



THE PROTECTION OF CONSTITUTIONAL RIGHTS THROUGH THE PRACTICE OF JUDICIAL ACTIVISM IN THE CONSTITUTIONAL COURT

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Abstract

According to the democracy index, Indonesia is a flawed democracy, meaning that, as the state's organ of governance, the government is still insufficiently powerful to effectively defend the fundamental rights of its people. One of the causes of this is the inadequate legal system and protection of citizens' fundamental rights from the state, which is essentially achieved through the practice of judicial activism at the Constitutional Court. This study utilizes normative research to examine written regulations' norms to provide findings about the pressing need to address the practice of judicial activism at the Constitutional Court. This study utilized three distinct sorts of approaches: the statute approach, the conceptual approach, and the comparative approach. Moreover, relevant primary, secondary, and tertiary legal documents serve as the foundation for this study. After gathering this legal data through a review of the literature, qualitative descriptive and comparative descriptive analytic methodologies were used for analysis. The author found that judicial activism is one of the steps that judges can take to make efforts to protect the constitutional rights of citizens in the constitutional court.

Keywords: *Constitutional Rights, Judicial Activism, Constitutional Court*

1. INTRODUCTION

A country's adoption of the practice of judicial activism today can successfully contribute to the protection of its fundamental rights and will inevitably result in a more democratic nation. Regarding this, Indonesia has essentially accepted and even introduced the practice of judicial activism in a number of its current legal establishments. To date, however, the practice of judicial activism in Indonesia cannot be considered the most effective means of enhancing the level and caliber of the country's democratic environment. This is demonstrated by data from The Economist Intelligence Unit's (EIU) global democracy index for various nations. The EIU's Democracy Index assesses a nation's level of democracy using five (five) parameters, including the electoral process and pluralism, functioning of government, political participation, political culture and civil liberties. (*Democracy Index 2022: Frontline Democracy and the Battle For Ukraine*, 2022)

Indonesia is categorized by the EIU as a democracy with flaws. On the same index, Indonesia scored a score of 7.92 points, with the civil liberties indicator receiving one of the lowest scores of 6.18 points. (Monavia Ayu Rizaty, 2022). The poor status of civil liberties in Indonesia is a sign that the state apparatus, the government, is still insufficiently powerful to effectively safeguard the fundamental rights of its people. The rise in human rights abuses that have happened in Indonesia in recent years is evidence of this. One of the causes is the inadequate framework for safeguarding and deciding citizens' fundamental rights against the state, which is genuinely achieved by judicial activism, some of which takes place at the Constitutional Court.

When judges interpret applicable legislation, they often take outcomes, attitudinal preferences, and other extrajudicial matters into account. This tendency is known as judicial

activism. Judicial activism is defined as "control or influence by the judiciary over political or administrative institutions" in this sense by Brian Galligan. (Galligan, 1991) Furthermore, Aharon Barak interprets judicial activism as a "judicial discretion" that results from the complexity of issues that the court is mandated to answer in the absence of formal appropriate law in his book "Judge in Democracy." (Masyitoh, 2021) Generally, the idea of discretion is achieved through the evolution of meaning from legal norms, changes to the law, and the introduction of new legal standards, to choices that are supra vires or out of control. Every court must give citizens real justice to support judicial activism. This point of view refutes the notion that the role of the judiciary is limited to applying legal interpretations, which frequently fall short of providing answers to issues. (Galligan, 1991)

The practice of judicial activism, especially at the Constitutional Court, is an idea proposal to answer the vacuum in regulating the protection of citizens' constitutional rights in Indonesia. (*Panduan Dalam Memasyarakatkan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, 2003) Legal review of the 1945 NRI Constitution, which only permits horizontal protection between citizens, is the exclusive means of regulating the legal protection of citizens' fundamental rights. More progressive and forward-thinking action in the Constitutional Court is required because the protection of citizens' basic rights through the authority of various state institutions through a variety of mechanisms, including litigation and non-litigation, is also not optimally able to resolve any existing rights conflicts. Because of this, any research on the defense of people' constitutional rights must include an analysis of the practice of judicial activism.

