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A COMPARATIVE STUDY OF JUDICIAL RESTRAINT AND ACTIVISM ON THE MATERIAL REVIEW OF PRESIDENTIAL THRESHOLD IN THE CONSTITUTIONAL COURT

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Abstract

The doctrine of Judicial Restraint and Judicial Activism has become a debate in democratic countries on decisions related to the presidential nomination threshold (presidential threshold) made by the Constitutional Court. In the application of judicial restraint, judges are more self-limiting in deciding a case and are more restrained in their authority, in contrast to judicial activism which is more active and brave in providing new legal breakthroughs on the norms being tested. In this paper, the formulation of the problem to be discussed is How the Decision of the Constitutional Court Judges Applying the Doctrine of Judicial Restraint Against the Presidential Threshold Lawsuit in the Presidential Election and the Development of Democracy in Indonesia and How the Relationship between the Decision of the Constitutional Court Judges Using the Doctrine of Judicial Activism Against the Presidential Threshold Lawsuit in the Presidential Election and the Development of Democracy in Indonesia. This paper also uses normative legal research methods, which is a process to analyze legal rules, legal principles and legal doctrines. The problem approach in this writing is the statute approach and conceptual approach.

Keyword: Judicial Restraint, Judicial Activism, Presidential Threshold Constitutional Court.

Introduction

In the implementation of judicial review examined by the Constitutional Court, there are several decisions of the Constitutional Court of the Republic of Indonesia that not only declare a norm of law contrary to the Constitution, but also determine the norm that should be enforced or change the meaning of a norm in the Constitution that is out of the original intent of the framers. In the legal context, judges by virtue of their position can make law or change the constitution through the method of constitutional interpretation. However, the doctrine of judicial restraint requires certain prerequisites so that judges and courts are more careful in interpreting the law so that they can

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form new legal norms or change the meaning of a norm in the Constitution through their decisions.[1]. One example is the Constitutional Court's decision related to the presidential threshold, which has been tested several times by the Constitutional Court.

In several decisions that were tested, the judges said that the presidential threshold was an open legal legacy made by the legislators, so the Constitutional Court had no authority to make new legal norms. Whereas the implementation of the presidential threshold when the presidential election is held actually makes Indonesia like an absolute rechstaat state of law, which only benefits some political elites but justice becomes a victim of the system created and creates injustice[2], It has also led to polarisation and mutual insults between the camps of presidential candidate supporters, spreading hatred and noise that is quite prolonged and will disrupt the democratic state system.

Judges of the Constitutional Court should be able and must dare to bump into legal norms and rules by applying judicial activism in deciding cases testing Article 222 of Law No.7/2017 on Elections so that it will create a decision that protects the interests of the general public. Although it is often found, in the judge's decision, it is stronger to use the doctrine of judicial restraint than to use the doctrine of judicial activism in its application in Indonesia. Because in this case Indonesia itself adheres to a civil law legal system, judges choose to restrain themselves and do not want to take care of the duties of the legislature as lawmakers.[3].

Judges who limit themselves by using the argument of judicial restraint which is used as an assumption that a constitutional judge can only cancel a law that is considered contrary to the 1945 Constitution and without having to create a new norm which in its authority is not given to the court. In fact, a judge can also apply the doctrine of judicial activism which in interpreting norms is more responsive and follows the development of society and also the development of law so that in its application judges are not always constrained by a statutory text in other words independent and impartial judges will be more progressive in interpreting a norm that is considered contradictory.

[1] Wicaksana Dramanda," Menggagas Penerapan Judicial Restraint Di Mahkamah Konstitusi" di dalam artikel jurnal Konstitusi, Volume 11, Nomor 4, Desember 2014 h.618

[2] Jimly Asshidiqie, Hukum Tata Negara & Pilar-Pilar Demokrasi (Jakarta: Sinar Grafika, 2010) ,h. 201.

[3] Aharon Barak, *The judge in a Democracy,* (Princeton : Princeton University Press.,2006) h.267.

