

# REFORMULATION OF THE CONCEPT OF JUDICIAL ACTIVISM THROUGH LEGAL DISCOVERIES AND BREAKTHROUGHS AFTER THE NATIONAL CRIMINAL CODE AS AN EFFORT TO BALANCE THE PRINCIPLE OF LEGAL CERTAINTY AND SUBSTANTIVE JUSTICE

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## Abstract

Certainty law as fundamental principles of the Indonesian state of law are often face tension with demands justice substantive in practice justice criminal law, especially in the middle dynamics social and developmental type crimes that are not fully accommodated by law positive. Condition the push emergence practice *judicial activism* as response on limitations of written norms, in particular through invention law (*rechtsvinding*) and breakthrough legal *breakthrough*. Although get legitimacy juridical through Constitution Power National Judiciary and Criminal Code, practice *judicial activism* Not yet accompanied by clear settings about its limitations and parameters, so that potential cause uncertainty law, inconsistency decision, and exceedance authority judicial. This article aim For analyze typology form *judicial activism* carried out by judges in practice justice Indonesian criminal law and formulate a reformulation model draft ideal *judicial activism* to balance principle certainty law and justice substantive in implementation of the National Criminal Code. Research This use method juridical normative with approach legislation and approaches conceptual, through analysis to regulation legislation, jurisprudence, and doctrine law. Research results show that *judicial activism* in practice justice criminal present in three typology main, namely through method interpretation law, construction law, and breakthroughs law that goes beyond normative limits. This article propose a reformulation model *judicial activism* based seven fundamental parameters that are hierarchical and cumulative. This model expected capable give corridor clear normative for judges to engage in *judicial activism* still measurable, accountable, and non-shift become arbitrariness judicial, at the same time ensure realization balance between certainty law and justice substantive in system justice Indonesian criminal law.

**Keywords :** *certainty law, justice substantive, judicial activism, discovery law, National Criminal Code.*

## BACKGROUND

Certainty law is one of the fundamental pillars in Indonesia as a state of law and is right constitutional every citizens. This is in a way explicit confirmed in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Provisions the is guarantee protection for seeker justice to potential abuse power, with implications that individual can get right or certainty in accordance hope in situation certain.<sup>1</sup> Discussion about principle certainty law No can released from Gustav Radbruch's thoughts about theory three objective main mutual law related, namely achievement justice (*gerechtigkeit*), guaranteed certainty law (*rechtssicherheit*), as well fulfillment aspect benefits or usefulness law for society (*zweckmäßigkeit*) in its implementation.<sup>2</sup> In order to realize objective law said, the court especially the judge acts as gate final in implementation objective law. This is as provisions of Article 2 paragraph (2) of the Law Number 48 of 2009 concerning Power Justice affirmed return in Article 53 paragraph (1) of the Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code). In implementing function judicial according to Article 5 paragraph (1) of the Law Power Justice, the judge does not only play a role as implementers of norms, however also required to digging, following dynamics, as well as understand values law and a living sense of justice in society. Affirmation the progressive role of judges This the more strengthened in the National Criminal Code, as mentioned in Article 53 paragraph (2) which introduces A formulation of new norms that

<sup>1</sup> Asikin Zainal, Introduction to Indonesian Legal System, Rajawali Press, Jakarta, 2012, p. 35.

<sup>2</sup> Shidarta, Legal Reasoning and Legal Reasoning, Genta Publishing, Yogyakarta, 2013, p. 191.

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confirm that if happen conflict between certainty law and justice , then the judge is obliged prioritize principle justice as runway main in cut off matter . However thus , in the reality practice justice criminal law in Indonesia is still confronted with challenge Serious in face dynamics development problem increasingly strict laws complex which is often experience changes , things This cause fact that Constitution just Of course No can made into mainstay For anticipate all problem emerging laws in society . Problems like This become the more complicated with emergence types crime new ones that haven't been accommodated Enough in regulation previous legislation No anticipated at the time formulation the beginning of the Criminal Code.

