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Progressive Legal Perspective on the Ultra Petita Decision of the Constitutional Court

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ABSTRACT: Until now, the discourse on *ultra petita decisions* has not found a point meeting between various parties. In this matter it is also necessary to examine, what are the considerations for making *ultra decisions the petita*, so that it can be known in what ways the constitutional judges can drop decision which contain *super petita*. From consideration- With these considerations, we can determine whether there really is enforcement law which progressive. This legal research uses a normative juridical approach with research specification analytical description. The type of data used is secondary data, consists of primary legal materials, secondary legal materials and tertiary legal materials. Technique data collection using library research (*library research)* and from the data which collected and then analyzed in a manner qualitative-normative. From results study which conducted get it conclusion, that doctrine ban *super petita* for judge no apply absolute and general. Withuse approach normative and interpretation systemic could said that provision in Constitution MK nor Regulation MK no give possibility for judge constitution for make decision *super petita*. In issue decisions containing *ultra petita*, in general the Court based there is an inseparable connection between the article being reviewed and other articles which is not tested, so therefore the article or the entire law must be stated no strength law, in side because reason for avoid lawlessness and uphold substantive justice. MK's breakthrough in making *ultra petita* decisions in principle are a form of progressive law enforcement, However, any creativity carried out by law enforcers may not be progressive meaning if not to realize substantive justice, placing justice, benefit and human happiness as a goal finally.

KEYWORDS: Ulta Petita, Testing Constitution, Law Progressive**.**

A. INTRODUCTION

Court Constitution own position which urgent in systemstate administration Indonesia. Formation Court Constitution intended for complete matters which tightly relation with constitutionality administration of the state and constitutional issues in Indonesia. In Article 2 Law Number 24 of 2003 concerning the Constitutional Court states, that "The Court The constitution is one of the state institutions that exercise judicial power who are independent to administer justice in order to uphold law and justice. Court Constitution own position which equal with institutions country other even colleagues namely the Supreme Court.

Based on Article 24C of the 1945 Constitution *in conjunction with* Article 10 of Law Number 24 Year 2003 about Court Constitution (UU MK), Court Constitution as state institutions holding judicial power are given 4 (four) authorities and 1 (one) obligation, ie [1] ; Examine the laws against the Constitution of the Republic of Indonesia Year 1945; Deciding disputes over the authority of state institutions whose powers are granted by Constitution NRIs 1945; disconnect dissolution party political; and disconnect dispute about results election general; as well as The obligation to render a decision on the opinion of the DPR that the President and/or Deputy The President is suspected of having violated the law in the form of treason country, corruption, bribery, follow criminal heavy other, or deed reprehensible, and/or no again fulfil condition as President and/or Representative President as meant in Constitution Base Country Republic Indonesia Year 1945.

Presence MK has many give donation for health systemour constitution and laws. [2] Constitutional Courts which only have 9 (nine) Constitutional judges are seen as having high productivity. In relative age still very young (step on 7 year) the, Court Constitution has manyproduce judgments which has coloring thinking and life

[1] Chapter 24C jo Chapter 10 UU Number 24 Year 2003 about Court Constitution

[2] Moh Mahfud "is the fifth amendment to the 1945 Constitution necessary" **Paper on the National Law Convention of the 1945 Constitution, as the constitutional basis of the Grand Design of the National Law System and Politics** " organized byBPHN Department Law and HAM in Jakarta 15-16 April 2008.

state administration Indonesia. Discourse and thinking about law state administration Becomes dynamic and eye-catching audience wide.

Even so, many controversies have arisen related to the decisions decision Court Constitution in testing Constitution. Not a little practitionerlaw nor academics law which criticize action MK the. A number of According to Adnan Buyung Nasution, the complicated problems raised by the Constitutional Court were one of them related problem implementation decision Court Constitution which cancel characteristic against material law in corruption crimes and matters of violation of doctrine *ultra petita* ban . In the case of testing the Judicial Commission Law, for example, in the verdict has abolish all authority KY for supervise and examining the behavior and performance of Supreme Court judges down to the lowest ranks (judges first). In fact, the authority of the KY to examine MK judges was also abolished. even though the matter was never asked by the petitioners to be canceled. With Thus, the Constitutional Court has tried and decided on its own cases that contain *conflict of interest* because regarding their interests alone. [3]