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This research is a normative legal research with a statute approach and conceptual approach. Primary legal materials used in this research include: Constitution of the Republic of Indonesia Year 1945, Law Number 7 Year 2020 on the Constitutional Court, Law Number 7 Year 2017 on General Elections.

In this study, there are two problem formulations that will be answered; first, How is the Decision of the Constitutional Court Judges Applying the Doctrine of Judicial Restraint Against the Presidential Threshold Lawsuit in the Presidential Election and the Development of Democracy in Indonesia? and How is the Relationship between the Ideas of the Constitutional Court Judges' Decision Using the Doctrine of Judicial Activism Against the Presidential Threshold Lawsuit in the presidential election and the Development of Democracy in Indonesia?

Discussion

A. Conceptual of Judicial Restraint

In the legal tradition adopted by any country, be it civil law or common law, its development is often hampered by the problem of legal gaps with developments in society, thus creating an urgency or emergency to provide laws that follow the development of society, so that people can have responsive solutions to problems that arise. In today's democratic world, the courts are one of the places that people turn to in order to bridge the gap between the law and social reality. Even so, the courts need "signs" or appropriate limits in order to be able to provide decisions that have beneficial value without destroying the legal order.[4]

The obligation of constitutional judges to maintain a balance between carrying out the functions of the court in solving problems in society on the one hand and maintaining the legal order on the other, is a very big challenge for the court in exercising its authority. thus judicial restraint becomes a way out in the midst of judges as holders of power in examining the constitution so that the court is precise and wise in carrying out its functions in giving decisions.

[4] Wicaksana Dramanda, Loc.it

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Aharon Barak defines judicial restraint as that judges are more likely to limit themselves or restrain themselves to strike the right balance between conflicting social values, maintaining or using existing law rather than judges creating new law in society.[5]

Robert Posner explained that judicial restraint is an attempt by judges and courts to limit themselves in the sense of limiting their authority in order to remain within the corridors of the principle of separation of powers, or in short, it is an effort by the judicial branch not to hear cases that will interfere with other branches of power, in this case the legislators (legislative and executive). Posner assumes that the courts are not the "primary custodian" in a country's political system that can determine social welfare. Therefore, courts are only permitted and allowed to hear cases that are limited by law as their authority (limited jurisdiction).[6].

Posner also suggests that the opposite of restraint is activism (referring to judges) which is the tendency of attempts to expand power through judgements made by judges to influence other branches of power.[7]

In terms of providing a firm understanding of judicial restraint, the definition put forward by Raoul Berger and Robert Bork is that judicial restraint is a form of judges in interpreting the law that prioritises the process of reaffirming the reality or historical facts of constitutional formation. Their view shows that the constitution is a legal document that must actually be at the centre of a judge's personal preference. Therefore, judicial restraint is a concept or flow that provides more in using interpretation through an originalism approach or more so-called judges still refer to the text of the law.[8]

[5] Lihat dalam Aharon Barak, *The Judge in d Democracy*, (New Jersey: Princeton University Press, 2006) h.218

[6] Philip A. Talmadge,"*Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court System"*, *Seattle University Law Review*,1999 h. 707.

[7] Posner ,Robert dalam Peter M.Shane, " Federalism's 'Old Deal': What Is Right and Wrong with Conservative Judicial Activism". Villanova University School of Law Publlic Law and Legal Theory Working Papper, No.2000-4,2000, h.267.

