



Judicial Activism in the Practice of Law Examination on Parliamentary Threshold in the Constitutional Court

Siska Yosephin Sirait

Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Ir. Sutami street, No. 36 Kentingan, Jebres, Surakarta, Jawa Tengah, Indonesia 57126
siraitchika@student.uns.ac.id

Hartiwiningsih Hartiwiningsih

Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Ir. Sutami street, No. 36 Kentingan, Jebres, Surakarta, Jawa Tengah, Indonesia 57126
hartiwiningsih@staff.uns.ac.id

Arief Hidayat

Mahkamah Konstitusi Republik Indonesia, Jakarta, Indonesia
Arief.h@mkri.id

Abstract—One of the Court's authorities is to assess the constitutionality of laws against the Constitution. When adjudicating a judicial review case, the Court tends to prioritize substantive justice over procedural justice, which still relies on conventional methods. In the process of law enforcement and achieving substantive justice, the Constitutional Court frequently adopts progressive legal approaches. This progressiveness is often realized through Judicial Activism. Judicial Activism creates the perception that the Court assumes some roles of the legislative and executive branches as lawmakers. Some even argue that when the Constitutional Court annuls the material content of a law, it functions as a legislative branch, especially in politically charged cases. This article discusses the application of judicial activism in deciding the constitutionality of the parliamentary threshold in the Election Law, an issue rife with political interests. By applying judicial activism, is the Court engaging in judicial politics? What role does the Constitutional Court play in interpreting the Election Law regarding the parliamentary threshold? The purpose of this article is to examine the Constitutional Court's stance in providing justice, legal certainty, and benefits to justice seekers while maintaining its independence, ensuring that decisions are based on objective law rather than political considerations. The methodology of this article is normative empirical. The normative method describes and explains legal rules or norms reviewing judicial activism and judicial politics through theoretical, juridical, political sociological, legislative (statute approach), conceptual, and case approaches. Judicial activism by judges through their decisions aims to make the judiciary a reformer capable of fostering societal thinking and legal engineering while supporting national economic growth. In this context, judicial activism seeks to protect and enhance the democratic rights of citizens.

Keywords—Judicial Politics; Judicial Activism; Parliamentary Threshold.

I. INTRODUCTION

Democracy is closely related to general elections[1]. Although elections are not the only instrument of democracy, with elections, a country can be considered to have a democratic political system. That is why, a democratic state leads a country to international trade activities. And one of the positive contributions of increased international trade activities is economic growth.

In general elections, people elect their representatives to determine the direction and policies of the country. Elected legislators, who will later sit in the legislature, will be the representatives of their voters. They will strive to convey the aspirations of their people, including making policies that do not harm the people.

General elections are held every 5 (five) years, and are conducted based on the principle of direct, general, free, secret and fair elections (Luber-Jurdil). When the organization of general elections applies this principle, it is hoped that quality elections can occur. Quality elections will produce strong legislative and executive institutions, because they are held legally and in accordance with the law. However, the fact is that the implementation of these elections also has serious problems. For example, in terms of campaigning, the acquisition of entry tickets to occupy seats, both in the legislature, and the executive. It is not uncommon for legislative candidates to try to attract the sympathy of the people by providing assistance in the form of cash or providing basic necessities, however, on the other hand, there are also many legislative candidates who actually go down to their constituencies to see the conditions of their people directly. The number of political parties that exist, requires the simplification of parties through a mechanism that was formerly known as the electoral threshold and currently, Indonesia calls it the parliamentary threshold.

When discussing the history of its implementation, political parties are the participants in general elections. The number of political parties taking part in these elections has varied over the years. In the first general election after the reformation in 2004, 24 political parties participated. [2] Out of these, six political parties passed the verification process, while the remaining 18 passed the selection. The six verified parties were those that met the electoral threshold in the 1999 general election. The Electoral Threshold is a rule applied to political parties participating in the 2004 general election to determine their eligibility for re-participation in the 2009 general election. This mechanism aims to streamline the number of political parties. The electoral threshold has been deemed consistent with the 1945 Constitution. [3]

In the 2009 general election, the electoral threshold was transformed into a parliamentary threshold, as outlined in the transitional provisions of Article 316(d) of Law 10/2008. Under these rules, political parties that had taken part in the previous general election were given exceptions to participate in the 2009 general election. Even if a party did not reach the electoral threshold, it could still join the general election if it held seats in the DPR, thus skipping the verification by the General Election Commission. However, the Constitutional Court, through its Decision Number 12/PUU-VI/2008, ruled that the transitional provisions violated the 1945 Constitution and therefore had no binding effect. The Court found that Article 316(d) of Law 10/2008 resulted in unequal treatment, causing legal uncertainty and injustice among political parties that competed in the 2004 general elections. [4]

In 2014, the parliamentary threshold was reintroduced for the general election with an increased nationwide percentage. This threshold also applied to the calculation of seat allocation for members of the Provincial and Regency/City DPRD, as outlined in Article 208 of Law No. 8/2012. The Court argued that the provisions regarding the parliamentary threshold in Article 208 of Law 8/2012 contradicted the diversity and distinctiveness of political aspirations in various regions. The Court held that the article failed to embrace the spirit of unity and diversity. Consequently, in Decision Number 52/PUU-X/2012, the Court declared Article 208 of Law 8/2012 inconsistent with the 1945 Constitution and void of binding legal force. [5].