Mahfud MD stated that there is some internal problems MK decision. There are several MK decisions that are ultra *Petita* (unsolicited) which lead to intervention into the field of legislation, there are also decisions that can be considered as violating the *principle nemo judex in causa sua* (prohibition of deciding matters that concern himself), as well as decisions that tend to regulate or decisions that are based on conflict between one law and another law even though it is *a judicial review* for test material that can carried out by the Constitutional Court is vertical, namely the constitutionality of the law against the Constitution, no crash problem Among UU with UU which other. [4]

accusations that the Constitutional Court is considered a *super body institution* . Provisions of the Constitution stating that the decision of the Constitutional Court is final and tie as if Becomes weapon powerful which strengthen presumption the. The accusations that the MK judges acted not neutral, there were special orders from a certain point of view, group interests and money are two things that are most often assumed by people as things which may influence the Court's decision. [5] Reasonable just, because of course sometimes institution this make judgments which precisely could rated go beyond authority its constitutional. [6] in short, many whichsneered institution new this, but not a little also which wait his work for enforce law and justice.

Debate then shrink on opinion, is of course Court The constitution may make decisions containing *ultra petita* . What is the verdict which its nature *super petita* in testing act justified by Constitution Constitutional Court. Many legal experts allow it, but not a few too which says no. The former Chief Justice of the Constitutional Court, Jimly Asshiddiqie, said it was OK Of course, the Constitutional Court's decision contains an ultra petita if the main issues requested for review are related other articles and become the heart of the law that must be reviewed. While Mahfud MD and former Supreme Court Justice Benjamin Mangkoedilaga, of the opinion that the Constitutional Court should not make super verdict petita without its inclusion in the law.

Discourse and discourse which develop, there is part expert law which want the *ultra petita decision to* be banned by including it in amendment Constitution Court Constitution [7] . Part consider needed amendment UU MK with include allowed decision containing ultra petita with strict restrictions. Some that others are of the view that no amendment is needed, and consider the practice of the Constitutional Court the as part of *judicial activism.*

It is interesting to examine Mahfud MD's statement in the *focus group event discussion* (FGD) organized by the National Legal Development Agency (BPHN), Tuesday 2 November 2010, with the theme "The Dynamics of the Constitutional Court in Guarding the Constitution". according he, in carry out authority, Court Constitution (MK), There are signs that must be obeyed. For example: the Constitutional Court's decision may not contain norms (regulatory in nature), the Constitutional Court may not decide more than a request (*ultra petita*), or in terms of General Election Result Disputes (PHPU), the Constitutional Court only has the authority to decide disputes or vote counting recapitulation errors. However, in practice, the sign the difficult always obeyed. MK, sometimes, need make breakthroughs law for realize justice. [9] Breakthrough MK in case Seed-Chandra [10]for example can made as gauge measuring for evaluate progressiveness enforcement lawin Constitutional Court.

If of course thus, so there is trend thinking law progressive among judge constitution. the question next is is thinking-thinking which progressive the also appear in judgments Court Constitution which contain *super petita* . is breakthroughs MK in making decisions containing *ultra petita* can be categorized as actions progressive action that dares to go against the grain in order to realize substantive justice and by humanize humans.

[3] Adnan Buyung Nasution, **Quo Vadis of Indonesian Law Enforcement,** published in Kompas Daily edition 22December 20 08 .

[4] See Mahfud MD, Constitution and Law, ... p. 278.

[5] Harjono, Constitution as Home Nation..... p.166-167.

[6] Mahfud MD, Constitution and Law, ...p. 278.

[7] Discourse ban MK for no make decision which characteristic super petita which contained in bill changeagainst Law no. 24 of 2003 concerning the Constitutional Court (MK) is getting warmer. See the article “Don't GetThe Constitutional Court Feels As The Highest State Institution: Revision of the Constitutional Court Law, www. Hukumonline.com

Leave from background thinking in on, so writer feel interested for conducted research with the title "Ultra Petita Decision of the Inner Constitutional Court Testing Constitution (A Perspective Progressive Law)". From background behind problem mentioned in on, so there is a number of tree problem which will researched in this research that is How position decision super petita in testing Constitutionbased on normative provisions ? is which Becomes consideration he made decision Court Constitution whichcontain super petita in testing law ? How perspective law progressive to decision *super* court *petition*Constitution in judicial review ?

