JUDICIAL ACTIVISM IN THE INDONESIAN CONSTITUTIONAL COURT'S DECISIONS DURING THE COVID-19 PANDEMIC

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Abstract *– During the Covid-19 pandemic, Indonesia's Constitutional Court issued significant decisions on challenges to three crucial laws: the COVID-19 Handling Law, the Job Creation Law, and the Election Law. These decisions, which were based on the substantive justice approach, raised questions over whether the Court's nine justices were driven by judicial activism or influenced by populist pressure and public opinion. The underlying contention of this article is that the Constitutional Court's interpretation concerning a state of emergency and legislation during times of crisis should form a cohesive entity that upholds the primacy of safeguarding the public and ensuring equitable legal certainty for all individuals, as enshrined in the Indonesian Constitution. This article analyzes the impact of judicial activism and populism in addressing the issue of officials who misused or embezzled funds related to Covid-19, ensuring that they can still be held accountable both civilly and criminally. Furthermore, it explores the implications of the conditional annulment of the Job Creation Law and the application of the presidential threshold in elections. During the period of the Covid-19 pandemic and in the context of the Job Creation Law and the presidential threshold, it was imperative for the Constitutional Court's decisions to emphasize the fair and definitive application of the law, irrespective of any influence from judicial activism or populism.*

Keywords*: Constitutional Court Interpretation; Covid-19 Pandemic; Judicial Activism*

1. INTRODUCTION

This paper will explore three main aspects. First, judicial power and its responsibilities. This section explores the independent judicial power to administer justice and uphold the law. According to the Constitution, judicial power in Indonesia is divided between two separate institutions, namely the Supreme Court and the Constitutional Court, each with its own jurisdiction and competencies. Although these institutions have a coordinating relationship, they remain independent judicial bodies. This section will also examine the authority and responsibilities of Supreme Court and Constitutional Court justices as the primary agents of judicial power. Article 5, paragraph 1 of Law No. 48 of 2009 on Judicial Authority directs judges to explore, uphold, and comprehend the societal values of law and justice. Additionally, this section will explain how Supreme Court Justices and Constitutional Court Justices employ legal discovery (*rechtsvinding*) and legal interpretation, as well as their connection to judicial activism. Furthermore, it willillustrate the practical implementation of judicial activism, both internally and externally, leading to final decisions.

Second, the state during a state of emergency. This section provides a chronological account of the spread of Covid-19 and its profound global impact. The Covid-19 pandemic presented unprecedented challenges to nations worldwide, leading to diverse actions and responses. This section explores Indonesia's response to the rapid spread of Covid-19 across the country. The government implemented crucial measures, including the establishment of a Task Force for the Acceleration of Handling Covid-19. It highlights the transformation of the initial health crisis into an economic crisis, impacting financial policies (Widijowati,2023)

The Indonesian Constitution addresses emergencies in two articles. Article 12 grants the President the authority to declare a "state of emergency" or "*keadaanbahaya*," which denotes a dangerous

situation. Article 22, Paragraph (1), empowers the President to enact government regulations in lieu of laws when exigencies arise. This section explains that the emergencies faced are primarily public health emergencies (as stipulated in Presidential Decree No. 11 of 2020) and non-natural national disasters (under Presidential Decree No. 12 of 2020), both falling under the President's discretionary power. These designations represent policy measures aimed at maximizing the response to Covid-19's threats to public health, with the principle of public safety as the highest law (*salus populi supreme lex*). Furthermore, it emphasizes the state's obligation to establish a welfare state in line with the constitutional objectives of promoting welfare and ensuring citizen protection.

Regarding governance, the government (state administration) is granted discretionary authority based on the concept of *freiesermessen*(discretion). This allows the President, as the executive authority, flexibility in taking action unbound by strict legal constraints. Consequently, the government employs legal instruments to protect the public interest and formulate policies related to state finances. Notably, the President issued Government Regulation in Lieu of Law (Perpu) No. 1/2020, which later received parliamentary approval and was enacted as Law No. 2 of 2020. This section also addresses the alignment of Perpu No. 1/2020 and Law No. 2/2020 with Constitutional Court Decision No. 138/PUU-VII/2009 and other relevant laws and regulations governing Perpu and government officials' discretion.

Under Perpu No. 1/2020 and Law No. 2/2020, the government has issued various additional policies to address the challenges posed by Covid-19. These include Presidential Regulations, Presidential Instructions, Ministerial Regulations, Ministerial Decrees, Ministerial Instructions, and Circulars (*Surat Edaran*).

Third, the concept of judicial activism in the rulings of the Constitutional Court will be explored. This section aims to elucidate the meaning of judicial activism and examine its practical application by judges in decision-making processes. Judicial activism can be viewed positively when judges' actions are perceived as necessary adaptations to societal changes while upholding fundamental constitutional values. However, it can beregarded negatively when it entails an abuse of judicial authority, resulting in the intervention of the judiciary that undermines the representative democratic system. This abuse of power can lead to judicial autocracy, where the court dominates over the executive and legislative branches. Furthermore, this section will discuss the presence of judicial activism in both positive and negative aspects, as well as the existence of judicial restraint, which entails adhering to existing norms and prior decisions. The six dimensions of judicial activism proposed by political scientist Bradley C. Canon will be described in detail (Wahyuni & Huda, 2021).

In analyzing Constitutional Court Decision No. 37/PUU-XVIII/2020 on Law No. 2 of 2020, this section will look at how the Court’s justices interpret laws and the Constitution, as well as the paradigm of judicial activism. The justices’ actions, as evident in their respective legal opinions (LO), provide insight into this matter. Notably, six justices expressed their approval and granted the petition, leading to the interpretation that Article 27, paragraph (1) of the Attachment to Law No. 2 of 2020 does not constitute a state loss as long as it is carried out in good faith and accordance with relevant laws and regulations. However, it is important to note that the decision in this case was not unanimous, as three justices opposed the petition. The opinions of the six justices who supported the petitioner's request and formed the court's decision exemplify judicial activism, which aligns with Canon's sixth dimension.

Further, in the analysis of Constitutional Court Decision No. 91/PUU-XVIII/2020, it is explained that during the formal review of Law No. 11 of 2020 on Job Creation, a majority of five justices found formal defects in the law. Consequently, they granted the petition and declared the Job Creation Law conditionally unconstitutional. This means that the law is limited in its scope, and the government has been given a two-year period to make the necessary corrections. Two justices shared the view that the law indeed exhibited formal flaws in its formation, but they believed it should be granted with a constitutional condition. Accordingly, the law is considered to have limited validity and is allowed a two-year period for correction. The remaining two justices, however, rejected the petition entirely.

In the analysis of Constitutional Court Decision No. 66/PUU-XIX/2021, which reviewed Law No. 7 of 2017 on Elections, it will be examined how judicial activism is manifested in the majority decisions of the justices. Five justices concluded that the applicants lacked legal standing to file a judicial review of Article 222 of the Election Law, resulting in the petition being deemed unacceptable. On the other hand, two justices held the view that the petitioners had legal standing but ultimately rejected the principal petition. Two additional judges expressed that the applicants indeed had legal standing, and the principal petition needed to be granted. The justices' exercise of judicial activism in this case aligns with Canon's fourth dimension, as the decision involved the formulation of substantive policies rather than merely upholding outcomes derived from a democratic political process.