Additionally, in the 2019 general elections, the parliamentary threshold percentage was raised once more, increasing from 3.5% to 4% of the total valid votes nationwide. These regulations are stipulated in Article 414 paragraph (1) of Law No. 7 of 2017. The parliamentary threshold provisions were re-examined in Case Number 116/PUU-XXI/2023, where the Constitutional Court partially granted the petition.

Parliamentary Threshold is something that is naturally applied in general elections. However, in practice, the issue of parliamentary threshold is still interesting to be tested, considering that the proposed president and vice president come from political parties, as well as the direction of state policy, determined by legislative members who also come from political parties. When the constitutionality of the parliamentary threshold norm is answered by a decision, does the Court apply judicial activism? And what kind of approach should be taken? Judicial activism is carried out in order to realize the judiciary as a legal reformer who is able to dynamize the thinking and engineering that occurs in society. When judges engage in judicial activism, the Court does not always engage in judicial politics. The interpretations of the law carried out in judicial activism are also a form of support from the Court to protect and strengthen the democratic rights of citizens and legal subjects in Indonesia, and support the economic growth of the country.

II. LITERATURE REVIEW

A. *Theory/Concept of Judicial Politics*

Laws enacted by the legislator are subject to examination by the Constitutional Court. The review can involve laws, norms, article content, paragraphs within laws, and government regulations in lieu of laws, particularly when these are deemed harmful or likely to infringe upon constitutional rights or authorities granted by the 1945 Constitution. This examination arises from petitions submitted by individuals or entities with legal standing. Petitioners include individual citizens of the Republic of Indonesia, customary law communities that

are recognized according to societal development and the principles of the Unitary Republic of Indonesia as regulated by law, as well as public or private legal entities, and state institutions [6], [7].

If based on the Trias Politica theory by Montesquieu, then for a sovereign state, there must be a separation of powers, so that there is no absolute power in government.[8] Each institution, both legislative, executive and judicial, carries out its respective duties and functions and does not influence each other. Because the essence of the concept of separation of powers makes the legislature, executive and judiciary perform the function of checks and balances. Indonesia is a country that adheres to the theory of separation of powers, but it is not absolute.

In practice, the Constitutional Court makes variations in the form of its decisions, not only granting, but also declaring conditional constitutional, conditional unconstitutional, and formulating new norms.[9] Historically, this has been done by the United States Supreme Court when deciding the Marbury vs Madison case. The United States Supreme Court handed down an ultra petita decision. So then there is an opinion that the American Supreme Court is a political institution. This is because the Supreme Court adjudicates fundamental controversial issues, the decisions made are not only derived from formal and informal legal norms, but also from ideological, political, and policy concepts.[10] In addition, the court, because of its authority, is able and can substantially limit the power of the legislature. The court becomes a place where substantial policies can be made through the mechanism of judicial review. Even judges can regulate the implementation of political activities by creating, building and enforcing standards of behavior that are acceptable to interested groups, political parties, and elected and appointed officials.[11] In simple terms, if a law, norm, article or paragraph is petitioned for review, the Court chooses to leave the regulation to the legislator or in the form of an open legal policy. This open legal policy is based on the concept of Judicial Restraint carried out by judges, by leaving the follow-up of a decision to the legislators.

However, when the Court acts as a positive legislature, the Court has conducted judicial politics. Positive Legislature in question is when judges make decisions that contain new norms, declare a law to be constitutionally valid or conditionally unconstitutional, and even postpone the enactment of a law. This is done as an effort to protect the human rights of citizens guaranteed by the 1945 Constitution, prevent legal vacuum, and in order to harmonize laws and regulations. Judges do not just make good laws, but rather make laws that fulfill a sense of justice, legal certainty and benefit for the entire community. In this case the Court can be said to carry out Judicial Politics.

