

## *Judicial Activism on Indonesia's Constitutional Court Verdict on the Judicial Review of Job Creation Bills Number 6 of 2023*

Reyman Dhani Erwansyah<sup>1</sup> M. Rizqi Senja Virawan<sup>2</sup>

<sup>1</sup>Faculty of Law, Universitas Negeri Surabaya, Indonesia

<sup>2</sup>Faculty of Law, Universitas Airlangga, Indonesia

Corresponding Email: [reyman.21074@mhs.unesa.ac.id](mailto:reyman.21074@mhs.unesa.ac.id)

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### Abstract

A rule of law country is known by emphasizing the existence of separation of powers concept which is divided into the legislative, executive, and judicial powers or what is commonly referred to as judicial power. Constitutional courts are one of the manifestations of the judicial power with rights to keeping the dignity and supremacy of the constitution. Constitutional court's judges had the right to take any actions to ensure the supremacy of the constitution is upheld. Which the way is we knew as judicial activism. The practice of judicial activism commonly known and flourishes in countries with Anglo-Saxon traditions such as United States and United Kingdom. Judicial activism defined as a judicial behaviour where judges proactively interpret existing legal norms due to constitutional issues, especially in the context to uphold the constitutional supremacy. The methodology of this research is normative which is analysing how is applied in Indonesia particularly through the Indonesia's Constitutional Court Verdict 168/PUU-XXI/2023 regarding the judicial review of Job Creation Bills Number 6 of 2023.

Keywords: Judicial Activism, Constitutional Court, Judicial Supremacy

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### INTRODUCING

A state can be referred to a rule of law state if it upholds the principle of the supremacy of law, which signifies that the law is the highest authority in order to establish an orderly, ideal society and to provide a means of accessing justice. The supremacy of law means that the law serves as a guideline for resolving issues faced, both between individuals and between individuals and the state. The emphasis on the supremacy of law highlights the role of law as an instrument for citizens to access the law equally. This accessibility can ultimately provides citizens with a mechanism to resolve various problems. The rule of law emphasizes the exercise of power through the existence of law as a legitimacy that provides both freedom and limitations to ensure that the powers is not arbitrary. This is achieved through the separation of powers, or separation of powers, through the concept of trias politica, which divides the state power into three branches: legislative, executive, and judiciary. There are two fundamental characteristics that are consistently inherent in a rule of law state: equality before the law and the existence of constitutional rights, which are upheld by the judiciary and parliament, or the derivation of constitutional rights from the individual

rights proclaimed by courts of justice and parliament.<sup>1</sup> There are other features in state of law such as transparency and social control, the availability of means to achieve the state's objectives, and the limitation of state power.<sup>2</sup> Although there is a legislative power as the supreme authority responsible for enacting laws and regulations, the judicial power exists to oversee whether these laws are created with consideration for the aspirations and needs of citizens. This is because the legislature cannot act arbitrarily in making decisions as it is bound to administer justice through the laws it enacts.<sup>3</sup>

The paradigm of the rule of law is realized through the recognition of the consequences inherent in the exercise of power based on law. These consequences concern how the institutions responsible for wielding state power acknowledge the existence of normative limits on their authority, which are established through the enactment of positive law, such as legislation. Such limitations are fundamentally oriented towards ensuring the proper functioning of state governance, which upholds constitutional ethics, respects human rights, and fosters both political and legal stability.

Indonesia's Constitutional Court as a judicial powers or with other known as part of judicial supremacy are necessary to do some regulational judicial review because the laws and regulations that have been systematically formulated and established as positive law often provide interpretations that are not yet sufficiently clear. The dialectical development of constitutional norm interpretation by judges has led to the emergence of a monumental idea that has become a doctrine for judges in making decisions until this day. This doctrine is called judicial activism, which is often a topic of discussion. The study of judicial activism is not widely explored in Indonesia, although, upon closer examination, the practices of judges in issuing rulings can be considered a form of judicial activism. Indonesia's Constitutional Court, through Verdict No. 168/PUU-XXI/2023, ordered the legislature to create a new labor law that contains substance separate from Job Creation Bills Number 6 of 2023. The constitution serves as a critical foundation in the functioning of the state, especially in a system governed by the rule of law. Accordingly, a judicial institution is established to safeguard the adherence to the constitution.

The Omnibus Law on Job Creation emerged as a significant piece of legislation when it was introduced to the public in 2019 and subsequently enacted in 2020. In his second-term inauguration speech, the 7th President of the Republic of Indonesia, Joko Widodo, emphasized the need for a regulatory framework capable of integrating various legal aspects of the economy, with a specific focus on fostering investment. President Widodo highlighted that the existing legal provisions were often overlapping, which hindered investment inflows and economic growth. As a result, the Job Creation Law was formulated using the omnibus method to streamline and simplify the regulatory landscape.