2. JUDICIAL POWER AND RESPONSIBILITIES: AUTHORITY AND DUTIES OF JUDICIAL POWER

2.1. The Indonesian Judiciary as an Independent Judicial Power

The power to adjudicate is commonly known as judicial power. This power operates independently, free from any interference from other branches of government, namely the executive and legislative branches. Conversely, the executive and legislative powers are also protected from external interference, in accordance with Montesquieu's theory of the separation of powers. Prior to the amendment of the 1945 Constitution between 1999 and 2002, Indonesia followed a system of power division, while the post-amendment Constitution embraces a system of separation of powers, which is grounded in the principle of checks and balances.

During the debates of the Investigating Committee for the Preparation for Indonesian Independence (BPUPKI) in 1945, Soepomo underscored the adherence of the 1945 Constitution to the principle of Trias Politica, which involves the separation of powers through power sharing. In this system, the executive, legislative and judiciary possess overlapping duties and authorities, and the president, as the holder of executive power, retains the authority to enact laws. Another characteristic of the power division is that judges (representing the judiciary) are limited to the application of existing laws and are not empowered to pass judgment on the validity of laws themselves.

As a result of the amendments to the 1945 Constitution between 1999 and 2002, and in conjunction with reform measures, Indonesia has adopted a rigorous separation of powers, accompanied by a system of checks and balances among the three branches. Among the institutions born out of these efforts to reform the state administration and provide a balancing and controlling function is the Constitutional Court, which was established in 2003. According to the Constitution, the Constitutional Court is entrusted with the responsibility of administering judicial power, with its main role being fulfilled by nine constitutional justices.

Under Article 24 of the Constitution, judicial power is an independent authority responsible for organizing the judicature to ensure law enforcement and justice. Article 24(2) specifically states, “The judicial power is exercised by a Supreme Court with its subordinated judicial bodies within the form of general courts, religious courts, military courts, administrative courts, and by a Constitutional Court.”

Therefore, the judicial power in Indonesia follows a bifurcation system, where judicial power is divided between two institutions: the ordinary courts, culminating in the Supreme Court, and the constitutional authority operated by the Constitutional Court. The Supreme Court and the Constitutional Court are two parallel state institutions, both playing a role in the exercise of judicial power in Indonesia, but with differences in jurisdiction and competence. These two top judicial institutions possess independent judicial powers to administer justice and uphold the principles of law and justice.

Judges, in carrying out their duties and functions, are obliged to maintain the independence of the judiciary and must explore, follow and understand the legal values and sense of justice that exist in society. The powers and obligations bestowed on the judicial power mean the judiciary has great power to touch people's lives in economic, social, political and other fields. This authority gives rise to a power that can determine the direction of a country's policy, so it is called judicial power.

2.2. Constitutional Authority and Obligations of the Constitutional Court

Under Article 24C paragraph (1) of the 1945 Constitution, the Constitutional Court has four constitutional authorities and one constitutional obligation. Article 10 paragraph

(1) letters a to d of Law No. 24 of 2003 junco Law No, 8 of 2011 as amended by Law No.

7 of 2020 on the Constitutional Court (the Constitutional Court Law) reinforces this provision by listing the four powers of the Court, namely:

1. To review laws against the 1945 Constitution.
2. To resolve disputes of jurisdiction between state institutions whose authorities are granted by the 1945 Constitution.
3. To decide on the dissolution of political parties; and
4. To adjudicate on disputes about general election results.

Meanwhile, according to Article 7A and Article 7B paragraphs (1) to (5) and Article 24C paragraph (2) of the Constitution, which were subsequently reaffirmed in Article 10 paragraph (2) of the Constitutional Court Law, the Constitutional Court is obligated to issue a decision regarding the opinion of the House of Representatives (DPR) alleging that the President and/or Vice President have committed law violations in the form of treason against the state or engaged in disgraceful acts such as corruption, bribery, other serious criminal offenses, or misconduct. The Constitutional Court also has the responsibility to determine whether the President and/or Vice President meet the requirements stipulated by the Constitution.

In addition to its four powers and one obligation, the Constitutional Court also serves a broader function as the guardian of the Constitution, the final interpreter of the Constitution, the protector of democracy, the defender of citizens' constitutional rights, and the safeguard of human rights. These functions derive from the Court's authorities and contribute to its role in upholding the principles and values enshrined in the Constitution.

As the guardian of the Constitution, the Constitutional Court has been entrusted with the responsibility of protecting and upholding not only the Constitution as the supreme law but also Pancasila as the state ideology. This can be observed in the Court's authority to decide on the dissolution of political parties. According to Article 68 of the Constitutional Court Law, a political party can be dissolved if its ideology, principles,

goals, programs or activities are in contradiction with the provisions of the Constitution. Given that Pancasila embodies the spirit of the Constitution and is explicitly mentioned in its Preamble, it is essential to consider Pancasila as a benchmark when determining the dissolution of a political party.

Furthermore, in the examination, adjudication, and decision-making of every constitutional case, the Constitutional Court is not only guided by the provisions of the Constitution but also by Pancasila as a touchstone. The abstract and noble values of Pancasila serve as a standard for assessing the constitutionality of legal norms, including laws, and are reflected in every decision made by the Constitutional Court. Moreover, as the guardian of the Constitution, the Constitutional Court recognizes the significance of upholding Pancasila as a state fundamental norm and the essence of the Constitution. This aligns with the Court's vision of establishing a modern and dependable judiciary and its mission to enhance the awareness of citizens and state administrators regarding the Constitution.

In this context, the constitutional duty of the Constitutional Court as the guardian of the Constitution encompasses the task of upholding Pancasila as the foundation and ideology of the state. Therefore, in addition to its role as the guardian of the Constitution, the Constitutional Court also assumes the responsibility of safeguarding the state's ideology.

2.3. Role of Justices in Legal Discovery and Judicial Activism

Legal discovery, or *rechtvinding*in Dutch legal terminology, refers to the process of law formation undertaken by judges or other legal officers tasked with applying the law to specific events or circumstances, resulting in the concretization, crystallization, or individualization of legal regulations. This process is guided by the normative aspect of general legal principles, known as *das sollen*, which considers what the law should be in light of concrete events or *das sein*, which

pertains to the actual state of affairs (Sudikno, 2010). Legislative laws are often not clearly formulated and may be incomplete. To gain a comprehensive understanding of a legal term, it is necessary to provide explanations, interpretations, or employ other methods of legal discovery. In the process of discovering or creating law, several methods are utilized, including (Sudikno, 2010):

1) The interpretation method, which comprises grammatical interpretation, systematic (logical) interpretation, historical interpretation, teleological (sociological) interpretation, comparative interpretation, anticipatory interpretation (futuristic), restrictive interpretation, and extensive interpretation.