[8] Lihat dalam Raoul Berger dan Robert Bork dalam Jerold Waltman, *Principle Judicial Restraint: A Case Against Activism*, (New York:Mcmillan,2015) h.40

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B. Decisions of Constitutional Court Judges on Presidential Threshold Challenges in the Application of Judicial Restraint

1. Decision of the constitutional court Number 51-52-59/PUU-VI/2008

In this decision, the petition filed is the constitutional testing of article 3 paragraph (5) and article 9 of Act 42/2008 which was decided on 18 February 2009. article 3 paragraph (5) reads "Presidential and Vice Presidential elections are held after the implementation of the general elections of members of the House of Representatives (DPR), the Regional Representatives Council (DPD), and the Regional Representatives Council (DPRD)." article 9 reads:
" Candidate pairs are nominated by a political party or a coalition of political parties participating in the election that meets the requirements of obtaining at least 20% (twenty per cent) of the total seats in the DPR or obtaining 25% (twenty-five per cent) of the national valid votes in the election of members of the DPR, before the implementation of the Presidential and Vice Presidential Elections,"

In essence, the reasoning of the applicant, in this case the Central Leadership Council of the Hanura Party, is that the provisions of Article 9 of Law 42/2008 are detrimental to the constitutional rights of the applicant because the provisions of Article 6A(2) of the 1945 Constitution are sufficient to qualify the applicant as a Political Party or Association of Political Parties participating in the General Election, the party can already propose a pair of Candidates for President and Vice President before the general election. However, with the enactment of Law No. 42/2008 in relation to Article 9, the applicant must comply with other additional requirements as described above, which is detrimental to the applicant. It is clear that the provisions of Article 9 of Law No.42/2008 are contrary to Article 6A(2) of the 1945 Constitution as a provision that is much higher than the law in the hierarchy of legislation in Indonesia.[9] The applicant in his lawsuit also considers that Article 3 paragraph (5) which regulates the implementation of the general election of the president and vice president is not carried out simultaneously with the election of members of the DPR, DPD and DPRD,

[9] Putusan MK-RI Nomor Perkara 51-52-59/PUU/VI/2008. h.160.

contrary to the provisions of Article 22E paragraph (2).[10]

In the decision, the Constitutional Court then considered that Article 3 paragraph (5) of Law No.42/2008 was a procedural method or issue whose implementation often emphasised an illogical sequence based on common experience. The Constitutional Court also considered that Article 9 is a concrete norm that is an elaboration of Article 6A paragraph (2) of the 1945 Constitution. The policy of a vote acquisition requirement of 20 per cent of the DPR seats or 25 per cent of the national valid votes in the DPR elections, as has become jurisprudence in previous decisions, is a legal policy, which in its delegation is regulated by Article 6A paragraph (5) of the 1945 Constitution which determines.

And Article 22E paragraph (6) of the 1945 Constitution stipulates "Further provisions concerning general elections shall be regulated by law".

Based on the legal policy above, the Constitutional Court as the guardian of the Constitution cannot possibly invalidate a law or part of its content, if the norm is an open delegation of authority that can be determined as a legal policy by the legislator.[11]

2. Decision of the constitutional court Number 14/PUU-XI/2013

Dalam putusan MK Nomor 14/PUU-XI/2013, pemohon yaitu Effendi Gazali, mengajukan gugatan kepada MK untuk melakukan pengujian pasal 3 ayat (5), pasal 9, pasal 12 ayat (1) dan (2), pasal 14 ayat (2) dan pasal 112 UU No.42 Tahun 2008 terhadap pasal 4 ayat (1), pasal 6A ayat (2), pasal 22E ayat (1) dan ayat (2), pasal 37 ayat (1) pasal 28D ayat (1), pasal 28H ayat (1), dan pasal 33 ayat (4) UUD 1945.

In 2014, prior to the general election, the Constitutional Court decided to partially grant the petitioner's request to annul Article 3 paragraph (5) on the implementation of the presidential election, Article 12 paragraphs (1) and (2) on

[10] Pemilihan umum diselenggarakan untuk memilih anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Presiden dan Wakil Presiden dan Dewan Perwakilan Rakyat Daerah.

