pengadilan menjadi wasit dengan berpedoman kepada ketentuan-ketentuan konstitusi.

B. *Judicial Activism – Judicial Review*

Menurut Satya Brata Sinha, *judicial activism is nothing but exceeding the constitutional brief of interpreting and applying the law as it is, and taking over executive and legislative functions in violation of the constitutional scheme of the separation of powers.*[294] Secara filosofis, *judicial activism* berarti "*as a philosophy of judicial decision making where by judges allow there personal views about public policy, among other factors, to guide their decisions, usu. with the suggestions that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedents*."[295] Singkatnya, mengutip pendapat Cass Sunstein dan Paul Gewitz, suatu *judicial activism* merupakan "*as any judicial decision to strike down legislative acts.*"[296] Tetapi J.S. Verma, mantan Ketua Mahkamah Agung India, menolak definisi yang membatasi *judicial activism* hanya mencakup "*stricke down legislative acts."* Menurutnya, *judicial activism* merupakan *the process by which new juristic principles are evolved to update the existing law, to bring it in conformity with the current needs of the society, and, thereby, to sub serve the constitutional purpose of advancing public interest under the Rule of Law*.[297]

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[294] Satya Brata Sinha, "Constitutionality of Judicial Activism", Paper Presented during the International Conference and Showcase on Judicial Reforms held at the Shangri-la Hotel, Makati City, Philippines on 28-30 November 2005, hlm. 3.

[295] *Ibid.*

[296] *Ibid.*, hlm. 4.

[297] J.S. Verma, 2000, *New Dimensions of Justice*, Universal Law Publishing Co. Pvt. Ltd., hlm. 7.

Dalam pandangan yang skeptis, *Judicial Review* harus diserang karena memberikan " *"judges' authority to strike down legislation in the name of individual rights*."[298] Alasannya karena "*The people should decide their own fate through voting and majority rule, with everyone's vote counting equally. When judges decide the fate of the people, the judges' votes count for everything and the people's for nothing*."[299] Selanjutnya, ada 2 problem terhadap *Judicial Review,* yaitu problem demokratik dan problem kapasitas intepretasi. Dalam problem yang pertama mengandung pengertian "*the fact that the legal norms being judicially enforced have nondemocratic provenances*." [300] Kemudian, dalam problem yang kedua, mengandung pemahaman "*the fact that it is the courts rather than some other institution that is interpreting the entrenched legal norms.*"[301] Dari kritik terhadap *Judicial Review* tersebut menunjukkan bahwa "*surely not everyone accepts the legitimacy of judicial review*."[302]

Hal tersebut terjadi karena dalam praktik timbul asumsi bahwa "*it is not a case against constitutional entrenchment but only a case against judicial interpretation of the entrenchment*."[303] Padahal, *Judicial Review* dalam pencapaiannya hingga dewasa ini "*in short, rests on both the short-term calculations of political*

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[298] Jeremy Waldron, "A Rights-Based Critique of Constitutional rights," *Oxford Journal of Legal Studies*, Vol. 13, 1993, hlm. 18.

[299] Larry Alexander, "What is the Problem of Judicial Review?", Legal Studies Research Paper Series Research Paper No. 07-03 September 2005, hlm. 1.

[300] *Ibid.*

[301] *Ibid.*

[302] Dale Smith, "Disagreeing with Waldron: Waldron on Law and Disagreement," *Res Publica,* Vol. 7, 2001, hlm. 57.

[303] Thomas Christiano, "Waldron on Law and Disagreement," *Law & Philosophy*, Vol. 19, 2000, hlm. 513.

actors and on long-term social changes."[304] Salah satu penyebab yang mendorong penerimaan *Judicial Review* adalah "*One consequence of this global transformation is that some democratic diversity has been lost. Parliamentary supremacy is now a critically endangered constitutional species as many of the last holdouts succumbed to judicial review*."[305] Sehingga yang terjadi adalah "*demise of parliamentary supremacy*" ("kematian supremasi parlemen").

Atas cabaran terhadap supremasi parlemen yang mendorong *Judicial Review*, maka dalam pandangan yang optimistik, peran pengadilan "*look at the experience of newer, transitional democracies to argue that judicial review has an important democratic payoff*." [306] Sementara dalam kubu yang pesimis, "*constitutional courts weaken democracy by looking primarily at the record of older, consolidated democracies.*"[307] Tetapi kedua kubu ini sesungguhnya "*do a particularly good job of elucidating*

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[304] Mark Tushnet, "The Possibilities of Comparative Constitutional Law", *Yale Law Journal*, Vol. 108, 1999, hlm. 1225.

