

## CHAPTER TWO

### LITERATURE REVIEW

#### A. Brief Concept of *Ultra Petita* in the Constitutional Court Decision

*Ultra petita* decision in Constitutional Court is not regulated explicitly in the legislation. There is no a single Article that regulated the prohibition of justices of Constitutional Court to issue the *ultra petita* decision. The *ultra petita* in Constitutional Court decision should be based on the theory of justice that gives something in accordance with its portion.<sup>24</sup>

As the guardian of constitution, law, and democracy, the issuing of *ultra petita* decision by the Constitutional Court must be in accordance with the justice theory. The Constitutional Court is required to seek substantive justices in line with the 1945 Constitution, Act, and the general principles of the Constitution and the judiciary that are recognized as the truth.<sup>25</sup> Black Law's dictionary defines that the substantive justice is justice fairly administrated according to rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights.<sup>26</sup>

Article 45 (1) of Law Number 24 of 2003 on Constitutional Court mentions that the Constitutional Court decides a case based on the 1945 Constitution in

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<sup>24</sup> Hilda Agustina Wahyuni, "Tentang Adil dan Keadilan", taken from <http://www.hukumpedia.com/hildagustina/tentang-adil-dan-keadilan>, accessed on 16<sup>th</sup> November, 2017 at 3.46 pm.

<sup>25</sup> Mahkamah Konstitusi Republik Indonesia, 2009, *Mengawal Demokrasi Menegakkan Keadilan Substantive*, Jakarta, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, p. 5.

<sup>26</sup> Bryan A. Garner, 2004, *Black's Law Dictionary, 8<sup>th</sup> Edition*, United State of America, St. Paul, Thompson-West Publishing Co, p. 881.

accordance with the evidence and judge's conviction.<sup>27</sup> This Article mentions the evidence and the judge's conviction as basis of the decision in upholding the substantive justice, especially if the litigant clearly asks for a fair decision (*ex aequo et bono*).

There are several conditions that should be fulfilled by the Constitutional Court before issuing the *ultra petita*:

- a) The Act that requested to be review is the essence of the Act;
- b) The issuing of *ultra petita* by the Constitutional Court is common in other countries;
- c) The constitutional review of the law concerning on the public interest caused the *erga omnes* principle;
- d) Although public demand for *ultra petita*, it is not absolute to be accepted;
- e) If the public interest requires the justices of the Constitutional Court not to comply with the *petitum*;
- f) The parties clearly ask for justice (*ex aequo et bono*).<sup>28</sup>

From the discussion above, the Constitutional Court justices have freedom to decide an *ultra petita* decision as long as its decision is in accordance with the substantive justice, and the Constitutional Court justices are not arbitrarily violate the provision of Law that has been set up properly and deemed fair.

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<sup>27</sup> See Article 45 paragraph 1 of Law Number 24 of 2003 on Constitutional Court.

<sup>28</sup> Tempo.co, "Ultra Petita Mahkamah Konstitusi" taken from <https://hukum.tempo.co/read/1053067/ultra-petita-mahkamah-konstitusi>, accessed on 8<sup>th</sup> January, 2018 at 7.13 am.

Actually, the terminology of *ultra petita* derives from Latin word which means “beyond the request”.<sup>29</sup> It is frequently used to grants the request more than what is claimed by the petitioners.<sup>30</sup> *Ultra petita* appears when the judge accepts something that is not asked at all or indicates the granting of something requested but the value of the decision is beyond the original request.<sup>31</sup>

Based on the definitions above, it can be concluded that *ultra petita* is an act of judge in issuing the verdict where the decision is more than what the applicant requested. The provision of *ultra petita* is regulated in Article 178 paragraph (2) and (3) of *Herziene Indonesisch Reglement* (HIR) that states “prohibiting a judge to decide beyond the request of the plaintiff”. It is affirmed that the *ultra petita* is prohibited, the *judex factie* containing the *ultra petita* is known as an act which exceeds the authority of a judge, because a judge decides something that beyond what is requested.<sup>32</sup>

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<sup>29</sup> Thelaw.com Dictionary, “Ultra Petita”, taken from <https://dictionary.thelaw.com/ultra-petita/>, accessed on 16<sup>th</sup> November, 2017 at 13.45 pm.

<sup>30</sup> USLegal, “Ultra Petita Law and Legal Defition”, taken from <https://definitions.uslegal.com/u/ultra-petita/>, accessed on 16<sup>th</sup> November, 2017 at 12.31 pm.

<sup>31</sup> Elisabeth Putri Hapsari, *et all*, 2017, “Kewenangan Hakim Peradilan Tata Usaha Negara Menggunakan Asas *Ultra Petita* Berdasarkan Putusan Mahkamah Agung No. 5K/TUN/1992 (Studi Kasus Putusan No. 32/G/2012/PTUN.SMG)”, *Diponegoro Law Journal*, Volume 6, No. 2, (2017), p. 2.

<sup>32</sup> Bambang, Wahyudi, and Akhbar, “Kajian Penerapan Asas *Ultra Petita* pada *Petitum Ex Aequo et Bono*”, *Yuridika*, Volume 29, No. 1, (January-April, 2014), p. 104.