[11] Jamaludin Ghafur, *Presidential Threshold*: Sejarah, Konsep, dan Ambang Batas Persyaratan Pencalonan dalam Tata Hukum di Indonesia, penerbit Setara Press, Malang 2019. H.195

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the ability of political parties to announce their presidential candidates during the legislative election campaign, Article 14 paragraph (2) on the registration period for presidential candidates after the determination of the results of the legislative election and Article 112 of Law No.42/2008 on the implementation of the Presidential and Vice Presidential elections after the determination of the results of the legislative election. The article submitted by the petitioner was Article 9 of Law No.42/2008 relating to the presidential threshold. The Constitutional Court argued that the article is a legal policy that still has binding force.

In the lawsuit, the Constitutional Court judges granted that the election of the President and Vice President was held simultaneously with the election of the DPR, DPD, DPRD in 2019, but against the provisions of Article 9 of Law No.42/2008. 2008, the Constitutional Court gave consideration that the implementation of the Presidential Election and the Election of members of the Representative Institution which is carried out simultaneously, the provisions of the article on the requirements for the vote acquisition of political parties as a condition for carrying out the Presidential and Vice Presidential candidate pairs are the authority of the legislators while still based on the provisions of the 1945 Constitution. so, article 9 which regulates the threshold for the election of the President and Vice President is not granted by the Constitutional Court, so that the 2019 simultaneous elections will be held by still having to use the presidential threshold for the party that carries the candidate.

3. Decision of the constitutional court Number 6/PUU-XX/2022

In the Constitutional Court decision number 6/PUU-XX/2022 filed by DPD RI members namely Tamsil Linrung, Fahira Idris, Edwin Pratama Putra who filed a petition to the Constitutional Court against article 222 of Act No.17 Year 2017 which reads:

> "The candidate pair (President) is nominated by a political party or a coalition of political parties participating in the election that fulfils the requirements of obtaining at least 20% of the total seats in the DPR or obtaining 25% of the national valid votes in the previous DPR elections."

Articles in the 1945 Constitution Article 1 paragraph (2) and (3), Article 6 paragraph (2), Article 6A paragraph (1), (2) and (5), Article 22E paragraph (1), paragraph (2) and paragraph (6), Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3), Article 28J. The Constitutional Court, in giving its reasoning for Article 222, stated that the party that can submit a constitutionality test against the article a quo is a political party or a coalition of political parties participating in the elections, not individual citizens who have the right to vote. Individual citizens who have the right to be elected can be considered to have a loss of constitutional rights as long as they can prove that they are supported by a political party or a combination of political parties participating in the elections to nominate themselves or be nominated as a candidate pair for President and Vice President or include supporting political parties to jointly submit the application. Such an assessment of the loss of constitutional rights according to the Court remains in line with Article 6A paragraph (2) and Article 8 paragraph (3) of the 1945 Constitution. The judges believed that Article 222 did not limit the number of participants who would run as presidential and vice presidential candidates. In its decision, the Constitutional Court decided that the petitioners did not have legal standing as parties who felt aggrieved by the norm and the principal petition submitted by the petitioners was not considered by the Constitutional Court judges because the petitioners did not have legal standing.

In several of the Constitutional Court's decisions above on the lawsuit related to the presidential threshold, the judges still refused to cancel article 9 of Law No.42 of 2008 and article 222 of Law No.17 of 2017, which is the law that replaces the old regulation, since when article 9 of Law No.42 of 2008 and article 222 of Law No.17 of 2017 were tested to the Constitutional Court, the attitude of the judges in giving decisions remained to refuse the cancellation of the article a quo which regulates the threshold for nominating the President and Vice President by arguing that the norm has become a delegation to the legislator. The Constitutional Court in its decision also seems to be very self-limiting in making

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decisions in terms of examining the constitution, in its function the Constitutional Court becomes the interpreter of the constitution and as the guardian of the constitution if other power institutions deviate from the basic state constitution. Therefore, the Constitutional Court in carrying out its functions must be independent and apply the principle of impartiality so that the judges in deciding cases will be wise for the sustainability of democracy in Indonesia.