B. Theory/Concept of Judicial Activism

The concept of "Judicial Activism" was popularized by Arthur M. Schlesinger in his article about the United States Supreme Court, published in the January 1947 edition of Fortune magazine. Schlesinger described a "split over statutory interpretation" and "the proper function of the judiciary in a democracy." He categorized Justices Black, Douglas, Murphy, and Rutledge as "Judicial activists" and Justices Frankfurter, Jackson, and Burton as "Champions of Self Restraint." The Black-Douglas group believed that the Supreme Court should use its judicial power to advance their vision of social welfare. Conversely, the Frankfurter-Jackson group advocated for greater judicial restraint, preferring that other branches of government achieve the desired outcomes for the people.[12]

The concept of Judicial Activism is a judicial activity related to the Court's duty, as the final interpreter of the constitution. The Court must be able to declare what the law means, even in difficult and politically sensitive cases. An Australian Constitutional law scholar, Professor Craven, offers three definitions that are one in the same, and each relates to the common law, statutory and Constitutional legal systems. He equates "Judicial Activism" with progressivism, where courts consciously adopt grammatical interpretations of statutes beyond their ordinary meaning. This is done because the court needs an expansion of interpretation that can give "effect" to the provisions or norms, articles or paragraphs of a law made by the legislator or with the intention of canceling the validity of the provisions or norms, articles or paragraphs of the law that is petitioned for constitutionality testing [13]. That although Indonesia adheres to a civil law legal system, the practice of Judicial Activism is still applied in the Supreme Court and the courts under it and the Constitutional Court.

C. Theory/Concept of Legal Interpretation and Reasoning

In deciding a case, the judge bases it not only on evidence and conviction alone. Judges must also be able to follow, explore and understand the legal values and sense of justice that live in society. This requires strong reasoning skills and the ability to interpret the law. A common "legal" approach taken by judges is to apply precedent. Applying precedent means that the judge applies the law that has been decided in a previous case or cases by looking for factual similarities between the previous case and the case currently being dealt with[14].

However, Judges do not always recognize what approach they are taking, and the criteria used may not always be the same for each case or legal norm. Judges will use the method of interpretation, which is to determine the meaning and provide an explanation of the law.[15] The most common methods of interpretation are the grammatical or linguistic method, the systematic method, the statutory history method and the

teleological method. As for legal reasoning, the fact is that a rule is applied analogously with respect to the same event. Analogical reasoning is often an extensive application of a rule." [16]

III. METHOD

According to Soerjono Soekanto, research involves methodically, systematically, and consistently analyzing and constructing ideas. It serves as a tool to reinforce, establish, and advance knowledge. Legal research, specifically, is a scientific endeavor grounded in specific methods, systematic procedures, and thoughtful analysis aimed at studying particular legal phenomena. This involves analyzing legal facts in depth and seeking solutions to the arising issues. In this article, an empirical normative approach is employed. The normative approach is utilized to examine, describe, and elucidate the legal rules or norms that assess judicial activism in the context of the Constitutional Court's review of the Election Law Testing concerning the Parliamentary Threshold. To address the legal issues discussed in this article, various approaches will be adopted, including theoretical, juridical, political-sociological, legislative (statute approach), conceptual, and case approaches.

IV. RESULT AND DISCUSSION

A. *Judicial politics to protect citizens' human rights and constitutional rights*

The law is a product of the legislature together with the executive. As we know, legislative seats are filled by political parties that successfully passed the legislative elections. In addition to this, when viewed from the composition of constitutional judges, who are proposed by the proposing institution alone, it seems to reinforce the opinion that the Constitutional Court is a political judicial institution. Although in the 1945 Constitution, it is clearly stated that the Constitutional Court is one of the institutions exercising judicial power and not a political judicial institution.

It is undeniable that the role of the Constitutional Court in adjudicating judicial review cases accentuates the political nuances inherent in the process. From the perspective of courts and law, such interactions highlight that the law is fundamentally a product of political institutions.

When the Constitutional Court exercises one of its powers, namely to examine the law as a legal product of the legislator, it makes the authority of the Constitutional Court able to act as a positive legislator, where the judges not only act as a mouthpiece of the law, but also must be able to provide alternative problem solving solutions. This is due to the limitations of the legislators in making law indirectly, thus making the Constitutional Court through its judges, trained to find answers to constitutional problems that occur. The Court influences and determines the direction of the nation's journey in the constitution. This is what makes the Constitutional Court conduct judicial politics. Judicial politics is also applied in the Court of Vienna, Austria, although in 1933-1938, the judiciary, before its transformation, served the political goals of the ruling elite. [17] In Korea, the judiciary enforces laws against senior public officials who have violated the provisions of the Campaign and Election Financing Act, and the Anti-Corruption Act. This is intended to improve the rule of law and good governance [18].

Although the parliamentary threshold is an effort to simplify parties and strengthen the presidential system, the determination of the percentage of numbers in the parliamentary threshold results in many voters' votes that cannot be converted into seats in the DPR. This creates disproportionality in the electoral system, and indirectly injures the meaning of popular sovereignty, the principle of fairness in elections and legal certainty that is fair to all election participants and voters who exercise their voting rights. However, the Court remains consistent as stated in previous decisions, that the determination of the parliamentary threshold percentage is left to the legislators.