B. METHOD STUDY

Study law this use method approach juridical normative withspecification study description analytical. Type data which used is type data secondary, consisting of primary legal materials, secondary legal materials and tertiary legal materials. The data collection technique used is library research. From data which collected then analyzed in a manner qualitative-normative with road interpret and construct statement which there is in document and legislation.

C. DISCUSSION

History institutionalization *judicial Reviews* in Indonesia

Learn institutionalization judicial reviews in Indonesia no will free from search how journey idea this first time appear and develop until moment this. Until moment this has hundreds country which institutionalize practice *constitutional review (judicial review)* in the constitutional system. Indonesia itself is country 78th which form institution Court Constitution as the state administrative court which has the authority to conduct *a constitutional review* and is a country first in world on century 21st which shape it. [17]

If traced from the historical background, then from various test models [18] existing moment this could classified in 2 kinds of models main testing, that is: *decentralize model* style America which more before develop and *centralize model* as conducted in Austria which more lately present . Model which firstrepresents the ideas shared by countries with the *common law tradition* and the model which second followed by part big countries Europe which tradition *civil law*. On model America Union, testing constitutional conducted in a manner spread and decentralized in Among court in countries part and Court great Europe, whereas on model Austria or model Europe testing its constitutional only carried out centrally in one institution only. In addition, according to Jimmy there is still one more model that is unique and cannot be categorized follow model America Union or Austria. Model the is as practiced in French which conducted by a Board Constitution (*Conseil de constitutional*). as name, institution this indeed no a institution Justice. [19]

Zainal Arifin Hoesein [20] divides three time periods related to development *judicial review* system in Indonesia. *First* , the initial period of drafting the 1945 Constitution to 1970. At this time, *judicial review* was limited ideas and discourse which never materialized; *Second* , the period when Law Number 14 of 1970 was formulated regarding the Main Provisions of Judicial Power up to 1999. This is the time first *judicial reviews* discussed in a manner deep and debated in a manner open, at a time Becomes milestone beginning applied mechanism the; and *third* , periodchanges to the 1945 Constitution up to 2003. During this period a process occurred change system political and power country, including formation Court Constitution which is given the authority to review the law against the Law Invite Base 1945.

When discussing changes to the 1945 Constitution, the idea of the importance of an Justice system country appear return, especially after MPR no again domiciledas the highest state institution. The principle of parliamentary supremacy that has been upheld strong has shifted from the supremacy of the MPR to the supremacy of the constitution. [21] Due to change which fundamental this so need provided a mechanism institutional and constitutional as well as the presence of state institutions that address possible disputes between state institutions that have now become equal and mutually offset and mutually control (*checks and balances*). [22] Model testing constitutional as

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[9] Source: http://www.mahkamahkonstitute.go.id/index.php?page=website.BeritaInternalLengkap&id=4719 , access date 3 November 20 2 0.

[10] This breakthrough was for example when the Court dared to play evidence of the KPK's telephone recordings in court which open for public, even broadcast in a manner live by a number of station tv national.

[17] A complete description of the Constitutional Court in 78 countries can be read in Jimly Asshiddiqie and Mustafa Fakhri, The Supreme Court Constitution, Compilation Provision Constitution, Laws and Regulation at 78 Country, Jakarta: Study Center Constitutional Law, Faculty of Law, University of Indonesia and Association of Constitutional Law and Law Lecturers Administration Country Indonesia.

[18] According to Jimly, there are at least 10 models of constitutional review in various countries, among others are: United States Model, Austrian Model (Continental Model), French Constitutional Council Model, Model American and Continental Mix, *Special Chambers Testing* Model, Belgian Model, Model without *Judicial Review*, Model Legislative Review, Model Executive Review, Model International Judicial Review. Look inside Jimly Assiddiqie, 2005, Models of Constitutional Testing in Various Countries, Constitutional Press, Jakarta. Thing55-94.

