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THE PRINCIPLE PEOPLE'S SOVEREIGNTY AS BASIC RULE OF THE MINIMUM AGE LIMIT FOR PRESIDENT AND VICE PRESIDENT CANDIDATES

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ABSTRACT

Equality are the essence of the principles of popular sovereignty. In Indonesia, the principle of popular sovereignty has been transformed and formulated into a legal basis in statutory regulations. However, setting the minimum age limit for Presidential and Vice Presidential Candidates has actually created injustice. This research aims to explain the principle of popular sovereignty in relation to the minimum age limit for presidential and vice presidential candidates. This type of research is normative juridical, with a prescriptive normative approach apart from being based on state teachings. The analysis was carried out normatively qualitatively. Research results: (1) A country that adheres to the principle of popular sovereignty wants every public position to be open and to provide equal and equal opportunities for every citizen to achieve it, including the positions of President and Vice President. (2) The regulation that limits the minimum age to 40 years as a requirement for candidates for President and Vice President is an action that violates human rights, is less sensitive to changes and the legal needs of society, and is not in accordance with the essence of popular sovereignty.

Keywords: the principle of popular sovereignty, minimum age limit, president and vice president

1. Introduction

The minimum age limit for candidates for President and Vice President has found new momentum in Indonesian constitutional history following the Constitutional Court decision Number 90/PUU-XXI/2023. The reason is that in this decision, the Court provides 2 (two) alternative ways regarding the age limit for candidates for President and Vice President, namely: *first* , they must be at least 40 years old; or *secondly* , not yet 40 years old but has or is currently holding a position elected through general elections, including regional head elections.

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Minimum age limit for candidates for President and Vice President, constitutionally the 1945 Constitution of the Republic of Indonesia did not design and regulate it completely from the start. As the highest written basic law, the 1945 Constitution of the Republic of Indonesia handed over the regulations regarding the minimum age limit for Presidential and Vice Presidential candidates to the appropriate forming institutions or officials, in terms of the formation of laws it was handed over to the DPR together with the President. This means that setting the minimum age limit for candidates for President and Vice President becomes an open legal policy or known as an *open legal policy,*[2] which gives the legislators the freedom (*vrijstelling*) to regulate or not regulate it.[3]

In the course of time, laws regulating the age limits for candidates for President and Vice President after the fourth amendment to the 1945 NRI Constitution can be found, among others, in Law Number 23 of 2003 and Law Number 42 of 2008 concerning General Elections for President and Vice President. The latest regulation is outlined in Law Number 7 of 2017 concerning General Elections. [4] What is unique about these three laws is that there is no consistency regarding the minimum age limits for candidates for President and Vice President. In fact, in Law Number 23 of 2003 the requirements for candidates for President and Vice President are limited to a minimum age 35 years, whereas in Law Number 42 of 2008 it is still the same, namely the minimum age is 35 years. Different from the previous law, in Law Number 7 of 2017 there is a change in the minimum age limit for candidates for President and Vice President, namely at least 40 years. This last law can be categorized as a modern law because it combines several laws into

[2]Iwan Satriawan and Tanto Lailam, (2019), Open Legal Policy in Constitutional Court Decisions and the Formation of Laws, *Journal of the Constitution* , (16) 3, p. 560.

[3]Sudikno Mertokusomo, Chapters on Legal Discovery , Citra Aditya Bakti, Bandung, 2013, p. 83.

[4]Law Number 7 of 2017 concerning General Elections, State Gazette of the Republic of Indonesia 2017 Number 182, Supplement to State Gazette of the Republic of Indonesia Number 6109.

one law, so that some experts state that it is a form of codified law, and some even state that it is an [5]*omnibus* law.[6]

Even though Law Number 7 of 2017 is categorized as a modern law, the regulations regarding the minimum age limit for Presidential and Vice Presidential candidates in this law still leave problems. The most obvious problem is the public opinion that age restrictions cause injustice. Apart from that, no strong and comprehensive theory has been found that can be used as a basis for changing the minimum age limit for presidential and vice presidential candidates. A search of legal materials on academic texts did not reveal any sharp debate regarding the minimum age limit for the President and Vice President, nor was the general explanation in Article 169 letter q stated quite clear.

If in the future there is no clear theoretical consistency as a basis for raising or lowering the minimum age limit for candidates for President and Vice President, it is feared that changes to the minimum age for President and Vice President will only be based on subjective and pragmatic interests, making it very vulnerable to abuse of power (*abuse) of power*). In fact, according to state teachings, according to the principle of popular sovereignty, every public position must always be based on the will of the people. The principle of popular sovereignty requires a condition that allows the people to hold the highest power in a country. In short, the principle of popular sovereignty seeks equality and equity.

If so, what about setting the minimum age limit for Presidential and Vice Presidential candidates which is determined to be at least 40 years if it is related to the principle of popular sovereignty? Is the minimum age setting of 40 years in accordance with the principle of popular sovereignty? Starting from the absence of consistent arguments regarding the theoretical basis to

[5]Titi Anggraini, (2016), Codification of the Election Law, Election Law Reform towards Simultaneous National Elections and Simultaneous Regional Elections *", Journal of Elections & Democracy* , Edition 9, p. 5.

[6]Jimly Asshiddiqie, Omnibus and its Application in Indonesia , Constitution Press, Jakarta, 2020, p. 126.

justify the regulation of raising or lowering the minimum age limit for Presidential and Vice Presidential candidates in statutory regulations, especially laws, further research is needed regarding the minimum age limit for Presidential and Vice Presidential candidates in perspective. the principle of popular sovereignty.