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<sup>1</sup> Al Araf, *Pembubaran Ormas: Sejarah dan Politik-Hukum di Indonesia (1945-2018)*, (Jakarta: Kepustakaan Populer Gramedia, 2022)

<sup>2</sup> Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia* (Jakarta: Sinar Grafika, 2018)

<sup>3</sup> John Locke, *Two Treaties of Government* (London: Cambridge University Press, 1988)

The dynamics of labor in Indonesia present a significant area of inquiry. The workforce in Indonesia faces numerous challenges, with one of the primary issues being the frequent and inconsistent changes in labor regulations. Existing labor laws and regulations often fail to provide long-term solutions, effective legal protections, or satisfactory mechanisms for resolving labor disputes. Law, by its very nature, is dynamic—particularly when considering positive law, such as statutory legislation. A dynamic legal system continuously adapts to the evolving needs and realities of society. However, this also underscores the responsibility of lawmakers to create legal frameworks that can remain relevant and responsive to the changing demands of society over the long term, particularly in relation to labor. Legislation tends to become outdated when lawmakers do not comprehensively account for ongoing developments in both legal and social contexts.

## RESEARCH METHODS

The type of research used is normative legal research, which focuses literature, theory, and dogma as the objects of study, addressing the issues under investigation. Normative legal research also refers to a research process based on existing literature, often referred to as secondary legal materials.<sup>4</sup> The author utilizes legislation and all necessary library materials to analyze the topic being studied and to present answers to the legal issues in this research.

## ANALYSIS AND DISCUSSION

Judicial activism is the act of constitutional court judges in resolving cases that cannot be settled due to the complexity of the case, often arising from the lack of adequate formal law. Judicial activism is also the action of judges who use their judicial power to question, and even doubt, the policies made by non-judicial institutions, particularly the legislature. From this, judges critically determine the direction of the policy or how the interpretation of the norm should ideally accommodate the constitution.

There are indicators that can confirm the classification of a constitutional court judge's behavior as judicial activism. These indicators are not absolute measures agreed upon by legal scholars; rather, they can theoretically be applied and used as a lens to identify the manifestations of judicial activism. The indicators are decisions that strike down arguably constitutional actions of other branches, decisions that ignore precedent, decisions that "legislate from the bench", and decisions that depart from accepted interpretive methodology.<sup>5</sup> Indonesia's Constitutional Court Verdict No. 168/PUU-XXI/2023 can be considered a form of judicial activism due to several factors. These several factors, which will be outlined, serve as criteria for evaluating how a

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<sup>4</sup> Ishaq, *Metode Penelitian Hukum Penulisan Skripsi, Tesis, serta Disertasi* (Alfabeta: Bandung, 2020)

<sup>5</sup> Keenan D. Kmiec, "The Origin and Current Meanings of 'Judicial Activism'" *California Law Review* (2004): 92-94

judicial decision may reflect or embody judicial activism by constitutional court judges.

Otherwise, this is why the Constitutional Court of Indonesia's Decision Number 168/PUU-XXI/2023 is viewed as an instance of judicial activism. Indonesia's Constitutional Court of Indonesia further stated that the enactment of Law No. 6/2023 is a response by the government to comply with the mandate, "if no improvements are made within two (2) years from the pronouncement of this decision," when the Court ruled that the Omnibus Law on Job Creation would be deemed permanently unconstitutional unless revised within two years. In the Court's view, the introduction of Law No. 6/2023 must also accommodate several rulings regarding the review of Law No. 13/2003, with the objective of reinforcing labor protection and enhancing the role and welfare of workers. Indonesia's Constitutional Court further clarified that the Closing Provision in Article 184, paragraph (2) of Law No. 6/2023, which stipulates, "all regulations that serve as implementing provisions of Law No. 11 of 2020 on Job Creation shall remain in effect insofar as they do not conflict with this Government Regulation in Lieu of Law," suggests that the existing government regulations (PP) as implementing provisions are not in alignment with Law No. 6/2023. The Constitutional Court emphasized that the substance of these government regulations must align with the overarching principles of Law No. 6/2023, as mandated by Article 12 of Law No. 12/2011, which states, "The content of Government Regulations must encompass matters essential for the proper implementation of the Law. Indonesia's Constitutional Court legal reasoning in Decision Number 67/PUU-XI/2013, the Constitutional Court of Indonesia emphasized that the relationship between employers and workers is not socially and economically equal, but rather distinct. While workers are clearly in a weaker and more vulnerable social and economic position compared to employers, production would not be possible without workers, and workers cannot perform their duties without employers. Therefore, the Constitutional Court anticipates that the substantive changes to labor provisions in Law No. 6/2023 will preserve and ensure a fair balance in labor relations, where employers, as the socially and economically more powerful party, do not exploit their position to the detriment of workers' rights.