When faced with cases that are not or Not yet Enough arranged in a way clear in regulation legislation , according to Article 10 paragraph (1) of the Law Power Justice , the judge does not may lift hand . For fulfil need law in settlement unresolved cases arranged said , the concept *judicial activism* appear as response and become bridge connector to limitations law positive in accommodate dynamics problem social and also demands justice from society .Implementation *judicial activism* carried out by judges when cut off dispute appear Because existing regulations Still own limitations and lack give clarity .<sup>3</sup> Draft *judicial activism* This hold a very essential position in context implementation of the National Criminal Code which will will take effect in 2026. This is due to the large number of renewal concepts progressive and innovative adopted in the National Criminal Code, which does not only revise structure criminalization and system accountability , but also expand room interpretation law for judges.

Practice *judicial activism* in system justice criminal law in Indonesia has show various significant manifestations . Until with moment this , various decision The Supreme Court of the Republic of Indonesia has become *landmark decision* , as well as decision at the level court level the first one that often reflect implementation values from *judicial activism* through the process of discovery law ( *rechtsvinding* ) even until breakthrough legal *breakthrough* . Decision the among them Decision Bengkulu District Court Number 410/ Pid.B /2014/PN Bgl , Decision Penajam District Court Number 3/ Pid.Sus -Anak/2024/PN Pnj , and Decision Pandeglang District Court 71/ Pid.Sus /2023/PN Pdl. Although practice draft *judicial activism* This can viewed positive from One perspective in realize justice substantive , but if seen from corner different views , attitudes the judge's reluctance to apply draft This potential cause impact negative , namely creation implementation laws that do not reflect mark benefit and justice for public .<sup>4</sup>In addition , there are problem about legitimacy the juridical rights granted to the judge to do *judicial activism* namely in Article 5 paragraph (1) of the Law Power The Judiciary and Article 53 paragraph (2) of the National Criminal Code do not followed with arrangement adequate follow- up or comprehensive so that arise problem to what extent is the practice *judicial activism* through invention law or breakthrough law by judges is permitted , criteria what becomes limitation permissions and prohibitions for judges when do *judicial activism* , and what parameters can used For determine When happen conflict between certainty law and justice ?

Indecisiveness regulations This create issue blurriness legal *ambiguity* and emptiness potential legal *vacuum* give birth to uncertainty law new in practice justice criminal , because without existence strict regulations regarding these parameters , incl criteria his abilities as well as the prohibitions that limit it , then appear concern will occurrence deviation function judicial , good That in form exceedance authority and potential will uncertainty law . Indecisiveness this also opens gap for occurrence inconsistency between decision , inequality protection law , doubt in principle separation power between institution legislative and judiciary , as well as violation to principle legality . In context so , no existence strict regulations about boundaries and space scope the judge's authority in do *judicial activism* precisely can weaken ability system justice criminal in give protection responsive and effective law . More far , condition this can also cause conflict between principles base in law criminal , such as principle legality , principles certainty law , principle justice and principles usefulness . Based on complexity problem said , becomes important For do in -depth research about problematic reformulation concepts and limitations *judicial activism* through invention law ( *rechtsvinding* ) and breakthrough legal *breakthrough* in case criminal , with formulated problems as following :

1. How typology form *judicial activism* carried out by internal judges practice justice criminal ?
2. How the reformulation model works draft ideal *judicial activism* to be able to balance principle certainty law and justice substantive in implementation of the National Criminal Code?

<sup>3</sup>Bambang Sutiyoso , Methods of Legal Discovery : Efforts to Realize Certain and Just Laws , Yogyakarta, UII Press, p . 22.

<sup>4</sup>Bagus Surya Prabowo, Initiated *Judicial Activism* in Decision *Presidential Threshold* in the Court Constitution , Journal Constitution , Faculty of Law, As- Syafi'yah Islamic University , Volume 19, Number 1, 2022, p . 75.