Position of *Ultra Petita Decisions* in Reviewing Laws Based on Provisions normative

Various parties have conflicting views regarding the decision *super petita* which made by Court Constitution. Party which pro to allowed decision *super petita* in testing Constitution view as follows: a. if part of the requested review is related to the articles other and become the heart of the law that must be reviewed, then the cancellation of related articles unavoidable; b. if the applicant includes an *ex aequo et bono application* (deciding for the sake of justice), then the judge has the freedom to determine the verdict; c.The ultra petita doctrine is only used in civil procedural law; d. deep lytic object civil cases are civil rights, while in the judicial review are rights constitutional, therefore characteristic *erga omnes* . Rights civil no could equated with constitutional rights; e. The authority of the Constitutional Court is to examine laws against the Constitution, so not the articles and verses; f. *Ultra petita* rulings are common in countries other countries, even the idea of *a judicial review* first came from the decision of Jhon Adam who very *ultra petita,* and g. The Law on the Constitutional Court does not expressly prohibit prohibition do *ultra petita.*

On the other hand, those who oppose the decision contain *ultra petita* The Constitutional Court is of the view that the *ultra petita decision is* on trial The law violates the generally accepted/universal doctrine in procedural law (*ultra ban petita)* , the principle of *non ultra petita* is international jurisprudence. *Ultra petita* verdict also considered as cidrai the principle of people's sovereignty (parliamentary supremacy), even impressed interfere with other domains of power, thereby violating the doctrine of separation of powers and *check and balances system.* Decision *super petita* is violation on realm legislature by institutions judicial because interfere authority arrange (*regeling*) which no questioned. [23] Overdone again, he did *super petita* considered has violate UU MK , because UU the no arrange allowed make decision which contain *super petita.* In perspective positivistic-legalistic, format the ruling as stipulated in the Constitutional Court Law does not allow *ultra petita.* Based on on difference perspective about *super petita* in on, so according to economical writer there is two problem which its nature operational which proper elaboratedmore carry on To use answer how position verdict *super petita* in perspectivenormative. Two Thing the that is, first related with is doctrine *super petita*of course apply general so that Becomes norm which tie for all judge invarious case, and second, remember UU MK no arrange in a manner assertive, so willseen in a manner more comprehensive regarding how indeed perspective UU MK against *vonnis super petita.*

To analyze the two sub-problems above, 2 (two) analyzes will be used approach, namely normative analysis and comparative analysis. Normative analysis here will used to examine the articles in the Constitutional Court Law and Constitutional Court Regulations which regulates the Review of the Act. While the comparative analysis in This discussion is limited to comparisons between justice systems according to law positive for Indonesia, in this case only the perspectives of procedural law will be presented Civil, Law Event Criminal, Law Event Administrative Court to judgments which contain *super petita*. With so, so will clear position *vonnis superpetita,* both from the perspective of the Indonesian justice system in general and the trial Constitution specifically.

Provisions for the prohibition of *ultra petita* are strictly regulated in article 178 paragraph (3) *Het Herziene Indonesisch Reglement,* which in this case can be interpreted in two aspects, first, judge prohibited for grant on things which no requested by the plaintiff, and secondly, the judge is prohibited from granting more than what is requested by plaintiff. However, in the development of judicial practice, the provisions prohibiting *ultra petita* this no considered apply absolute again based on jurisprudence LET Number556K/Sip/1971 which provides a rule of law that actually grants more than thatbeing sued is allowed during that matter still appropriate with material state.

In criminal procedural law, the prohibition of *ultra petita* is only related to the indictment which is *contestatio litis* in nature for trial examination, and vice versa does not apply in relation with demands criminal. Before validity Criminal Procedure Code, based on jurisprudence Decision Court great RI Number: 47 K/Cr/1956 date 23 March 1957, found the rule of law, that the basis for examination by the court is an indictment (indictment), not an accusation made by the police. So, the two articlesemphasizes that the judge's decision may only concern the facts within the limits letter indictment prosecutor prosecutor general. Judge no justified drop punishmentoutside the limits contained in the indictment, therefore the defendant can onlysentenced based on what is proven regarding the crime he committed according to draft indictment. Article 193 paragraph (1) of the Criminal Procedure Code provides strict limits, “If the court is of the opinion that the defendant is guilty of committing a crime **charged** against him, then the court imposes a sentence”. Vice versa, according to Chapter 191 paragraph (1) Criminal Procedure Code, "if court argue that from results examination at trial, the guilt of the accused for the actions **charged** to him no proved legitimate and convincing, then defendant disconnected free".

[19] See Jimmy, Ibid. Thing 147.

[20] Zainal Arifin Hoesein, 2009, **Judicial Review at the Supreme Court: Three Decades of Reviewing RegulationsLegislation,** Rajagrafindo Homeland, Jakarta.