[305] Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries", *Wake Forest Law Review*, Vol. 38, 2003, hlm. 813-815.

[306] Ken I. Kersch, "The New Legal Transnationalism, The Globalized Judiciary and the Rule of Law", *Washington University of Global Studies Law Review*, Vol. 4, 2005, hlm. 345 dan 351–353. Lihat juga argumen yang mengatakan bahwa pengadilan menjalankan peran yang heroik dalam masa transisi untuk menegakkan keadilan konstitusional dalam Mauro Cappelletti, "Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice' ", *Catholic University Law Review*, Vol. 35, 1985, hlm.191.

Demikian juga argumen yang mengatakan "*The nations of continental Europe drew on their domestic experience of tyranny and oppression unchecked by law to conclude that constitutions need judicial machinery to be made effective*." Baca: Lorraine E. Weinrib, "The Postwar Paradigm and American Exceptionalism", *The Migration of Constitutional Ideas*, Vol. 84, hlm. 98.

[307] *Ibid.*

the complex relationship between judicial review and the construction or erosion of the societal attitudes that sustain democracy for the long haul."[308]

Bruce Ackerman, dalam penelitiannya terhadap konstitusionalisme Jerman, termasuk dalam kelompok optimistik. Dia mengatakan bahwa "*that the success of the German Constitutional Court flows from the sociological fact that the Basic Law has become a central symbol of the nation's break with its Nazi past*."[309] Herman Schwartz menambahkan bahwa dalam peran di era transisi tersebut "*that while constitutional courts cannot implement liberty, they can help to maintain, nurture, and perhaps even to strengthen it.*"[310]

Sementara itu dalam kelompok pesimistis, diwakili oleh pandangan Jeremy Waldron, Ran Hirschl, serta Larry Kramer dan Mark Tushnet. Menurut Jeremy Waldron, "*that legislatures can do as good a job as courts in effectuating rights by examining parliamentary debates on liberalizing abortion, legalizing adult homosexual conduct, and abolishing capital punishment in the United Kingdom, Canada, Australia, and New Zealand.*"[311] Pada sisi lain, Ran Hirschl mengungkapkan bahwa "*that polities may have vigorous judicial protection of rights yet suffer from income inequality as its influence on promoting progressive notions of distributive justice has been exaggerated*."[312] Kemudian, Larry

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[308] Miguel Schor, "Mapping Comparative Judicial Review", *Washington University Global Legal Studies Law Review*, Vol. 7, 2008, hlm. 271.

[309] Bruce Ackerman, "The Rise of World Constitutionalism", *Virginia Law Review*, Vol. 83, 1997, hlm. 778.

[310] Lihat dalam Louis Favoreu, "Constitutional Review in Europe", dalam Louis Henkin dan Albert J. Rosenthal eds., 1989, *Constitutionalism and Rights the Influence of the United States Constitution Abroad*, hlm. 58-59.

[311] Jeremy Waldron, "The Core of the Case Against Judicial Review", *Yale Law* Journal, Vol. 115, 2006, hlm. 1346.

[312] Dalam Miguel Schor, *op.cit.*, hlm. 272.

Kramer dan Mark Tushnet menambahkan *that vigorous judicial review in the United States has undermined the societal attitudes needed to sustain democracy.*"[313]

Figur *Judicial Review* dalam cabaran dan caturan teoritis di atas perlu diungkapkan kembali, sehubungan dengan pengkajian pengujian Perpu oleh Mahkamah Konstitusi. Tak disadari bahwa telah terjadi persaingan antara Mahkamah Konstitusi dengan DPR dalam meninjau suatu Perpu yang ditetapkan sepihak oleh Presiden. Artinya, Mahkamah Konstitusi merasa berwenang untuk menguji Perpu karena di samping untuk mengontrol *unitary executive* Presiden, juga untuk mencegah jangan sampai substansi Perpu bertentangan dengan UUD 1945. Bagaimanapun Mahkamah Konstitusi berpijak bahwa ada kemungkinan Perpu berlawanan dengan konstitusi saat isinya justru bertentangan dengan kaidah-kaidah dalam UUD 1945. Artinya, pengujian Perpu akan bersaing dalam 3 arena: Presiden, DPR, dan Mahkamah Konstitusi.