Legal protection is an obligation of the legal state. One understanding of the rule of law is that there is protection, respect and fulfillment of individual rights as constitutional rights. This can be seen by limiting state power so as to create a system of limited government or absolute power (not held by any state organ). (Basu, 2003). To achieve this, a country usually divides state power into three branches (executive, legislative and judicial) with the following meaning:

- a. Making laws is the right of the legislature, so legal products must not violate constitutional rights;
- b. The government as the government executive may not take certain actions in running the government that violate constitutional rights;
- c. Courts that have judicial rights and authority cannot judge in violation of constitutional rights.

Thus, it is crucial to conduct research on the practice of judicial activism in Indonesia, particularly within the Constitutional Court, in order to establish a democratic rule of law. The author of this study attempts to provide information and insight regarding the practice of judicial activism within the Indonesian legal system. The concept in question is examined in light of the necessity of judicial activism from the standpoint of a democratic rule of law as a precondition to the defense, observance, and realization of people' constitutional rights.

2. IMPLEMENTATION METHOD

This research involves the use of legal research (normative research), where law is conceptualized as rules or norms considered appropriate. The study of these norms is then elaborated using three approaches: statutory approach, conceptual approach, and comparative approach. (Marzuki, 2011)



Furthermore, in dissecting all aspects related to the practice of judicial activism, the author refers to three legal sources: primary, secondary, and tertiary legal materials. First, the primary legal materials used in this research are derived from several regulations such as the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999 concerning Human Rights, and other regulations.

Meanwhile, the secondary legal materials in this research are sourced from textbooks, legal journals, and expert commentaries related to the protection of constitutional rights, democratic rule of law, and the practice of judicial activism itself. (Marzuki, 2011) As for tertiary legal materials in this study, they are referenced from official documents, library books, academic works, articles, and relevant documents. (Mamudji, 2003) These legal materials are collected through literature review techniques. (Achmad, 2010)

Furthermore, the author also employs the comparative descriptive technique in analyzing the collected legal materials. This technique is used to compare one opinion with another. These opinions are then identified in a quantity considered sufficient to provide clarity about the legal issues compared in this research. After describing and comparing, the author evaluates a legal condition that is being compared, culminating in the argumentative analysis phase, which is the core of the legal research. (Diantha, 2019)

3. RESULTS AND DISCUSSION

3.1 Kondisi Eksisting Perlindungan Hak Konstitusional di Indonesia

The 1945 Constitution of the Republic of Indonesia (UUD 1945) is divided into two main parts. The material part reflects the founding fathers' idea to make Indonesia a state based on the principles of the rule of law. In the amendments made to the UUD 1945 (1999-2002), this concept is explicitly expressed in Article 1 Paragraph (3). This affirmation is accompanied by a broader and more comprehensive regulation regarding human rights in Chapter XI A. This chapter guarantees all aspects of human rights, not only civil and political rights but also rights related to the welfare of society, such as economic, social, and cultural rights.

The regulation of human rights in the 1945 Constitution represents the state's commitment to fulfilling the requirements of being a rule of law state. However, it's important to note that even though human rights are constitutionally guaranteed and protected, this doesn't guarantee that these rights will always be respected. The guarantees in the constitution merely establish that human rights exist, are recognized, and are protected. The implementation of human rights depends on the availability of institutional infrastructure, mechanisms, and commitment from the state authorities. In other words, it is crucial for the state to build and strengthen institutions and mechanisms that can ensure the respect for human rights in line with the principles of the rule of law mandated by the constitution. (Lailiyah, 2016)

Examining the long history of upholding constitutional rights in Indonesia reveals numerous violations of citizens' constitutional rights committed by the state. (*Data Pengaduan HAM 2022*, 2022) However, regarding legal instruments for citizens to file constitutional complaints related to these violations, the Constitutional Court plays a crucial role. Based on Article 24C paragraphs (1) and (2) of the 1945 Constitution, the Constitutional Court has the authority to do several things. (Lailiyah, 2016) One of the powers granted by the 1945 Constitution to the Constitutional Court to protect the

constitutional rights of aggrieved citizens is through the examination of laws or judicial review. According to Article 51 of Law No. 24 of 2003 concerning the Constitutional Court, the Constitutional Court has the authority to examine laws that contradict the 1945 Constitution. In this examination (judicial review), parties who can act as applicants are those who believe their constitutional rights and/or authorities have been harmed by the enactment of the law in question. In this context, "constitutional harm" is a requirement that must be met for an individual or party to have legal standing as an applicant in the examination of laws in the Constitutional Court. This means that the applicant must demonstrate that the law being examined has harmed their constitutional rights. (Sumadi, 2011)

