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The Application of Judicial Activism in the Constitutional Court Decision Number 90/PUU-XXI/2023 Regarding the Age Requirements for Presidential and Vice Presidential Candidates in Relation to the Theory of Legal Purpose

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Abstract : *The Constitutional Court's decision 90/PUU-XXI/2023 has sparked controversy in society, as it is seen as exceeding its authority or encroaching on legislative powers, commonly referred to as open legal policy. The application of judicial activism in this decision has raised many questions, leading to polarization ahead of the 2024 Presidential Election. The aim of this research is to examine the application of judicial activism in the Constitutional Court's decision Number 90/PUU-XXI/2023 in relation to the theory of legal objectives. The methodology used in this study is normative legal methodology, utilizing various legal sources found in literature related to judicial activism in the Constitutional Court's decision 90/PUU-XXI/2023 regarding the age requirements for presidential and vice-presidential candidates, linked to the theory of legal objectives and the doctrine of legal activism, which are discussed and evaluated. The research findings indicate that the application of judicial activism in the Constitutional Court's decision Number 90/PUU-XXI/2023 is an inappropriate step that does not adequately consider the principle of virtue jurisprudence. Furthermore, the application of judicial activism in Decision 90/PUU-XXI/2023 does not fulfill the principles of legal objectives, which prioritize justice, followed by utility and certainty.*

Keywords : *Judicial Activism, Decision MK 90/PUU-XXI/2023, Theory of Legal Purpose*

Abstrak : Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 menuai kontroversi di tengah masyarakat karena dianggap melampaui kewenangannya atau melanggar kewenangan legislatif yang lazim disebut dengan istilah open legal policy. Penerapan judicial activism dalam putusan ini menimbulkan banyak pertanyaan yang berujung pada polarisasi menjelang Pemilihan Presiden 2024. Tujuan penelitian ini adalah untuk mengkaji penerapan judicial activism dalam putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 dikaitkan dengan teori tujuan hukum. Metodologi yang digunakan dalam penelitian ini adalah metodologi hukum normatif, dengan menggunakan berbagai sumber hukum yang ditemukan dalam kepustakaan terkait dengan judicial activism dalam putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 tentang syarat usia calon presiden dan wakil presiden, dikaitkan dengan teori tujuan hukum dan doktrin legal activism yang dibahas dan dievaluasi. Hasil penelitian menunjukkan bahwa penerapan

yudisial aktivisme dalam putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 merupakan langkah yang kurang tepat karena belum mempertimbangkan asas yurisprudensi keutamaan secara memadai. Lebih jauh, penerapan yudisial aktivisme dalam Putusan 90/PUU-XXI/2023 tidak memenuhi asas tujuan hukum, yaitu mengutamakan keadilan, diikuti oleh kemanfaatan dan kepastian.

Kata kunci : Aktivisme Yudisial, Putusan MK 90/PUU-XXI/2023, Teori Tujuan Hukum

I. INTRODUCTION

The establishment of the Constitutional Court (MK) in Indonesia is expected to help resolve constitutional practice issues that did not have a resolution mechanism before its formation. Over the years, the Constitutional Court's capacity to interpret, decide, and adjudicate cases has developed in line with the execution of its judicial functions. This development can be seen in various decisions of the Constitutional Court. These decisions include changes and the creation of new rules. (positive legislatur). In constitutional practice, the actions of the Constitutional Court may involve the concept of judicial activism. The adjustment of law to social developments through the principle of constitutional development and previous rulings to apply constitutional values.[1]

Judicial activism by Aharon Barak in his book "Judge in Democracy" is interpreted as a "judicial discretion" that arises due to the complexity of issues that fall under the mandatory jurisdiction of the court to resolve without adequate formal law.2 The concept of discretion is generally manifested through the development of the meaning of legal norms, modification of laws, creation of legal norms, and even ultra vires or out-of-power decisions. Judicial activism desires that every court can provide true justice to citizens. These three views negate the opinion that the judicial power only functions to interpret the law, which often cannot find solutions to problems.[2]

The term "Judicial Activism" initially emerged through the Supreme Court of the United States, introduced by Arthur Schlesinger in January 1947. However, critics in the United States are concerned that judicial activism, with its excessive behavior, could undermine the fundamental principles of governance, namely democracy and the separation of powers. The establishment of courts in general and constitutional courts in particular is interconnected with the social, cultural, and economic backgrounds that arise from a specific political system, so courts cannot function in conditions of political and ideological vacuum.[3]

The concept of judicial activism in Indonesia arises from the decisions rendered by the Constitutional Court, which are often produced from non-unanimous votes or dissenting opinions of the constitutional judges. This shows that there are at least two characteristics of constitutional judges in Indonesia when deciding cases. First, the type of judge who tends to adhere to procedures and refrains from further interpretation.