C. The Impact of Judicial Restraint in the Development of Democracy

In a democratic state, the judiciary also plays a role in promoting a democratic system, which in this case guarantees the individual rights of citizens through the constitution. Therefore, living in a constitutional democracy, the judiciary becomes a hope for citizens in overcoming various basic problems or problems that become confusion in life.[12]

The protection of democracy must include both aspects that are equally important, namely first, the formal aspect of democracy in the sense that it is the sovereignty of the people exercised in elections by freely choosing representatives of the people who will occupy the parliament by determining new policies based on the will of the majority.[13] The second is the substantive aspect of democracy, which contains values other than the majority. These values include the principle of separation of powers, the rule of law, judicial independence, human rights, morality, justice, social goals of peace and security, goodfaith, reasonableness, and ethics as well as good behaviour.[14] These values are the core substance of democracy, without which democracy will never be established.

The author sees two things in judges' decisions that apply judicial restraint, namely the advantages and disadvantages of the doctrine. Judicial restraint has its own advantages, which refer to its nature which is more careful and subject to what has been mandated in the constitution. The implementation of judicial restraint can also be used as a tool to reduce the potential crisis between the branches of state

[12] Aharon Barak "*The Judge in d Democracy"*,,. Op,cit. h.701.
[13] Ibid
[14] Ibid, h.24.

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power, so that the state can be avoided from political fragmentation and will form a stable government.

And the drawback is that judges will use the interpretation method when deciding cases, especially constitutional cases. The interpretation of the constitution carried out by judges using this school can be done easily or even very difficult. In an easy sense, judges can refer to the original intent of the constitution and will interpret more deeply the meaning of the constitution through historical aspects. But with the development of the times and often these developments away from the historical in the sense of history, surely the interpretation in judicial restraint will also experience stagnation or cannot be executed so that the interpretation of following developments through constitutional construction in the political and legal order is needed to provide solutions to the problems of the crisis that occurred.

D. Doctrine of Judicial Activism

1. Definition of Judicial Activism

The concept of judicial activism is embedded in the conception of the English legal tradition, which is centred on the notions of "equity" and "natural rights". Both concepts were brought to the United States as a fundamental reference when implementing judicial review. Its application can be seen from the landmark decision Madison vs Marbury in 1803. In the case of Madison vs. Marbury, as the first step of the judiciary actively participated in criticising the actions of the legislature.[15]

At that time the Chief Justice of the United States Supreme Court was John Marshall who faced a dilemma faced with two choices, namely whether he would submit to the power of congress (legislative, executive) by respecting the existing rule of law or he had to uphold justice in the Marbury case. In his judgement, John Marshall relied on Section 13 of the Judiciary Act of 1789 for William Marbury, stating that it was unconstitutional because the writ of

[15] Zainal Arifin Mochtar, Kekuasaan Kehakiman Mahkamah Konstitusi dan Diskursus *Judicial Activism., op.cit. h.104.*

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mandamus contained in the act was considered to be contrary to the constitution and the basic jurisdiction of the supreme court. Marshall asserted that the constitution is the supreme law that becomes the basic norm of a country. Joseph C. Hutcheson, Jr. was the first to use judicial activism in a judicial opinion..[16]

In Satjipto Rahardjo's progressive legal theory, judicial activism is in line with his theory. According to the theory, Satjipto argues that the law serves humans and not the other way round.[17] Therefore, progressive legal theory provides discretion and freedom to legal subjects to make a creative decision in interpreting a norm without having to wait for changes to legislation or other rules first. Therefore, judges may make decisions by ignoring the legislative, executive branches of power as lawmakers, if the norms made lead to a regulation that is not in accordance with the constitution and there are indications to cause injustice.

E. Judges' Decisions Implementing Judicial Activism

Until now, judges have always rejected requests for the cancellation of Article 222 of Law No.7/2017, which is considered contrary to the 1945 Constitution. In his decision, the judge was not active when examining the article a quo, in fact the judge could have used the doctrine of judicial ativism in deciding a case that in reality the norm had caused injustice and ignored human rights. Below is a judge's decision that uses judicial activism that should be applied in the examination of the presidential threshold.