The Constitutional Court's Decision Number 116/PUU-XXI/2023, which declared the parliamentary threshold conditionally constitutional, aims to safeguard the human and constitutional rights of citizens. The decision reflects the Court's consideration of its legal implications on Indonesia's constitutional framework. Specifically, the Court ruled that the parliamentary threshold percentage will apply to the 2024 House of Representatives Elections but will not affect the 2029 elections or any subsequent ones unless changes are made to the norms, amount, or percentage of the parliamentary threshold. Furthermore, the Court mandates that any modifications to the parliamentary threshold provisions must involve all relevant groups, ensuring meaningful public participation, including political parties without representation in the DPR.

B. *Judicial Activism as one of the instruments to maintain Democracy in the Juridical domain*

Courts have a great influence in people's lives, in addition to affecting economic and social life [19], including political life. Court decisions can be a tool for social change, because the law has the power of threat or force, which if not implemented will cause sanctions. Law provides a framework for regulating relationships between individuals, groups and institutions in society. As a regulatory instrument, law can create conditions that support investment, innovation and trade that enable sustainable economic growth. In addition, law also plays an important role in the protection of individual rights, including the rights to justice, security and social welfare.

In the US Supreme Court judiciary, which adheres to a common law legal system, there is a tendency to decide cases by leaving considerable room for discretion and interpretation - either because it is a supposedly relevant part of the Constitution that contains open-ended language, or because the drafters could not foresee the problems that would be encountered later. Even if the judges try to make the right decision, their decision may inadvertently end up with ideological overtones. Moreover, judges may interpret the text of a law differently, based on different legal philosophies, socio-economic backgrounds, or life experiences.

Although Indonesia adheres to a civil law legal system, where judges only follow precedent or jurisprudence that has existed through previous decisions, because the law is dynamic, judges also practice legal interpretation and reasoning. Judges make reasoning to reach a decision that has the value of truth and justice. It is from this reasoning that we can understand the law. The interpretation carried out by judges in their decisions is sometimes very progressive. In this case the judge has applied Judicial Activism as an effort to avoid a legal vacuum and avoid ambiguity caused by legal uncertainty in legislation.

Decision-making carried out by applying Judicial activism for some people is considered as an action that leads to abuse of the power of the judiciary. There is even criticism that the Constitutional Court should encourage legislative reform rather than taking over the role of the legislature. Although the practice of judicial activism remains contentious, in a democratic context, judicial activism can be an important instrument to maintain the balance of power and ensure that constitutional rights are protected from potentially harmful executive and legislative actions. By applying judicial activism, judges can interpret the law to reach conclusions that differ from the prima facie interpretation. Conflicts from various fields such as economics, ideology and socio-politics can be legally resolved by making them the object of court decisions."^[20]

In a democratic state, every citizen must have a representative in the legislature. The existence of a proportional electoral system can help citizens as a social community to obtain representatives selectively, who are expected to truly fight for the interests, aspirations and needs of their constituents. Therefore, the provisions regarding the parliamentary threshold provide an opportunity for citizens as a group in society to participate in political activities.

In a rule of law, it is essential for democracy to safeguard human rights, including the rights to vote and to be elected. Ensuring that the parliamentary threshold does not infringe upon the constitutional rights of certain individuals or groups falls under the role of judicial activism. Moreover, judicial activism can verify that the parliamentary threshold aligns with societal developments without causing political instability. Changes to the parliamentary threshold must be guaranteed by judicial activism to be conducted transparently and based on fairness, rather than short-term political interests. A state governed by the rule of law, with a healthy democracy, requires a balance between fair representation, governmental stability, and the protection of human rights. Judicial activism concerning the parliamentary threshold should aim to uphold these democratic principles and ensure that all societal voices are represented proportionally and fairly.

V. CONCLUSION

In deciding a case, judges are not solely guided by the applicable law. Judges are more than mere mouthpieces of the law; they must explore and follow societal values through legal interpretation and reasoning. Court decisions that embody judicial activism involve judicial activities related to the duties of the Court as the final interpreter of the constitution. The Court must articulate the meaning of the law, even in challenging and politically sensitive cases.

It is undeniable that the Constitutional Court's role in adjudicating judicial review cases often highlights the political nuances involved. When viewed from the perspective of courts and law, the law is seen as a product of interaction between political institutions. Judicial activism in the Court's decision regarding the parliamentary threshold exemplifies judicial independence in striving for substantive justice. Judicial activism must ensure that changes to the parliamentary threshold are conducted transparently and based on principles of justice, rather than short-term political interests.

A rule-of-law state with a healthy democracy requires a balance between fair representation, government stability, and the protection of human rights. Judicial activism concerning the parliamentary threshold aims to protect these democratic principles, ensuring that all societal voices are proportionally and fairly represented.

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