Dalam doktrin supremasi parlemen seperti diyakini kubu pesimistik *Judicial Review* di atas, tentu kenyataan itu tidak diterima, bahkan dianggap bertentangan dengan prinsip pemisahan kekuasaan. Argumennya, karena Perpu lahir dari kebutuhan administratif dalam situasi kegentingan yang memaksa, yang muncul dari perilaku Presiden, maka hal tersebut berada dalam ranah pengawasan penyelenggaraan pemerintahan sehingga menjadi *domain* DPR. Apalagi—walaupun dalam kajian ini tidak disetujui—Mahkamah Konstitusi menganggap detail prosedur Undang-Undang harus dipandang sebagai prosedur legislasi Perpu, yang dalam konteks ini merupakan hubungan antara Presiden dengan DPR.

Kemudian, dari sudut Mahkamah Konstitusi, perilaku Presiden harus diawasi termasuk dalam melaksanakan hak menetapkan Perpu, karena "tidak boleh ada dalam satu detikpun, peraturan yang bertentangan dalam UUD 1945." Secara teoritis,

[313] *Ibid.*, hlm. 273.

hal ini dapat dibenarkan karena dalam pengalaman Amerika Serikat misalnya, kendati klausula *state of emergency* tidak ditentukan dalam konstitusi, "*in a crisis the right of habeas corpus can be suspended and Presidents have de facto increased their powers in times of war or eme*rgency."[314] Justifikasi yang mengemuka sehubungan dengan masalah ini adalah "*In times of crisis there is an unmistakable tendency to augment and extend the powers of the executive branch*." [315] Bahkan seperti diungkapkan oleh Eric A. Posner dan Adrian Vermeule, *"[w]hen national emergencies strike, the executive acts, Congress acquiesces, and courts defer*."[316] Bagaimanapun, dalam kerangka makro, "*the use of emergency powers (and their continued extension) is an exceedingly rational position, and is grounded in the assumption that there are evident benefits to the state in choosing to utilize extra-ordinary power*s."[317] Akan tetapi, "*there are substantial dangers to the centralization of crisis powers in times of emergency*."[318]

Berkaitan dengan itu, maka "*judicial review of emergency and national-security measures can and has established important constraints on the exercise of emergency powers and*

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[314] Samuel Issacharoff and Richard H. Pilides, "Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach To Rights During Wartime", *International Journal of Constitutional Law,* Vol. 2, 2004, hlm. 296.

[315] Fionnuala Ni Aolain dan Oren Gross, "A Skeptical View of Deference to the Executive in Times of Crisis", *Isarel Law Review,* Vol. 41, 2008, hlm. 544.

[316] Thomas P. Crocker, "Book Review: Torture, with Apologies:Terror in the Balance: Security, Liberty, and the Courts. By Eric A. Posner and Adrian Vermeule" , *Texas Law Review,* Vol. 86, 2008, hlm. 569.

[317] Cass Sunstein, "National Security, Liberty and the D.C. Circuit", *George Washington Law Reviwe,* Vol. 73, 2005, hlm. 693.

[318] Fionnuala Ni Aolain dan Oren Gross, *loc.cit.*

has restricted the scope of what is acceptable in future emergencies."[319] Hal ini disebabkan "*because courts, unlike the political branches or the political culture more generally, must explain their reasons in a formal manner that then has precedential authority in future disputes, judicial decisions offer an opportunity to set the terms of the next crisis, even if they often come too late to be of much assistance in the immediate term*."[320]

Dalam perkara pengujian Perpu, Mahkamah Konstitusi mencoba untuk melakukan apa yang dinamakan sebagai *judicial balancing.* Pada kajian peradilan yang berkembang di Amerika Serikat dan Inggris, yang digunakan adalah istilah *proportionality test.* Menurut Michel Rosenfeld, "*Proportionality and balancing are not synonymous, but they seem to overlap significantly, particularly since balancing proper forms part of proportionality tests*."[321]

Kaidah "kegentingan yang memaksa" (*time of stress*) tidak sama dengan pengertian krisis (*a crisis*) atau situasi normal (*time of ordinary).* Menurut Bruce Ackerman, "*In the context of a crisis, be it military, economic, social or natural, the head of government may be entitled to proclaim exceptional powers and to suspend constitutional rights, including political rights. In an acute crisis, the polity is singularly focused on survival and all other political concerns and objectives recede into the background*." [322] Sementara itu, "*in ordinary times, the polity can readily absorb the full impact of the give and take of everyday politics, and*

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[319] David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis", *Michigan Law Review*, Vol. 101, 2004.