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[1]Judicial activism. (2017). In *Judges and Democratization* (pp. 159–182). Routledge. https://doi.org/10.4324/9781315544847-9

[2] Aharon Barok. *The Judge in a Democracy*. Princeton University Press, 2006, p.34

[3] Hirschl, R. (n.d.). *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*. http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm

Second, the type of judge who engages in judicial activism, leaning towards substantive justice rather than procedural justice. Judicial activism in the constitutional practice conducted by the Constitutional Court is interconnected with one another. However, excessive enthusiasm in carrying out judicial activism can impact a healthy democratic climate. Therefore, the implementation of judicial activism practices needs to be accompanied by constructive academic criticism to help maintain the legitimacy of the constitutional court.

One of the important elements in the legal system of a democratic country is the authority of the Constitutional Court (MK) to test the constitutionality of a law. Therefore, every decision made by the Constitutional Court (MK) is erga omnes, meaning that all state institutions and the entire Indonesian society must comply with it as a final decision. Thus, as the guardian of the constitution and the final interpreter of the constitution, the MK is expected to interpret laws in accordance with the intent of the constitution based on justice. However, what is happening now are several decisions by the Constitutional Court that have sparked controversy and created polarization within society. One example of such a decision is the ruling regarding the reduction of the age of vice presidential candidates in the MK Decision Number 90/PUU/-XXI/2023, which was issued ahead of the 2024 Presidential Election.

The MK's decision certainly made some of the public angry. The decision is considered to violate procedural rules that limit the authority of the Constitutional Court itself. As a result, differing opinions about the ruling have created debate and polarization in society, especially since the ruling is considered by some in the public as a red carpet for Jokowi's eldest son to accompany Prabowo in the 2024 presidential election contest. The MK's decision is considered valid by those who feel that human rights are protected and applied to every citizen. On the other hand, those who believe that the Constitutional Court has violated various rules that limit its authority consider that the Constitutional Court has deviated from its original "mission." They say that the Constitutional Court has turned into a superbody institution with the authority to set regulations and act according to its own will. Additionally, there are those who argue that, because the Constitutional Court is often uncontrollable, they frequently engage in judicial activism when making their decisions.[4]

In addition, it is also necessary to pay attention to the fact that ideally, the practice of judicial activism applied by constitutional court judges should be based on the theory of legal purposes, which in its development has given birth to modern law that combines the three classical views, namely empirical law, normative law, and ethical law into one approach that was later formulated by Gustav Radbruch into three fundamental legal values, including justice (philosophical), legal certainty (juridical), and utility for society. (sosiologis).[5]

The study of the doctrine of judicial activism regarding the Constitutional Court's decision 90/PUU/-XXI/2023 on the change of age requirements for vice presidential

[4] Pan Mohamad Faiz, (n.d.). *Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi Dimensions of Judicial Activism In The Constitutional Court Decisions*. http://ssrn.com/abstract=2847500

[5] Afdhali, D. R., & Syahuri, T. (n.d.). Idealitas Penegakan, Hal 555-561. In *COLLEGIUM STUDIOSUM JOURNAL* (Vol. 6, Issue 2).

candidates is interesting and very important to examine. The reason is that there are judges who limit themselves with the doctrine of judicial restraint, believing that a judge can only annul a law without being given the power to create a new norm. As a result, judges often misunderstand their own authority in deciding and interpreting articles in laws, which are considered open legal policies that belong solely to the legislative domain. Therefore, a thorough examination of the doctrine of judicial activism will provide enlightenment on the authority of judges, particularly Constitutional Judges, who are expected by society to be the protectors of the constitution. Meanwhile, the theory of the purpose of law is used as an analytical tool for judicial activism in the Constitutional Court Decision Number 90/PUU-XXI/2023.