## RESEARCH METHODS

Type of research used in study This is study juridical normative , research This focus on analysis to application of legal norms as poured out in system law positive that applies in Indonesia.<sup>5</sup> For answer formulated problems said , research apply approach statute *approach* and legal approach conceptual *approach* related *judicial activism* that will done with examine various regulation legislation and relevant jurisprudence to issue runway laws and limitations implementation *judicial activism* that became object study . Meanwhile that , approach conceptual is also done to provide framework analytical in formulate solution on reformulation draft *judicial activism* , through assessment to principles and concepts the underlying basis draft law the .<sup>6</sup> In this research, the legal materials used are related legislation as primary legal materials and related literature in the form of books and scientific articles, through studies of legislation and literature studies, so that the most appropriate legal material analysis technique to be used in this legal research is descriptive analysis.<sup>7</sup>

## RESULTS AND DISCUSSION

### 1) Typology Form *Judicial Activism* Carried Out by Judges in Practice Justice Criminal

Leave from various definition , characteristics , and approaches theoretical about draft *judicial activism* in various literature , *judicial activism* is a series the judge's actions are of a nature proactive and dynamic in respond limitations law positive , which is not limited to the application of norms in a mechanical , but rather covers interpretation creative , construction law progressive , even breakthrough provision existing in order to realize justice substantive that is not accommodated in sound text regulation legislation .<sup>8</sup> This means can understood that *judicial activism* is not draft single standing in a way narrow , but rather covers various action judicial which shows role active judge in the enforcement process law . With thus *judicial activism* is also something freedom expression from the function of judges in guard sustainability and relevance law in the middle dynamics ongoing social developing . The activity aim For ensure that law No lost meaning and power its use , as well as still capable give protection , certainty and justice in a way real for society . *Judicial activism* carried out by judges can classified to in a number of form or different typologies , each with its own characteristics , legitimacy , and implications law alone .

Within the framework understanding this , concept invention law ( *rechtsvinding* ) which includes interpretation , construction law and argumentation juridical , as well as draft creator law ( *rechtsschepping* ) through the judge 's decision that creates a new <sup>9</sup>norm is not antithesis from *judicial activism* , but rather precisely is core part of practice *judicial activism* That Alone in system justice modern criminal law . Therefore , it can it is said until moment This in a way theory there are 2 (two) forms *judicial activism* in practice justice criminal through invention general law carried out by judges in the judicial process that is first , method interpretation or interpretation and methods construction law .<sup>10</sup> In a way theory , interpretation law ( *interpretation method* ) can carried out in circumstances where regulations legislation That Actually Already there is , but when want to applied by the judge to the problem concrete things that are handled , it turns out regulation the No can implemented so only , thing This Can happen such as there is something the formulation of norms does not clear or blur ( *vage normen* ), or there may also be something contradiction or inconsistency between norms ( *antinomy normen* ), or uncertainty material in regulation legislation . So that in problem this , interpretation need conducted by the judge to clarify the meaning of norms in order to be able to implemented in a way appropriate in problem concrete the .<sup>11</sup>

Furthermore method construction or reasoning law ( *redeneerwijzen* ) is carried out by judges in circumstances where it is not there is regulation legislation The same once you can implemented For overcome problem the law faced by the judge, so can it is said happen something emptiness law ( *recht vacuum* ) and/ or emptiness regulations ( *wet vacuum* ) . So it's a choice For solve problem emptiness said , the judge applied his logical and systematic reasoning in perfect substance something provisions . In the method this judge is required For still guard consistency with principles base in system law .<sup>12</sup>

<sup>5</sup>Abdulkadir Muhammad, Law and Legal Research , Citra Aditya Bakti, Bandung, 2004, p . 57.

<sup>6</sup>Peter Mahmud Marzuki, Legal Research , Kencana Prenada Media Group, Jakarta, 2014, p . 141.