2. Research methods

The approach used is a prescriptive normative approach, and also an approach based on state principles or teachings. [7] Legal materials were obtained through literature study. Legal materials are collected and then sorted into 2 (two) categories, namely primary legal materials and secondary legal materials. To obtain clarity on the issues discussed, analysis activities were carried out in a normative qualitative manner.[8]

3. Research Results and Discussion

3.1. Popular Sovereignty is the Basic Reference for Setting the Minimum Age Limit for Presidential and Vice Presidential Candidates

In itself, sovereignty means an unlimited power. This is its main attribute. Nonetheless, the whole concept cannot be reduced solely to this aspect, as some lawyers believed. As noted, the two opposite streams had different solutions for relating unlimited power to the state authority. Whereas classical thinkers believed that the state authority was sovereign and thus unlimited, Constitutionalists held that, although final, it must have been limited and that sovereignty was vested in the constitution[9]. Heywood formulates the "traditional" concepts of sovereignty as follows: "An internal sovereignty is therefore a political body that possesses

[7]Mochamad Ali Safa'at, Model of Legal Realism Approach in the Development of Constitutional Law Science, Inauguration Speech for Professor in the Field of Constitutional Law at the Faculty of Law, Brawijaya University, delivered at the Open Session of the Academic Senate, Malang, 22 July 2023, p.11.

[8] Arif Hidayat, Zaenal Arifin, (2019), Legal Politics of Legislation as Socio-Equilibrium in Indonesia, *Ius Constituendum Journal* , (4) 2, p. 151.

[9] Dusan Pavlovic, "Rousseau ' S Theory of Sovereignty," no. June 1997 (1997): 100, https://doi.org/10.13140/RG.2.2.28144.76806.

ultimate, final and independent authority; one whose decisions are binding upon all citizens, groups and institutions in society. Much of political theory has been an attempt to decide precisely where such sovereignty should be locatedhere are three main elements of the Classical theory of sovereignty. The first element is the unlimited power. The second is that the sovereign power is the source of all the rights in the state. The third is that the state authority is the bearer of sovereignty, not the people, some legal document (like a constitution), or any other actor[10].

One of the many theories about popular sovereignty is the theory of popular sovereignty which was initiated by Jean Jecques Rousseau. This theory was developed through a community agreement (*social contract*) which has a number of principles, including: (1) the power of the people as the highest power must reflect the general or collective will (*volonte generale or general will*); (2) the people themselves determine how they are led and by whom they are led; and (3) every person has the right to determine himself and to participate in the decision-making process that concerns the entire community. This principle was born from the assumption that no one has the right to order other people unless that authority is based on the consent of the members of the community themselves.[11]

Rousseau's theory of sovereignty is attractive for one simple reason: it has two opposite elements in it -- one that wholly belongs to the Classical theory of sovereignty (unlimited power) and the second that contradicts it (popular sovereignty). That placing Rousseau within the Constitutional of sovereignty is impossible goes without saying. The problem remains, however, whether Rousseau can be subsumed completely under the Classical theory of sovereignty. For example, Heywood thinks that the main feature of the traditional doctrine of

[10] Pavlovic.

[11] Moh. Fadli, Marsudi Dedi Putra, Formation of Fast Track Legislation , Nuswantara Media Utama, Malang, 2021, p. 18-19.

sovereignty is that it should be unlimited and the source of all the laws and rights in the state. What traditional thinkers disagreed over was who or what the ultimate authority should have been In this regard, it does not matter who is the bearer of sovereignty[12].

Rousseau's construction of popular sovereignty As time goes by, it turns out to be problematic and invites criticism. The main problem lies in the general will. Rousseau equates the general will with the will of the majority. [13] Rousseau follows the general will to the will of the majority and is arbitrary. This is where vulnerability *is* easily attacked, because Rousseau's construction of the general will is identical to the will of the majority. [14]There is a tendency for Rousseau to develop an anti-emancipatory attitude or at least deny an emancipatory attitude. This attitude is quite clearly reflected in his attitude towards minorities. [15] Minorities are forced to adapt, and if they don't want to, they will be destroyed. In this context, Rousseau tended to develop an anti-democratic ideology, and favored totalitarianism, and therefore it was the weakness of his theoretical structure that was widely criticized.

After establishing Rousseau's definition of sovereign power as an unlimited one, Rousseau's concept analyzes to what extent the elements of the state of nature can limit sovereign power. Rousseau's concept of freedom, natural right, law, morality and property will be examined in detail. As the relationship of these elements to the sovereign power will indicate, no elements which can be found in the state of nature can limit sovereign power. Hence, the whole concept of the state of nature, along with its elements, is not enough to base the limitation of sovereign power thereon.

[12] Pavlovic, "Rousseau ' S Theory of Sovereignty."

[13]Frans Magnis Suseno, Political Ethics, Basic Moral Principles of Modern Statehood , Gramedia Pustaka Utama, Jakarta, 1988, p. 245-246.

[14]Eduardus Marius Bo, Theory of the Rule of Law and Popular Sovereignty , Setara Press, Malang, 2019, p. vii.

[15] *Ibid.*

Rousseau's concept of social contract. Rousseau defines social contract as the act by virtue of which people lay down all their natural rights. Thus, all the rights that individuals can have are these which are given by the sovereign power after concluding the social contract. This idea implies that subjects can have rights only on the basis of the sovereign will, or, more precisely, that sovereignty is the origin of all their rights. This conception indicates the second attribute of the Classical understanding of sovereignty that can be found in Rousseau's political thought[16].

A sharp criticism of Rousseau's theory of popular sovereignty was put forward by John Stuartmill.[17] He stated that majoritarian democracy was no longer the time. The current concept of democracy which is based only on understanding majority rule is no longer the right way. John Stuart Mill the liberal and Jean-Jacques Rousseau the republican, are two political philosophers whom focussed on the integration of political liberty with the relationship found between that of the individual, society and the state, by the means of power or authority. Both of these political thinkers formed their arguments in their writings, namely; On Liberty (1859) by Mill, and The Social Contract (1913) by Rousseau. On a more specific scale, their ideologies were stark opposites, whereby Rousseau claims that people and individuals of society may only acquire the entity of freedom through a transitioning process from the natural state to the civil state, whereby they would have to conform to the general will as the common good. On the other hand, Mill claims that society is more tyrannical over individual liberty, where he believes that individuals should pursue their own self-liberty as dependency on the general will is not always reliable[18].

[16] Pavlovic, "Rousseau ' S Theory of Sovereignty."