2) The reasoning method, which comprises *argumentum per analogiam*(appeal from analogy), *argumentum a contrario*(appeal from the contrary), and legal refinement (*rechtsverfijning*).

3) The exposition method, also known as legal construction.

In carrying out the task of legal discovery, judges also engage in judicial activism, which refers to the context in which judges create legal principles through their decisions. Judicial activism becomes necessary when the law is unclear or there is no specific regulation (*rechtvacuum*), as judges are prohibited from refusing to examine and adjudicate cases based on the absence or ambiguity of a law. Therefore, judges have a legal obligation to explore the societal legal values and sense of justice by employing the legal discovery method. The decisions rendered by judges, which introduce new legal rules (judge-made law), are sometimes positively received and contribute to a better understanding in society. However, there are instances when such decisions are viewed negatively as they may be perceived as different from or even contradictory to existing laws or previous court precedents. An example of this is the Constitutional Court's decision on "electricity theft," where the Court employed a teleological interpretation of the word "goods" in the norms of Article 362 of the Criminal Code. The Court ruled that electricity should be included, in view of its independent nature and certain value (Badriah, 2022).

Likewise, the extensive interpretation method encompasses the broad interpretation of the word "sell" in the norm of Article 1576 of the Civil Code. It goes beyond mere buying and selling, extending to any transfer of property rights (Badriah, 2022). The legal discovery procedure begins by establishing a connection between a concrete event (*das sein*) and its corresponding legal regulations (*das sollen*). Transforming a concrete or actual event into a legal event requires a comprehensive understanding and mastery of legal regulations.

The relationship between *das sein* and *das sollen*is closely intertwined, as actual events determine the relevant legal regulations. Judges must actively choose from various methods of interpretation, knowing that each approach may yield different results. They have the freedom to interpret. When the time comes to make a choice among the various possibilities, the judge fulfills the role of completing or supplementing the legal regulations. By rendering a decision that incorporates an element of creation, the judge (as part of the judicial power) becomes the law's creator, engaging in the discovery of law (Sudikno, 2010).

The judge's endeavor in finding and interpreting the law encompasses the practice of judicial activism, which has two aspects:

1. Legal discovery (*rechtsvinding*): When there is no existing law that addresses a particular issue, judges undertake legal discovery to formulate appropriate legal rules to fill the gap.

2. Legal interpretation: Even when there is a legal provision concerning a matter, there may be a need for more progressive measures to address it beyond the confines of conservative (textual) provisions. Interpreting the Constitution can involve exceptional or progressive acts aimed at interpreting the Constitution based on a judge's personal beliefs regarding the fundamental freedoms they uphold.

In situations where there are differing opinions and choices among the judges (assembly) during the decision-making process, it reflects an internal activism within the judiciary. The deliberation session among the judges, consisting of a minimum of three justices in the Supreme Court or nine justices in the Constitutional Court (or a minimum of seven justices), plays a pivotal role in determining the ultimate direction of the decision that will be adopted by the respective courts.

The law mandates that in cases where unanimous consensus is not reached during judges' deliberations, a vote must be conducted, and the opinion of the majority of judges becomes the official court decision, while the dissenting opinions must be included in the decision. Dissenting opinions and concurring opinions are made public, allowing easy access to each judge's stance in a decision. However, before the enactment of Law No. 48 of 2009, Law No. 4 of 2004 stated that the disclosure of differing opinions was limited to the advisory opinion of the panel of judges and remained confidential. The publication of dissenting opinions now serves as an external activism paradigm for judges as it generates diverse perspectives within public and academic spheres.

The first viewpoint holds that judges with dissenting or concurring opinions are assimilated into the majority opinion since it has become the official court decision. The second viewpoint argues that in future similar cases, judges with differing opinions must uphold their stances in the form of dissenting opinions or concurring opinions, as it is inherent to the individualism of independent judges.

Differences of opinion among the panel of judges who preside over cases play a crucial role in discussions and analyses, as they are integral to internal judicial activism and ultimately shape the direction of officially recognized court decisions. The High Court of Gujarat in India has aptly described judicial activism by stating that judges without it can be likened to a colorless and odorless flower or a vehicle without fuel and propulsion. Judicial activism is an inherent aspect that cannot be disregarded, as it is necessary for the judiciary to achieve substantive justice and expedite trials. It is through embracing judicial activism that the judiciary can flourish and progress (Tyagi, 2000).

3. JHE COUNTRY FACES A STATE OF EMERGENCY

3.1. Global and National Impact of Covid-19

The Covid-19 outbreak, which rapidly spread and resulted in fatalities worldwide, was initially detected in Wuhan, China, in late December 2019. The acceleration and the impact on the financial sector, as well as the disruption to demand, began to escalate rapidly since mid-February 2020. On March 12, 2020, the World Health Organization (WHO) declared Covid-19 a global pandemic.

The threats posed to public health and safety compelled countries to implement various extraordinary preventive measures. To break the chain of transmission, most countries adopted policies such as travel bans/restrictions, border closures, and tightened traffic between countries. Some countries even implemented complete border shutdowns, while others opted for partial closures. Additionally, several countries enforced domestic lockdowns. The Covid-19 pandemic served as a valuable lesson for countries worldwide in formulating fiscal policies to anticipate such crises. Failing to anticipate the impact of the pandemic in a timely manner can have dangerous consequences for the economies of nations, ultimately leading to global repercussions (Burhanuddin, 2021).

The first case of Covid-19 in Indonesia, confirmed positive on March 2, 2020, marked the beginning of a rapid increase in cases as the transmission spread across the country, with Greater Jakarta emerging as the epicenter. In response, the government issued Presidential Decree No. 7 of 2020 on the Task Force for the Acceleration of Handling Covid-19 on March 13, 2020. This decree was later updated through Presidential Decree No. 9 of 2020, dated March 20, 2020. The Covid-19 pandemic had a cascading impact on various socio-economic and financial aspects. The initial absence of vaccines, medications and limited medical resources created a health crisis. Consequently, many economic activities in both formal and informal sectors came to a halt, leading to job terminations across different industries. This domino effect resulted in a significant decline in economic performance, disrupted consumption patterns, hindered investments, and the cessation of import-export activities. These factors further impacted the financial sector, with declining profitability and solvency for companies.

3.2. Emergency Due to the Covid-19 Pandemic

In the Indonesian Constitution, there are two articles frequently invoked to address abnormal or emergency situations. The first is Article 12, which pertains to "a state of emergency". It states,

"The President declares a state of emergency. The conditions for such a declaration and the subsequent measures regarding a state of emergency are regulated by law." This article serves as the basis for the Emergency Constitutional Law or *Hukum Tata Negara Darurat* in Indonesian.

Another relevant provision is Article 22 of the Constitution, which addresses government regulations in lieu of law (Perpu) in cases of compelling exigency. It states, "In the event that exigencies compel, the President has the right to enact government regulations in lieu of laws." Both Article 12 and Article 22 are often interpreted as granting the President the authority to issue government regulations in lieu of laws, which are commonly employed to address emergency situations (Arsil, F & Ayuni, 2020).