<sup>7</sup>Soerjono Soekanto and Sri Mamudji , Normative Legal Research something Review Briefly , Rajawali Press, Jakarta, 1990, p . 29.

<sup>8</sup>Indriati Amarini , *Implementation of Judicial Activism in Judge's Decision* , Journal of Law and Justice , Volume 8, Number 1, 2019, p . 22.

<sup>9</sup>Wiwin Dwi Ratna Febriyanti , Discovery of Law ( *Rechtsvinding* ) and Formation of Law ( *Rechtsschepping* ) in System Indonesian Judiciary , Journal of Law, Society, and Islamic Civilization, Volume 13, Number 2, 2025, p . 169.

<sup>10</sup>Achmad Ali, Revealing The Veil of Law: A Philosophical and Sociological Study , Chandra Pratama, 1993, Jakarta, p . 167.

<sup>11</sup>Bambang Sutiyoso , Methods of Legal Discovery , *Op.Cit* . , p . 60.

<sup>12</sup>Jazim Hamidi, Legal Hermeneutics , History, Philosophy , and Interpretation Methods, UB Press, Malang, 2011, p . 40.

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In some studies in various literature, methods interpretation generally divided to in a number of category, namely consists of from interpretation grammatical, historical, systematic, teleological or sociological, comparative, futuristic or anticipatory, restrictive, extensive, authentic, interdisciplinary, multidisciplinary, and hermeneutic.<sup>13</sup> Whereas method construction law divided to in a number of categories, which consist of from method with use analogy (*argumentum per analogium*), method reasoning upside down (*argumentum a contrario*), method narrowing or concreting law (*rechtsvervijning*), and methods implementation fiction law. Every method interpretation and construction law the own characteristics, functions, and space scope different applications in practice justice criminal law. Methods the No stand Alone in a way separate, but rather often used in a way combination by the judge in cut off something case For produce a decision that is not only fulfil aspect certainty law, but also justice and benefit for public.

Outside various method interpretation and construction the law that has been analyzed in a way comprehensive above, according to Writer there is One form *judicial activism* additions that are extremely extreme and controversial outside theory / method invention law in general, namely breakthrough legal *breakthrough* that goes beyond limitation normative. Form breakthrough law this is in principle born from provisions of Article 53 paragraph (2) of the National Criminal Code which provides chance for judges to prioritize justice compared to certainty law (regulations) legislation. Form This different fundamentally from all over method interpretation or previous construction has mentioned, because No Again based on interpretation meaning of norms or filling emptiness law, but rather precisely deviate from provision the law that has been formulated in a way clear and firm by the creator law. In the context this, the judge did not only play a role as interpreter or inventor law, but in a way real take position to "go beyond" the law positive in order to achieve objective certain things that are seen more fair or more relevant with condition concrete problems faced.

Phenomenon breakthrough law the can seen in a way real in Decision Number 3/ Pid.Sus -Anak/2024/PN Pnj, in which the Panel of Judges sentenced criminal prison for 20 (twenty) years to the child who did togetherness action criminal murder planning, theft with violence, and rape. The verdict This in a way normative break through / go beyond provision Article 81 paragraph (2) and paragraph (6) of the Law Number 11 of 2012 concerning System Justice Child Criminal Acts which are firm limit maximum threat criminal prison for child only as much as  $\frac{1}{2}$  (one half) of maximum threat criminal prison for adults, and if threatened with criminal dead or lifetime live, then criminal maximum imprisonment of 10 (ten) years. In a way overall, *judicial activism* is phenomena that are not avoidable in system justice modern criminal law. However, its implementation must done in a way careful, proportional and responsible answer so as not to sacrifice certainty law and belief public to judiciary. Synthesis This show that *judicial activism* in Indonesia is present in various form with level different legitimacy, at the same time become base conceptual For formulating a model of limitation and reformulation ideal *judicial activism*, which will discussed in the section furthermore.

