



Ultra Petita Decision of Constitutional Court on Judicial Review (The Perspective of Progressive Law)

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Abstract

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This research come up from the premise that in the execution of their duties during this time, the Constitutional Court issued many decisions by some legal experts considered break the limits of his authority. One is on a judicial review which contains ultra petita decisions. Regarding to that condition, some parties considered that the Court has acted as an institution that is authoritarian and violated its authority, but on the other hand, the Court instead declared itself as the guardian of democracy and substantive justice. Author argued that, the prohibition to use a doctrine of ultra petita for judge was not generally applicable. Through normative approach and systematic interpretation said that on Law concerning to Constitutional Court (MK, Mahkamah Konstitusi) or other MK decisions did not give any possibilities for Judge to make an ultra petita decision.

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INTRODUCTION

THE CONSTITUTIONAL Court plays an important position in the Indonesian State system. The establishment of the Constitutional Court is intended to resolve some cases that are closely related to the constitutionality of state administration and constitutional issues in Indonesia. In Article 2 of Law No. 24 of 2003 regarding the Constitutional Court stated that “the Constitutional Court is one of the state institutions that conduct independent judicial power to organize judicial administration to uphold law and justice”. The Constitutional Court has the equal position with other State institutions—the Supreme Court.

According to Section 24C of the 1945 Constitution *jo*. Article 10 of Law Number 24 of 2003 concerning the Constitutional Court (MK Act), the Constitutional Court as a State institution of judicial power holders have four authorities and one obligation, namely:²

1. Examine the laws against the Constitution of the Republic of Indonesia of 1945;
2. Resolve the authority dispute between State institutions the authority granted by the Constitution of 1945;
3. Dissolution of political parties; and
4. Decide disputes concerning the results of the general election; and
5. Obligation to give a decision on the opinion of the House of Representatives that the President and/or Vice President is alleged to have violated the law in the form of treason, corruption, bribery, other felonies, or misconduct, and/or no longer qualifies as President and/or Vice President as defined in the Constitution of the Republic of Indonesia of 1945.

The presence of MK has a lot to contribute to the restructuring of our constitutional system and the law.³ The Constitutional Court only has nine Constitutional Court Judges deemed high productivity. In the age of the relatively still very young (tread 7 years), the Constitutional Court has produced many decisions that have colored the thinking and constitutional life of Indonesia. The discourse and thinking on constitutional law to be dynamic and attract the attention of a wide audience.

Even so, there are many controversies that arise related to the decisions of the Constitutional Court in a judicial review. Not a bit of legal practitioners and academics who criticized the Court action. Some difficult issues posed by the Court according to Adnan Buyung Nasution, one is related to issues of implementation of the Constitutional Court that canceled the unlawful nature

² Art.24C *jo* Art.10 Act No.24 of 2003 Constitutional Court

³ Moh Mahfud “perluah Amandemen ke lima UUD 1945” **Paper presented on National Law Convention UUD 1945 as basic constitutional of grand design to political and state system**, held by oleh BPHN Depkum HAM, Jakarta 15-16 April 2008.

of the material in the corruption and the violation of the doctrine of *ultra petita* prohibition. In the case of judicial review of Act of the Judicial Commission (KY, *Komisi Yudisial*), for example, in its decision had eliminated all of the authority KY to supervise and check the behavior and performance of Supreme Court judges to the lowest ranks (the trial judge). KY also annulled the authority to examine the judges of the Constitutional Court, but the matter was never asked the applicant to be canceled. Thus, the Court has been hearing and deciding its own case containing *conflict of interest* because it concerned their interests.⁴

Mahfud MD stated that there are some problems in the Constitutional Court decision. There are several decisions of the Constitutional Court that are *Ultra Petita*(unsolicited) that lead to intervention in the area of legislation, there is also a decision that can be considered to violate the principle of *nemo iudex in causasua* (prohibition decide matters concerning himself), as well as decisions tend set or decision which is based on the opposition between one law with another law when *judicial review* to test materials that can be done by the Court is the constitutionality of the Act is vertical against the Constitution and not the problem of the collision of the Act with other legislation.⁵

Allegation that the Court regarded as an institution that *super-body* was implicated. Provisions of the Constitution which states that decision of the Constitutional Court are final and binding as if a powerful weapon that reinforce the presumption. Accusations that the Constitutional Court judges act is not neutral, no special orders from certain parties, group interests and money into two of the most often assumed to be the case that could affect the decision of the Court.⁶ Naturally sometimes, caused of this institution make decisions that actually can be considered to be beyond its constitutional authority.⁷ In short, many who sneer of this new institution, but not a few were waiting for their work to uphold the law and justice.

The debates then come up the opinion, whether it is the Constitutional Court may make a decision containing *ultra petita*. Is the nature of the ruling *ultra petita* in judicial review is justified by the Law on the Constitutional Court. Many legal experts are allowed, but not least also the states should not be. Former Chief Justice, Asshiddiqie, said the decision of the Court may only contain *ultra petita* if the subject matter for which the review related articles of the other and at the heart of the law that must be tested it. While Mahfud MD and former Supreme Court Justice Benjamin Mangkoedilaga, argues that the Court should not make a decision *ultra petita* without inclusion in the Act.⁸

⁴ Adnan Buyung Nasution, *Quo Vadis Penegakan Hukum Indonesia*, on KOMPAS, Dec 22, 2006.

⁵ See Mahfud MD, *Konstitusi dan Hukum*,..... p. 278.

⁶ Harjono, *Konstitusi sebagai Rumah Bangsa*..... pp. 166-167.

⁷ Mahfud MD, *Konstitusi dan Hukum*,..... p. 278.