[320] *Ibid.*, hlm. 2566.

[321] Michel Rosenfeld, "Judicial Balancing in Times of Stress: Comparing Diverse Aprroaches to the War of Terror", *Jacob Burns Institute for Advanced Legal Studies Working Paper No. 119*, 2005, hlm. 14.

[322] Bruce Ackerman, "The Emergency Constitution", *Yale Law Journal*, Vol. 113, 2004, hlm.1029 dan 1040.

constitutional rights ought to be protected to their fullest possible extent."[323]

Untuk mengatasi "kegentingan yang memaksa" (*time of stress*), maka "*the legislature and/or the executive power is responsible for devising measures designed to cope with the relevant threat*." [324] Kemudian, pada posisi yang lain, "*The judiciary, in turn, is charged with determining whether implementation of such measures is compatible with maintaining a suitable equilibrium*." [325] Dalam konteks ini, maka "*Judicial balancing would work best and be most transparent if the social goods subjected to balancing were both quantifiable and comparable*."[326]

Kesemua itu menggambarkan tradisi *British Constitution,* yang "*characterized by a balance of power between the legislature and the executive, and later, the judiciary*."[327] Tradisi ini, yang kemudian ditiru di Amerika Serikat, mengandung kearifan "*the total union of executive and legislative power would produce tyranny,but the partial separation of powers of the branches, and the resulting system of checks and balances between the King's prerogatives and Parliament's taxing and legislative powers, guaranteed liberty and prosperity*." [328] Gagasan *British Constitution* ini dalam realisasinya di negara Amerika Serikat menunjukkan bahwa "*The U.S. Constitution adopted*

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[323] *Ibid.*

[324] Michel Rosenfeld, *op.cit.*, hlm. 15.

[325] *Ibid.*

[326] *Ibid.*, hlm. 16.

[327] Robert J. Reinstein, "The Limit of Executive Power", *American University Law Review*, Vol. 59, 2009, hlm. 287.

[328] Curtis A. Bradley dan Martin S. Flaherty, "Executive Power Essentialism and Foreign Affairs", *Michigan Law Review*, Vol. 102, 2004, hlm. 545.

supplementary measures to contain presidential power by including numerous proscriptions from English laws."[329] Dalam hal ini, "*At least sixteen of these proscriptions are encoded in the U.S. Constitution, some particularly directed at the President and others broadened as guarantees against the entire government.*"[330]

Basis pemikiran konfigurasi kekuasaan Presiden menurut konstitusi Amerika Serikat menurut Steven G. Calabresi yaitu *"clearly reject[ing] executive tyranny of the kind exercised by George III . . . but . . . favor[ing] a president who was a forceful but constitutionally constrained executive like William III*."[331] Dalam tradisi Amerika Serikat, ketentuan Pasal 2 Konstitusi yang mengatakan "*The executive Power shall be vested in a President of the United States....*", yang dikenal sebagai *Vested Clause*, telah berkembang sedemikian rupa sehingga mencakup "*to execute a legislative scheme, and thereby change domestic law, even in the absence of congressional authorization to do so.*"[332] Cakupan yang demikian dipandang "*necessarily possesses in deciding how and when to execute the laws*."[333]

Tidak berlebihan bahwa dari sudut pandang tersebut, maka kekuasaan Presiden berwatak diktator, di mana "*Dictatorships are what democracies are not, the very opposite of representative*

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[329] David Gray Adler, "George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs", UCLA *Journal of International Law*, Vol. 12, 2007, hlm. 75.

[330] Lihat dalam Saikrishna Prakash, "The Essential Meaning of Executive Power", *op.cit.*, hlm. 717–718.

[331] Steven G. Calabresi, "The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman", *Chicago Law Review*, Vol. 73, hlm. 469.

[332] Jack Goldsmith & John F. Manning, "The President's Completion Power", *Yale Law Journal*, Vol.115, 2006, hlm. 2282.