Furthermore, regarding its practical application, the process of judicial review in the Constitutional Court is still considered to have limitations. While applicants can use this mechanism to protect their constitutional rights, this scrutiny is confined to the constitutionality of laws. This avenue cannot be used to assess all decisions or actions by state officials that potentially violate human rights, especially if these decisions or actions are based on regulations lower than laws. Violations of citizens' rights occur not only due to laws produced by the legislative authority alone but also because all public authorities, including decisions of judicial bodies and executive regulations, have significant potential to threaten citizens' constitutional rights.

Therefore, it is inadequate if constitutional violations that can be brought to the Constitutional Court are limited to violations originating solely from laws as legislative products. This indicates that there is still a need to broaden the scope of constitutional review in the Constitutional Court to encompass all decisions or actions that have the potential to violate citizens' constitutional rights, not just limited to laws. There is a necessity for a broader and more inclusive mechanism to address constitutional rights violations stemming from various institutions and government decisions. This would ensure a more comprehensive protection of constitutional rights. (Lailiyah, 2016)

In this context, the practice of judicial activism in the Constitutional Court as an effort to strengthen the protection of every Indonesian citizen's rights, in accordance with the prevailing constitutional provisions and legislation, becomes a necessity. With this mechanism in place, citizens who feel their constitutional rights have been violated or harmed by government policies will have a broader space in the process of seeking justice. Therefore, it is crucial to analyze the urgency of strengthening the practice of judicial activism in the Constitutional Court as a means of protecting the constitutional rights of citizens.

The urgency of strengthening the practice of judicial activism in the Constitutional Court as a means of protecting the constitutional rights of citizens can be seen through several cases, such as the Pollycarpus case and the Joint Ministerial Decree, which I will discuss in the sub-sections below.

3.1.1 The Rejection of the Pollycarpus Case in the Constitutional Court

On January 25, 2008, the Supreme Court (Mahkamah Agung) granted the request for case review (peninjauan kembali) by the Public Prosecutor in the case of Pollycarpus Budihari Priyanto. In the prosecution's demand, Pollycarpus was accused of premeditated murder and using false documents, as regulated in Article



340 of the Indonesian Penal Code (KUHP) in conjunction with Article 55 paragraph (1) point 1 of the KUHP and Article 263 paragraph (2) of the KUHP in conjunction with Article 55 paragraph (1) point 1 of the KUHP, with a penalty of life imprisonment. In its verdict, the Central Jakarta District Court declared convincingly that Pollycarpus was guilty of "participating in premeditated murder" and "participating in document forgery." As a result, he was sentenced to fourteen years in prison.

The case involving Pollycarpus began during the appellate process when the Jakarta High Court, in its verdict, granted the appeals made by the Public Prosecutor and Pollycarpus. This decision reinforced the Central Jakarta District Court's judgment regarding the charges against Pollycarpus. However, during the cassation process, the Supreme Court issued a verdict rejecting the Public Prosecutor's cassation appeal and accepting Pollycarpus's cassation appeal. In its ruling, the Supreme Court stated that Pollycarpus was not convincingly proven guilty of the initial charge, thus he was acquitted of that charge. The Supreme Court ruled that Pollycarpus was only convincingly proven guilty of the crime of "using false documents." As a consequence, the judge sentenced Pollycarpus to a reduced prison term of only two years, differing from the sentence given by the Central Jakarta District Court. (Sakti, 2014)

In response to the Supreme Court's decision, the Public Prosecutor submitted a request for case review on July 26, 2007, detailing various reasons, which were later outlined in the Supreme Court Decision Number 109/PK/Pid/2007. The Supreme Court then accepted the request submitted by the Public Prosecutor. In its considerations, the Supreme Court took into account the Supreme Court's jurisprudence dated October 25, 1996, Number 55 PK/Pid/1996, which officially accepted the Public Prosecutor's request for a review of a court decision that had become legally binding, even if that decision had ended in an acquittal.