⁸ Sumber:<http://www.kompas.com/kompas-cetak/0702/05/opini/3289700.htm>, accessed on 20 August 2010.

Discourse and discourse that developed, there are some legal experts who want to be *ultra petita* decision is prohibited to include in the amendment of the Constitutional Court Act.⁹ Some considered the need for the amendment of the Constitutional Court ruling stating the permissibility of containing *ultra petita* with strict restrictions. Others argued that it is not necessary amendments, and considers the practice of the Constitutional Court as part of *judicial activism*.

Interesting to be analyzed is the statement Mahfud MD in the event *focus group discussion* (FGD) held by the National Law Development Agency (BPHN) on Tuesday November 2, 2010, with the theme "The dynamics of the Constitutional Court in Guarding the Constitution." According to Mafhud MD, in exercising its authority, the Constitutional Court (MK), have signs that must be obeyed. For example: the decision of the Court cannot contain norms, the Court may not decide exceed the petition (*ultra petita*), or in the case of Dispute Election Results (PHPU, *Perselisihan Hasil Pemilihan Umum*), the Court only has the authority to decide disputes or mistakes vote count recapitulation. However, in practices, the signs were difficult to be obeyed always. MK, sometimes, need to make breakthroughs in the law to achieve justice.¹⁰ Breakthrough Court in the case of Bibit-Chandra¹¹ for example can be used as a benchmark to assess the progression of the rule of law in the Constitutional Court.

If so, then there is a tendency of progressive legal thought among the constitutional judges. The next question is whether progressive thinking is also visible in the decisions of the Constitutional Court containing *ultra petita*. Is MK breakthroughs in making a decision containing *ultra petita* can be categorized as progressive measures would dare go against the flow in order to realize substantive justice and to guarantee the human rights.

LITERATURE REVIEWS

Separation of Powers and Check and Balances

IN THE THEORY of separation of powers of *trias politica*, each organ or state power should be separated, because the focus is more on the functions on one person or organ of government would endanger democracy and freedom. Most countries in the world have adopted this theory, but of course with different style and modifications from each other. These modifications

⁹ See Online Article "Jangan Sampai MK Merasa Sebagai Lembaga Tertinggi Negara: Revisi UU MK, www.hukumonline.com, accessed on 22/11/07

¹⁰ Article on official website of Constitutional Court, check at <http://www.mahkamahkonstitusi.go.id/index.php?page=website.BeritaInternalLengkap&id=4719>, accessed on 3 November 2010.

¹¹ For the example, when MK showed the recording of KPK on court publicly and even live in some media televisions.

include a look at the division of powers doctrine and the doctrine of *checks and balances system*.

After the amendments made to the 1945 Constitution, then there is a tendency of the system used in the relationship between State institutions is the ideology of separation of powers based on the principle of checks and balances. In a system of checks and balances of State institutions recognized as equal position. No State institutions which superior as the position of the Assembly first. State agencies such as MPR, DPR, DPD, President, BPK, MA and MK have equal position, no domiciled higher than the other, but the principle of State institutions are mutually supervise and control each other. This is the essence of the doctrine of *checks and balances*. The existence of the Constitutional Court in the constitutional system of Indonesia one reason is to support the institutionalization of the *system of checks and balances*.

Judicial Review: An Overview

JUDICIAL REVIEW consists of two words, namely "*judicial*" that shows the meaning of the court and the word "*review*" means perceive, assess, re-examine. In simple terms can be defined as a *judicial* authority to examine by the judiciary against the products of the written law.

Tests were carried out based on Law No. 24 of 2003 is limited to testing whether the material and things outside material testing.¹² In testing in addition to testing the material covered four meanings, the first whether the form of legislation have been right or not, secondly whether the procedure of its formation has been carried out correctly or not, third, whether the institution former Act was right or not, and the fourth is whether the format of legislation have been right or not. Based on this, then there are two types of judicial review by the Constitutional Court, namely: material and formal examining of legislation. While examining on other regulations under laws were made by referring to the Supreme Court Supreme Court Regulation No. 1 of 1999 on Material Claims Test.

Thus the authors interpret the judicial review into three categories, namely *first*: judicial review in a broad sense, concerning all legal norms testing performed by the judiciary, whether the decision, court decisions or legislations. *Second*, judicial review in the narrow sense, should be in terms of testing norms of the legal form of the legislation alone. Judicial review in the narrower sense is divided again into two groups, namely: constitutional review if tested, are laws against the Constitution and the judicial review of regulations, if the tested is legislation under the Act to the Act. In this paper discussed constitutional review, namely judicial review against the Constitution.

¹² Article 51 (2) Constitutional Court Act

Constitutional Court Decision and Problem of *Ultra Petita*

CONSTITUTIONAL Court decision in the testing of the Act against the Constitution consists of three types, among others:¹³

- (1) Declare the petition cannot be accepted, if the Constitutional Court found the applicant and/or his request does not qualify as referred to in Article 50 and Article 51.
- (2) Declare the petition is granted, if the Constitutional Court found the request is founded. In the decision of the Constitutional Court must be clearly stated:
 - a. the substance of paragraphs, articles, and/or parts of laws that are contrary to the Constitution of the Republic of Indonesia of 1945 and stated that the substance of the paragraph, chapter, and/or parts of the law is not legally binding.
 - b. in the formation of legislation in question does not meet the provisions of the establishment of law based on the Constitution of the Republic of Indonesia of 1945, the ruling stated the petition is granted and declared the law does not have binding legal force.
- (3) Declare the petition is rejected, if the law is not in conflict with the Constitution of the Republic of Indonesia Year 1945, both the formation and the material in part or whole.

