurrence of several cases that are violations of the constitutional rights of citizens, but cannot be handled by the Constitutional Court because there is no authority possessed by the Constitutional Court to handle it. Even though the number of applications submitted to the Constitutional Court are Constitutional Complaints and Constitutional Question applications, the number shows the urgency of the need for the Constitutional Court to handle these applications.

The decision of the Constitutional Court Number 90/PUU-XXI concerning the age limit for Presidential and Vice Presidential Candidates is at least 40 (forty) years old with the addition of the phrase or holding an elected position from the election/regional election.

1. The decision of the Constitutional Court became a polemic and controversial after it was decided by the Constitutional Court Judges where there were 9 (nine) requests submitted at the Constitutional Court regarding the age limit for Presidential and Vice Presidential Candidates and where there were 8 (eight) requests that were rejected and could not be accepted because the Court was of the opinion that it was an Open Legal Policy, namely an open legal policy for lawmakers. In Decision number

90/PUU-XXI, where the application was filed by a Surakarta University Student on behalf of Almas Tsaqibbirru Re A, where the Constitutional Court granted the Application in part where there was an additional phrase in the decision, which caused controversy in the community, the Applicant was also one of Solo Mayor's big fans, Gibran Rakabuming Raka, who would be nominated as a Vice Presidential candidate.

2. Concurring Opinion and Dissenting Opinion
   Against the decision of the Court aquo, there are concurring opinions from 2 (two) Constitutional Judges, namely Constitutional Judge Enny Nurbaningsih and Constitutional Judge Daniel Yusmic P. Foekh, and there are also dissenting opinions from 4 (four) Constitutional Judges, namely Constitutional Judge Wahiduddin Adams, Constitutional Judge Saldi Isra, Constitutional Judge Arief Hidayat, and Constitutional Judge Suhartoyo who stated as follows:

Considering that the Petitioner in his petition requests the Court that the norm of Article 169 letter q of Law 7/2017 which states, "at least 40 (forty) years old" is contrary to the 1945 Constitution and has no binding legal force conditionally as long as it is not interpreted to be or experienced as a Regional Head both at the Provincial and Regency / City levels" The writing of the Petitioner's petition is not as complete as what the Petitioner wrote in his initial petition which stated "at least 40 (forty) years old or experienced as a Regional Head both at the Provincial and Regency / City levels". In the revision of the petition, the Petitioner did not include the phrase "at least 40 (forty) years old", but only the Petitioner wrote using the punctuation symbol, which reads as if there is a quote phrase that does not need to be written again by the Petitioner but is only sufficiently written using the symbol in this regard, In this regard, the petition can be understood if it is associated with the reasons for the petition (posita) because the intention is "at least 40 (forty) years old or experienced as a Regional Head at both the Provincial and Regency / City levels." The partially granted decision states that all elected officials, including regional head elections, can be nominated as candidates for President and Vice President by a political party or coalition of political parties participating in the general election, against the aquo Decision, I, have different reasons (concurring opinion).

Considering that the norm of Article 169 letter q of Law 7/2017 has actually definitively regulated the age limit of candidates for President and Vice President, namely "at least 40 (forty) years old." With regard to the issue of age, the Court in its various decisions so far has been of the opinion that the 1945 Constitution does not determine a certain age limit to occupy all positions; therefore, such matters are an open legal policy of the legislators to determine the age limit policy in accordance with developmental demands or needs. This is also in accordance with the intent of Article 6, paragraph (2) of the 1945 Constitution, which states, "The requirements to become President and Vice President.

4.2 Deviations from the Trias Politica

At the level of implementation, the Unitary State of the Republic of Indonesia implicitly applies the division of powers in accordance with the Trias Politika Theory espoused by Montesquieu, in which there is a division of powers based on state functions (Suparman, 2023): legislative, executive, and judicial, into state institutions in Indonesia based on Pancasila. However, apart from the three powers of the state institutions, in the Unitary State of the Republic of Indonesia, there are still constitutive powers, examinative powers, and monetary powers. Therefore, it can be said that the application of the concept of trias politika in the government system of the Republic of Indonesia based on the 1945 Constitution of the Republic of Indonesia before the amendment of its implementation is not absolute. To be easily understood, the authors can be described as follows.

The Legislative (DPR) President (Executive) and Supreme Court (Judicial) fall into the realm of Trias Politika Theory (Montesquieu), DPA (Consultative), and BPK (Examinative) (Syamsuddin, 2018). Meanwhile, state institutions or agencies in the government system of the Republic of Indonesia based on the 1945 Constitution of the Republic of Indonesia after the amendment are the MPR, DPR, DPD, President, BPK, Supreme Court, and Constitutional Court. To be able to understand this can be seen in the following description: MPR, DPR, and DPD (Legislative), President (Executive), MA, and MK (Judicial) are included in the realm of Montesquieu's Trias Politika}, and BPK (Examinative).

Implicitly, both before and after the amendment of the Constitution of the Republic of Indonesia in 1945, the concept of Trias Politika Montesquieu was applied in the government system of the Republic of Indonesia, but the implementation of the Trias Politika concept was not absolute (absolute). This is because it turns out that the concept of Trias Politika Montesquieu states that the division of power is only based on the Legislative, Executive and Judicial functions of the state. In Indonesia, apart from the three institutions of power, it is still divided, as explained and described above. At the level of life of the nation and state of Indonesia, the application of the Trias Politika Theory is still relevant and has been used in various laws and regulations of the Republic of Indonesia (Isnaeni, 2021). The state as an organisation in society is distinguished from other organisations because it has the privilege of using its physical strength.

Based on the explanation above, the Constitutional Court has committed a deviation from the Trias Politica Concept, where there is no check in balance on Decision Number 90 / PUU-XXI / 2023 concerning the nomination limit for President and Vice President, at the beginning of which the Court postulates that lawsuit Number 90 / PUU-XXI / 2023 is an Open Legal Policy, namely an open legal policy for lawmakers, namely the Legislature and the Executive.

5. Conclusion

The decision of the Constitutional Court (MK) regarding the age limit of presidential candidates (presidential candidates) and vice presidential candidates (vice presidential candidates) must be evaluated from the perspective of Rechtsstaat and Trias Politica, namely, the principle of a stateof law that protects individual rights and ensures fair and equitable application of the law. Thefollowing are some analytical conclusions from the Rechtsstaat perspective regarding the Constitutional Court's decision on the age limit for presidential and vice presidential candidates,in which every individual has equal rights in the eyes of law. The Constitutional Court's decision must ensure that the age limit for presidential and vice presidential candidatesis not discriminatory and does not violate the principle of equality before law.

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