[333] *Ibid.*, hlm. 2293-2295.

government under a constitution." [334] Dalam hal ini, "*dictatorship—the power of government officials to act on important matters free of accountability or timely legal checks—is not the opposite of democracy*." [335] Bukan hanya di Amerika Serikat, tetapi selama Perang Dunia II, banyak label yang diberikan sebagai *dictatorship* guna menyebut penyelenggaraan pemerintahan di masa itu seperti Prancis, Inggris, dan Jerman.[336] Diuraikan bahwa penyebutan *dictatorship* oleh karena "*the power conferred on the dictator combines elements of judicial, legislative, and executive power*."[337]

Jika dikaitkan dengan kekuasaan Presiden dalam situasi negara dalam keadaan darurat (*state of emergency*) watak pemerintahan semakin terkonsentrasi kepada eksekutif dan hal lain disebabkan karena "*emergencies can take a variety of forms, both foreign and domestic*."[338] Hal ini dikarenakan *"the emergency*

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[334] Miguel Schor, "Constitutionalism Through the Looking Glass of Latin America", *Texas International Law Journal*, Vol.41, 2006, hlm.6. Sehubungan dengan hal ini menarik pendapat yang disampaikan oleh J.M. Balkin, *"The term "dictatorship," after all, began as a special constitutional office of the Roman Republic, granting a single person extraordinary emergency powers for a limited period of time.* Lihat selengkapnya dalam J.M. Balkin, "Nested Oppositions", *Yale Law Journal*, Vol. 99, 1990, hlm. 1669.

[335] Jack Balkin, "Constitutional Dictatorship: Its Dangers and Its Design", *Minnesota Law Review*, Vol. 90, 2010, hlm. 1791.

[336] [*S]tudied the responses of France, Great Britain, Germany, the United States, and ancient Rome to emergencies, real and perceived, including those generated by the Great Depression and World War II*. Lihat *Ibid.*, hlm. 1798.

[337] *Ibid.*, hlm. 1805.

[338] *Ibid.*, hlm. 1811.

Di Jerman misalnya, "*Most of the more than 250 presidential suspensions of rights under the notorious Article 48 of the Weimar Constitution concerned economic matters; government officials repeatedly turned to the mechanisms of emergency power as Germany struggled to respond to the*

norms are said to be characterised by the fact that they are applicable to a limited set of addresses."[339] Penafsiran semacam ini dikatakan *"has been to radically alter key aspects of US constitutional law so as to expand executive power to the detriment of other institutions and decision-making process*."[340]

Oleh karena dalam konstitusi Amerika Serikat tidak diatur bagaimana batas dan substansi kewenangan Presiden dalam situasi darurat [341], maka dalam praktik dikembangkan apa yang

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economic and social difficulties created by its defeat in World War I, the Versailles treaty, and a society bitterly divided between left and right, Communists and Nazis." Lihat: András Jakab, "German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse", *German Law Journal*, Vol. 7, 2005, hlm. 455-457.

Contoh lain, Presiden Meksiko, Felipe Calderón, yang *"placed the entire country under a state of emergency because of the potential swine flu pandemic."* Lihat: Thomas Black, Mexico's Calderon Declares Emergency Amid Swine Flu Outbreak, BLOOMBERG, http://www.bloomberg.com/apps/news?pid=20670001&sid=aEsNownABJ6Q, diakses 26 April 2011.

Kemudian, menurut Ackerman notes that Latin America has a "long history of using states of emergency as ploys to return to authoritarian-ism." Lihat: John M. Ackerman, An Outbreak of Opportunism: Mexico's President Is Trying to Use the Swine Flu to Consolidate His Power, SLATE, http://www.slate.com/id/2217017/, diakses 26 April 2011.

[339] Scott Shane, 'Book cites secret Red Cross report of CIA torture of Qaeda captives', International Herald Tribune, 11 June 2008, available at http://www.iht.com/articles/2008/07/11/america/11detain.php, diakses 26 April 2011.

[340] 'The Green Light', entry in the blog published by Harper's, available at http://harpers.org/archive/2008/04/hbc-90002779, 26 April 2011.