### 2) Reformulation Model Draft *Judicial Activism* is Ideal for Balancing the Principles of Legal Certainty and Justice Substantive in Implementation of the National Criminal Code

Analysis to forms *judicial activism* that has Lots implemented in practice justice criminal show existence paradox, namely in one side, *judicial activism* required as mechanism For bridging the gap between law positive in nature rigid with dynamics ongoing social developing, *judicial activism* is also needed For fill in ambiguity or emptiness provision law and *judicial activism* required as means For reach out justice substantive. However, on the other hand, *judicial activism* that is not limited, no measurable, and not structured potential cause erosion to principle uncertainty law, the rise inconsistency decision on similar things, and even exceedance authority judicial violations principles of the rule of law.

As has explained in background behind research, ambiguity concept and emptiness arrangement about boundaries and space scope *judicial activism* in system justice Indonesian criminal law creates doubt for seekers justice and dilemma situation for judges. Even though Article 5 paragraph (1) of the Law Number 48 of 2009 concerning Power Justice and the presence of Article 53 paragraph (2) of the National Criminal Code have give legitimacy for judges to do *judicial activism*, however provision This No followed with adequate arrangements about criteria and limitations of its application. Condition normative the show existence asynchronization and problems between level conceptual, level normative, and level practice law in implementation *judicial activism* in Indonesia. With thus, it can it is said that problem main thing that appears No lies in need or whether or not *judicial activism* in

<sup>13</sup>Muawahid, Method of Legal Discovery (*Rechtsvinding*) by Judges in Efforts to Realize Responsive Law, *Journal Al-Hukama The Indonesian Journal of Islamic Family Law*, Volume 7, Number 1, 2017, p. 235-241.

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system justice Indonesian criminal law , but rather in the absence of a clear conceptual model and normative parameters in direct implementation . Conditions This confirm existence urgency For do further study in-depth and systematic in order to formulate return draft ideal *judicial activism* , namely a concept that is capable bridge tension between certainty law and justice substantive in a way proportional , measurable , and can accountable . In research this , Author try submit a reformulation model draft ideal *judicial activism* with build something comprehensive and measurable parameter framework . Reformulation model This based on seven fundamental parameters that must be fulfilled and considered by the judge when do *judicial activism* , in particular in context invention law in the case criminal . The seven parameters is corridor normative functioning as a methodological filter For ensure that *judicial activism* carried out by judges is not changed become *judicial arbitrariness* judicial ). These parameters arranged in a way hierarchical and systematic , starting from runway philosophical highest namely Pancasila as the basic norm of the state, until considerations of a nature specific that is the views of the victim and the accused as well as his family . Through this parameter framework , it is expected *judicial activism* can implemented in a way measurable , transparent and accountable , so that capable balance between certainty law and justice substantive .

The seven parameters is :

- (1) Compliance with the basic norms of Pancasila and the 1945 Constitution of the Republic of Indonesia ;

These fundamental parameters placing Pancasila as *grundnorm* and the 1945 Constitution as the constitution that must become runway every action *judicial activism* . When a judge does invention law or breakthrough law of a legal nature progressive to something provision criminal , the judge must ensure that the resulting decision No contradictory with values Belief in the One and Only God ( sila first ) , just and civilized humanity ( sila second ), Indonesian unity ( sila third ), a people led by wisdom wisdom in deliberation / representation ( principle fourth ), and justice social for all Indonesian people ( please fifth ), and in harmony with principles constitutional in the 1945 Constitution.

Testing suitability must substantive , not formalities . Judges are required to explain in his considerations in a way explicit Which values of Pancasila or the 1945 Constitution are the most important ? foundation , how implemented in the process of interpretation / construction , why *judicial activism* required For realize Pancasila values and constitution in case concrete things that are handled , and how balance mark or potential rights contradictory through *balancing test* . This parameter ensure *judicial activism* rooted in legitimacy constitutional , not preference subjective judge wrapped rhetoric constitutional , at the same time guard accountability and transparency in its implementation .