The constitutional review of the Job Creation Bill Number 6 of 2023 has garnered considerable attention, as the subject matter under review plays a critical role in labor regulation, which constitutes the legal framework for workers in Indonesia. The involvement of judges in effectuating justice and upholding constitutional principles is particularly evident in this context, where the review of the Job Creation Bill Number 6 of 2023 is poised to shape the future direction of labor law.

Judicial activism on Indonesia's Constitutional Court based on the examination of several articles of Law No. 6/2023 provided an alternative normative formulation by combining the old and new norms, which served as a reference for refining the interpretation of those articles. The old norms found in previous legislation and the new

norms in Job Creation Bills Number 6 of 2023 were unified and modified in an acculturative manner to form a cohesive set of norms. The Indonesia's Constitutional Court thus becomes an alternative policymaker, offering clear and firm normative clarity by blending and aligning the originality of the existing norms with the new norms resulting from the judicial review. Indonesia's Constitutional Court seeks to put the labor issues in a more focused manner by instrumentalizing them into a sectoral law. The mandate from the Indonesia's Constitutional Court to create a separate labor law, while incorporating the contents of Law No. 13/2003, the provisions of Law No. 6/2023, and the materials from several Constitutional Court decisions on labor issues, reflects the Constitutional Court's attention to making labor issues easier to understand. A sectoral law serves as one of the solutions to simplify the effort of understanding regulations, particularly in comprehending labor law itself. Labor issues are a crucial aspect as they directly impact the livelihoods of the population. When addressing labor, the focus is on workers who are often vulnerable to insufficient legal protection and a lack of welfare guarantees. Consequently, labor regulations must be designed to provide robust legal protection and ensure the well-being of workers.

Judicial activism was initially recognized in countries with an Anglo-Saxon or common law legal tradition, such as the United States, or in countries that operate with a single, primary judiciary responsible for conducting judicial reviews of legislation. In contrast to Indonesia, which has both the Supreme Court and the Constitutional Court, the United States relies solely on the Supreme Court, which also undertakes the task of reviewing the constitutionality of laws. It is from this context that the doctrine of judicial activism emerged and has evolved into its current form. Federal systems that centralize judicial authority in a single body are often regarded as the originators of judicial activism.

Judges such as John Marshall and Earl Warren are often characterized as 'judicial activists', a term used to describe judges who actively engage in judicial activism. Both Marshall and Warren were key figures in the United States judiciary, recognized for their contributions to this practice. A pivotal example of judicial activism is found in John Marshall's landmark ruling in *Marbury v. Madison* (1803). At the time, Chief Justice John Marshall, along with Associate Justices William Cushing, Samuel Chase, William Patterson, Bushrod Washington, and Alfred Moore, heard the petition of a prominent American businessman, William Marbury. Marbury sought a writ of mandamus, requesting that the U.S. Supreme Court compel James Madison, the U.S. Secretary of State, to deliver his commission for appointment as Justice of the Peace in Washington D.C., a position approved by President John Adams. However, Marbury had not received the commission. The position of Justice of the Peace, also known as The People's Court, was a local judicial office drawn from the community, typically filled by individuals from various professional backgrounds who received basic legal training.



These judges were responsible for handling minor criminal and civil cases, with an emphasis on reconciliation and restorative justice. The cases they typically handled included minor offenses such as violations of public order.

In this case, Marbury, as a prospective Justice of the Peace, claimed that Madison's refusal to deliver the commission was detrimental to his interests. Marbury's lawsuit was grounded in the Judiciary Act of 1789, which established the U.S. Supreme Court and defined its jurisdiction. However, instead of ruling solely on the merits of the case, the Supreme Court declared that the Judiciary Act of 1789—on which Marbury had based his petition—was unconstitutional. The Court, led by John Marshall, argued that the Act conflicted with Article III of the U.S. Constitution. Marbury sought a writ of mandamus compelling Madison to issue the commission. However, issuing such a writ would exceed the authority granted to the Supreme Court by Article III, resulting in a constitutional conflict. Marshall faced a critical decision: to uphold the Constitution by rejecting the Judiciary Act of 1789, which had conferred the Court with such powers, or to affirm Marbury's right, which would have been inconsistent with the Constitution. Marshall ultimately chose to uphold the supremacy of the Constitution, asserting that the Constitution was the highest and most fundamental law of the land. He further declared that, when a conflict arises between a legislative act and the Constitution, it is the judiciary's duty to uphold the Constitution. The decision in *Marbury v. Madison* (1803) is widely regarded as a foundational moment in the development of judicial review and is considered a concrete example of judicial activism in practice.