The decision regarding Pollycarpus's status directly highlights the issues concerning the concept and practice of case review in criminal law. Article 263 of the Indonesian Criminal Procedure Code (KUHAP) does indeed regulate case review (which is an extraordinary legal remedy), but its implementation remains controversial. Some experts, practitioners, and legal observers argue that only convicts or their heirs are entitled to file case review based on Article 263 paragraph (1) of the Criminal Procedure Code. In this regard, the Public Prosecutor, acting for and on behalf of the state in representing crime victims, is considered not eligible to file case review. Until now, there are those who maintain the opinion that only convicts or their heirs have the right to file case review, while the Public Prosecutor is deemed ineligible to do so. (Kuffal, 2003) Some parties perceive these decisions as violations of the Criminal Procedure Code and constitutional rights related to the submission of case review, arguing that there are no specific provisions granting the Public Prosecutor the authority to file case review. Therefore, for some, the acceptance of the case review submission by the Public Prosecutor in Pollycarpus's case is seen as a violation of existing legal provisions and Pollycarpus's constitutional rights. (Effendy, 2005).

Furthermore, the decision on the case review in the Pollycarpus case, which was deemed to infringe upon constitutional rights, was challenged in the Constitutional Court but was rejected by the Constitutional Court. (Guyanie, 2013) The judicial review of the case review decision was dismissed on the grounds that the case review was considered an extraordinary legal remedy that had been previously reviewed multiple times, both at the appellate and cassation levels. Another reason provided was that the Supreme Court and the Constitutional Court are two separate branches of the judiciary in Indonesia that cannot review each other's decisions. Thus, the Constitutional Court's authority to review the case review decision would disrupt the relationship between the two equal branches of the judiciary. In essence, the Constitutional Court does not have the jurisdiction to review the case review decision in the Pollycarpus case.

3.1.2 Joint Ministerial Decree As A Legal Product Violating Constitutional Rights

Empirically, Joint Ministerial Decree (Surat Keputusan Bersama Menteri) often infringe upon the constitutional rights of citizens. Constitutional rights are a manifestation of fundamental human rights that need to be ensured and protected. Consequently, provisions to safeguard the rights of citizens are formulated within the constitution, namely in the 1945 Constitution. (Setya et al., 2022) These rights are then referred to as constitutional rights, definitively meaning the rights owned by every citizen as specified and guaranteed by the constitution of their respective country. (Hamzah, 2022)

One of the issues related to Joint Ministerial Decrees and constitutional violations can be observed in the case of the issuance of a Joint Ministerial Decree by the Minister of Religious Affairs, the Minister/Attorney General, and the Minister of Home Affairs (SKB 3 Menteri) regarding deviations from religious norms, which applies to the followers of Ahmadiyya. This decree was seen as violating citizens' rights to recognition, guaranteed protection, and fair legal certainty. In 2008, Joint Decisions by the 3 Ministers (Minister of Religious Affairs, Attorney General, and Minister of Home Affairs of the Republic of Indonesia) No. 3 of 2003, No. 3/KEP-033/A/JA/6/2008, and No. 199 of 2008 were issued, warning and instructing the followers, members, and/or officials of the Indonesian Ahmadiyya Congregation (JAI) and the public that JAI must cease disseminating interpretations and activities that deviate from the fundamental teachings of Islam. (Anjarsari, 2017)

The enactment of this Joint Ministerial Decree was considered an accusation of violating the provisions of a law committed by the followers of Ahmadiyya. This decree placed Ahmadiyya followers in a position that could lead to criminalization, orders, and harsh warnings without the opportunity for defense. This directly constitutes a violation of Article 28D paragraph (1) of the 1945 Constitution and contradicts the principle of presumption of innocence and the obligation to respond and defend against such accusations. Moreover, decisions involving orders or warnings like this Joint Ministerial Decree (SKB 3 Menteri) issued against Ahmadiyya can be challenged in court as part of the due process of law. (Anjarsari, 2017).