In the Government Regulation in Lieu of Law No. 23 of 1959 on a State of Danger (referred to as Perpu No. 23/1959), which derives from Article 12 and Article 22 of the Constitution, various types of emergency situations in Indonesia are regulated. These include civil emergency, military emergency, and a state of war. Perpu No. 23/1959 grants

the President, as the Supreme Commander of the Armed Forces, the authority to declare a state of emergency in all or part of the territory of the Republic of Indonesia.

However, there are several other laws in Indonesia that address emergency situations without relying on Article 12 of the Constitution. These laws include:

- Law No. 24 of 2007 on Disaster Management
- Law No. 7 of 2012 on Handling Social Conflict
- Law No. 6 of 2018 on Health Quarantine
- Law No. 9 of 2016 on Prevention and Mitigation of Financial System Crisis

Article 12 of the Constitution can be considered an article that grants authority for legal deviations during a constitutional emergency. In response to the emergency situation caused by the Covid-19 pandemic, the government issued Presidential Decree No. 11 of 2020 on the Determination of the Corona Virus Disease 2019 (COVID-19) as a Public Health Emergency (Presidential Decree No. 11/2020). This decree activated Law No. 6 of 2018 on Health Quarantine. Subsequently, Presidential Decree No. 12 of 2020 on the Determination of the Non-Natural Disaster of Corona Virus Disease 2019 as a National Disaster (Presidential Decree No. 12/2020) was issued, activating Law No. 24 of 2007 on Disaster Management. These two laws were specifically activated to address emergencies related to public health and non-natural disasters (Arsil, F & Ayuni, 2020).

Furthermore, the government exercised its constitutional authority based on Article 22 of the Constitution to issue Government Regulation in Lieu of Law No. 1 of 2020 on State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or in Facing Threats that Endanger the National Economy and/or Financial System Stability (Perpu No. 1/2020). The formation of this Perpu does not rely on Article 12 of the 1945 Constitution as its basis. Therefore, it can be stated that Perpu No. 1/2020 is not an emergency regulation (which would have required Article 12 in conjunction with Article 22 of the Constitution), but rather an ordinary Perpu based on Article 22 of the Constitution (Prasetio, 2021; Abdulqader&Assalmani, 2021).

In essence, the Constitution and laws grant the President attributive authority as the governing power to determine the "status" of the country during an emergency situation. This authority is bestowed upon the President with the sole purpose of safeguarding the entire Indonesian nation and its homeland.

A civil emergency is a status established in accordance with Perpu No. 23/1959 to address regulated issues. According to this Perpu, a civil emergency refers to a state of danger that is determined by the President/Supreme Commander of the Armed Forces for all or part of the nation's territory.

The government's decision to invoke a civil emergency in its efforts to mitigate the spread of Covid-19 was met with criticism from some parties. They argued that the implementation of civil emergency prioritizes the state's interests in maintaining security while potentially neglecting the needs of individuals affected by the virus. Furthermore, the security-oriented approach raised concerns regarding human rights, as a civil emergency, military emergency, or state of war may

infringe upon human rights in the name of security (Susanti, 2020); whereas the spread of Covid-19 is primarily a health emergency and a non-natural disaster.

The state should prioritize public safety rather than adopting a state security approach. During the Covid-19 pandemic, the lives of every Indonesian citizen were at risk, making the safety of the people the primary concern. This aligns with the principle of "salus populi suprema lex" (public safety is the highest law).

From an objective standpoint, a health emergency and a civil emergency serve different purposes. Declaring a health emergency aims to protect the health of individuals threatened by Covid-19. On the other hand, declaring a civil emergency aims to ensure the smooth functioning of the government and prevent disruptions caused by civil unrest or actions.

3.3. Government Discretionary Authority

In the realm of state administrative law, discretion (*freiesermessen*) refers to the power granted to officials or state administrative bodies to take action that is not strictly bound by the law (Ridwan, 2006). In a welfare state, the government has the responsibility to provide public services and strive for the well-being of its citizens, which includes ensuring their protection. In the context of Indonesia, discretion is particularly relevant when it pertains to the government's duty to realize the state's goals as stated in the fourth paragraph of the Preamble to the Constitution. The constitutional norms within the Constitution are formulated to establish order, legal certainty, and the exercise of state power under normal or stable conditions.

The life of a state is highly dynamic, as it encounters various social, economic, political, legal, and health-related issues, along with other factors that can give rise to crises, emergencies, or extraordinary situations. Such circumstances require prompt and decisive actions. However, these actions must be carried out within the boundaries of the public interest and remain subject to accountability.

To address the global impact of the Covid-19 pandemic and its national implications, the government, through presidential actions, took measures to mitigate the crisis. In addition to Presidential Decree No. 11/2020 and Presidential Decree No. 12/2020 mentioned earlier, Presidential Regulation No. 21/2020 on Large-Scale Social Restrictions in the Context of Accelerating the Handling of Covid-19 was also issued. This regulation aimed to limit people's mobility and contain the spread of the virus.

Various actions undertaken by the President, as the head of government, are aimed at safeguarding the public interest and illustrating the government's functioning duringemergency situations. These policies require significant funding and necessitate prompt and comprehensive decision-making, particularly concerning the procurement of medical equipment and personnel, construction and repair of healthcare facilities, medical support, exploration of financing sources, and the adjustment of state revenues through tax and non-tax measures. Additionally, there is a need for the reallocation and reprioritization of funds within the State Budget.

A state emergency can disrupt the proper functioning of state institutions. In administrative law, the declaration of a state emergency rests with the head of government, who is obligated to exercise the discretionary authority available to them in order to protect the public interest. This includes taking necessary government actions to achieve overarching goals and prioritizing the protection of the public interest, as well as implementing state financial policies. Consequently, the President issued the aforementioned Perpu No. 1/2020. This Perpu, promulgated on March 31, 2020, was subsequently enacted into law through Law No. 2 of 2020 on May 18, 2020 (hereinafter referred to as Perpu No. 1/2020 in conjunction with Law No. 2/2020). The justification for the Perpu is outlined in the preamble, which states: "Article 22, paragraph (1) of the 1945 Constitution stipulates: 'In the event that exigencies compel, the President has the right to enact government regulations in lieu of laws.'"

In relation to the health emergency or urgency as stipulated in Article 22, paragraph of the Constitution, the Constitutional Court, in its Decision No. 138/PUU-VII/2009, states that it has the authority to review Perpu with the consideration that the President holds the power to issue it. This indicates that the assessment of a Perpu is subject to the President's subjective judgment.

However, this does not imply that the President's subjective assessment is absolute. The President's judgment must be based on objective conditions, specifically the presence of three conditions that serve as parameters for the existence of a compelling exigency or urgency, thus necessitating the issuance of a Perpu. These conditions are as follows:

a. The existence of circumstances requiring swift resolution of legal issues based on the law.
b. The absence of an existing law or the insufficiency of an existing law.
c. The impossibility of addressing the legal vacuum through the regular legislative process due to time constraints, while the urgent situation requires prompt resolution.