The problems arise when the Court made the ruling that the Constitution of a different model, as mandated by Article 56 *jo.* Article 57 Constitutional Court Law. One example is the decision containing *ultra petita*. *Ultra Petita* according to Ranuhandoko¹⁴ is exceeded requested. *Ultra Petita* is a term familiar enough in the Civil Procedure Code. In Civil Law, set a principle that limits the judge in deciding a case as outlined in Article 178 paragraph (2) and (3) HIR namely: "The judge was obliged to prosecute every Courant charges." And "He is prohibited from going to impose a decision on the case were not prosecuted, or will graduate more than what was required." This chapter provides an assertion that a civil judge should not decide on cases that are not prosecuted or pass the case were not prosecuted.

Progressive Law Theory

THE PROGRESSIVE Law principally contradicts with the law of two components, namely the rules and behavior.¹⁵ Prof. Satjipto Rahardjo also states that the law needs to be re-thought in the context of philosophical

¹³ See Art. 56 UU No.24 of 2003

¹⁴ I.P.M. Ranuhandoko, *Terminologi Hukum*, (Jakarta: Sinar Grafika, 200), p.522.

¹⁵ Satjipto Rahardjo. "*Menuju Produk HukumProgressif*". Paper on LGD, Faculty of Law UNDIP. Semarang, 24 June 2004

which is the law should be used for humans.¹⁶ With that philosophical, the man set the tone and orientation point of law. Laws are there to serve people, not the other way to serve the law of man. Departing from this assumption, the presence of these not for himself, but for something more spacious and large that is why when there is a problem in the law, then the law should be reviewed and changes into better form not the people forced put into the legal scheme.

In the perspective of a progressive law theory, the law is not an autonomous institution which is separated from the human interest. Quality of law is determined by its ability to serve human welfare. Laws should provide the happiness for people. This concept led to the legal doctrine of progressive ideology embraced pro-justice law and the Law of the pro-people. Justice provides under the law, and not vice versa. If the rule of law does not reveal the breath of justice, then he should be abandoned.

JUDICIAL REVIEW IN INDONESIA

History of Institutionalization of Judicial Review

DISCUSSING about the institutionalization of judicial review in Indonesia cannot be separated from the question how this idea first emerged and developed until today. Until today it has hundreds of countries that institutionalize the practice of constitutional review (judicial review) in their State system. Indonesia itself is the 78th Country that established the Constitutional Court as the State judiciary with the authority to carry out *constitutional review* and is the first Country in the world in the 21st century that established it.¹⁷

If traced from its historical background, the various review models¹⁸ that can be classified into two types of main model of review, namely: *American decentralize model* who first develops and *centralize the model* as was done in Austria more recently present. The first model represents the ideas embraced by the countries traditionalist *common law* and the second model followed by

¹⁶ Satjipto Rahardjo, *Hukum Progresif (Penjelajahan Suatu Gagasan)*, Paper presented on Doctoral Alumni Meeting, Faculty of Law Undip Semarang, 4 September 2004, p. 3.

¹⁷ For more comprehensive, please refer to Jimly Asshiddiqie and Mustafa Fakhri, *Mahkamah Konstitusi, Kompilasi Ketentuan Konstitusi, Undang-Undang dan Peraturan di 78 Negara*, Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia dan Asosiasi Pengajar Hukum Tata Negara dan Hukum Administrasi Negara Indonesia.

¹⁸ According to Jimly, at least there are 10 models of judicial reviews such as: Model of United States of America Model Austria (Continental Model), Model of France, Model America dan Continental, Model Reviewing *Special Chambers*, Model Belgia, Model without *Judicial Review*, Model Legislative Review, Model Executive Review, Model of International Judicial Review. See Jimly Asshiddiqie, 2005, *Model-Model Pengujian Konstitusional di Berbagai Negara*, Konstitusi Press, Jakarta. pp. 55-94.

most of the European countries that referred to *civil law*. The American model, the constitutional review done dispersed and decentralized among courts in the States and the Supreme Court of Europe, while in the model of Austria or the European model of constitutional review only done centrally in one single institution. In addition, according Ashshiddiqie there is still one more model that is unique and cannot be considered whether to follow the model of the United States or Austria. The model is as practiced in France carried out by a Constitutional Council (*Conseil de Constitutionnel*). As the name suggests, this institution is actually not a judicial institution.¹⁹

Zainal Arifin Hoesein²⁰ divided three time periods associated with the development of a *judicial* system in Indonesia. *First*, is the early preparation on 1945-1970. During this period, only limited *judicial review* of ideas and discourse that never materialized. *Second*, is when the period began to be formulated Law No. 14 of 1970 on Basic provisions on judicial Power until 1999. This is the first *judicial review* extensively discussed and debated openly, as well as a first milestone of the implementation of the mechanism. *Third*, future changes in 1945 until 2003. During this period there is a process change in the political system and state power, including the formation of the Constitutional Court is given the authority to test the laws against the Constitution of 1945.

At the time of the discussion of the 1945 changes, the idea of the importance of a state judiciary reappear, especially after the Assembly no longer serves as the highest State institution. The principle of parliamentary supremacy that had been held strong has been switched from the supremacy of the Assembly to the supremacy of the constitution.²¹ Because of a fundamental change is deemed necessary to provide an institutional mechanism and the constitutional and the presence of state agencies that deal with the possibility of disputes between state agencies that have now become equal and offsetting and mutual control (checks and balances).²² Model of constitutional review instituted in Austria centralized to the Assembly as a form of institutional selection Constitutional Court in Indonesia.