This Joint Ministerial Decree was then challenged in the Constitutional Court for constitutional review. During the trial, the Petitioners, who were Ahmadiyya followers, argued that their constitutional rights were violated by the enactment of Article 1, Article 2, and Article 3 of the Blasphemy Law. According to the Petitioners, the Joint Ministerial Decree by the Minister of Religious Affairs harmed them by categorizing Ahmadiyya as a deviant sect. The provisions in the Joint Ministerial Decree had a domino effect on the lives of Ahmadiyya followers, including the Petitioners. Among these effects were their inability to worship in the mosques they had built due to arson and sealing, challenges in registering marriages at the Office of Religious Affairs (KUA), and even forced eviction from their residences. (Ningrum, 2009)

In the Constitutional Court Decision Number 56/PUU-XV/2017, the Court rejected all applications from the Petitioners. One of the reasons for the rejection was based on the consideration that the Joint Ministerial Decisions No. 3 of 2003, No. 3/KEP-033/A/JA/6/2008, and No. 199 of 2008 regarding warnings and orders to the followers, members, and/or officials of the Indonesian Ahmadiyya Congregation (JAI), which were formulated based on Article 2 paragraph (1) of Law 1/PNPS/1965 on the Prevention of Blasphemy, were not legislative regulations (*regeling*) but specific determinations (*beschikking*). Therefore, they did not fall within the jurisdiction of the Constitutional Court for judicial review.

Another issue related to Joint Ministerial Decrees arose when the organization Hizbut Tahrir Indonesia (HTI) was dissolved through a decision to revoke its legal entity status, following Government Regulation in Lieu of Law (Perppu) Number 2 of 2017. HTI was registered with the Ministry of Law and Human Rights as an Association Legal Entity under registration number AHU-00282.60.10.2014 on July 2, 2014. HTI had submitted its application for Association Legal Entity electronically. The revocation of the SK was executed on Wednesday, July 19, 2017, by the government. The government regulated the enforcement and sanctions against organizations through Perppu No. 2 of 2017. (*Siaran Pers Kewenangan Legal Administratif Kemenkumham Sebagai Tindak Lanjut Perppu Nomor 2 Tahun 2017*, 2017)

Based on the Joint Ministerial Decree, the State Administrative Court in Jakarta issued Decision Number 211/G/2017/PTUN-JKT on May 7, 2018, which dissolved HTI. This decision was later upheld through Decision Number 196/B/2018/PT.TUN.JKT. The case proceeded to the appellate and cassation stages. However, Decision Number 27 K/TUN/2019 at the cassation level rejected the cassation application from the Hizbut Tahrir Indonesia (HTI) Association. (Miranda dan Hananto Widodo, 2019)

The judge's considerations in Decision Number 27 K/TUN/2019 revolved around the object of the dispute, which was the State Administrative Decision (KTUN) in the form of Decree Number AHU30.A.01.08.Year 2017 regarding the Revocation of the Minister of Law and Human Rights of the Republic of Indonesia Decree Number: AHU-00282.60.10.2014 concerning the Approval of the Establishment of the Legal Entity of the Hizbut Tahrir Indonesia Association. This decree was issued by the Minister of Law and Human Rights, Director-General of

General Legal Administration, on July 19, 2017. The key issue was that this decree did not clearly and explicitly specify the legal violations committed by HTI. However, facts emerged during the trial that contradicted the widespread assumption that the decision to revoke HTI's legal entity status was invalid.

The cases of rejection against the lawsuits filed by the Ahmadiyah and HTI groups, who felt their constitutional rights were violated, as discussed above, demonstrate a gap in the protection of constitutional rights in Indonesia. This is based on the fact that constitutional violations occur due to specific instruments (in this case, Ministerial Joint Decrees) falling outside the jurisdiction of the relevant institutions. In this context, the Constitutional Court (MK) in Decision Number 56/PUU-XV/2017 rejected the lawsuit of the petitioner (Ahmadiyah Community) who claimed their constitutional rights were violated, arguing that Ministerial Joint Decrees No. 3 of 2003, No. 3/KEP-033/A/JA/6/2008, and No. 199 of 2008 were not legislative regulations (*regeling*) but specific decisions (*beschikking*), thus falling outside the scope of MK's authority for judicial review. Meanwhile, the State Administrative Court in Jakarta, through Decision Number 211/G/2017/PTUN-JKT, also rejected the filed lawsuits.