Furthermore, the concept of Perpu is explained in Article 1, point 4 of Law No. 12 of 2011 on Law Making, as amended by Law No. 15 of 2019. According to this provision, a "Government Regulation in Lieu of Law" refers to legislation issued by the President in an emergency situation.

Similarly, Article 1, point 9 of Law No. 30 of 2014 on Government Administration states: “Discretion is a Decision and/or Action determined and/or carried out by Government Officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide options, do not regulate, are incomplete or unclear, and/or where there is government stagnation.” Article 22 paragraph (2) of Law No. 30 of 2014 on Government Administration, states.

Every use of a Government Official's Discretion aims to:

a. expedite the administration of government.
b. fill legal voids.
c. provide legal certainty.
d. overcome the stagnation of government in certain circumstances for the benefit and interest of the public.

So, Perpu No. 1/2020 in conjunction with Law No. 2/2020 has been enacted in accordance with the constitution and relevant laws. However, the law does not rule out the possibility of a judicial review being submitted by certain parties to challenge its legality.

Indonesia follows the concept of a material law state and adopts the concept of a welfare state. This is evident from the preamble of the Constitution, which aims to establish Indonesia as a legal state with a welfare state concept. In a welfare state, the government has an absolute responsibility to promote public welfare and achieve social justice for all its citizens.

The rule of law refers to a state where governance is based on laws or regulations established by the authorities. In a material sense, the state actively participates in the well-being of its people, which is known as the welfare state or "*verzorgingsstaat*" or "*socialerechtsstaat*" (State of social law) (Mustafa, 1982).

The main characteristic of a welfare state is its obligation to pursue the general welfare of its citizens. This signifies a transition from a state where the government's role in interfering with the economic and social aspects of society was limited ("*staatsonthouding*") to a state of active involvement ("*staatsbemoeinis*"). The active involvement of the state and government in the economic and social life of society is aimed at achieving public welfare while also maintaining order and security ("*rust en order*") (Ridwan, 2006).

The welfare state is closely connected to social policy, which encompasses strategies and government initiatives aimed at improving the welfare of citizens. This includes social protection measures such as social security, which encompasses both social assistance and social insurance, as well as social safety nets (Elviandri, 2019).

In response to the Covid-19 pandemic, the government has implemented various additional social benefits. If managed effectively, these social benefits can pave the way for Indonesia to become a welfare state – a country that willingly allocates a significant budget for the well-being of its people. A welfare state promotes economic and social justice, preserving the dignity of its citizens and reducing the need for individuals to resort to begging during times of crisis.

Granting discretionary authority or *freiesermessen*to the government is a logical outcome of the welfare state concept. However, in a state governed by the rule of law, the exercise of discretionary authority cannot be without limits and should not solely rely on a power-based approach. Absolute discretion, which involves the creation of law, is not permissible. Legal

provisions governing formal requirements serve as the foundation for policy implementation and necessitate constraints on discretionary powers. This is because those who exercise discretion are ordinary individuals who are prone to making mistakes or errors.

Therefore, the Indonesian government has implemented various follow-up policies to address the challenges posed by Covid-19 and to continue supporting the welfare of the community. These policies include:

a. Presidential Decree No. 7 of 2020 on the Task Force for the Acceleration of the Handling of Corona Virus Disease 2019 (Covid-19).
b. Presidential Decree No. 9 of 2020 on the second amendment to Presidential Decree No. 7 of 2020 on the Task Force for the Acceleration of Handling Corona Virus Disease (Covid-19).
c. Presidential Decree No. 24 of 2021 on Determination of the Factual Status of the Corona Virus Disease 2019 (Covid-19) Pandemic in Indonesia.
d. Presidential Instruction No. 4 of 2020 on Refocusing of Activities, Budget Reallocation, and Procurement of Goods and Services in the Context of Accelerating Handling of Corona Virus Disease 2019 (Covid-19).
e. Minister of Home Affairs Regulation No. 20 of 2020 on Acceleration of Handling Covid-19 in Regional Governments.
f. Minister of Finance Regulation No. 19/PMK.07/2020 on Distribution and Use of General Allocation Funds and Regional Incentive Funds for Fiscal Year 2020 in the Context of Combating Covid-19.
g. Minister of Finance Regulation No. 23/PMK.03/2020 on Tax Incentives for Taxpayers Affected by the Corona Virus Outbreak.
h. Minister of Health Regulation No. 9 of 2020 on Guidelines for Restrictions in the Context of Accelerating the Handling of Covid-19.
i. Minister of Finance Decree No. 6/KM.7/2020 on Distribution of Physical Special Allocation Funds for the Health Sector in the Context of Prevention and/or Handling of Covid-19.
j. Minister of Home Affairs Instruction No. 1 of 2020 on Prevention of the Spread and Acceleration of Handling Covid-19 in Regional Governments.
k. Government Goods/Services Procurement Policy Institute (LKPP) Circular Letter No. 3 of 2020 on the Explanation of the Implementation of Goods/Services in the Context of Handling Covid-19.
l. Government Goods/Services Procurement Policy Institute (LKPP) Circular Letter No. 5 of 2020 on Procedures for Implementing Qualification/Clarification Proof and Negotiations in the Selection of Providers during the Covid-19 Outbreak.
m. Financial and Development Supervisory Agency (BPKP) Circular Letter No. SE- 6/KD2/2020 on Procedures for Review by Government Internal Supervision Officials on the Procurement of Goods/Services in the Context of Accelerating Handling of Covid-19.
n. Minister of Home Affairs Circular Letter No. 440/2622/SJ on the Establishment of a Task Force for the Acceleration of the Handling of the Regional Covid-19.
o. Ministry of Finance Circular Letter No. S-247/MK.07/2020 on Termination of the Procurement Process for Physical Goods/Services (DAK) for Fiscal Year 2020 (except in the fields of health and education).
p. Ministry of Home Affairs Circular No. 905/2622/SJ on Termination of the Procurement Process for Physical Goods/Services (DAK) for Fiscal Year 2020 (except in the fields of health and education).
q. Corruption Eradication Commission Circular Letter No. 8 of 2020 on the Use of the Budget for the Implementation of the Procurement of Goods/Services in the Context of Accelerating the Handling of Covid-19 Related to the Prevention of Corruption Crimes.

4. JUDICIAL ACTIVISM PARADIGM IN THE CONSTITUTIONAL COURT'S DECISIONS

Black's Law Dictionary defines judicial activism as: "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their

decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent (Garner, 2004).

Aziz Mushabber Ahmadi, who was the 26th Chief Justice of India, defines judicial activism as: "A necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern (Ahmad, 1996).

The practice of judicial activism has evolved over time and initially carried negative connotations, particularly when judges overstepped their authority. However, it gradually began to yield positive outcomes. Critics argue that judicial intervention can undermine the representative democratic system, leading to a judicial autocracy where courts dominate the executive and legislative branches in decision-making. The practice of judicial activism cannot be universally compared across countries, as it is influenced by variations in legal systems, state structures, and the evolving role of the judiciary. What may be deemed legitimate judicial activism in one society may lack legitimacy in another (French, 2010).