[17]John Somerville and Ronald E. Santoni (ed)., Social And Political Philosophy Readings From Plato to Gandhi , Anchor Books a Division of Random House Inc, New York, 1963.

[18] Mischal Ranchod, "Political Thought: John Stuart Mill vs Jean-Jaques Rousseau," no. February 2016 (2018),

John Mill's interpretation of political liberty begins with t"the tyranny of authority" problem . This includes the colliding notions of liberty and authoritarianism where Mill refers to "the Governing One" (rulers) whom obtained their powers hierarchically in the form of force or by means of inheritance, neglecting the fact that society had not conformed to such. Nonetheless, society still felt that a ruler was needed in order to pursue a society full of liberty, and in this sense, society believed that liberty was a form of security from the ruler (or the tyranny of authority). But consequently in this case, these rulers in these times used their powers in variation to their own needs and own agendas, regardless of whether it puts society in jeopardy, simply because the ruler wills the power of unlimited freedom . Therefore, due to this tyrannical power of the ruler and over time, modern society sought a way to limit this power, which gave rise to themselves in the form of democracy. Mill argues that as democracy forms, it incorporates the concept of giving power to the people (the majority) and that this notion of the majority forms the next social problem; "the tyranny of the majority". The context of which Mill uses tyranny, is in the sense of oppression, whereby oppression is found within democracies of the majority over the minority, in the indirect sense of political power . This notion is implemented by means of the social problem where the majority enforces the 'what's right' and 'what's wrong' connotations of society through laws, policies and generalised opinions, which impose against the minority[19].

Taking lessons from John Stuartmill's opinion, it can be understood that if democracy is defined as government only by a majority who have representatives, then in the end democracy will cause frustration. Because minorities who do not have representation do not have certainty that their rights will be protected. The majority will be in a position to

https://www.researchgate.net/publication/323389891_Political_Thought_John_Stuart_Mill_vs_Jean-Jaques_Rousseau.

[19] Ranchod.

impose their various interests, including even evil interests. Allowing such conditions will clearly endanger the pillars of the nation and state.

Mill refutes this transitioning process on the basis that he does not consider, that the two forms of social freedom (the natural and civil) needed any sort of differentiation nor acknowledgement. He (Mill) instead, justifies his theory on the basis of a utilitarian approach specifically where; "actions are right in proportion as they tend to promote happiness, [or] wrong as they tend to produce the reverse of happiness." . In other words, Mill's theory is more concrete, as he does not posit this sort of differentiation between the two states, and that he does not claims to know anything that of the natural state. If Mill does not claim to know anything of the natural state, he cannot think that such exists, and therefore denies that Rousseau's idea of the civil state society exists, as it becomes ethically problematic to understand[20].

Rousseau, the legitimate form of authority does not lay on the foundations of the superiority nor that of the natural state. Rather, he believes that society and individuals must conform to some sort of sovereign convention of the civil state society, which builds further on the concept of the natural state, where it fosters the ideas of collective liberty . As a result, Rousseau proposes a plan to enlighten society by means of his social contract, on the grounds of three implications; first: The social contract is the same for all, and that the collective would strive to make the contract as easy and simple for everyone. Secondly: these members conforming to the social contract must surrender themselves unconditionally, meaning that they have no rights that can stand in opposition to the state, where in this case, they are the state- the unified collective . And the third: those bound to the contract will be of equal in nature, whereby no individual is set above anyone else hierarchical or competitively[21].

[20] Ranchod.
[21] Ranchod.

Mills critique of Rousseau's three implications continues as it surrounds the notions of individual uniqueness, which he believes is the central point of what constitutes a free society and that it employs the needed ideas of being independent and competitive, which one should use in accordance to govern themselves. Mill strongly believes that individuals should not surrender their rights to the social contract as that would force them from the private realm to the civil, and in addition, force others to make laws and regulations for them. Instead, he claims that individuals must govern themselves in the manner where they set the laws and regulations for themselves, simply because nobody can understand someone better than the individuals themselves[22].

Apart from all the advantages and disadvantages of the theory of popular sovereignty above, David Held's opinion would be more appropriate to use to explain the meaning contained in the teaching of popular sovereignty. In principle, David Held stated "In popular sovereignty or democracy, everyone should be free and equal in determining their lives, that is, they should have the same rights"[23]. David held refer to as the classic regime of sovereignty. The regime covers the period of international law and regula tion from 1648 to the early twentieth century (although elements of it, it can be argued plausibly, still have application today). Not all of its features were intrinsic to the settlement of Westphalia; rather, they were formed through a normative trajectory in international law that did not receive its fullest articulation until the late eighteenth and early nineteenth centuries, when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation became the core

[22] Ranchod.

[23] Khairul Fahmi, (2010), Principles of Popular Sovereignty in Determining the General Election System for Legislative Members, *Constitutional Journal* , (7) 3, p. 12 8.

principles of inter national society[24]. The classic regime of sovereignty highlights the development of a world order in which states are nominally free and equal; enjoy supreme authority over all subjects and objects within a given territory; form separate and discrete political orders with their own interests (backed by their organiza tion of coercive power); recognize no temporal authority superior to them selves; engage in diplomatic initiatives but otherwise in limited measures of cooperation; regard cross-border processes as a "private matter" concerning only those immediately affected; and accept the principle of effectiveness, that is, the principle that might eventually makes right in the international world—appropriation becomes legitimation[25].

Changes in human rights law have placed individuals, governments, and non governmental organizations under new systems of legal regula tion—regulation that, inprinciple, is indifferent to state boundaries.This development is a significant indicator of the distance that has been traveled fromtheclassic, state-centric conception of sovereignty to what amounts to a new formulation for the delimitation of political power on a global basis.The regime of liberal international sovereignty entrenches powers and con straints, and rights and duties, in international law that—albeit ultimately formulated by states—go beyond the traditional conception of the proper scope and boundaries of states, and can come into conflict, and sometimes contradiction, with national laws. Within this framework, states may for feit claims to sovereignty if they violate the standards and values embedded in the liberal international order; and such violations no longer become a matter of morality alone [26].