## B. Constitutional Court

According to Hans Kelsen, there must be a separate judicial institution which has main function to uphold the Constitution with the authority to annul a law if it is not in accordance with the Constitution.<sup>33</sup> The absence of institutions that have authority to decide the problems that occur in the implementation of state administration practice was the basic concept of the establishment of the Constitutional Court in Indonesia, including when there is a conflict of norms in the law with the norm in the 1945 Constitution.<sup>34</sup>

Based on the Hans Kelsen's idea and the explanation above, the 1945 Constitution as the highest law becomes the reference of the establishment of laws and regulations in Indonesia, so the establishment of the Constitutional Court is necessary to uphold the Constitution in Indonesia.

The adoption of the Constitutional Court idea in the constitutional amendment made by the People's Consultative Assembly (here after MPR/*Majelis Permusyawaratan Rakyat*) in 2001 initiated the history of the establishment of the Constitutional Court as defined in the provisions of Article 24 paragraph 2, Article 24C, and Article 7B of 1945 Constitution<sup>35</sup> as the result of the Third Amendment adopted on November 9<sup>th</sup>, 2001.

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<sup>33</sup> I Dewa Gede Palguna, 2013, *Pengaduan Konstitusi (Constitutional Complaint) Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Jakarta Timur, Sinar Grafika, p. 191.

<sup>34</sup> Zaka Firman Aditya, "Kewenangan Mahkamah Konstitusi dalam Penyelesaian Perkara Constitutional Complaint Berdasarkan Undang-Undang Dasar Tahun 1945", *UNNES Law Journal*, Volume 3, No. 1, ISSN: 2301-6744, (June, 2014), p. 40.

<sup>35</sup> See Indonesian 1945 Constitution Article 24 paragraph 2, Article 24C, and Article 7B.

In the 20<sup>th</sup> century, there was emergence of legal concept and modern state which became the reason of the establishment of the Constitutional Court. In the period before the establishment of the Constitutional Court, the Supreme Court conducted the duties of Constitutional Court temporarily as regulated in Article III of the transitional provisions of the 1945 Constitution<sup>36</sup> as the result of the Fourth Amendment.

The House of Representative (here after DPR/*Dewan Perwakilan Rakyat*) and the President proposed the bill on the Constitutional Court. Then, the House of Representative and the Government agreed to enact Law Number 24 of 2003 on the Constitutional Court in August 13<sup>th</sup>, 2003 and legalized by the President in the same day. Two day later, on 15<sup>th</sup> August 2003, the President through the Presidential Decree Number 147/M of 2003 endorses the first Constitutional Justices and continued by the declaration of the oath of the Constitutional Justices at the State Palace on 16<sup>th</sup> August 2003.

Furthermore, the Supreme Court delegated the authority to the Constitutional Court, and it was the beginning of the establishment of the Constitutional Court as one of the branches of the judicial authority based on the provisions of the 1945 Constitution to uphold the Constitution.<sup>37</sup> This situation

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<sup>36</sup> See Article III of Transitional Provisions of the 1945 Constitution, it stated the Constitutional Court Shall be established at the latest by 17 August 2003, and the Supreme Court shall undertake its functions before it is established.

<sup>37</sup> Mahkamah Konstitusi, “Sejarah Pembentukan Mahkamah Konstitusi”, taken from <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=1&menu=2>, accessed on 9th November, 2017 at 7.48 am.

designates that the Constitutional Court has a position as the branch of the judicial authority which mentioned in Article 24 paragraph 1 and 2 of the 1945 Constitution *Juncto* Article 2 of Law Number 24 of 2003 on Constitutional Court<sup>38</sup>, namely:

- a. Constitutional Court as one of the state institution conducting the Judicial Power;
- b. Constitutional Court as the Independence Judicial Power;
- c. Constitutional Court as the upholder the law and justice.

While, Law Number 24 of 2003 on Constitutional Court states that the general task and function of Constitutional Court is to settle the constitutional case in order to safeguard the 1945 Constitution.<sup>39</sup>

Article 24C paragraph 1 and 2 of 1945 Constitution<sup>40</sup> mentions the authorities of Constitutional Court to handle particular constitutional case, namely:

- a. Constitutional Review of Act;
- b. Determining disputes over the authorities of state institutions whose powers are given by the Constitution;
- c. Deciding over the dissolution of a political party;
- d. Deciding over dispute on the result of a general election;

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<sup>38</sup> See Indonesian 1945 Constitution Article 24 paragraph 1 and 2 *Juncto* Article 2 of Law Number 24 of 2003 on Constitutional Court.

<sup>39</sup> Abdul Mukhtie Fadjar, 2006, *Hukum Konstitusi dan Mahkamah Konstitusi*, Jakarta, Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi RI, p. 119.

<sup>40</sup> See Indonesian 1945 Constitution Article 24C paragraph 1 and 2.

- e. Issue a decision over a petition from the House of Representative concerning alleged violations by the President and/or Vice-President as provided by the Constitution (impeachment).

The Constitutional authority of the Constitutional Court is implemented in accordance with the Law of Constitutional Court Procedure consisting of general procedural law for all the authorities of the Constitutional Court which stated in Article 28 to 49 of Law Number 24 of 2003 on Constitutional Court and special procedural law for every authorities of the Constitutional Court which completed with the several Regulation of Constitutional Court (here after *Peraturan Mahkamah Konstitusi/PMK*) as mentioned in Article 86 of Law Number 24 of 2003 on Constitutional Court.<sup>41</sup>

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<sup>41</sup> Abdul Mukhtie Fadjar, *Op. Cit.*, p. 120.