***Ultra Petita* Decision on Judicial Review According to Normative Provisions**

VARIOUS parties have different views on responding *ultra petita* decision made by the Constitutional Court. The pro against the permissibility of *ultra petita* decision in the judicial review as follows: (a) if part of the requested review related to other chapters and at the main point of the law that should

¹⁹ See Jimly, *Ibid.* hal 147.

²⁰ Zainal Arifin Hoesein, 2009, *Judicial Review di Mahkamah Agung: Tiga Dekade Pengujian Peraturan Perundang-Undangan*, Rajagrafindo Persada, Jakarta.

²¹ See Art 1 (2) UUD 1945:

²² "Mahkamah Konstitusi dalam Sistem Ketatanegaraan Republik Indonesia", *PAPER* presented at Pendidikan Sespati dan Sespim Polri, Bandung, 19 April 2008.

be reviewed, then the cancellation of the related articles cannot be avoided; (b) if the applicant included a request *ex aequo et bono* (to decide for justice), then the judges have the freedom to determine the verdict; (c) the doctrine of *ultra petita* only used in civil law procedural; (d) *objektum litis* in a civil case is a civil rights, whereas in judicial review is a constitutional right, and therefore are *erga omnes*. Civil rights cannot be equated with constitutional rights; (e) the authority of the Constitutional Court is to examine the laws against the Constitution, so it's not the chapters and verses; (f) *ultra petita* decision prevalent in other countries, even the idea of a *judicial review* of the decision first came from John Adam which very *ultra petita*, and (g) the Constitutional Court Act did not expressly prohibit a ban on *ultra petita*.

On the other hands, those who objected to the decision that had the *ultra petita* in the Constitutional Court holds that the decision *ultra petita* in reviewing the law violates the generally accepted doctrine/universal in the procedural law (prohibition *ultra petita*), the principle of non-*ultra petita* is an international jurisprudence. *Ultra Petita* decision also considered violated a principle of popular sovereignty (supremacy of parliament), and even seem to interfere with the realm of the other powers, thus violating the doctrine of separation of powers and *checks and balances system*, ruling *ultra petita* constitutes an infringement of the legislative sphere by the judiciary for interfering authority to regulate (*regeling*) which is not disputed.²³ Even, the practice of *ultra petita*, violated the Constitutional Court Act, because the Act does not regulate the permissibility of making a decision containing *ultra petita*. In the perspective of positivistic-legalistic, format the verdict as stipulated in the Constitutional Court Law does not allow for *ultra petita*.

Based on the difference in perspective concerning to *ultra petita* above, the opinion of the Author, there are two issues that are operational are worth further elaborated in order to address how to position verdict *ultra petita* in a normative perspective. Two things: first related to whether the doctrine of *ultra petita* is generally accepted to be the norm that is binding for all judges in many cases, and secondly, given the Constitutional Court Act does not set explicitly, it will be looked at more comprehensively about how the real perspective of the Constitutional Court Act against *vonnis ultra petita*.

To analyze the two sub problems above, Author used two (2) analysis approach, *i.e* normative analysis and comparative analysis. Normative analysis here will be used to examine the articles of the Constitutional Court Act and the Constitutional Court Regulations governing Testing Act. While, the comparative analysis in this discussion is limited to the comparison between the judicial systems in accordance with Indonesian laws, and in this case will only be presented the perspectives of the Procedure of Civil Code, the Procedure of Criminal Code, and also the Procedure of Administrative Court against decisions containing *ultra petita*. By doing so, then it will be

²³ Mahfud MD, Mendudukan Soal *Ultra Petita*, accessed from <http://www.kompas.com/kompas-cetak/0702/05/opini/3289700.htm>

clear position *vonnis ultra petita*, both in the perspective of the Indonesian judicial system in general and judicial particular.

Prohibition *ultra petita* expressly provided for in Article 178 paragraph (3) *Het Herziene Indonesisch Reglement*, which in this case can be interpreted in two aspects, first, judges are prohibited from granting over things that are not requested by the plaintiff, and secondly, judges are prohibited to grant more than requested by the plaintiff. However, in the development of judicial practice, *ultra petita* prohibition is not absolute longer considered valid by the jurisprudence MARI No. 556K/SIP/1971 which gives legal norms that grant more than the accused is permitted as long as it is still in keeping with the state of the material.

In the criminal procedure law ban *ultra petita* only related to indictments that are *litis contestatio* for the proceedings, and the reverse does not apply in relation to criminal charges. Prior to the enactment of the Criminal Procedure Code, based on the jurisprudence of the Supreme Court Decision No. 47 K/Kr/1956 dated March 23, 1957, obtained the rule of law, that is the basis of the examination by the court is the indictment (charges) and not the allegations made by the police. Thus, both the aforementioned article asserts that the judge's decision should only be about the facts within the limits of the public prosecutor's indictment. The judge is not justified sentence beyond the limits contained in the indictments, therefore, the accused can only be convicted based on what proved the crimes he committed in the formulation of the indictment. Article 193 paragraph (1) Criminal Procedure Code imposes limits emphatically, "if the court found the defendant guilty of committing a crime **against** her, the court dropped the criminal." Likewise, according to Article 191 paragraph (1) Criminal Procedure Code, "if the court believes that the results of the examination in the trial, the guilt of the accused for the actions **against** her not proven legally and convincingly, the defendant was acquitted".

In the event the administrative court of law, although normatively charge prohibited by the *ultra petita* because according to the Supreme Court Act can be used as an excuse filed reconsideration, but in the development of decision *reformatio in peius* allowed. *Reformatio in peius* is a verdict dictum that it is not profitable to plaintiff, such as applying the *reformatio in peius* context in the case of employee affairs.