- (2) Compliance with objective law universally ;

This parameter adopt theory three objective law Radbruch that is certainty law ( *rechtssicherheit* ), utility ( *zweckmäßigkeit* ), and justice ( *gerechtigkeit* ) adopted in Article 53 paragraph (2) of the National Criminal Code. Although justice become priority highest when contradictory with certainty law , sacrifice certainty law must proportional done in corridor measurable and achievable predicted , not arbitrary . Judge duly do balance between third objective law with principle proportionality , which requires that sacrifice to One value ( eg. certainty law ) only can justified if required For protect other values that are more height ( eg. justice ), and sacrifice the must explained such appearance in a way comprehensive and proportional with the intended goal achieved .

Illustration application of this parameter can seen in Bengkulu District Court Decision No. 410/ Pid.B /2014/PN Bgl which interprets " force " in Article 285 of the Criminal Code to include " persuasion" seduce ". Although reduce predictability ( certainty law ), however expansion meaning still in corridor that can justified Because give benefit significant for protection of victims of violence sexual from manipulation psychological , and achieve justice substantive Because impact traumatic persuade seduction No lost heavy from violence physical . *Judicial activism* must also be take into account impact term long to stability system judiciary , so that judges are obliged to explain explicit Why justice comes first and why sacrifice certainty law nature proportional ensure balance dynamic between third objective law in accordance context concrete .

- (3) Compliance with objective the relevant law ( which is charged );

This parameter want *judicial activism* in line with purpose and objectives the law that is being charged , which can be traced through considerations , explanations general , and/ or script academic . As Article 5 of Law no. 13 of 2022 concerning Formation Regulation Legislation , states that every regulation legislation must fulfil principle clarity purpose , which means every regulation legislation that was formed own clear goals to be achieved achieved , so that objective Constitution the duly become *ratio legis* which provides direction and orientation that must be followed by the judge in implementation law in every cases handled .

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Testing suitability with objective Constitution in *judicial activism* can done through a number of stages , which can identified : first , the judge must identify objective Constitution objective the relevant law through search considerations , explanations general , and/ or script academic Constitution ; Second , after identify objective law , the judge must test whether *judicial activism* that will done in line or contradictory with objective Judicial *activism* justified If required For realize objective unfulfilled legislation through implementation literal text , however on the contrary must rejected If produce conflicting consequences with objective Constitution .

As illustration , application of objective parameters Constitution can seen in context Constitution about Child Protection and the Law about System Justice The purpose of child criminalization is protect dignity dignity children , giving chance growth and development , and prioritize justice restorative . Decision No. 2/ Pid.Sus -Anak/2021/PN Rgt which applies *rechtelijke pardon* is very much in line with objective This with protect the future child from stigmatization and implementing approach restorative . On the other hand , criminal punishment prison precisely contradictory with objective Constitution the .

## (4) Compliance with purpose and objectives the article charged ;

This parameter is concretization more specific from the third parameter , focus on the article certain charges with understand interest protected law . Understanding This become handle determine whether actions concrete is the object to be forbidden chapter or just outside the scope in question former Constitution although in a way textual fulfil formulation offense . *Judicial activism* must ensure expansion / contraction meaning element offense still in corridor protect interest the same law .

Testing to purpose and objectives articles must also be consider systematics chapter in chapter or part law , because every chapter in the Criminal Code are grouped based on interest protected law , Grouping systematic This give instruction important about interest the law that is intended protected by articles in chapter said , and the judge must consider systematics This For ensure that interpretation or construction the law that is carried out No result in something chapter go out from group interest the law that should be protected . More further , parameters of intent and purpose articles must also be considered in context proportionality sanctions . Every chapter criminal No only formulate prohibited acts , but also threats criminal law that reflects level seriousness violation to interest protected law . When the judge does *judicial activism* with method interpretation , construction , or breakthrough law , the judge must ensure that meaning chapter the No result in somebody sentenced sanctions that are not proportional with level errors and losses incurred .