1. Decision of the constitutional court Number 5 /PUU-V/2007.

   In this decision, the Constitutional Court allowed independent regional head candidates to run in the regional head elections with the following considerations: first, the Court considers that independent regional head candidates are not contrary to the 1945 Constitution[18], Independent

[16] Keenan D Kmiec, “ The Origin and Current Meanings of ‘Judicial Activism’, *California Law Reviews*, Vol.92,2004. h.1456.

[17] Bernard L Tanya, Yoan N Simanjuntak, and Markus Y Hage, Teori Hukum: Strategi Tertib Manusia Lintas Ruang Dan Generasi (Yogyakarta: Genta Publishing,2019), h.190..

[18] Mahkamah Konstitusi, Putusan MK No. 5/PUU-V/2007 (2007), h.54.

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candidates were also enacted not as a reason for a state of emergency (staatnoodrecht), but as a provision by the legislature in the implementation of regional elections to make them more democratic.

Second, the difference in the permissibility of independent candidates in the province of Aceh and not allowed outside the province of Aceh raises and creates political discrimination so that fellow citizens do not have the same position. Therefore, there must be equal rights between fellow citizens by amending the Local Government Law to adjust to the development of society at this time, which has been done by the legislators themselves, namely by giving the right to independent candidates to be able to run for regional head and deputy regional head without having to go through a political party or a coalition of political parties as determined by Article 67 paragraph (2) of the Aceh Government Law.[19]

Dengan dikabulkannya sebagian dari keseluruhan para pemohon, maka MK mengubah beberapa frasa dalam Pasal 56 ayat (2), Pasal 59 ayat (1), ayat (2) dan ayat (3) UU No. 32 Tahun 2004 Tentang Pemerintah Daerah.

2. Decision of the constitutional court Number 102/PUU-VII/2009

In this decision, the Constitutional Court allowed the public to exercise their voting rights in the 2009 presidential election by showing their identity card (KTP) and family card (KK) or passport at the time of voting with the following considerations: First, the constitutionally guaranteed right of citizens to vote and to be elected is an individual right guaranteed by law that cannot be removed from every individual. Therefore, human rights should not be inhibited and limited by the provisions and requirements of administrative procedures in any form. Second, because updating the permanent voters list (DPT) can take a long time, with this emergency situation, the Constitutional Court took an alternative decision by allowing residents to use their KTP and

[19] Putusan MK No. 5/PUU-V/2007. h.55.

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KK or passport to the polling station.[20]

By approving some of the petitioners' requests, the Constitutional Court said that Article 28 and Article 111 of Law No.42/2008 are conditionally constitutional. Which means that the article is constitutional as long as it is interpreted as the Constitutional Court's ruling which states (1) that citizens who have not registered with the DPT can exercise their voting rights with their KTP and KK or passport, (2) the use of voting rights is based on the polling station in the RT / RW listed on the KTP. (3) first register at the voting organising group (KPPS). (4) must exercise their voting rights starting one hour before the end of voting.[21]

The two decisions above made by the Constitutional Court in the judicial review of laws that are considered to have applied judicial activism when deciding a case, the Constitutional Court provides a new norm that regulates the decision. In its nature, the Constitutional Court is not only a negative legislature, but the Constitutional Court can also be a positive legislature to provide regulatory decisions which are actually in the concept of separation of powers (separation of power) carried out by the legislature as a policy maker.

3. The Impact and Legal Consequences of the Notion of Judicial Activism in the Development of Democracy in Indonesia

The Constitution mandates the Constitutional Court as a judicial body to review laws against the 1945 Constitution. The mandate is directly given through article 24C paragraph (1) which reads:

> "The Constitutional Court has the authority to hear cases at the first and last instance, whose decisions are final, to review laws against the Constitution, to decide disputes over the authority of state institutions whose authority is granted by the Constitution, to decide on the dissolution of political parties, and to decide disputes over the results of general elections."