In the author's opinion, there are at least 2 (two) main things that can be learned from David Held's opinion, namely *first*, the creation of

[24] David Held, "Law of States, Law of Peoples: Three Models of Sovereignty," *Legal Theory* 8, no. 1 (2002): 1–44, https://doi.org/10.1017/S1352325202081016.
[25] Held.
[26] Held.

freedom, and *second* the guarantee of equality. Thus, the heart of popular sovereignty or democracy is basically equality and equity. Boundaries between states are of decreasing legal and moral significance. States are no longer regarded as discrete political worlds. International standards breach boundaries in numerous ways. Within Europe the Euro pean Convention for the Protection of Human Rights and Fundamental Freedoms and the EU create new institutions and layers of law and govern ance that have divided political authority; any assumption that sovereignty is an indivisible, illimitable, exclusive, and perpetual form of public power—entrenched within an individual state is now defunct.[27]

In relation to the Indonesian state, the minimum age requirements for candidates for President and Vice President are not regulated rigidly in the 1945 Constitution of the Republic of Indonesia. The only conditions that can be used as a legal basis are Article 6 paragraph (1) and paragraph (2).

Article 6

(1). Calon Presiden dan calon Wakil Presiden harus warga negara Indonesia sejak kelahirannya dan tidak pernah menerima kewarganegaraan lain karena kehendaknya sendiri, tidak pernah mengkhianati negara, serta mampu secara rohani dan jasmani untuk melaksanakan tugas dan kewajiban sebagi Presiden dan Wakil Presiden".
(2). Syarat-syarat untuk menjadi Presiden dan Wakil Presiden diatur lebih lanjut dengan Undang-Undang".

In principle, Article 6 paragraph (1) of the 1945 Constitution of the Republic of Indonesia regulates the requirements for becoming candidates for President and Vice President, including: (a) Indonesian citizen since birth; (b) does not accept another nationality of his own free will; (c) not betray the country; (d) spiritually and physically capable of carrying out their duties as President and Vice President. Meanwhile,

[27] Held.

Article 6 paragraph (2) mandates that the conditions for becoming President and Vice President should be further regulated by law.

The law that regulates the requirements for candidates for President and Vice President is Law Number 7 of 2017 concerning General Elections. Article 169 regulates the requirement for presidential and vice presidential candidates:

> Article 169
> Persyaratan menjadi calon Presiden dan calon Wakil Presiden adalah:
> a. Bertakwa kepada Tuhan Yang Maha Esa;
> b. Warga Negara Indonesia sejak kelahirannya dan tidak pernah menerima kewarganegaraan lain atas kehendaknya sendiri;
> c. Suami atau istri calon Presiden dan suami atau istri calon Wakil Presiden adalah Warga Negara Indonesia;
> d. Tidak pernah mengkhianati negara serta tidak pernah melakukan tindak pidana korupsi dan tindak pidana berat lainnya;
> e. Mampu secara rohani dan jasmani untuk melaksanakan tugas dan kewajiban sebagai Presiden dan Wakil Presiden serta bebas dari penyalahgunaan narkotika;
> f. Bertempat tinggal di wilayah Negara Kesatuan Republik Indonesia;
> g. Telah melaporkan kekayaannya kepada instansi yang berwenang memeriksa laporan kekayaan penyelenggara negara;
> h. Tidak sedang memiliki tanggungan utang secara perseorangan dan/atau secara badan hukum yang Menjadi tanggung jawabnya yang merugikan keuangan negara;
> i. Tidak sedang dinyatakan pailit berdasarkan putusan pengadilan;
> j. Tidak pernah melakukan perbuatan tercela;
> k. Tidak sedang dicalonkan sebagai anggota DPR, DPD, atau DPRD;
> l. Terdaftar sebagai Pemilih;
> m. Memiliki nomor pokok wajib pajak dan telah melaksanakan kewajiban membayar pajak selama 5 (lima) tahun terakhir yang dibuktikan dengan surat pemberitahuan tahunan pajak penghasilan wajib pajak orang pribadi;
> n. Belum pernah menjabat sebagai Presiden atau Wakil Presiden selama 2 (dua) kali masa jabatan dalam jabatan yang sama;
> o. Setia kepada Pancasila, Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Negara Kesatuan Republik Indonesia, dan Bhinneka Tunggal Ika;
> p. Tidak pernah dipidana penjara berdasarkan putusan pengadilan yang telah memperoleh kekuatan hukum tetap karena

melakukan tindak pidana yang diancam dengan pidana penjara 5 (lima) tahun atau lebih;

q. Berusia paling rendah 40 (empat puluh) tahun;
r. Berpendidikan paling rendah tamat sekolah menengah atas, madrasah aliyah, sekolah menengah kejuruan, madrasah aliyah kejuruan, atau sekolah lain yang sederajat;
s. Bukan bekas anggota organisasi terlarang Partai Komunis Indonesia, termasuk organisasi massanya, atau bukan orang yang terlibat langsung dalam G.30.S/PKI; dan
t. Memiliki visi, misi, dan program dalam melaksanakan pemerintahan negara Republik Indonesia.

Article 169 letter q states: "The requirement to be a candidate for President and a candidate for Vice President is to be at least 40 (forty) years old."[28] The meaning contained in the provisions of this article is that there is only one path to occupying the position as the number one person who holds the highest government power in Indonesia, namely, you must be 40 years old. In other words, only citizens who have a minimum age limit of 40 years can run for President and Vice President.[29] From a normative juridical perspective which prioritizes legal certainty, this reality is not wrong because according to legal norms these are the conditions that must be fulfilled by candidates for President and Vice President.[30] Whereas From a political-legal perspective that prioritizes agreement, this reality does not need to be clashed with theories or methods adopted in other countries. Because, according to Mahfud MD, “Basically, binding constitutional law is whatever the

[28]Article 169 letter q of Law Number 7 of 2017 concerning General Elections, ratified in Jakarta on 15 August 2017 and promulgated on 16 August 2017 by the Minister of Law and Human Rights, in the State Gazette of the Republic of Indonesia of 2017 Number 182, Additional Gazette Republic of Indonesia Number 6109. General Election Law, Surabaya: Permata Press, p. 102-103.