## (5) Compliance with objective criminalization as arranged in Article 51 of the National Criminal Code;

This parameter is innovation important National Criminal Code which formulates explicit four objective criminalization , namely prevention with enforcing norms, rehabilitation through coaching , completion conflict and recovery balance ( restorative ), and growing regret for convict . Paradigm integrative This shift orientation from retributive ( assessment past mistakes ) towards orientation to future ( improvements and future impacts ) . Each *judicial activism* must measured based on his contribution to achievement fourth objective the in a way simultaneously , these parameters functioning as a normative limit so as not to develop without control that only based on preference justice subjective judge. This parameter give legitimacy normative for judges to do *judicial activism* when implementation law in a way textual precisely No will reach objective the punishment required by the National Criminal Code, but also provides limitation that *judicial activism* must can accountable based on rational consideration about effectiveness criminalization in reach goals the .

## (6) There are considerations to Report Litmas and/ or view public based on figure public ;

This parameter is concretization from the judge's obligations as arranged in Article 5 paragraph (1) of the Law Power Justice at a time embodiment of Article 54 paragraph (1) letters f, g, h of the National Criminal Code. At the level of practice trial , for can consideration to aspects the No always can obtained optimally only through a formal and limited trial process time . If the judge has to dig Alone in a way deep aspect the through inspection directly in court , then the judicial process potential become protracted and not efficient , while depth no studies have been obtained yet Of course adequate . Therefore that , Report Study Community ( Litmas ) and input from element relevant communities become instrument important that works as bridge between obligation normative judges and limitations procedural trial . In context *judicial activism* , use of Report parameters Litmas and/ or view figure public No intended For replace independence of judges, but rather For enrich base consideration in drop decision . With utilise instrument said , the judge remains can operate role active in realize justice substantive , but in measurable and responsible corridors answer . This

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parameter at a time functioning as mechanism *self-restraint* , so that *judicial activism* No develop become subjectivism of judges, but rather still rooted in values objective , rational , and social accountable in a way juridical and sociological .

### (7) Consideration to statement of the victim/ defendant and/ or his family .

To case crimes where there are victims then duly need existence consideration to statements from victims, defendants , and/ or family they . This parameter make an effort manifest one of from seven mark principle the balance mentioned in considerations of the National Criminal Code, as well as represent aspect humanistic ( humane ) from *judicial activism* that places the parties involved direct in case criminal No as object passive from the judicial process , but rather as subject active who has voices and interests that must be listened to and considered . Referring to Article 54 paragraph (1) i and j and Article 70 paragraph (1) letters d, e, and h of the National Criminal Code, the victim's statement and/ or his family own relevant position in determine direction and proportionality criminalization , not as determinant verdict , but as the party whose views can give description concrete about impact action criminal , needs recovery , as well as level justice is expected , so that the judge can get a clearer picture intact about level losses incurred , intensity suffering experienced , as well to what extent the punishment will be dropped potential provide a sense of justice and restoration for the victims, until Finally the decision handed down by a permanent judge rooted in reality social matter , in harmony with objective criminalization , as well as No let go from a sense of justice substantive that wants realized by law criminal national .

On the other hand , based on Article 54 paragraph (1) letters a, b, c, e, f, g, and h and Article 70 paragraph (1) letters a, b, c, e, f, j, k, and l of the National Criminal Code, the opinion the defendant must also considered as manifestation from principle humanity that places defendant as subjects who have dignity and rights For listened to , not just object from the criminal process . Against family the defendant who experienced impact from actions criminal and judicial processes undertaken the defendant , for example defendant as bone back obligated family For fulfil living for his family , and so on , according to Writer the judge also needs to consider it . However so , of course need underlined under matter the No as well as immediately requires the judge to always grant request defendant or his family For released or convicted light , but rather that the judge must understand perspective defendant For can evaluate in a way comprehensive whether formal criminalization will reach desired goal or precisely on the contrary .