Through MARI decision No. 5 K/TUN/1992, terminated on 6 February 1993, the judge cassation creates new legal norms on the prohibition of *ultra petita*, as follows:²⁴

"That although Plaintiff origin is not filed in the petition, the Supreme Court can consider and adjudicate all decisions or rulings that are contrary to the existing order. Is not in place when the right to test the

²⁴ *Himpunan Kaidah Hukum Putusan Perkara on Yurisprudensi Mahkamah Agung RI Tahun 1969-1997*, Mahkamah Agung RI, 1999. p.10.

judge only on the object of dispute filed by the parties as is often the object of dispute must be assessed and considered in relation to parts of the rulings or decisions Agency or Official TUN is not disputed between the parties (*ultra petita*).”

Thus, the *ultra petita* prohibition is not a doctrine that applies absolutely and generally, as well as binding on all judges in the various courts. This happens because each procedural law has different characteristics from each other, as well as the need for legal developments in judicial practice protocols. This conclusion would also apply in the procedural law of judicial review in the Constitutional Court.

Constitutional Court decision was taken after considering a request which comprises a *posita* or description of the subject on which the petition and *the petition* is based on the evidence available.²⁵ If the application is in the testing material reasoned and therefore granted, then based the provision of Article 56 and Article 57 of the Constitutional Court Act, the Constitutional Court stated that the substance of paragraphs, articles, and/or parts of laws contrary to the Constitution. Should not any other form decision except the decision based on the provision of Article 56 and Article 57 the Constitutional Court Act, *jo.* Article 36 (c) of Constitutional Court Decision Number 6/PMK/2005. In other words, in the perspective of positivism, there is no room for constitutional judges to make decision containing *ultra petita*, especially containing *positive legislature*. Although not strictly regulated, in the sense of actively forbid, but to approach the interpretation of systemic can conclude that the provisions of Law No. 24 Year 2003 regarding the Constitutional Court and the Constitutional Court Regulation Number 006/PMK/2005 does not enable made the decision containing *ultra petita*. In the simple way, formatively the procedural law of judicial review does not allow the decision made *ultra petita*.

However, in the cult has been some decision of the Court which carries with *ultra petita* and can therefore be used as jurisprudence of the Court. Jurisprudence itself is one source of formal law in the procedural law of judicial review. If the understanding of this jurisprudence may be associated with whether or not perform *ultra petita* for constitutional justice, and then of course there should be permanent provisions and rules, whether and to what extent the boundaries of permissibility of constitutional judges to make a decision containing *ultra petita*.

²⁵ Maruarar Siahaan, 2008, UUD 1945 sebagai Konstitusi yang Hidup, Setjen MKRI, Jakarta. p.394.

RATIO DECENDI OF THE CONSTITUTIONAL COURT MADE CONTAINING *ULTRA PETITA* IN JUDICIAL REVIEW

THE CONTROVERSY and debate among legal experts concerning to the Court decision which containing *ultra petita* become seriously, not only associated with the act of issuing variation decision has no legal basis, but also the impact of the decision to the state administration and law enforcement in Indonesia. Despite the controversy proficiency level, it would be better probably if examined, what exactly drives and underlying constitutional judges to issue a ruling *ultra petita*. Through the legal considerations of the decision we will find the legal reasoning of judges, including the paradigm that underlies the verdict handed down. That would be a light to understand what really wants to achieve / addressed by the judges through its decision. In the context of the discussion on *ultra petita* this, we can get a legal principle in the jurisprudence created by the Constitutional Court, and therefore can be determined how far the boundaries of *ultra petita* can be done by the Constitutional Court in a judicial review. Below are presented some of the case:

Case Number 001-021-022/PUU-I/2003

IN CASE Number 001-021-022/PUU-I /2003, the Constitutional Court has annulled the Law No. 20 Year 2002 on Electricity as a whole. The Constitutional Court in its legal considerations actually focuses its testing on Article 16, Article 17 paragraph (3), as well as Article 68 of the Electricity Act that ordered system of separation/splitting electricity business (*unbundling system*) with entrepreneurs different, but because of these articles a chapter of the heart and the underlying paradigm Electricity Act, the Electricity Act declared the overall strength is not legally binding. Court argued that the system is contrary to Article 33 of the Constitution 45, since they will be made worse state that will be geared towards not guarantee the supply of electricity to all levels of society, both commercially and non-commercially.²⁶

Case Number 007/PUU-III/2005

IN EXAMINING Law No. 40 of 2004 on National Social Security System, the Applicant requested that that Article 5 (1), paragraph (3) and (4) and Article 52 shall be declared contrary to Article 34 paragraph (2) of the 45 Constitution and declared enforceable binding. The main focus in this petition is whether the state of meaning in the phrase “the State Social Security

²⁶ Decision No. 001-021-022/PUU-I/2003, p. 347.

System” in the hands of the Central Government, Local Government or both. In the verdict, the Court rejected the petition Article 5 (1) and Article 52 of the Social Security Law, but set the Article 5 paragraph (2) Social Security Law contradictory to the 1945 Constitution and stated that article does not have binding legal force, whereas the Petitioners did not asked in the petition. In considerations of law related to *ultra petita* Article 5 (2),²⁷ the Constitutional Court stated, that although not requested in the petition request, but this passage is a unity that cannot be separated by paragraph (3), hence if retained instead will give rise to multiple interpretations and legal uncertainty.