The application of judicial activism in Indonesia is prominently observed through the decisions of the Constitutional Court in its judicial reviews of the Constitution. Proponents of judicial activism, often consisting of human rights activists advocating for democracy, perceive it as a legal adaptation to social changes. They view judicial activismas a means to progressively implement the fundamental values of the Constitution by developing principles derived from constitutional texts and previous rulings (French, 2010).

The courage of Constitutional Court justices to grant a petitioner's request for conditional constitutional interpretations or the rephrasing of norms, phrases, or words has drawn criticism from some members of the academic community. They argue that the Constitutional Court has deviated from its doctrinal duty, which is solely to declare the unconstitutionality of a norm (negative legislators). From a positive standpoint, however, if the Constitutional Court interprets by modifying the existing norm to establish a new norm in order to safeguard the constitutional rights of the people without waiting for lengthy legislative revisions, the justices' actions can be seen as engaging in judicial activism. On the other hand, if the Court adheres to the original norm and refrains from making changes, it is regarded as practicing judicial restraint.

Bradley C. Canon categorizes six dimensions or degrees of judicial activism, namely (Canon, 1982):

(1) Majoritarianism: This dimension looks at the extent to which policies that have been taken and adopted based on the democratic process have been negated by the judicial process.
(2) Interpretive Stability: This dimension considers the extent to which previous decisions, doctrines, and interpretations of a court are changed.
(3) Interpretive Fidelity: The third dimension describes the extent to which the articles in the constitution are interpreted differently from what is clearly intended by the constitution makers or what is clearly read from the language used.
(4) Substance/Democratic Process Distinction: This dimension looks at the extent to which court decisions have made substantive policies compared to maintaining the results decided by a democratic political process.
(5) Specificity of Policy: The fifth dimension analyzes the extent to which a court decision forms its own policy that is contrary to the discretionary principle possessed by other institutions or individuals.
(6) Availability of an Alternate Policymaker: This final dimension considers the extent to which a court decision replaces important considerations made by other government agencies.

Furthermore, it is important to examine how the Constitutional Court engages in legal interpretation, interpretation of the Constitution and constitutional adjudication through its practice of judicial activism.

4.1. Decision No. 37/PUU-XVIII/2020

The Constitutional Court issued Decision No. 37/PUU-XVIII/2020 in response to a petition for a judicial review of Perpu No. 1 of 2020, which was issued on March 31, 2020. Perpu No. 1 of 2020 is a Government Regulation issued by the President based on the compelling urgency stipulated in Article 22 of the Constitution. The issuance of a Perpu falls under the discretionary authority of the

President to address concrete problems faced by the Government. Although Article 22 paragraph (2) of the Constitution requires the approval of the DPR at its next session for the Perpu to not be revoked, the DPR gave its approval, resulting in the enactment of the Perpu into Law No. 2 of 2020 on May 18, 2020.

In a democratic country such as Indonesia, the public has tended to be highly critical of government policies, especially those enacted during a pandemic situation that encompasses public health, national economic issues, and the state's financial system. The Perpu in question, No. 1 of 2020, generated both support and opposition, as evident from the numerous requests for formal and material review of the law. Even before its approval by the DPR, three review applications had already been submitted to the Constitutional Court. After the Perpu became Law No. 2 of 2020, eight additional requests for formal and material examinations were brought before the Constitutional Court.

These requests presented various arguments, highlighting concerns about the law's formation during complex conditions, which led to suspicions of high uncertainty due to abnormal state circumstances such as the Covid-19 pandemic being declared a public health emergency and a national disaster. Decision No. 37/2020 addresses the formal examination arguments put forth by the applicants, including the absence of the Regional Representative Council (DPD) in the law's discussion and the potential violation of people's sovereignty through decision-making in virtual meetings, which is seen as unconstitutional and could undermine the implementation of the people's mandate.

For these reasons, the Petitioners contended that the formation of Law No. 2 of 2020 was formally flawed. The reasons for the material review, among others, stated that the contents of Law 2/2020 are contrary to several fundamental principles. They argued that it violates the principles of the rule of law, popular sovereignty, the supervisory function, the budget function of the DPR, and the principle of managing state finances. According to the Petitioners, the determination of the widening of the deficit should not be carried out unilaterally by the government; instead, it should involve considerations from the DPR and DPD. They emphasized that even during an emergency, the power of the President must be balanced by the legislative power, which carries out extraordinary measures of legislative oversight. In particular, Article 27 paragraphs (1), (2), and (3) of the attachment of Law 2/2020 were deemed to be against the principle of the rule of law, the principle of managing state finances, the authority of the Audit Board (BPK), judicial power, the principle of equality before the law, and the principle of guarantees of protection and fair legal certainty. The Petitioners argued that these provisions provide immunity for state administrators, exempting them from lawsuits when implementing the provisions derived from the Perpu.

In response to the reasons for the formal review, the Constitutional Court considered the explanation of Perpu No. 1 of 2020 (in its attachment) and its connection to the requirements of compelling urgency, as specified in the Constitutional Court's decision No. 18/PUU-VII/2009. The Court concluded that Perpu No. 1 of 2020 meets the specified requirements, as stated in the Constitutional Court's decision No. 138. Therefore, the stipulation of Perpu No. 1 of 2020 becoming Law No. 2 of 2020 was deemed in accordance with the provisions of Article 22 of the Constitution. The Court further emphasized that during a pandemic, direct (face-to-face) public participation is limited due to constraints. As a result, conventional methods of participation are not relevant during the Covid-19 period. Based on these considerations, the Court concluded that the formal examination proposed by the Petitioners lacked a legal basis.

In response to the judicial review of Article 27, paragraphs (1), (2), and (3), the Court made the following considerations. Upon examining the tested norms, three issues related to constitutionality were identified, as follows: First, the costs incurred by the government and financial policies should not be considered as state losses. Second, individuals carrying out their duties in good faith and in accordance with the provisions of the legislation cannot be subject to civil or criminal prosecution. Third, these issues are not within the scope of lawsuits that can be brought before the State Administrative Court.

From this issue a *contrario*, it can be inferred that even if the utilization of costs from state finances for handling the Covid-19 pandemic is conducted without good faith and in violation of laws and regulations, the perpetrators who abuse their authority as stated in Article 17, paragraph (1), cannot be criminally charged due to the inclusion of the phrase "not a loss to the state". When connected to the provisions of Article 27, paragraph (2), which allows for both criminal and civil prosecution, the essential element that must be satisfied is the presence of "state losses" caused by the use of state finances in bad faith and in violation of laws and regulations. If we maintain that Article 27, paragraph (1), is related to the provisions of Article 27, paragraph (2), then Article 27 has the potential to grant immunity to the parties mentioned in Article 27, paragraph (2), thereby potentially resulting in impunity in law enforcement. This clearly contradicts the principle of the rule of law. The inclusion of the phrase "not a loss to the state" in Article 27, paragraph (1), is unquestionably in conflict with the principle of due process of law, which aims to ensure equal protection and creates uncertainty in law enforcement.