[20] Putusan Nomor 102/PUU-VII/2009 h.16.
[21] Putusan Nomor 102/PUU-VII/2009 h.20.

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In an effort to uphold constitutional democracy, the Constitutional Court as the guardian pillar and interpreter of the constitution must place the law as the sovereignty of the people. One of the applications of judicial activism is that judges dare to take a stand in terms of creating new norms and breaking through norms against the testing of the laws being tested. Judicial activism also takes sides to protect human rights when justice and legal certainty are hijacked by lawmakers in the name of the constitution, even though the norms have violated and harmed citizens.

The idea of Judicial activism has an impact on the development of democracy where judges are more independent in deciding cases freely without any restrictions in making decisions. Judges as a function have exercised their authority in examining, adjudicating and deciding disputes.

The purpose of creating a new norm is to make a new breakthrough for the development of society through interpretation by judges. And it also affects the electoral order if the judge when deciding the case of judicial review of the law related to the presidential and vice presidential nomination threshold (presidential threshold) applies judicial activism, if the judge uses the doctrine and dares to create a new norm in the sense of cancelling a law product formed by the legislative and executive branches of power, it will change the condition of the face of democracy in Indonesia, the candidates who will participate in the election are not constrained by a fairly high limit of 20% (twenty per cent) of the number of DPR seats or obtaining 25% (twenty-five per cent) of the national valid votes in the election of DPR members, before the implementation of the Presidential and Vice Presidential Elections.

There is a comparison when judges decide cases using the doctrine of judicial restraint with judges who decide cases using the doctrine of judicial activism. in using judicial activism judges are more courageous in providing a broad and progressive interpretation of the law and when deciding a case judges also take into account the interests of the community. In the context of issues

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related to the presidential threshold, judges should make judicial activism a consideration of their decisions. Justice and equality of political rights will be guaranteed when the presidential threshold is set aside in the presidential and vice presidential nomination requirements.

In exercising judicial activism, constitutional judges should exercise impartiality and fairness. Morally, judges must act rationally and in good faith. Procedurally, a judge's view must see the parties to the dispute equally or equally and have an objective (unbiased) view of the decision-making process up to how the implications of the decision on the parties affected by the decision.

The Constitution and the law have provided space for judges to be independent of the judiciary, free from the intervention of other parties, free to express themselves in their activities to develop and advance the development of law, free to explore legal values based on the sense of justice of the community and including free to deviate from the provisions of written law if it is considered not in accordance with the sense of justice of the community.[22] However, with such freedom, it does not mean that judges can act freely in deciding cases. Judges are limited by the ideology of the state, laws and regulations, and the principles of human rights.

The implementation of judicial activism contains advantages and disadvantages. The advantages in this case can be seen from the methodology shown in this flow will provide a responsive interpretation of the constitution and will follow the development of the law so that there will be many legal discoveries that become breakthroughs and can be a reference to correct policies and norms made by the legislators, namely the legislature and the executive.

Closing

From the results of the discussion above, it can be concluded as follows:

1. Judicial restraint is a doctrine that limits judges and courts from hearing cases that would interfere with other branches of power. In the Constitutional Court's decision

[22] Lihat pasal 3 dan 5 undang-undang No.48 Tahun 2009 tentang Kekuasaan Kehakiman. Pasal ini mengatur mengenai kemandirian hakim dan kewajiban (kebebasan) hakim dalam memutus perkara.

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on the presidential threshold, judges are considered to be too restrictive so that judges do not want to enter into the authority of the legislators. Whereas in the 1945 Constitution the right to elect and be elected has been guaranteed, so that candidates who will run for president and vice president can compete in the presidential election.

2. The doctrine of judicial activism is a doctrine that requires judges to act actively and progressively when making a decision that ignores the existence of legislators by creating a new norm. in its application it is still very commonly used in the Constitutional Court's decisions, even though by applying the doctrine the judge will find and create new norms if it is felt that the article being tested has problems in society. Judicial activism itself becomes an alternative for judges when deciding a case where the norm creates problems in society.

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