[341] Hampir semua konstitusi sebelum abad ke-21 tidak mencantumkan ketentuan mengenai *state of emergency*. Konstitusi Amerika Serikat, misalnya, sejak dibentuk tidak mengatur mengenai hal tersebut hingga terjadi Perubahan Ketiga, yang menegaskan bahwa dalam situasi perang, Presiden tidak dapat bertindak unilateral dengan meninggalkan Konggres, tetapi pengadilan dapat menunda berlakunya ketentuan hukum acara pidana. Lihat: Kim Lane Scheppele,

dinamakan "*constitutional construction*." Mekanisme ini "*involves the implementation of the Constitution's vague clauses and abstract principles—not to mention its silences—through the creation and application of precedents (both judicial and nonjudicial), congressional enactments, administrative regulations, and building of institutions with their own rules and practices*."[342]

Dengan demikian, dalam situasi tidak normal, pengadilan dapat tetap melakun *review* terhadap tindakan eksekutif. Dalam pandangan Mahkamah Konstitusi, "Pembuatan Perpu memang di tangan Presiden yang artinya tergantung kepada penilaian subjektif Presiden, namun demikian tidak berarti bahwa secara absolut tergantung kepada penilaian subjektif Presiden karena sebagaimana telah diuraikan di atas penilaian subjektif Presiden tersebut harus didasarkan kepada keadaan yang objektif yaitu adanya tiga syarat sebagai parameter adanya kegentingan yang memaksa." Untuk itu, Mahkamah Konstitusi menafsirkan bahwa "kegentingan yang memaksa" dalam Pasal 22 harus ditafsirkan sebagai (i) adanya keadaan yaitu kebutuhan mendesak untuk menyelesaikan masalah hukum secara cepat berdasarkan Undang-Undang; (ii) Undang-Undang yang dibutuhkan tersebut belum ada sehingga terjadi kekosongan hukum,atau ada Undang-Undang tetapi tidak memadai; dan (iii) kekosongan hukum tersebut tidak

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"Law in a Time of Emergency: States of Exception and the Temptations of 9/11", *Journal of Constitutional Law*, Vol. 6, 2004, hlm. 6.

Fenomena serupa dijumpai di kawasan Eropa, di mana "*In much of the nineteenth century in Europe, however, even when constitutions did try to establish separation of powers and respect for the rights of citizens, they typically broke down under stress, and had to be rewritten when the crises were over. The invocation of emergency provisions typically spelled the end of the constitutional order itself. The periods between breakdown and reconstruction were simply non-constitutional moments.*", *ibid.*, hlm. 7.

[342] Jack M. Balkin, "Framework Originalism and the Living Constitution", *New York University Law Review*, Vol. 103, 2009, hlm. 566.

dapat diatasi dengan cara membuat Undang-Undang secara prosedur biasa karena akan memerlukan waktu yang cukup lama sedangkan keadaan yang mendesak tersebut perlu kepastian untuk diselesaikan."

Perkembangan aktivitas Mahkamah Agung di India semakin disadari prinsip pragmatis dalam rangka "the *guarantee of Fundamental Rights and the mandate of the Directive Principles in the Constitution of India*."[343] Selanjutnya dikatakan bahwa, "*The basic reason for the growth of judicial activism in India is the tendency of Courts to control the functioning of Government, when it exceeds its power and to protect any abuse or misuse of power by government agencies. It is inevitable reaction to check misuse of public power*."[344] Seperti juga dalam kasus *Kurokawa v. Komisi Pemilu Chiba* di Jepang, Mahkamah Agung India secara atraktif menggunakan *judicial activism* dalam proses pemilihan umum di bawah pemerintah yang tangguh seperti Perdana Menteri Indira Gandhi.[345] Ketika terjadi perselisihan mengenai bagaimanakah pengisian jabatan Komisi Vigilance yang bertugas untuk memberantas korupsi, maka putusan amat menentukan posisi badan ini berhadapan dengan eksekutif.[346] Bahkan, *judicial activism* menjadi sarana para hakim untuk menolak penerapan ajaran hukum alam yang dikitrik sebagai "*a distillate process*".[347]

Perkembangan fungsi Mahkamah Agung India itu, hampir serupa dengan yang terjadi di Jepang, berlangsung secara

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[343] *Ibid.*

[344] *Ibid.*, hlm. 6.

[345] Putusan Mahkamah Agung dalam Indira Gandhi v. Raj Narain (1975).

[346] Putusan Mahkamah Agung dalam Vineet Narain v. India (1998).