II. RESEARCH METHOD

The method used in this research is the normative juridical research method. Various legal sources found in the literature related to Judicial Activism in MK 90/PUU-XXI/2023 regarding the age requirements for presidential and vice-presidential candidates are linked to the theory of legal purposes with the doctrine of legal activism, which are discussed and evaluated. The legal sources discussed in this research consist of public and legal secondary data, such as laws, decisions, legal textbooks, and scholarly works. In addition, this research uses library studies to gather these materials. The author will explain the relationship between the two and the role of legal activists in the Constitutional Court's decision on presidential term limits.[6]

III. RESULT AND DISCUSSION

In the 2024 Presidential election, several political parties and community groups filed a lawsuit with the Constitutional Court regarding the ideal age of presidential and vice-presidential candidates, which generated various reactions from the public and community leaders, including those who supported and opposed the issue, resulting in public polemics.[7] A Unsa student named Almas Tsaibbirru Re A made the first submission, challenging the requirement that presidential and vice-presidential candidates must be at least forty years old. In this lawsuit, Law No. 7 of 2017 on General Elections is used as the legal basis and material test for the age of presidential and vice-presidential candidates. Three community groups, Ariyanto, Rahayu Fatika Sari, and Rio Saputro, authorized by Alinasi 98, are another group expressing their disagreement and also filing a lawsuit. In his lawsuit, he not only discussed the age of the presidential and vice-presidential candidates but also added the prerequisite that the presidential candidate must be free from legal cases and must not have ever violated Human Rights. (HAM). There are a total of six petitions related to the age limit prerequisites for the President and Vice President submitted to the Constitutional Court, each with different case numbers. First, with case number 29/PUU-XXI/2023, involving several petitioners, including the Indonesian Solidarity Party (PSI), Anthony Winza Probowo, Danik Eka Rahmaningtyas, Dedek Prayudi, and Mikhail Gorbachev Dom. Other related parties in this case include the Association for Elections and Democracy (Perludem), Evi Anggita Rahma, Azzah

[6] Wibisana, A. G.. MENULIS DI JURNAL HUKUM: GAGASAN, STRUKTUR, DAN GAYA. *Jurnal Hukum & Pembangunan*, *49*(2), 471. 2019, https://doi.org/10.21143/jhp.vol49.no2.2014

[7] Novitalia, K. H. B. A.. KREDIBILITAS MAHKAMAH KONSTITUSI PASCA PUTUSAN MK NOMOR: 90/PUU-XXI/2023. *Jurnal Solusi*, *22*(1). 2024

Riski Safira, Aulia Rahmawati, Rayhan Fiqi Fansuri, Sultan Bagarsyah, Oktavianus Rasubala, and the Independent Election Monitoring Committee. Second, the petition submitted by the Indonesian Change Guard Party (GARUDA) numbered 51/PUU-XXI/2023.

In this case, the Independent Election Monitoring Committee (KIPP) and the Voter Education Network for the People (JPPR) are the parties involved. The third case, numbered 55/PUU-XXI/2023, involves several important figures in regional government such as Erman Safar, Pandu Kesuma Dewangsa, Emil Elestianto Dardak, Ahmad Muhdlor, and Muhammad Albarraa. The Great Indonesia Movement Party (Gerindra), Oktavianus Rasubala, the Independent Election Monitoring Committee (KIPP), and the Voter Education Network for the People (JPPR) are some of the parties involved in this matter. The fourth to sixth cases, numbered 90/PUU-XXI/2023, 91/PUU-XXI/2023, and 92/PUU-XXI/2023, involve the petitioners Almas Tsaqibbirru Re A, Arkaan Wahyu Re A, and Melisa Mylitiachristi Tarandung. In this situation, there are no related parties involved.

The acceptance of Constitutional Court Decision Number 90/PUU-XXI/2023 indicates the application of judicial activism, which has become a source of intense debate regarding the role and authority of the Constitutional Court in the formation of new norms related to elections. This decision affirms that a presidential or vice-presidential candidate must meet the minimum age requirement of 40 years or have experience holding an elected position through a general election, including regional head elections. The ruling implies the view that the Constitutional Court is involved in the domain and legislative function that should be the authority of the legislative body, commonly referred to as open legal policy. (open legal policy). The decision states:

> "Declares Article 169 letter q of Law Number 7 of 2017 on General Elections (State Gazette of the Republic of Indonesia Year 2017 Number 182, Supplement to the State Gazette of the Republic of Indonesia Number 6109) which states, 'at least 40 (forty) years old' is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force, as long as it is not interpreted as 'at least 40 (forty) years old or has ever/holds a position elected through a general election including regional head elections.' Thus, Article 169 letter q of Law Number 7 of 2017 on General Elections reads in full 'at least 40 (forty) years old or has ever/holds a position elected through a general election including regional head elections."