[21] See Chapter 1 paragraph (2) Constitution 1945: "Sovereignty is at in hand people and held according to ConstitutionBase".

[22] Court Constitution In System state administration Republic Indonesia, paper /ingredients lecture on EducationSpaspati and Sespim police, Bandung, institutionalized in Austria which centralized Becomes choice MPR as shapeinstitutional Court Constitution in Indonesia.

[23] Mahfud MD, Sitting on the *Ultra Petita Question,* article downloaded from the page http://www.kompas.com/kompas-print/0702/05/opinion/3289700.htm

In the PTUN procedural law, although normatively *ultra petita content is* prohibited by because according to UU MA could made as reason submit reviewreturned, but in its development the *reformatio in peius decision was* permitted. *Reformatio in peius* is dictum decision which precisely no profitable plaintiff. Example application *reformatio in peius* for example in case staffing.

Through the MARI decision Number 5 K/TUN/1992, decided on February 6, 1993, judge cassation make rule law new about ban *super petita* , as following: [24]

"that even though the original plaintiff did not submit a petition in the petitum, the Supreme Court can consider and adjudicate all decisions or decisions that are contrary to the existing order. It is out of place for the right to test The judge is only on the object of the dispute submitted by the parties because it is often the object dispute the must rated and consider in relation with part- part determinations or decision Body or Official TUN which no disputed Among second split party (*ultra petita).*"

Thus, the *ultra petita prohibition provision* is not a valid doctrine absolute and general, and binding on all judges in various trials. it happens because each procedural law has different characteristics from one another, Besides because exists need development law in practical Justice.

This conclusion presumably also applies to the procedural law for testing the law in Court Constitution.

Decision Court Constitution taken after consider application consisting of a *posita section* or a description of the subject matter on which the application is based and *petitum* based tool proof which exists. [25] If the application is in material testing reasoned and therefore granted, then based on the provisions of Article 56 and Article 57 of the Constitutional Court Law, the Constitutional Court stated that the material contained in paragraphs, articles and/or part conflicting laws with Constitution. Not there is shape other rulings besides those based on the provisions of Article 56 and Article 57 of the Constitutional Court Law junto Article 36 letter c Regulation of the Constitutional Court Number 6/PMK/2005. In other words, in the perspective of positivism, there is no room for constitutional judges to make judgments those containing *ultra petita* , especially those containing *positive legislation* . Although no arranged in a manner assertive, in meaning no forbid in a manner assertive, will but withsystemic interpretation approach can be concluded that the provisions in UU Number 24 Year 2003 about Court Constitution and Regulation MK Number 006/PMK/2005 no possible he made decision which contain *super petita.* In short, formatively, procedural law does not allow judicial review he made *super* verdict *petita* .

However, in practice there have been several decisions of the Constitutional Court which contain payload *super petita* and by therefore could used as jurisprudence MK. Jurisprudence itself is a source of formal law in procedural law statutory review. If this understanding of jurisprudence is associated with whether it is permissible to do ultra petita for constitutional judges, then of course there must be provision and rule anyway, what and until so far which boundaries allowed judge constitution for make that verdict contain *super petita.*

Consideration (*Ration Decidendi*) for the Constitutional Court Decisions Containing *UltraPetita* in Testing Constitution

- **Some of the Constitutional Court's decisions containing *ultra petita content* have been debated and controversy among legal experts, not only related to the act of issuing variation decision which no there is base law, but also impact decision the Case Number 001-021-022/PUU-I/2003**

In case Number 001-021-022/PUU-I/2003, Court Constitution hascancel Law Number 20 of 2002 concerning Electricity whole. Court Constitution in consideration the law actually more focus the test on Chapter 16, Chapter 17 paragraph (3), as well as Chapter 68 UU Electricity which instruct system segregation/splitting effort electricity (*unbundling system*) with perpetrator effort which different, will butbecause these articles are the heart of the article and the paradigm that underlies the law Electricity, then the entire Electricity Law is declared powerless law tie. Court argue that system the contrary with Article 33 of the 1945 Constitution, because it is seen that it will further bring down the state-owned enterpriseswill lead to an insecure supply of electricity to all levels of society,good which commercial or non-commercial. [26]

- **Case Number 007/PUU-III/2005**

In testing Law no. 40 of 2004 concerning the National Social Security System, Applicant request so that so that Chapter 5 paragraph (1), paragraph (3) and paragraph (4) and Chapter 52 stated contrary with Chapter 34 paragraph (2) Constitution 45 and stated no strength law tie. The focus main in application this is, ismeaning country in phrase "Country develop system guarantee social " is at in hand Government Center, Government Area or both. In amar

[24] Set of Rules of Law on Case Decisions in the Book of Jurisprudence of the Supreme Court of the Republic of Indonesia for 1969-1997,Court great RI, 1999. Page 10.