3.2 Protection of Constitutional Rights Through the Practice of Judicial Activism

Judicial activism is a term commonly used to describe a tendency by judges to consider outcomes, personal preferences, and issues beyond the law when interpreting existing laws. In this context, Brian Galligan defines judicial activism as the 'control or influence by the judiciary over political or administrative institutions.' (Galligan, 1991) Furthermore, Aharon Barak, in his book "Judge in Democracy," defines judicial activism as "judicial discretion" that arises due to the complexity of issues falling within the court's mandatory jurisdiction, requiring the court to resolve them in the absence of adequate formal laws. (Masyitoh, 2021) The concept of discretion is generally manifested through the development of the meaning of legal norms, modifications of laws, creation of legal norms, and even decisions that are *ultra vires* or beyond the powers of the authority. Judicial activism aims to ensure that every court can provide true justice to citizens. This view negates the opinion that judicial power only functions to interpret the law, often unable to find solutions to problems. (Galligan, 1991)

"Judicial activism" is a term that originated in the United States Supreme Court. It was first introduced by Arthur Schlesinger in January 1947 in *Fortune* magazine. (Kmiec, 2004) The phrase 'judicial activism' was subsequently used by critics of the government (referring to the judiciary in this context) to indicate the conscious actions of judges that undermine, ignore, or deliberately violate the law. Generally, judicial activism is associated with situations where judges create legal rules (judges making law) in their rulings. (Galligan, 1991) According to Black's Law Dictionary, judicial activism is defined as a philosophy elementary of judicial decision-making whereby judges allow their personal views every about public policy, among other factors, to guide their decisions and case, *usu.* with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent. (Garner, 2009).



3.2.1 Application of Judicial Activism in Various Countries (Perspective from Australia, Netherlands, and England)

Judicial activism through a lengthy process, has evolved into a phenomenon commonly adopted by countries worldwide. Upon closer examination, the application of judicial activism can be found in several countries, namely:

3.2.1.1 Australia

In the context of implementation, judicial activism is understood as the control or influence exerted by the judiciary over political or administrative institutions, which subsequently becomes a central and robust element in Australia's governance system. Judicial activism has also become prominent in other areas of public life in Australia. (Galligan, 1991)

The implementation of judicial activism in Australia is closely linked to the common law system used in this country. This common law system is commonly employed in several countries such as the United States, Canada, Australia, India, Malaysia, and New Zealand. In the common law system, the principle of separation of powers among state institutions is upheld, ensuring the judiciary's independence from the legislative and executive branches. Nevertheless, within the common law system, judges still ensure that laws enacted by the legislature are adhered to. (J. et al. Craig, 2008)

Furthermore, when new situations arise and the values within the law undergo changes, judges can decide specific cases in court through different justifications. These different interpretations and justifications arise when judges decide a case strictly based on precedent, fearing potential injustice in the judgment. This is the root cause of the emergence of judicial activism in the legal practices of countries with a common law system like Australia. In Australia, even though it is not the judge's duty to create laws, they can adapt the law to suit new situations. (J. et al. Craig, 2008)

The application of judicial activism in Australia has elicited various responses, both in favor and against. Those in favor of judicial activism argue that it allows for a more flexible interpretation of the constitution. They contend that the framers of the constitution could not foresee the conditions of future governance, and thus, judicial activism enables the ideas within the constitution to be shaped without overly restricting contemporary legislation. Judges acknowledge that the constitution's drafters could not anticipate every circumstance, and over time, new situations arise, requiring the constitution to be interpreted in line with these situations. This means that judicial activism is crucial in such scenarios. (J. et al. Craig, 2008)

Meanwhile, the application of judicial activism, on the other hand, has also been criticized for being seen as straying from the actual constitution, creating a kind of constitutional crisis. Opponents of judicial activism in Australia argue that it contradicts the theory of judicial restraint and that judges should adhere to the constitution because judges are no better than the framers of the constitution. Critics of this system also claim that judicial activism usurps the power that should be held by the (elected)

branches of government, thus becoming an enemy of democracy and the rule of law. (J. et al. Craig, 2008)

Heydon also stated that judicial activism in Australia damages both the strong adherence to existing law and total probity, resulting in the breakdown of the rule of law. Heydon further describes illegitimate pressures that drive judges away from probity, potentially occurring when judges apply judicial activism. One of these is the need to taint judicial decisions with personal opinions on every issue. Other illegitimate pressures include the desire to state the law (as it stands) in a way completely untrammelled by what had gone before, with the perception that justifications in new case decisions should be different from justifications in past case decisions. (Heydon, 2003)