[29]It still depends on the political party that is carrying it, because not all political parties or coalitions can nominate a pair of President and Vice President, but only political parties or combinations of political parties that meet the requirements for obtaining seats of at least 20% (twenty percent) of the total number of seats. DPR or obtaining 25% (twenty five percent) of the valid votes nationally in the previous election of DPR members who can nominate candidates for President and Vice President. See Article 222 of Law Number 7 of 2017 concerning General Elections (State Gazette of the Republic of Indonesia of 2017 Number 182, Supplement to State Gazette of the Republic of Indonesia Number 6109)

[30]Moh. Mahfud MD, Post-Constitutional Constitutional Law Debate , 2nd Printing, RajaGrafindo Persada, Jakarta, 2011, p. 138.

people and country concerned have included in its law". In short, whatever the contents of the law are, those are the applicable constitutional law provisions that must be obeyed and enforced.[31]

However, in philosophical perspective which is rooted in the principle of popular sovereignty, this is considered inappropriate. The reason, in Moh.Hatta, in the principle of popular sovereignty, all laws (state regulations including laws) must rely not only on feelings of justice, but must also rely on the truth that lives in the hearts of the people. [32]This is what Satjipto Rahardjo calls the legal term that it must be perpendicular. [33]An upright law is a just law, while the law will be straight if it contains truth in it. Both must be integrated into the principle of popular sovereignty or democracy which prioritizes freedom. While freedom lies one level below death. Moh. Hatta even stated "Freedom is no different from death". This is clear from the statement of independence or death. So, taking and depriving a citizen of his right to freedom means waiting for his death.[34]

Law without humanitarian principles is essentially not law, because it only becomes a tool for oppression and tyranny. [35]In the principle of popular sovereignty, there is a basis for recognizing all types of civilized humans. There is no longer a group of people who determine the fate of the people and nation, but rather the people themselves are included in determining the leaders and by whom they will be led.[36] Setting the requirements for nominations for President and Vice President which can only be participated by citizens who are at least 40 years old, sooner or later from the perspective of popular sovereignty will cause problems.

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[31] *Ibid* ., p. 143.

[32]Mohammad Hatta, Our Democracy Thoughts on Democracy and People's Sovereignty, Fourth Edition , SEGA ARSY, Bandung, 2014, p. 20.

[33]Budiono Kusumohamidjojo, Legal Theory of the Dilemma Between Law and Power 2nd Edition, Yrama Widya, Bandung, 2019, p. 274.

[34] *Ibid.*

[35]A. Mukhtie Fadjar, The Rule of Law and the Development of Legal Theory, History and Paradigm Shifts, Intrans Publishing, Malang, 2019, p. 115.

[36] *Ibid* ., p. 80.

The philosophical problem that arises today is injustice. Indicators of injustice are shown by the existence of individual rights being confiscated by the state through positive law.[37] Meanwhile, positive law itself does not question right and wrong or good and bad. In Moh's view. Mahfud MD, as long as the process of forming positive law has been formed by the right creator and has also gone through valid procedures, then positive law must be enforced. [38]In contrast to this opinion, RM. AB Kusuma stated "Even though positive law must be obeyed, at the same time the goodness of positive law must still be measured from principles that originate from the nobility of human dignity and civility".[39] Positive law must be guided by moral values and justice, even moral values and justice are the basis for legal validity, when positive law is unable to achieve justice. [40]From the expert opinion above, it can be understood that it is not enough for the rights and obligations of citizens to be regulated in positive law which relies on legal certainty and is only based on the agreement of its founders which may not necessarily bring justice. On the other hand, positive law as the most effective instrument for achieving state goals as well as driving change according to the legal needs of society, and the main means of bringing prosperity and civilizing the dignity of citizens must be guided by moral values, the value of truth, the value of justice, in addition to the value of usefulness and legal certainty as the "trident" of legal objectives.

Article 169 letter q of Law Number 7 of 2017 concerning General Elections which regulates the conditions for the nomination of the President and Vice President of the Republic of Indonesia, shows that the

[37]Moh. Mahfud, Organizational Arrangement of Political Party Wings in the Future , paper delivered at the Constitutional Law Symposium, organized by the Indonesian Ministry of Law and Human Rights in collaboration with the Faculty of Law, Indonesian Islamic University (FH UII) in Yogyakarta, Saturday 29 June 2019, p. 3-4.

[38] *Ibid.*

[39]RM. AB Kusuma, Government System "Founder of the Nation" Presidential System "Reformation Order", Publishing Body, Faculty of Law, University of Indonesia, Jakarta, 2011, p. 6.

[40]FX Joko Priyono, Moral Principles as Determinants of Legal Validity, 1st Printing , Prenadamedia Group, Jakarta, 2019, p. 3.

aspect of justice with an ethical dimension has not been fulfilled, namely respect for human dignity , which[41] is contained in the principle of popular sovereignty,[42] which has at its core freedom and equality. A state is said to adhere to the principle of popular sovereignty if state office is open and every citizen is allowed to try to achieve the desired state position.[43]Gideon Rahat, providing an explanation of equality of opportunity in holding office in a democratic country, stated: *"Democracy means that every citizen is equally eligible to run for office. The state that should take care of the right to be elected,..."* .[44]

Thus, actions that do not provide opportunities for all citizens to be able to run for the position of President and Vice President just because they are not yet 40 years old is an act that violates human rights and is also a form of systematic violation of people's sovereignty. Systematic violations of popular sovereignty occur because legally formal principles have been discovered that deny citizens equality and equity in occupying certain positions in government, including the positions of President and Vice President.

3.2. Freedom and Equality Within Principle of People's Sovereignty

Running for President and Vice President is part of the principle of popular sovereignty which lays down the idea that humans have freedom, equality and equal opportunities as an effort to humanize humans as civilized creatures. In other words, when the state provides equality and equality for every citizen, the realization of the essence of popular sovereignty becomes closer. [45]On the other hand, the essence of popular

[41]Achmad Sodiki, From Dissenting Opinion to a Living Constitution (Legal Thoughts of Prof. Dr. Achmad Sodiki, SH, Constitutional Judge for the 2008-2013 Period), UB Press, Malang, 2014, p. 18.