Based on the seven parameters above , it is hoped that the reformulation model draft *judicial activism* is ideal for balance principle certainty law and justice substantive in implementation of the National Criminal Code must built on parameter framework that is hierarchical , systematic , and comprehensive . These seven parameters represent layers proper consideration passed by the judge when do *judicial activism* For ensure that *judicial activism* the get justification , proportional , and can accountable . first six parameters This duly No is a list of considerations that are optional or can chosen in a way selective by the judge, but rather is a methodological filter tiered that must be filled in a way cumulative , except for the seventh parameter specifically related victim's statement of a nature in the form of optional depends from There is or whether or not the victim is in the matter being handled . With With these parameters , *judicial activism* carried out by judges is only can justified if has pass testing to all of these parameters and it is proven that *judicial activism* the in line with fundamental values represented by each parameter.

## CLOSING

Based on various decision court in practice justice Indonesian criminal law , can concluded that typology form *judicial activism* carried out by judges includes a very broad spectrum , starting from from method interpretation until breakthrough law . The interpretation method used covering interpretation grammatical , historical , systematic , teleological / sociological , comparative , futuristic / anticipatory , restrictive , extensive , authentic , interdisciplinary , multidisciplinary , and hermeneutical . Meanwhile that , method construction law covers analogy ( *argumentum per analogium* ), reasoning inverted ( *argumentum a contrario* ), narrowing / concretization law ( *rechtsverfijning* ), and implementation fiction law . Outside second method mentioned , there are form the most extreme *judicial activism* that is breakthrough legal *breakthrough* that goes beyond limitation normative in a way real , as seen in the verdict that was handed down criminal exceeding the specified maximum limit Constitution . Each shape *judicial activism* own level legitimacy and implications different laws , depending on the context matter , basis consideration the laws used , as well as its suitability with principles fundamental law . Phenomenon This show that *judicial activism* is reality that is not avoidable in system justice modern criminal law , but implementation need clear corridor For prevent transformation from means achievement justice substantive become arbitrariness judicial .

## REFORMULATION OF THE CONCEPT OF JUDICIAL ACTIVISM THROUGH LEGAL DISCOVERIES AND BREAKTHROUGHS AFTER THE NATIONAL CRIMINAL CODE AS AN EFFORT TO BALANCE THE PRINCIPLE OF LEGAL CERTAINTY AND SUBSTANTIVE JUSTICE

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Reformulation model draft *judicial activism* is ideal for balance principle certainty law and justice substantive in implementation of the National Criminal Code must built on framework seven fundamental parameters that are hierarchical, systematic, and comprehensive. These seven parameters consists of from : (1) suitability with the basic norms of Pancasila and the 1945 Constitution as foundation philosophy and legitimacy constitutional ; (2) conformity with objective universal law ( justice , certainty) law , and benefits ) with prioritize justice when happen conflict as mandated by Article 53 paragraph (2) of the National Criminal Code; (3) conformity with objective the relevant law ( ratio legis ) which can traced through considerations , explanations general , and scripts academic ; (4) suitability with purpose and objectives the article charged , in particular interest law protected by article ( 5) conformity with objective criminalization as arranged in Article 51 of the National Criminal Code which includes prevention , rehabilitation , recovery conflict , and growth regret ; (6) consideration to Report Study Community ( Litmas ) and/ or view figure public as reflection values local and living sense of justice in society ; and (7) considerations to statements from victims, defendants , and/ or family they as manifestation principle balance and justice restorative . The first six parameters nature cumulative and must filled in a way tiered , while the seventh parameter nature optional depends There is whether or not the victim is in matter handled . This model No only give legitimacy normative for *judicial activism* , but also establishes measurable limits For ensure that *judicial activism* No changed become *judicial arbitrariness* s, so that the National Criminal Code can implemented with a guaranteed way certainty law at a time present justice substantive for all Indonesian people.

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