Based on the views of both sides, a clear conclusion can be drawn: judicial activism is categorized as permissible within certain bounds. When laws are interpreted by Australian judges in a manner consistent with the constitution, judicial activism is legitimate. This is because the constitution was drafted without foreseeing future changes. However, in situations where judges use their personal opinions to decide a case and in the process create a constitutional crisis, it is illegitimate because the constitution is the highest authority in Australia. Although judicial activism can be justified in certain situations, it can be accepted in practice if judicial restraint is also observed to uphold democracy. (*Judicial Activism in Australia*, 2022)

3.2.1.2 Netherlands

Judicial activism in the Netherlands can be understood as a proactive role taken by judges to shape legal and social policies. This proactive approach often involves innovative legal interpretations to address contemporary social challenges and protect fundamental rights. It may also involve surpassing existing legislative boundaries or even questioning the constitutionality of some laws. (Hirschl, 2004)

In recent years, the courts in the Netherlands have faced significant cases related to social issues such as COVID-19 restrictions, climate change, and human rights. Facing these challenges, Dutch judges have occasionally shown judicial activism. For example, in the Urgenda case, the Supreme Court of the Netherlands ruled that the government has a legal obligation to significantly reduce greenhouse gas emissions, setting a global precedent in climate change litigation. (Daniel, 2017)

Judicial activism in the Netherlands has elicited diverse reactions from the public. While some view it as a necessary step to ensure the protection of citizens' rights and address pressing issues, others criticize it as an overreach of judicial power, arguing that such decisions should be left to elected representatives. This tension raises questions about the appropriate balance between the judicial role in upholding societal values and democratic governance principles. (Schütze, 2015) Striking a careful balance between judicial activism and democratic governance is crucial. Dutch judges must interpret the law in a manner consistent with societal values and



fundamental rights while respecting democratic processes. Achieving this balance requires deep legal reasoning, profound understanding of social dynamics, and a commitment to upholding the rule of law. (Van Klink, Bart, 2018)

Judicial activism in the Netherlands reflects the evolving nature of legal interpretation in response to societal changes. While it plays a vital role in addressing pressing issues and safeguarding fundamental rights, judicial activism must be exercised judiciously. Dutch judges must navigate the complexities of societal expectations, legal norms, and democratic principles to ensure that their decisions contribute positively to society while preserving the integrity of the legal system. (Versteeg, Mila, 2017)

3.2.1.3 Inggris

Historically, the UK has upheld the principle of parliamentary sovereignty, emphasizing the supremacy of elected representatives in making laws. However, with changes in society and evolving norms, judges are often compelled to interpret the law creatively, leading to frequent instances of judicial activism. (Neuberger, 2018)

Judicial activism, as a proactive role taken by judges in the UK to shape legal and social policies, has indeed been a significant topic of debate. It is often seen as exceeding traditional judicial constraints by granting judges the freedom to interpret the law broadly and make decisions based on their beliefs and personal values, even without clear legislative intent. This involves the judiciary going beyond the confines of legal texts to address contemporary issues and societal concerns. (Sumption, 2019)

Judicial activism raises fundamental questions about the balance of power in a democratic society. These doubts stem from concerns about judges overstepping their roles and responsibilities concerning the legislative process. While proponents of judicial activism in the UK argue that it can ensure the protection of individual rights and hold the government accountable. (Holland, 2005) This argument is somewhat substantiated through a prominent case and precedent related to judicial activism. This case is *Ridge v. Baldwin* (1964), which marked a turning point where the judiciary began penetrating administrative decision-making processes and local governance. This case is considered a precedent that paved the way for increased judicial activism. (P. P. Craig, 2009)

4. CONCLUSION

Based on the analysis and review presented above, it can be concluded that fundamentally, Indonesia has systematically provided extensive room for the protection of constitutional rights of its citizens. However, the rapidly changing social dynamics create new spaces related to the protection of constitutional rights that often escape the existing legal framework. Therefore, the practice of judicial review, particularly in the Constitutional Court, is the most implementable alternative solution to address the gaps in the protection of constitutional rights of Indonesian citizens within the judicial scope.

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