[42]IDG Palguna, Foreword to the People's Constitution: Community Participation in Amendments to the Constitution , Rajawali Pers, Depok, 2019, p. vii.

[43]RM. AB Kusuma, *Op. Cit* ., p. 55.

[44]Rahat, Gideon, Which Candidate Selection Method is More Democratic , Center for the Study of Democracy, University of California, Irvine, 2008, p. 8.

[45] Khairul Fahmi, *Op. Cit* ., p. 121.

sovereignty is becoming increasingly distant when it narrows citizens' opportunities to receive equal and equal treatment in government .

Upholding the honor and dignity of humans as civilized creatures of God, by including the protection and guarantee of human rights in the constitution is a characteristic of modern constitutions. In line with the principle of popular sovereignty, principle Universal declaration of goodness and benevolence can also be found in *the Universal Declaration of Human Rights* (UDHR),[46] or Universal Declaration of Human Rights (UDHR) of 1948, which should be adopted by a country that claims to be a country with popular sovereignty.

The realization of a state with popular sovereignty is characterized by the adoption of the principles of civil and political freedom which emphasize the protection and respect of individual sovereignty, such as freedom of thought and assembly, in addition to fulfilling basic human needs, and protecting the principle of human integrity.[47] This provision indicates that the basic freedom to choose or be elected to public office has long been the desire of civilized nations. Consequences of embracing civil and political liberties stated in Article 27 paragraph (1) of the UDHR, concerning equality of position in government, as follows:

(1). Everyone has the right to take part in his country, directly or through freely chosen representatives",
(2). Everyone has the right of equal access to public service in his country".[48]

Based on the formulation of Article 27 of the UDHR or the Universal Declaration of Human Rights (UDHR), taking part in government by running for President and Vice President is part of human rights, because everyone has the same rights and position in government.

[46]Determined by the General Assembly in Resolution 217 A (III) dated 10 December 1948.
[47]Rhona KM Smith, Human Rights Law , Center for Human Rights Studies, Indonesian Islamic University, Yogyakarta, 2008, p. 15.
[48]Bagir Manan, Dissecting the 1945 Constitution, First Printing , Brawijaya University Press, Malang, 2012, p. 26.

Although this principle represented an important position, the word "democracy" does not itself appear in the Declaration and the adjective "democratic" appears only once, in Article 29. By contrast, the 1966 UN International Covenant on Civil and Political Rights (enacted 1976) elaborates this principle in Article 25, making a number of different declarations and other instruments into a binding treaty (see UN 1988, 28). According to Article 25 of the Covenant:

(a). To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b). To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guarantee ing the free expression of the will of the electors;
(c). To have access, on general terms of equality, to public service in his country.

Minimum age limit of 40 years, are increasingly open when *the International Covenant on Civil and Political Rights* (ICCPR) or the International Covenant on Civil and Political Rights,[49]also provides protection for the right to recognition and equal treatment before the law, the right to assemble and associate, and the right to participate in government.[50] Every citizen has the same rights and opportunities without any differences, and without unreasonable restrictions to participate in carrying out all public affairs either directly or through freely chosen representatives, furthermore to vote and be elected in elections held periodically.[51]

[49]The UN General Assembly through Resolution Number 2200 A (XXI) ratified *the International Covenant on Civil and Political Rights* on December 16 1966 and entered into force on March 23 1976. The Indonesian government has ratified *the International Covenant on Civil and Political Rights (ICCPR)* with Law Republic of Indonesia Number 12 of 2005 concerning Ratification of *the International Covenant on Civil and Political Rights* (International Covenant on Civil and Political Rights), which was promulgated on 28 October 2005 in the State Gazette of the Republic of Indonesia of 2005 Number 119, Supplement to the State Gazette of the Republic of Indonesia 4558 .

[50]Jimly Asshiddiqie, Constitution and Human Rights , Material presented at the KontraS 10th Anniversary *Lecture , Jakarta, 26 March 2008, p.* 22.

[51]Evi Purnama Wati, (2015). Elections as a Form of Popular Sovereignty , *Law Journal* , 8 (II), May, p. 192.

The preamble to the International Covenant on Civil and Political Rights states that, civil and political rights are rights that originate from the inherent dignity and worth of human beings, these rights are very basic or human in nature, which are absolutely necessary so that humans can develop in accordance with their talents, ideals, as well as his dignity. This right is also considered universal, meaning that all humans have it without distinction of nation, race, religion and gender. [52] Based on *the Universal Declaration of Human Rights* and *the International Covenant on Civil and Political Rights,* it shows that every citizen is free to assemble and associate without coercion, has the right to fair treatment, and has the right to occupy certain positions in the government, both President and Vice President, without having to bound by a minimum age limit of 40 years.

The values of justice, freedom, equality, equal opportunities in law and government, as explained in the explanation section of article 6 paragraph 1 letter g and h

Article 6 paragraph 1

g. Yang dimaksud dengan "asas keadilan" adalah bahwa setiap Materi Muatan Peraturan Perundang-undangan harus mencerminkan keadilan secara proporsional bagisetiap warga negara.
h. Yang dimaksud dengan "asas kesamaan kedudukan dalam hukum dan pemerintahan" adalah bahwa setiap Materi Muatan Peraturan Perundang-undangan tidak boleh memuat hal yang bersifat membedakan berdasarkan latar belakang, antara lain, agama, suku, ras, golongan, gender, atau status sosial.