Case Number 003/PUU-IV/2006

DECISION No. 003/PUU-IV/2006 is a decision of the judicial review of Act No. 31 of 1999 on the Eradication of Corruption (Corruption Act). The main issues appear in this decision is the annulment of the provisions of the expansion of the element “unlawful nature of the material” as defined in Explanation of Article 2 (1) of the taxable income. In the decision of the Constitutional Court clearly stated that the application for judicial review of the word “may” and “experiment” as the principal of *petitum*²⁸ declared “rejected” because declared not contradictory to Article 28D (1) Constitution of 1945. However, on the other hand, MK established that that explanation of Article 2 paragraph (1) Corruption Act is deemed to have expanded the categories element “unlawful” within the meaning of written laws (*formelewederrechtelijk / nature of the unlawful formal*), but also in the sense *materielewederrechtelijkheid* (nature of the unlawful material), and therefore contrary invitation 28D (1) Constitution of 1945. According to the Court, explanation of a law should not include the new norm, because the only explanation includes a description or further elaboration of the norms set out in the torso. Admittedly teachings of nature against the substantive law in Article 2 (1) also would cause legal problems, because what is appropriate and qualified morality and sense of justice are recognized in the community, which vary from one region to another, would lead to uncertainty law.²⁹ This decision does not provide an explanation that is directly related to why the Court did *ultra petita*.

Case Number 005/PUU-IV/2006

DECISION Number 005/PUU-IV/2006 is a decision judicial review on Act Number 22 of 2004 concerning Judicial Commission (KY Act) and the Law

²⁷ See Art 5 (2)

²⁸ On his application, Dawud Jatmiko argued that Art 2 ayat (1), explanation of Art 2 (1), Art 3, explanation of Art 3, dan Art 15 (as long as indicate the word “try/experiment” dan “may”) UU PTPK clearly contradictive with Art 28D (1) UUD 45

²⁹ Decision No.003/PUU-IV/2006. See p. 74.

of the Republic of Indonesia Number 4 of 2004 on Judicial Power (*UU Kekuasaan Kehakiman*, UU KK) of the Constitution, 1945. The main issues echoed in this decision is the uncertainty regarding the mechanism of supervision of judges in the law KY so therefore to legal uncertainty.³⁰ According to Gayus Lumbun,³¹ the Constitutional Court ruling related to the supervisory authority of judges as stated in Article 1 (5) of Law No. 22 of 2004 is *ultra petita* and discriminative, 31 Supreme Judges apply that they are not included in the object of supervision by KY. But MK precisely placed themselves outside the objects of supervision KY. This ruling has also significantly reduced the whole authority of KY in supervising judges (including Supreme Court justices and constitutional justice), when in fact the petition of the petitioner is related to the desire for justices is not included as a party controlled by KY. In this regard the Court in its legal considerations states:

“These exceptions (Justice Court) was based on a systematic understanding and interpretation based on “*original intent*” of the formulation of the provisions of Article 24B KY 1945 did not relate to the provisions concerning the Court under Article 24C of the 1945 Constitution”³²

Associated with the cancellation of the entire supervisory authority, the Court recognized “that the implementation of the supervisory function of birth of legal uncertainty (*rechtsonzekerheid*) due to the absence of clear norms about the scope of definition of the conduct of judges and judicial technical control related to the limits of accountability from the perspective of the behavior of judges with the independence of judges in performing his judicial duties, by naked intervention against the judicial power in the form of *pressure* or the pressure that is directly or indirectly.”³³

Case Number 006/PUU-IV/2006

DECISION of No. 006 / PUU-IV/2006 which annulled Act No. 27 of 2004 on the Commission of Truth and Reconciliation (UU KKR) overall very surprised many. The applicant in his petition that the existence of Article 1 point 9, Article 27,³⁴ and Article 44 is contrary to the Constitution 45, particularly Article 27 paragraph (1), 28D (1), 28I (2). According to Applicants, the norm in Article 27 has negated the guarantee on anti-discrimination, equality before the law and respect for human dignity

³⁰ Indonesian Constitutional Court: Institutional Report 2006, p.33.

³¹ Gayus Lumbun on “Putusan MK Ultra Petita dan Diskriminatif, Buletin Komisi Yudisial”, accessed: www.komisiyudisial.go.id.

³² Decision No.005/PUU-IV/2005, Chapter of “*Pertimbangan Hukum*”, pp.173-174.

³³ *Ibid.* P.201.

³⁴ *See* Art. 27 UUKKR

guaranteed by the Constitution, 1945.³⁵ Moreover, the existence of Article 44 of the KKR Act considered would eliminate the state's obligation to prosecute and punish perpetrators. In the decision which declared contrary to the 1945 Constitution is in fact Article 27, but because the Court considers the provisions of Article 27 determines the overall operation of the TRC Act, then the whole TRC Act otherwise have no binding legal force. According to the Court, the determination of the existence of the amnesty as a condition for the fulfillment of compensation and rehabilitation is that the exclusion of legal protection and justice guaranteed by the 1945 Constitution, however, the overall cancellation KKR Act has been to diminish the mandate of the Act to conduct a thorough investigation and settlement of past human rights violations, with the reconciliation approach, where it becomes impossible when used *ordinary rules*.