In the case of *Earl Warren*, the issue at hand involved a fundamental constitutional right: the right to education. This matter was brought before the United States District Court for the District of Kansas, where twelve African American families initiated a class action lawsuit against the Topeka Board of Education. At the time, racial segregation in public education was still entrenched in the United States, leading to discriminatory practices that adversely affected African American children. One notable example was the case of Oliver Brown, whose daughter was denied admission to a nearby white school and was instead forced to attend a distant school designated exclusively for black children. The plaintiffs contended that such racial segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The District Court of Kansas, however, upheld the precedent set in *Plessy v. Ferguson* (1896) and ruled that racial segregation in public education did not violate the Equal Protection Clause, asserting that the segregated facilities for black students could still be considered "equal" under the doctrine of separate but equal. Dissatisfied with the ruling, the plaintiffs, represented by Thurgood Marshall, a prominent attorney and civil rights activist with the National Association for the Advancement of Colored People (NAACP), appealed the decision to the U.S. Supreme Court.

Chief Justice Earl Warren, writing for the Court, overruled the District Court's decision and decisively held that racial segregation in public education was inherently dis-

criminatory and thus violated the Equal Protection Clause of the Fourteenth Amendment. Moreover, Warren's opinion mandated the desegregation of public education facilities across the United States. The Supreme Court's ruling in *Brown v. Board of Education* (1954) overturned the *Plessy v. Ferguson* (1896) decision, as well as other precedents, such as *Cumming v. Richmond County Board of Education* (1899) and *Berea College v. Kentucky* (1908). This groundbreaking decision triggered widespread opposition, particularly from white political leaders and the broader white populace who were accustomed to the existing social order. Many politicians and government officials, disturbed by the ruling, sought to resist its implementation.

The struggle to desegregate the American educational system encountered significant challenges, both from local citizens and state governments. In response to this resistance, the Supreme Court was faced with another pivotal case, *Cooper v. Aaron* (1958). In this case, William G. Cooper, representing the Little Rock School Board, brought a suit before the Court after the state government of Arkansas refused to implement the desegregation mandates outlined in *Brown v. Board of Education*. Earl Warren, reaffirming the *Brown* decision, asserted that Supreme Court rulings were binding on all states and governmental entities, without exception. Warren emphasized that no other branch of government—be it the federal judiciary, legislative bodies, or executive officials—had the authority to nullify or disregard the Court's decisions. The ruling in *Cooper v. Aaron* (1958) thus became another significant landmark in the jurisprudence of the United States, reinforcing the principle of judicial supremacy.

The concept of judicial activism is not understood uniformly or consistently. Judicial activism refers to the actions of judges who intentionally engage in the political and legal dynamics of a case assigned to them, whether prompted by external circumstances or their own initiative. Independent and impartial judges often issue rulings that are innovative, such as decisions that establish new legal norms or those that exceed the specific requests of the parties involved, similar to *ultra petita* rulings. However, the complexity surrounding the interpretation, application, and understanding of judicial activism is heightened by the fact that the term is also used to describe judicial behavior where personal preferences are applied without regard to existing legal frameworks. Judges who combine formal legal mechanisms with personal reasoning, or those who base their rulings on subjective interpretation—independent of legal formalities—are often categorized as engaging in judicial activism. Even judges who challenge or invalidate legislative norms are frequently labeled as judicial activists. This ambiguity arises from several factors: the diversity of constitutional structures and norms, the historical development that led to the formation of judicial institutions, and the broader societal perceptions of the judiciary.

## CONCLUSION

The judicial activism carried out by the Indonesia's Constitutional Court Verdict Number 168/PUU-XXI/2023 showing the Court's seriousness as the sole interpreter of the constitution, committed to upholding the objectives of the constitution which has cautioned lawmakers to include various essential aspects of social and state life within a democratic rule of law. Indonesia's Constitutional Court Verdict Number 168/PUU-XXI/2023, resulting from the Indonesia's Constitutional Court's judicial activism approach, raised the urgency of creating a separate sectoral labor law, distinct from Law No. 6/2023. A sectoral law aids the public in maximizing attention and understanding of legal regulations in relation to a specific issue. It becomes a tool that facilitates citizens in comprehending the regulations that bind them.

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