These are arguments for the law behind the requirements for nominating President and Vice President who do not have to wait until the minimum age of 40 years. Monika Ardelt in her research

[52]Retno Saraswati, (2009), Individual Candidates in Regional Elections, a Philosophical Review, *Constitutional Journal* , PPK Faculty of Law, Brawijaya University, (II)1, p. 80.

concluded that there is no relationship between age and *wisdom*.[53] This means that the wisdom a person has does not always coincide with age. This provision is in line with the essence of the Proclamation of Independence of 17 August 1945 for the Indonesian state, namely population sovereignty. Meanwhile, the principle of popular sovereignty is the basic building block for the government system of the Republic of Indonesia which is laid down in the constitution,[54] which consists of a preamble and articles. The preamble is a substantive source of law, a source of legal interpretation, and describes the fundamental political decisions of the state's founders. Liav Orgad , states the function of the Opening, as follows:[55]

> "The function of preambles, as a substantive source of rights, or as a guide for constitutional interpretation. The courts rely, more and more, on preambles as sources of law. The preamble is the part of the constitution that best reflects the constitutional understandings of the framers, and the preamble is "fundamental political decisions".

In the first paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia, [56]we find the sentence "independence" which means people's sovereignty, the sentence "humanity" shows the essence of Human Rights (HAM), while the sentence "justice" means justice which is the essence of existing law in Indonesia.[57]

> "Bahwa sesungguhnya kemerdekaan itu ialah hak segala bangsa dan oleh sebab itu, maka penjajahan di atas dunia harus

[53]Monika Ardelt, (2018), The Relation Between Age and Three Dimensional Wisdom: Variations by Wisdom Dimensions and Education, *Journal of Gerontology Series B,* (73) 8, p. 1339.

[54]Lalu Said Ruhpina, People's Sovereignty as Indonesia's *Absolute Ideel* , Brawijaya University Press, Malang, 2010, p. 51.

[55]Liav Orgad , (2010), The Preamble in Constitutional Interpretation , *International Journal of Constitutional Law,* Vol. 8 No. 4. doi: 10.1093/icon/mor010 .

[56] Constitution of the Republic of Indonesia 1945 , Secretariat General and Registrar of the Constitutional Court of the Republic of Indonesia, Jakarta, 2011, p. 1.

[57]National Legal Development Agency Ministry of Law and Human Rights, 2018 National Legal Development Document , Cahaya Tree, Jakarta, 2018, p. 28.

> dihapuskan, karena tidak sesuai dengan perikemanusiaan dan perikeadilan."

In the author's opinion, placing independence, which means people's sovereignty, in the first paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia is not coincidental. *The founding fathers* must have been fully aware of the importance of independence. It is believed that the founding fathers of the country were inspired by the theory of natural law initiated by John Locke, the essence of which is that humans are born free, equal and have the same opportunities. This means that freedom is a gift from God to be enjoyed by every human being. Based on that independence, being a candidate for President and Vice President is part of justice and human rights, while justice and human rights are a universal language for human nations and are the main characteristics of a civilized nation that upholds human dignity on earth.

The principle of popular sovereignty is reformulated in the fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia, with the sentence:

> "Kemudian dari pada itu untuk membentuk suatu Pemerintah Negara Indonesia yang melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia dan untuk memajukan kesejahteraan umum, mencerdaskan kehidupan bangsa dan ikut melaksanakan ketertiban dunia yang berdasarkan kemerdekaan, perdamaian abadi dan keadilan sosial, maka disusunlah Kemerdekaan Kebagsaan Indonesia itu dalam suatu Undang-Undang Dasar Negara Indonesia, yang terbentuk dalam suatu susunan Negara Republik Indonesia, yang berkedaulatan rakyat dengan berdasar kepada : Ketuhanan Yang Maha Esa, Kemanusiaan yang adil dan beradab, Persatuan Indonesia dan Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan/perwakilan, serta dengan mewujudkan suatu Keadilan sosial bagi seluruh rakyat Indonesia".

Word "...which is formed in the structure of the Republic of Indonesia which is sovereign by the people based on: "...the people are led by wisdom in the Deliberation / Representation …". The principle of popular sovereignty was transformed into the legal basis formulated in the Preamble to the 1945 Constitution of the Republic of Indonesia, which was further elaborated in the articles of the 1945 Constitution of the Republic of Indonesia, and organic legislation.

The formulation of Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia states

Article 1
(1). Negara Indonesia ialah Negara kesatuan yang berbentuk Republik.
(2). Kedaulatan berada di tangan rakyat dan dilaksanakan menurut Undang-Undang Dasar.
(3). Negara Indonesia adalah negara hukum.

Word that "Sovereignty is in the hands of the people and is implemented according to the Constitution", containing the intention that the will of the people is the basis of the ruler's power. [58] Popular sovereignty is conceptualized as the people who determine the style and method of government, and it is the people who determine what goals are to be achieved. [59] The change in the idea of sovereignty in the 1945 Constitution of the Republic of Indonesia was also accompanied by a change in the way the people gave mandates for the implementation of state power, including the way the people wanted the minimum age limit for candidates for President and Vice President.[60]

[58]Nunik Nurhayati, Ela Mayasari, (2022), Indonesian People's Sovereignty: Meaning and Implementation Before and After the Amendment to the 1945 Constitution, *Amnesty: Legal Journal* , (4) 1, DOI: https://doi.org/10.37729/amnesti.v4i1. 1433, p. 58.

[59]Kusnardi and Harmaily Ibrahim, Introduction to Indonesian Constitutional Law, Seventh Edition**,** Center for Constitutional Law Studies, Faculty of Law, University of Indonesia, Jakarta, 1988, p. 328.

[60]Khairul Fahmi, *Op. Cit* ., p. 120-121.

Candidates for President and Vice President who do not have to wait until the minimum age of 40 years are implicitly given a place by the existence of several articles in the 1945 Constitution of the Republic of Indonesia which provide the constitutional basis, including: Article 27 paragraph (1),[61] Article 28D (1) and (3),[62] as well as Article 28I paragraphs (2) and (5).[63]

Article *27*

(1). Segala warga negara bersamaan kedudukannya di dalam hukum dan pemerintahan dan wajib menjunjung hukum dan pemerintahan itu dengan tidak ada kecualinya.
(2). Tiap-tiap warga negara berhak atas pekerjaan dan penghidupan yang layak bagi kemanusiaan.
(3). Setiap warga negara berhak dan wajib ikut serta dalam upaya pembelaan negara.