Therefore, the Constitutional Court holds the opinion that, for the sake of legal certainty, the norm of Article 27, paragraph (1), as an attachment to Law No. 2 of 2020, must be declared unconstitutional unless the phrase "not a loss to the state" is interpreted as "not a loss to the state as long as it is carried out in good faith and in accordance with statutory regulations." With this interpretation of Article 27, paragraph (1), attached to Law No. 2 of 2020, there will no longer be a constitutional conflict between Article 27, paragraph (1), and Article 27, paragraph (2), as legal action can be taken against legal subjects who commit crimes by misusing state finances, provided that such acts result in state losses and are carried out in bad faith, thereby violating laws and regulations.

Furthermore, the provisions of Article 27, paragraph (3), as an attachment to Law No. 2 of 2020, cannot be viewed independently from the provisions of Article 49 of Law No. 5 of 1986 on the State Administrative Court, which states that the court is not authorized to adjudicate State Administrative disputes when decisions are issued during times of war, danger, natural disasters, or other extraordinary and dangerous circumstances, as well as in urgent circumstances for the public interest, based on applicable laws and regulations.

Article 27, paragraph (3), of Law No. 2 of 2020 emphasizes that decisions made based on this regulation, which are specifically relevant to actions related to the Covid-19 pandemic, cannot be subjected to lawsuits in the State Administrative Court. However, according to the Court, actions related to various activities that endanger the national economy and/or the stability of the economic and financial system, especially state administrative decisions made in bad faith and in violation of laws and regulations, should still be subject to control and can be brought before the State Administrative Court. Failure to provide this control function has the potential to cause abuse of power and legal uncertainty.

Furthermore, it is important to emphasize the significance of Article 29 in the attachment to Law No. 2 of 2020, as it exclusively deals with the enforcement of the aforementioned law. This provision becomes particularly important when Law No. 2 of 2020 becomes invalid. Since this law nullifies or invalidates various statutory norms, it is essential to establish time restrictions within the said law to ensure the continued validity of statutory regulations. The integration of the state of emergency and the legal framework during times of crisis is necessary to convey to the public that an emergency situation will eventually come to an end while ensuring fair legal certainty. Therefore, the Court determined a time limit that corresponds to the stages of conditions or the pandemic's conclusion, based on the announcement of the President.

From the perspective of different justices, this decision was not reached unanimously. Three justices of the Constitutional Court expressed their rejection of the petition brought forth by the Petitioners. Their stance aligns with the views of the government and the DPR, asserting that in urgent situations or circumstances compelling action as stipulated in the Perpu, the designated officials mentioned in the aforementioned law should be exempt from corruption charges (as the costs incurred are not considered state losses), in accordance with the formulation of Article 27, paragraph

(1) of the aforementioned law. On the other hand, the opinion of the six justices who granted the applicant's request reflects the paradigm of judicial activism, falling within the sixth dimension of the Bradley C. Canon. This dimension emphasizes the availability of an alternative policy maker, wherein a decision is deemed to supplant a crucial consideration made by other government agencies (Faiz, 2016).

As mentioned in the previous section, a Perpu is a law created to address legal issues promptly when existing laws are inadequate and urgent situations require swift resolution. The government formulates regulations aimed at addressing public interest problems arising from compelling urgency. The subsequent process involves obtaining approval from the DPR, making the regulations within the Perpu lawmaking by both the government and the DPR. However, based on the majority of the Constitutional Court justices' considerations, in line with principles of criminal law, state administrative law, and others, while a Perpu entails discretionary legal action, it must not contradict the legal system (positive legal rules). Its usage should solely be intended for the benefit of the general public (Ridwan, 2006). This development is in accordance with the concept of the judicialization of politics, which refers to the reliance on courts and judges to address political matters in a non-political manner.31 This situation has encouraged judges to be more active in correcting public policies and at the same time provide oversight over the policies of other powers.

4.2. Decision No. 91/PUU-XVIII/2020

The Constitutional Court rendered this decision in response to a formal review application filed by the Petitioners on the grounds that Law No. 11 of 2020 on Job Creation (UU Cipta Kerja) did not meet the constitutional requirements for law formation as stipulated in the Constitution. The Petitioners argued that the omnibus law deviated from the prescribed format for organizing regulations outlined in Law No. 12 of 2011 on the formation of laws and regulations.

After conducting the trial, hearing statements from the parties, experts and witnesses, as well as reviewing the evidence presented, the Constitutional Court issued its considerations and announced the decision on November 25, 2021. The decision was not unanimous, with five out of the nine justices granting the applicant's request. They found that Law No. 11 of 2020 had formal flaws and declared it conditionally unconstitutional, allowing a two-year period for legislators to revise the law. During this time, the law would have limited effect according to the decision's ruling. Two justices meanwhile concluded that there were formal flaws but deemed the law conditionally constitutional, providing a two-year period for the government to make the necessary formal corrections. The law would remain valid as long as these corrections were made. Additionally, two other justices expressed the view that there was no proven formal flaw in the formation of the law, thus allowing the law to remain in effect while further material testing could be conducted. The Constitutional Court's decision aligned with the majority vote of the five constitutional justices, while the remaining four justices issued dissenting opinions in two versions.

The Job Creation Law addresses significant political and mega-political issues, as the government's objective is to simplify the process for the public to benefit from this omnibus law. By consolidating approximately 78 laws into one, namely the Job Creation Law, it becomes susceptible to criticism, wishes and public opinion. The justices of the Constitutional Court took into account the research and analysis results in their respective legal opinions on cases involving public interest, while also considering the impact of the implementing regulations of numerous copyright laws that have been issued and enforced. The Constitutional Court's decision intended for the law to be implemented on a limited basis while making necessary corrections, particularly addressing formal requirements, within a two-year period following the decision. If no improvements were made within two years, the law would automatically be deemed unconstitutional (permanently).

The decision made in this case reflects the judicial activism paradigm, which aligns with Canon's sixth dimension. Law No. 11 of 2020 on Job Creation carries significant weight as a legislative policy initiated by the government and the DPR. Nonetheless, the Constitutional Court declared the law conditionally unconstitutional, allowing a two-year period for revisions. Failure to revise the law within this timeframe will result in its permanent unconstitutionality.

4.3. Decision No. 66/PUU-XIX/2021

In this case, an Indonesian citizen submitted an application for the review of Article 222 of Law No. 7 of 2017 on General Elections. The article in question stipulates that presidential and vice-presidential candidate pairs are proposed by political parties or coalitions of political parties that are election participants fulfilling the requirements of holding at least 20% of the total number of seats in the DPR or receiving 25% of valid votes in the previous general election for DPR members.

As an Indonesian citizen with the right to vote, the applicant argued that he had the right to challenge the constitutionality of the provisions in Article 222. In his petition, he requested the declaration of the inconsistency of the formulation of Article 222 with the Constitution, claiming that it lacks binding legal force.