Case Number 012-016-019/PUU-IV/2006

CONSTITUTIONAL Court's decision in the case Number 012-016-019/PUU-IV/2006 mandated a message that, dualism courts that prosecute corruption (as formulated in Article 53 of Law No. 30 of 2002 on Corruption Eradication Commission) is contrary to the 1945 Constitution, therefore, needs improvement arrangements corruption court in the Indonesian justice system. Being a unique look for the verdict of the Constitutional Court decision to postpone the enforceability tie and give a time limit of 3 (three) years for the legislator to establish the Corruption Court Law. Amar delay does not actually requested by the applicant. The Constitutional Court argued that although Article 47 of the Constitutional Court Law states that "The Constitutional Court had permanent legal power since completed pronounced a plenary session open to the public"; but that investigations of corruption by the KPK and the Corruption Court that is running is not disturbed and did not experience the chaos that can result in legal uncertainty which is not desired by the 1945 Constitution, the Constitutional Court to consider the need to provide time for the transition process smooth (*smooth transition*) to the formation of the new rules.³⁶ At this point, the attitude of statesmanship and wisdom of the judges was showed. Breakthrough like this contains the value of expediency and fairness as well, aims to create legal certainty.

From some cases *ultra petita* presented above, if the judgment is made groupings used by constitutional judges, it will get the data related to why the constitutional judges make decisions that *ultra petita*, as follows:

- 1) Part of the legislation (paragraphs, articles, explanations, etc.) requested tested the "heart/main point" of the legislation, so that the entire article cannot be implemented and should be declared no binding legal force

³⁵ See Decision No.006/PUU-IV/2006, Chapter of "*Duduk Perkara*" (attachment of application) p. 21.

³⁶ *Ibid.* p. 286.

- entirely. Included in this category, for example: The cancellation of the Electricity Law (Case Number: 001-021-022/PUU-I/2003) and the cancellation of the Truth and Reconciliation Commission Act (Case Number 006 / PUU-IV / 2006).
- 2) Part of the legislation (paragraphs, articles, explanations, etc.) requested tested with regard to other articles that cannot be separated, so that the chapters pertaining finally declared unenforceable as well. Included in this category are the considerations: Judicial Review System of the National Social Security System (Case Number 007/PUU-III/2005). Judicial review in Judicial Commission (Case Number 005/PUU-IV/2006) appears to have also led to these considerations, although the Court did not describe it explicitly.
 - 3) In order to avoid legal chaos, then the validity of the binding decision taken by a delay pending the establishment of new changes rules. In this case, the reasons of expediency beat of legal certainty, though in fact the ultimate objective is also to create legal certainty. Included in this category are the reason for the cancellation of the decision of the legal basis for the Corruption Court (Case Number 012-016-019 / PUU-IV / 2006). Constitutional Court's decision that tests the Law Number 16 Year 2008 regarding Amendment to Law Number 45 Year 2007 on State Budget 2008 (Case Number 04 / PUU-VI / 2008) are also included in the category of these reasons.
 - 4) MK legal considerations in trouble *ultra petita* only legal considerations associated with the main petition, in fact rarely impressed fetched and appeared suddenly. In this category Harjono's statement³⁷ to be relevant, that according to the Constitution is very clear, the authority of the Constitutional Court is to examine the enactment laws against the Constitution, so it's not the chapters and verses. Throughout tested were related laws, then there is no *ultra petita* dictionary. Included in this category are in the nature of the case against the cancellation of substantive law in the Anti-Corruption Act (case Number 003/PUU-IV/2006) and case Number 005/PUU-IV/006 which slashed authority of the Judicial Commission, all related to issuance of the Constitutional Court judges who supervised the Judicial Commission.

³⁷ Harjono, *Konstitusi Sebagai Rumah Bangsa*, Jakarta, Setjen dan Kepaniteraan MKRI, 2008. pp. 182-185.

ULTRA PETITA IN JUDICIAL REVIEW: PERSPECTIVE OF PROGRESSIVE LAW

THE UNCERTAINTY of the text governing the type and the charge should be in the Constitutional Court decision makes the debate so far has not led. As one consequence, the decision of *ultra petita* Constitutional Court in a judicial review is also a controversy here and there. The pro assume that the procedural law of the Constitutional Court (MK) does not regulate *ultra petita*, because it is may allowed to Court makes a decision that is *ultra petita*. The logic of the law of *ultra petita* exists only in civil law, because *objectum litis* in MK different from civil judicial protecting the individual, whereas in the Court over public law nature, not only to protect the interests of the litigants, but is *erga omnes*. In connection with the legal provisions have not been regulated in detail events including *ultra petita*, the Court reserves the right to regulate the translation of the PMK and in the course of finding the law in prosecuting authority.

The opening of a new precedent through its first verdict in the testing of the Electricity Act makes solving solutions deadlock normative attached to the Constitutional Court Act and the PMK Number 05/PMK/2005 related to puzzles ban *ultra petita*. The verdict has canceled the spirit of liberalization of the electricity sector in Law Number 20 Year 2002 regarding Electricity has become a bidder community concerns over the constitutional rights of those who potentially violated the law. Despite the provision is regarded as contrary to the constitution is basically just Article 16, 17 paragraph (3), as well as 68, especially regarding *unbundling* and competition, but because of these articles is the main of Act No. 20 of 2002, the Electricity Act should be canceled overall.

Although the rules are still multiple interpretations, the process of change is not necessarily centered on the existing rules, but the creativity of actors in the legal context. In the context of this case the Constitutional Court judges had the courage to creativity and law breakthroughs in make the laws and regulations more meaningful and functional for the justice. The Constitutional Court has made *the rule breaking* in order to break up the vagueness (*obscure*) the provisions of the Act on the Constitutional Court and the PMK to give birth to embryos new type of decision that can be used to achieve substantive justice in times of testing to come. This is by Satjipto Rahardjo said that the essence of the law is always in the process of becoming (*law as a process in the law making*).