The Court, besides stating that Article 169 letter q is contrary to the Constitution, also provides a new legal norm that the President and Vice President candidates can be under 40 years old provided they have held a position as a regional head." Then, looking at that, it certainly raises a question: to what extent is the judicial activism carried out by the Constitutional Court in Indonesia justified? Because the practice of judicial activism cannot be carried out indiscriminately, especially since William P. Marshall outlines the threats to the functions of democracy that come from judicial activism, referred to as the "seven sins of judicial activism", namely:[8]

1. Counter-Majoritarian Activism: The reluctance of the court to submit to decisions from other democratically elected branches of power;

[8] William P. Marshall. Conservatives and the Seven Sins of Judicial Activism. *University of Colorado Law Review*, *73*(4), 2002

2. Non-Originalist Activism: The court's failure to adhere to original ideas when deciding a case;
3. Precedential Activism: The court's failure to adhere to previous court rulings (judicial precedent)
4. Jurisdictional Activism: The court's failure to comply with the limitations of its own jurisdictional power;
5. Judicial Creativity: The creation of new theories and rights within constitutional doctrine;
6. Remedial Activism: The use of judicial power to impose ongoing affirmative obligations on the government or to take over the duties of government institutions under judicial supervision; and
7. Partisan Activism: The use of judicial power to achieve partisan goals.

William P. Marshal warns against the implementation of judicial activism without taking over the authority of other democratic institutions, and also notes that the Constitutional Court only has the authority to revoke, annul, abolish, or invalidate laws if they are found to be in conflict with the constitution. These actions reflect the role of the Constitutional Court as a negative legislator, which functions to annul legal rules deemed unconstitutional against the 1945 Constitution. This is in line with the mandate of Article 57 (2a) of the Constitutional Court Law, which states that the Constitutional Court does not have the authority to make laws like the legislative body.[9]

However, on the other hand, there are indeed other factors that cause the Constitutional Court to apply judicial activism in Indonesia, namely the relatively low public trust in political parties in Indonesia at present. This is at least caused by the rampant corruption cases involving political party members, both in the legislative and executive branches, including the involvement of Party Chairpersons, Secretaries General, and Cabinet Ministers. This unsatisfactory performance also contributes to the low level of public trust in the DPR, in addition to the implementation of judicial activism by the Constitutional Court, which involves the development and shift of legal paradigms taken by the Constitutional Court from merely following procedural law to substantive law. This legal paradigm emphasizes how a judge finds substantive justice by treating rights and obligations fairly. In the context of Indonesia, such a paradigm was introduced and influenced by Satjipto Rahardjo's thinking as progressive law.

It is this progressive legal paradigm that then encourages the Constitutional Court to engage in judicial activism when making decisions, especially when existing laws are deemed no longer capable of resolving legal issues. Greg Craven said that this paradigm is heavily connoted with "activism" and "progressivism" in constitutional interpretation. According to him, this paradigm is an approach to interpreting the constitution that requires continuous changes to the constitution to better align with societal desires and social expectations rather than the literal text or the intent of its drafters. Therefore, when the Constitutional Judges use progressive law to make decisions, they are indirectly engaging in a form of legal activism.

[9] Mohammad Agus Maulidi. "Problematika Hukum Implementasi Putusan Final Dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum. *Jurnal Hukum Ius Quia Iustum*, *24*(4).2017

However, it should be noted that the implementation of judicial activism in the Constitutional Court Decision 90/PUU-XXI/2023 also needs to consider the points raised by Christopher G. Buck, that in general, judicial activism must be based on legal principles and cannot be solely left to the discretion of the court. Furthermore, judicial activism that occurs in certain cases can be justified as long as it incorporates principles in adjudicating a case known as virtue jurisprudence, among others, such as:[10]

1. Principled implicationism: In a constitution, there are citizens' rights that are technically unwritten. This principle provides a broader view of the constitution that offers further protection of rights and freedoms not explicitly intended by the framers of the constitution, but which they could have wisely predicted;
2. Principled Minoritarianism: Although not intended to always support minorities, this principle gives special attention to minority groups when they receive negative impacts from the majority-based democratic process, especially when there are violations of the principle of equal protection. (equal protection). This principle is also interpreted as an intervention against the failures of the representative system that can lead to the enactment of discriminatory laws against minority groups;
3. Principled Remedialism: This principle touches on the principle of justice in the effort to restore rights, where the court has the discretion to restore the rights of individuals or groups deemed unjust. Policies regarding affirmative action fall into this category.
4. Principled Internationalism: By considering the developments in the world of international law, judicial activism can produce rulings that adjust to the current global context through comparative legal methodology and the implementation of principles and provisions in international law.