In its decision, the Constitutional Court rejected the request for review of Article 5 paragraph (1) and Article 52 of the Social Security Law, however, establishing Article 5 paragraph (2) of the SJSN Law is contrary to the 1945 Constitution and stated that the article did not have binding legal force, even though para Applicant no ask for it in application. In consideration law related with the *ultra petita* Article 5 paragraph (2) [27] , the Constitutional Court stated that although it was not requested in the petitum of the petition, this paragraph is one unity that cannot be separated from paragraph (3), therefore if it is maintained rather will give rise to multiple interpretations and legal uncertainty.

- **Case Number 003/PUU-IV/2006**

Decision Number 003/PUU-IV/2006 is a decision regarding the review of the Invite Number 31 Year 1999 about Eradication follow Criminal Corruption (UU Corruption). The main issue that appears in this decision is the annulment of the expansion provisionsthe element of "unlawful nature of the material" as formulated in the Elucidation of Article 2 paragraph (1) of the PTKP Law. In the decision the Constitutional Court clearly statesthat the request for judicial review of the words "may" and "probation" as the subject matter of petitum [28] stated "rejected", because stated no contrary with chapter 28D paragraph (1)UUD 45. However, on the other hand the Constitutional Court stipulates that the Elucidation Article 2 paragraph (1) of the Corruption Law is considered to have expanded the category of "unlawful" elements in meaning law written (*formele wederrechtelijk* / properties oppose law formal),but also in the sense of *materiele wederrechtelijkheid* (traits against material law), and therefore contrary to 28D paragraph (1) of the 1945 Constitution. According to the Constitutional Court, Elucidation of a laws may not contain new norms, because explanations only contain descriptions or further elaboration of the norms regulated in the body. Admittedly the teachings of nature violating the material law in Article 2 paragraph (1) will also cause problems law, because of what is proper and what qualifies morality and a sense of justice acknowledged in Public, which different from one area to area other, will lead to legal uncertainty. [29] This decision does not provide a clear explanation related live with why MK do *ultra petita.*

- **Case Number 005/PUU-IV/2006**

Decision Number 005/PUU-IV/2006 is a decision to review the law Number Number 22 of 2004 concerning the Judicial Commission (UU KY) and the Law Republic Indonesia Number 4 Year 2004 about Power Justice (UU family) to Constitution 1945. Issue main which buzzed in decision this is obscurity mechanism supervision judge in UU KY so that therefore raises uncertainty law. [30] According to Gaius Lumbar [31] , Decision MK relatedauthority supervision judge as listed on chapter 1 alphabet (5) UU Number

22 Year 2004 characteristic *super petita* and discriminatory, 31 judge great submit begging them not to enter KY supervision object. But MK actually placing oneself outside the object of KY supervision. This verdict has also castrated the whole KY authority in supervising judges (including supreme court justices and constitutional judges), when in fact the petition of the petitioners is more related to the desire of the judge Agung is not included as a party supervised by KY. In this case MK in consideration the law state: "This exception (MK Judge) is based on systematic understanding and interpretation based on the " *original intent* " formulation of provisions regarding KY in Article 24B of the Constitution 1945 is indeed not related to the provisions regarding the Constitutional Court which are regulated in Article 24C UUD 1945." [32]

Related with cancellation whole authority supervision, MK assume "that implementation of the supervisory function born of legal uncertainty (*rechtsonzekerheid*) as a result of the absence of clear norms about the scope of understanding behavior judge and supervision technical justicial related with boundaries accountability from perspective behavior judge with independence judge in carry out Duty justicially, in a manner visible eye is intervention to power justice form of *stress* or stress which direct or indirectly". [33]