Thus it can be said, a precedent on the decision made containing *ultra petita* in the procedural law testing these laws can we categorize as progressive enforcement action. However, it should be underlined that the creativity of anything done by law enforcement can be meaningless when there is progressive to achieve substantive justice, placing fairness, expediency and

human happiness as an end. In other words, could have decisions containing *ultra petita* that actually harm the justice and expediency.

In the context of the decisions that contain *ultra petita* as described in the previous section, it can be said that not all of these decisions reveal the substantive justice, and therefore also cannot be called as a progressive form of law enforcement. In a ruling *ultra petita* cancellation of the KKR law (Case Number 006/PUU-IV/2006), for example, the Court considered only emphasis on the judicial aspect.³⁸ Decision KKR also has brought unrest among the victims, which have viewed the existence of the KKR Law as one hope for justice for what they have experienced in the past.³⁹

Case trimming the authority of KY (Case Number 005 / PUU-IV / 2006) which cut the authority of the Judicial Commission, relating to the issuance of the judges of the Constitutional Court of the parties who supervised the Judicial Commission was also seen their discriminatory attitude and tended to be legalistic, because only the aspect of *the original intense* Constitution 45 just as legal considerations. That procedural justice, for it was during the discussion in the Committee MPR, did not appear as the name of constitutional judges who supervised KY. Historically the legal facts simply cannot be denied, but whether the decision of the Court in the above nuances reflect the values of justice and expediency, especially when linked to the cancellation of the entire authority of the Judicial Commission in supervising judge amid the tangled threads of the Mafia.

Another case in the context of the legal basis is for the cancellation of the Corruption Court (Case Number 012-016-019/PUU-IV/2006). According to the author, this decision reveals the progression in law enforcement. The Court in this case trying to bring together the three values of interest law, namely: fairness, certainty and expediency. From the aspect of justice, the Court considers that the existence of Anti-Corruption Court makes dualism and double standards for the defendant in a corruption case. In the aspect of legal certainty, the Court formally seen that there are errors in the foundation for the establishment Corruption Court that should be made in a separate law. From the aspect of expediency visible from MK attempt to avoid legal confusion that can be inflicted by cancelled the legal basis of the Corruption Court to give a time limit of 3 (three) years for the legislator to establish the Corruption Court Act.

Thus it can be made a conclusion that not every decision of the Court in testing legislation containing *ultra petita* contains the characteristics of a progressive law enforcement. MK courage to be creative in decisions is good,

³⁸ AM. Fatwa on "Menimbang-Nimbang Kinerja Mahkamah Konstitusi", *Majalah Figur*, Edisi X/Th. 2007.

³⁹ Indriaswaty D Saptaningrum, S.H, LLM, dkk, "Ketika Prinsip Kepastian Hukum Menghakimi Konstitusionalitas Penyelesaian Pelanggaran Ham Masa Lalu Pandangan Kritis Atas Putusan MK dan Implikasinya Bagi Penyelesaian Pelanggaran HAM di Masa Lalu", *Position Paper* Elsam against MK Decision annulled the UU KKR, Jakarta, 19 December 2006, accessed on <http://www.elsam.or.id>, at 06-01-2010.

as long as such measures are used in context and in order to realize substantive justice.

Of course there are always those who are not satisfied with the actions of the Court in making the decision to apply *the principle of rule breaking* as in the decision that *isultra petita* and *positive legislature*. It is not independent of the school of legal positivism and paradigms of thought that is controlled mostly Indonesian legal practitioners and academics. Such concerns are not only happen in Indonesia, but also in some countries that have a testing system unconstitutional. In this case, the Constitutional Court has also entered the region in the tradition of *common law* known as *judicial activism*, some thought the judge in the verdict that sometimes looks liberal-progressive in its decision legal considerations.

However, the practice of *judicial activism* that tended *judicative heavy* it can be negative and destructive if used to maintain conservatism of the judiciary or smooth the subjective preferences of the elite and the judges themselves. If that happens, with great authority, the judiciary can be morphed into an authoritarian institution (*judicial authoritarian*) that precisely denies the fundamental principle of *separation of power* and *checks and balances* as held strong over the years. Power is always shown its real face to always tend oppressive and corrupt. Lord Acton ever been stated that, "*Power tends to corrupt, and absolute power corrupt absolutely.*"

The use of *judicial activism* is excessive it can cause an unhealthy climate for the growth of democracy itself. To keep it, then activism judicial need is always escorted by of criticism academic constructive, so that the court will not lose its legitimacy.⁴⁰ Reflecting on enforcement realities above, it can also offer the idea of limits on the power of the Constitutional Court through progressive changes Constitutional Court Law as one of the alternatives revamping state judiciary system in Indonesia.

CONCLUSION

THE DOCTRINE of *ultra petita* prohibition for Judges is not generally applicable. By using a normative approach and systemic interpretation it can be said that the provisions in the laws or regulations of the Constitutional Court does not give the possibility for constitutional Judges to make a decision *ultra petita*. In issuing the verdict containing *ultra petita*, generally MK basing their inseparable relationship between articles are reviewed with other chapters that are not reviewed and so, chapter or the entire law must be declared unenforceable. Nevertheless, some of the decisions sometimes do not include legal considerations related directly to decision he passes that are *ultra petita*, in the sense that only legal considerations associated with the main

⁴⁰ Pan Mohamad Faiz, "Konstitusi dan Aktivisme Yudisial", Sumber: *Kolom Opini Jurnal Nasional*, Tuesday, 25 August, 2009.

petition, in fact rarely impressed fetched and appeared suddenly. MK breakthrough in making *ultra petita* decision in principle is a form of progressive law enforcement, but the creativity of anything done by law enforcement can be meaningless when there is progressive to achieve substantive justice, placing fairness, expediency and human happiness as an end.

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