Regarding this case, there were differences of opinion among the nine justices of the Constitutional Court, which can be divided into three groups:

1. The first group, consisting of five justices, concluded that the Indonesian citizen petitioner did not have the legal standing to file the application. According to Decision No. 74/PUU-XVIII/2020, only political parties participating in the General Election could apply for a review of the Article 222 provision. Therefore, the petitioner's application could not be accepted. This opinion is in accordance with the Constitutional Court's decision-making rules, where the decision is based on the majority vote.
2. The second group, consisting of two justices, concluded that the petitioner had legal standing to file the petition. However, in the main body of the petition, they argued that the petition lacked legal grounds because the determination of the percentage requirement is a discretionary policy of the legislators. Therefore, they deemed the norm to be constitutional, in accordance with the dissenting opinion on Decision No. 74/PUU-XVIII/2020. As a result, they recommended rejecting the petitioner's application.
3. The third group, consisting of three justices, concluded that the petitioner had legal standing to review the norm. In the main body of the petition, they argued that the petitioner's request was grounded in law, leading them to recommend granting the petitioner's application. They stated that Article 222 of Law No. 7 of 2017 is unconstitutional or contrary to the Constitution and lacks binding legal force. This opinion aligns with the dissenting opinion of Decision No. 74/PUU-XVIII/2020, which also examined the norm of Article 222 of Law No. 7 of 2017.

This decision, along with previous similar decisions, has been criticized by various parties for potentially limiting the democratic space by reducing opportunities for politicalparties outside the election participants and members of the public with political rights to nominate presidential and vice-presidential candidates. The judicial activism paradigm observed in Decision No. 66/PUU-XIX/2021 and Decision No. 74/PUU-XVIII/2020 can be classified within the fourth dimension of Canon, which involves the distinction between substance and democratic process. It examines court decisions that make substantive policies in contrast to upholding outcomes determined through a democratic political process (Hirschl, 2008).

From the decisions of the Constitutional Court, which were not decided unanimously, the presence of freedom of opinion in the dissenting opinions and concurring opinions highlights the importance of analyzing the justices' activities, both individually and collectively, to determine the extent to which external and internal influences shape their decisions. This analysis helps determine whether these influences have a positive or negative impact on the nation and state.

CONCLUSION

Article 5, paragraph (1) of Law No. 48 of 2009 imposes an obligation on Constitutional Court justices to engage in legal discoveries (*rechtsvinding*) using various methods. In the course of carrying out this task, it is natural for justices to engage in judicial activism, particularly when the law is unclear or there is no existing law (*das sollen*) that governs a specific situation (*das sein*). These judicial activities are necessary because judges are prohibited from refusing to examine and hear cases. In situations where the law is absent or unclear, judges must fulfill their duty to make legal discoveries, resulting in the creation of new legal principles through judicial activism. The

reception of judicial activism can vary, as it may be positively embraced and contribute to a better societal understanding. However, there are instances when judicial activism carries a negative connotation, as it may be seen as deviating from the law or contradicting previous court decisions (judicial precedent). In cases where there is a difference of opinion among the justices, multiple possibilities can be considered as the justices' collective opinion in delivering a decision. This process also encompasses the internal activism of the justices. Hence, the deliberation process involving a minimum of three justices in the Supreme Court and all nine or a minimum of seven justices in the Constitutional Court plays a crucial role in shaping the final opinion expressed in the form of a court decision.

A state of emergency can be invoked under Article 12 of the Constitution, or in cases of "compelling exigency" as outlined in Article 22, paragraph (1) of the Constitution. As a result, Law No. 23 of 1959 specifies three types of emergencies: Civil Emergency, Martial Law, and War Emergency. The Covid-19 pandemic did not qualify as a Civil Emergency since it primarily involved a public health threat rather than a security threat. In response to the emergency situation, the government implemented various policies, including Presidential Decree No. 11 of 2020, which declared a Covid-19 Public Health Emergency, followed by Presidential Decree No. 12 of 2020, which declared the spread of Covid-19 as a Non-Natural National Disaster. Discretionary measures were implemented to ensure the utmost protection of the public in the face of the Covid-19 threat, as the safety of the people is of paramount importance (*salus populi supreme lex*). The state is obligated to fulfill its duties and responsibilities as a welfare state, as stated in the fourth paragraph of the Preamble to the Constitution, which includes the goal of improving public welfare. The government is granted discretionary authority, which allows state administrators to take legal actions that are not solely bound by the law. However, this freedom of action is limited by the objectives of the public interest and must be accountable. The President, as the chief executive, has taken various measures to safeguard the public interest. This is evident in the Preamble, which acknowledges the government's actions during emergencies. The implementation of these policies requires significant funding and immediate policy actions. Therefore, it becomes necessary to secure sources of financing, reallocate state revenue, and refocus budgetary funds (Assalmani, 2021). In response to this need, the President issued Perpu No. 1 of 2020, which was subsequently ratified as Law No. 2 of 2020 with the approval of the DPR. The considerations for this law include the "compelling exigency" outlined in Article 22, paragraph (1) of the Constitution.

The practice of judicial activism has evolved over time, initially carrying negative connotations, particularly when viewed as an abuse of judicial authority. Instances of judicial interference that could undermine the representative democratic system have given rise to concerns about judicial autocracy. However, there has been a gradual shift toward a more positive understanding of judicial activism, recognizing it as a legal adaptation to social change. This approach involves the development of principles derived from constitutional texts and previous court decisions, aimed at progressively implementing the fundamental values enshrined in the Constitution.

Furthermore, the brief analysis presented here of the three decisions rendered by the Constitutional Court illustrates the paradigm of judicial activism through the voting process, reflecting differences of opinion. These three laws, all laden with political, social, and economic implications, were all enacted during the Covid-19 pandemic. In Constitutional Court Decision No. 37/PUU-XVIII/2020, announced on October 28, 2021, the judicial activity regarding the review of Perpu No. 1/2020 was analyzed based on each justice's expressed opinion in their Legal Opinion.

In Decision No. 91/PUU-XVII/2020, pronounced on November 25, 2021, the Constitutional Court deliberated on the formal review of Law No. 11/2020 (the Job Creation Law). The majority opinion of five justices concluded that the law contains a formal flaw, granting the petitioners' request and declaring the establishment of Law No. 11 of 2020 as conditionally unconstitutional. This means that the law is limited in effect and given two years for amendment. On the other hand, two justices found the law to be formally flawed in its formation. In Decision No. 66/PUU-XIX/2021, delivered on February 24, 2022, the Constitutional Court examined the review of Article 222 of Law No. 7/2017. The paradigm of judicial activism in this case can be observed through three groups of

opinions. The first group, consisting of five judges, opined that the petitioner lacks legal standing, rendering the application inadmissible. The majority opinion of the judges formed the Constitutional Court's decision. This paradigm of judicial activism can be classified within the fourth dimension of Cannon's judicial activism, where the decision made a substantive policy compared to upholding the outcomes derived from a democratic political process.

This analysis of the Constitutional Court's decisions shows how the paradigm of judicial activism is evolving, as reflected in the varying opinions among the justices. These decisions demonstrate the Constitutional Court's active role in addressing political, social, and economic issues, particularly during the Covid-19 pandemic. The dynamic nature of judicial activism is evident in the Court's interpretation and application of the law, indicating its responsiveness to societal changes and the pursuit of justice.

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