Article 28D

(1). Setiap orang berhak atas pengakuan, jaminan, perlindungan, dan kepastian hukum yang adil serta perlakuan yang sama di hadapan hukum.
(2). Setiap orang berhak untuk bekerja serta mendapat imbalan dan perlakuan yang adil dan layak dalam hubungan kerja.
(3). Setiap warga negara berhak memperoleh kesempatan yang sama dalam pemerintahan.
(4). Setiap orang berhak atas status kewarganegaraan.

Article 28I

(1). Hak untuk hidup, hak untuk tidak disiksa, hak kemerdekaan pikiran dan hati nurani, hak beragama, hak untuk tidak diperbudak, hak untuk diakui sebagai pribadi di hadapan hukum, dan hak untuk tidak dituntut atas dasar hukum yang berlaku surut adalah hak asasi manusia yang tidak dapat dikurangi dalam keadaan apa pun.

[61]Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states: "All citizens of the country have equal status under the law and government and are obliged to uphold the law and government without exception."

[62]Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia states: "Everyone has the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law." Meanwhile, paragraph (3) states: "Every citizen has the right to equal opportunities in government."

[63]Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia states: "Every person has the right to be free from discriminatory treatment on any basis and has the right to receive protection against such discriminatory treatment." Meanwhile, paragraph (5) states: "To uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated and stated in statutory regulations."

(2). Setiap orang berhak bebas dari perlakuan yang bersifat diskriminatif atas dasar apa pun dan berhak mendapatkan perlindungan terhadap perlakuan yang bersifat diskriminatif itu.
(3). Identitas budaya dan hak masyarakat tradisional dihormati selaras dengan perkembangan zaman dan peradaban.
(4). Perlindungan, pemajuan, penegakan, dan pemenuhan hak asasi manusia adalah tanggung jawab negara, terutama pemerintah.
(5). Untuk menegakkan dan melindungi hak asasi manusia dengan prinsip negara hukum yang demokratis, maka pelaksanaan hak asasi manusia dijamin, diatur, dan dituangkan dalam peraturan perundang-undangan.

It doesn't stop there, regulations regarding human rights are also contained in Law Number 39 of 1999 concerning Human Rights. An important element in the regulation of human rights, both in the 1945 Constitution of the Republic of Indonesia and in Law Number 39 of 1999 concerning Human Rights, is the guarantee of civil and political rights, which include citizens' human rights to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law.

Article 43
(1). Setiap warga negara berhak untuk dipilih dan memilih dalam pemilihan umum berdasarkan persamaan hak melalui pemungutan suara yang langsung, umum, bebas, rahasia, jujur, dan adil sesuai dengan ketentuan peraturan perundang-undangan.
(2). Setiap warga negara berhak turut serta dalam pemerintahan dengan langsung atau dengan perantaraan wakil yang dipilihnya dengan bebas, menurut cara yang ditentukan dalam peraturan perundang-undangan.
(3). Setiap warga negara dapat diangkat dalam setiap jabatan pemerintahan.

Every citizen has the right to fill positions in the government sector which is also regulated in Law Number 39 of 1999 concerning Human Rights, Part Eight concerning the Right to Participate in Government, more precisely in Article 43 paragraph (1), which states: “Every citizen has the right to be elected and vote in general elections based on equal rights…”.

Referring to the various considerations both philosophical and juridical above, Law Number 7 of 2017 concerning General Elections, as an instrument for implementing popular sovereignty, must not have the potential to limit citizens' human rights and injure the sense of justice. However, reality at least still shows a discrepancy with idealized conditions. Formulation of legal norms in both the 1945 Constitution of the Republic of Indonesia and Article 169 letter q Law Number 7 of 2017 concerning General Elections, using grammatical interpretation shows 2 (two) important things, namely: *first,* the amendment to the 1945 Constitution of the Republic of Indonesia has restored the sovereignty of the people on the one hand, but on the other hand in terms of nominating candidates for President and Deputy The President is still determined by a political party or a combination of political parties as stated in Article 6A paragraph (2) of the 1945 NRI Constitution. *Second,* Law Number 7 of 2017 concerning General Elections, which is the operationalization of the 1945 NRI Constitution, still contains restrictions on the rights of every citizen. to be able to nominate themselves as candidates for President and Vice President. The provisions in Article 169 letter q of Law Number 7 of 2017 concerning General Elections have enforced the *unequal* position of citizens in government.

This inequality and inequality in the position of citizens is what is used by some Constitutional Judges as a basis for legal considerations in deciding case Number 90/PUU-XII/2023. For some Judges, the Constitution opens two (2) doors regarding the minimum age limit for candidates for President and Vice President cannot be separated from the idea that: *Firstly*, age restrictions are considered unfair because they are not responsive to the development and dynamism of society , which is not in line with the principle of popular sovereignty. *Second,* Restricting the age for

running for President and Vice President is considered a form of discrimination that is not in accordance with the fundamental rights of citizens guaranteed in the 1945 Constitution of the Republic of Indonesia.

From the explanation above, it can be understood that restrictions on citizens' rights are a form of incompatibility with the principle of popular sovereignty which focuses on equality and equality. Neglect of both could lead to a decline in democracy, because citizens who wish to run as candidates for President and Vice President must be at least 40 years old. Such an arrangement is not a reflection of the principle of popular sovereignty which is based on the principle of justice by providing equal and equitable opportunities to every Indonesian citizen to nominate themselves as candidates for President and Vice President.

4. Conclusion

The conclusions that can be drawn from this research are: (1) A country that has established itself as an adherent of the principle of popular sovereignty wants supreme power to be in the hands of the people and every public position is open and provides equal and equal opportunities for every citizen to achieve it, no except for the positions of President and Vice President. (2) Actions that limit, close equal and equal opportunities and opportunity for all citizens to be able to run for President and Vice President simply because the minimum age has not reached 40 years are actions that violate human rights, are less sensitive to the dynamics of change society, and is not in accordance with the essence of popular sovereignty.

Suggestions addressed to the DPR together with the President as legislators should be to be able to use the principle of popular sovereignty as a theory that can consistently be used as a basis for making changes to the minimum age limit for the President and Vice President in the future.

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