[347] Putusan Mahkamah Agung dalam Maneka Gandhi v. Union of India (1978).

berangsur-angsur. Hampir dalam kurun waktu 1950-1975, tidak dijumpai *judicial activism* serupa tidak pernah dijumpai karena sifat konservatif para hakim dan terjerat dalam teks-teks konstitusi. Hanya sedikit kasus sehubungan dengan hak kepemilikan yang ditangani karena hak itu terlempar dari daftar hak asasi menurut konstitusi dan untuk kasus-kasus kebebasan sipil, Mahkamah Agung secara ekstrem menghindari untuk berbuat lebih jauh. Pengadilan tak pernah berusaha untuk merebut kewenangan dalam menafsirkan konstitusi. Baru menjelang tahun 1975, Mahkamah Agung mulai tegas dalam pengujian konstitusional (*constitutional review*) Undang-Undang. Dimulai dalam kasus *Keshvananda* [348] yang menyatakan bahwa dalam membentuk Undang-Undang Parlemen tidak boleh membatasi hak asasi manusia "*but also ruled that there are implied limits which could not be used to alter the basic structure of the Constitution*." Kemudian dalam kasus Basheshwar Nath, Mahkamah Agung dengan jeli menafsirkan mengenai makna *Rule of Law* sebagai suatu "*an essential feature of the Constitution of India; and absolute discretion in matters affecting the rights of the citizens is repugnant in the Rule of Law.*"[349] Seterusnya dalam putusannya, Mahkamah Agung India semakin sering menafsirkan pengertian *Rule of Law* yang mencakup *life, liberty,* dan *law*,[350] *absolute power in any individual is anti democratic*[351], hak atas peradilan yang cepat[352], larangan mempekerjakan anak karena

[348] Putusan Mahkamah Agung India (1973).

[349] Putusan Mahkamah Agung India (1967).

[350] Smt. Maneka Gandhi v.Union of India, Mahkamah Agung India (1978).

[351] Kumari Shrilekha Vidyarthi etc. v.State of Uttar Pradesh & ors. Putusan Mahkamah Agung India (1991).

[352] Hussainara Khatoon v.State of Bihar, Putusan Mahkamah Agung India (1979).

melanggar hak asasi manusia[353], dan *public trust* sebagai syarat pemerintah untuk menegakkan hak asasi manusia.[354]

Posisi Mahkamah Agung Jepang serupa dengan Mahkamah Agung Norwegia ((*Høyesterett*). Sekalipun dalam Konstitusi atau *Grunnlov* (1814) tidak ada aturan mengenai wewenang Mahkamah Agung dalam menafsirkan konstitusi, akan tetapi sepanjang praktik ketatanegaraan menurut "*constitutional customary law*" wewenang itu dianggap terlembaga.[355] Sekalipun demikian, "*cases to the Høyesterett come from the lower courts and these may concern different kinds of affairs, for example criminal cases or compensation cases. It should be noticed that, in fact, very few cases concern constitutional matters.*"[356]

C. Pengujian Konstitusional (*Constitutional Review*)

Sebagai salah satu konsep yang diterima dalam gerak pengorganisasian kekuasaan negara, Negara Hukum [357] sering

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[353] M.C.Mehta(child labour matter) V. State of Tamil Nadu, Putusan Mahkamah Agung India (1996).

[354] Satya Brata Sinha, *op.cit.*, hlm. 9.

[355] Veli-Pekka Hautamäki, "Authoritative Intepretation of the Constitution: A Comparison Argumentation in Finland and Noerwey", hlm. 8.

[356] *Ibid.*

[357] Diskursus tentang Negara Hukum mulai berkembang saat mencuatnya pemikiran mengenai teori hukum alam, yang tumbuh di Eropa pada abad ke-17 hingga abad ke-18. Pemikiran Negara Hukum terbagi ke dalam 2 (dua) kutub yaitu *rechsstaat* dan *rule of law*. Istilah *rechtsstaat* dikenal dalam negara-negara Eropa Kontinental, yang dikembangkan oleh Immanuel Kant, Paul Laband, Julius Stahl, dan Fichte. Sedangkan *rule of law* dikembangkan di negara-negara Ango Saxon yang dipelopori oleh A.V. Dicey di Inggris. Pada dasarnya kedua kutub pemikiran itu memiliki satu maksud yang serupa, ayitu adanya perlindungan terhadap hak asasi manusia dan penghormatan atas martabat manusia (*the dignity of man*). Uraian soal ini, baca antara lain: Wahyudi Djafar, "Menegaskan Kembali Komitmen Negara Hukum: Sebuah Catatan Atas Kecenderungan Defisit Negara Hukum di Indonesia", *Jurnal Konstitusi*, Vol. 7,