The principle of justice emphasized by Christopher G. Buck is justice for all, which, when linked to the theory of legal purposes articulated by Gustav Radbruch, states that there are three legal purposes: utility, certainty, and justice. However, Radbruch argues that there needs to be a scale of priorities in the implementation of these legal principles. Justice can be prioritized over utility for the broader society. Gustav Radbruch explains that there is a scale of priorities that must be followed, where the first priority is always justice, then utility, and finally legal certainty. Law performs its function as a means of conserving human interests within society. The goals of law have targets to be achieved, dividing rights and obligations among individuals in society. Law also grants authority and regulates the methods of resolving legal issues while maintaining legal certainty.

So how do we view the Constitutional Court's decision 90/PUU-XXI/2023, which is considered to serve the justice of only one individual and group, and has also caused much polemic in society? Additionally, the Chief Justice of the Constitutional Court, Anwar Usman, is also the uncle of Gibran, who is the eldest son and will accompany Prabowo in the 2024 presidential election. This is considered a violation of the judicial code of ethics, as a judge should not adjudicate someone with whom they have a familial relationship. Therefore, the Chief Justice of the Constitutional Court

[10] Christopher G. Buck. *Judicial Activism*. Encyclopedia of Activism and Social Justice.2007, P.87

should resign to participate in resolving this issue to avoid conflicts of interest in decision-making, which could be unprofessional and unfair. This is reinforced by the MKMK ruling chaired by Jimly Asshiddiqie, which stated that Anwar Usman violated the code of ethics and was removed from his position as Chief Justice of the Constitutional Court. This fact further strengthens the argument that judicial activism in the 90/PUU-XXI/2023 ruling was an inappropriate step, indicating inconsistency from the Constitutional Court, resulting in a problematic decision. Therefore, the legal goals intended by Gustav Radbruch will also not be achieved, the value of justice that is the main principle in that theory will not be felt by the entire society and will only become a mere wish.

Reading this, it is necessary to evaluate that the implementation of judicial activism, unlike in developed countries, has so far invited more political debate than academic discourse in Indonesia's Constitutional Court. The biggest criticism comes mainly from politicians in the DPR who believe that their authority in making laws is often usurped by the Constitutional Court (MK). The civil law system applied in Indonesia, which is based on the principle that judges are merely the mouthpieces of the law and not lawmakers, is not strictly followed by the MK. The decisions produced by the MK tend to lean more towards judges making law, as is practiced in common law countries. Therefore, the Constitutional Court has become a judicial institution in the civil law system that applies principles commonly found in the common law system.

IV. CONCLUSION

The application of Judicial Activism in the Constitutional Court Decision Number 90/PUU-XXI/2023 is an inappropriate step and does not pay attention to the principle of virtue jurisprudence. Specifically, the judicial activism in that decision is also not intended to restore the constitutional rights of citizens that have been violated, whether individual or group rights. This is based on the applicant's argument in representing their constitutional loss, which is not grounded in a logical and strong argument. The application of judicial activism in Decision 90/PUU-XXI/2023 also does not meet the principle of the purpose of law, which is to prioritize justice followed by utility and certainty. The Chief Justice of the Constitutional Court, Anwar Usman, should have recused himself from deciding on this matter in accordance with the principle of Nemo Judex In Causa Sua, which ultimately led to Anwar Usman being found to have violated the code of ethics and being removed from his position as Chief Justice of the Constitutional Court based on the MKMK Decision.

However, despite that, in the context of Indonesia, which is strengthening its constitutional governance system, the Author concludes that the practice of judicial activism should not be prohibited because it would only render the constitution a lifeless organism. As a result, the constitution will become outdated and the constitutional rights of citizens as well as democratic principles will become more difficult to protect. However, judicial activism in the Constitutional Court should not be carried out recklessly and without limits. If this happens, it is not impossible that a judicial tyranny will be created. (judicial tyranny).

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