- **Case Number 006/PUU-IV/2006**

Decision in case 006/PUU-IV/2006 which cancel Constitution Number 27 of 2004 concerning the Truth and Reconciliation Commission (UU TRC). whole very startling many party. para Applicant in his request postulate that existence Chapter 1 number 9, Chapter 27 [34] and Chapter 44 contrary to the 1945 Constitution, especially Article 27 paragraph (1), 28D paragraph (1), 28I paragraph (2). According to the Petitioners, the norm in Article 27 of the TRC Law has negated the guarantee for anti-discrimination, equality before the law and respect for human dignity guaranteed by the 1945 Constitution. [35] In addition, the existence of Article 44 of the TRC Law is deemed to eliminating the state's obligation to prosecute and punish perpetrators. In the verdict What is declared contrary to the 1945 Constitution is actually Article 27 UU TRC, however because MK consider provision chapter 27 determine operationalization of the entire TRC Law, then the entire TRC Law is declared not to have strength law tie. According to MK, determination exists amnesty as condition fulfilled compensation and rehabilitation is Thing which rule out legal protection and justice guaranteed by the 1945 Constitution. Nonetheless, The annulment of the entire TRC Law has destroyed the mandate of this Law to carry out disclosure truth and settlement violation HAM period then, withreconciliation approach, which becomes impossible when used *normally rules* .

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

Decision MK in case Number 012-016-019/PUU-IV/2006 mandate a message that, there is a dualism of courts that prosecute criminal acts of corruption (as formulated in Chapter 53 Law Number 30 years 2002 regarding the Corruption Eradication

Commission) is contrary to the Constitution 1945, therefore it is necessary to improve the arrangement of criminal courts corruption in system Justice Indonesia. Become seen unique because in he warnedThe Constitutional Court postponed the binding validity of the decision and gave a time limit of 3 (three) years for the legislature to form the Corruption Court Act. Amar the actual delay was not requested by the petitioners at all. Court The Constitution argues that even though Article 47 of the Constitutional Court Law states that "Verdict The Constitutional Court has permanent legal force since it has been pronounced in plenary session open to the public"; but so that the examination of criminal acts of corruption by KPK and Court Corruption which currently walk no disturbed and no experience chaos so that could raises uncertainty law which no desired by Constitution 1945, so Court Constitution consider necessity From some of the *ultra petita cases* presented above, if a grouping is made considerations used by constitutional judges, related data will be obtained with why judge constitution make decision which *super petita,* as following :

- The part of the law (paragraph, article, explanation, etc.) that is requested to be reviewed is "heart" of the law, so that the entire article can not be implemented and must stated no strength law tie entirely. Including in this category, for example: Cancellation of the Electricity Law (Case Number: 001-021- 022/PUU-I/2003) and the Cancellation of the Truth and Reconciliation Commission Law (Case Number 006/PUU-IV/2006).
- The part of the law (paragraph, article, explanation, etc.) that is requested to be examined is related with other articles that cannot be separated, so that the articles are related was finally declared not legally enforceable either. Included in the category consideration this is : Testing UU System System Guarantee Social National (Case Number 007/PUU-III/2005). In examining the Judicial Commission Act (Case Number 005/PUU-IV/2006) it seems also lead on consideration this, although MK not decipher it in a manner assertive.
- sake avoid chaos law, so taken delay enforceability binding decision pending the formation of new amendment rules. In In this case, the rationale of expediency defeats legal certainty, even though it is true the ultimate goal is also to create legal certainty. Included in the category this reason is the decision to annul the legal basis of the Corruption Court (Case Number 012-016-019/PUU-IV/2006). The Constitutional Court's decision to test Law Number 16 of 2008 concerning Amendments to Law Number 45 of 2007 concerning APBN for Fiscal Year 2008 (Case Number 04/PUU-VI/2008) is also included in category this reason.
- Consideration law MK in problem *super petita* only associated with consideration law tree plea, even not seldom impressed making it up and
  - appeared suddenly. It is in this category that Harjono [37] 's statement becomes relevant, that according to the Constitution it is very clear, the authority of the Constitutional Court is to review laws to constitution, so no articles and the verse. throughout which tested is related laws, then there is no ultra petita dictionary. Included in this category is in the case of cancellation of material unlawful nature in the Corruption Law (Case Number 003/PUU-IV/2006) and case Number 005/PUU-IV/2006 which reduce the Authority of the Judicial Commission, insofar as it relates to its issuance judge Constitutional Court from party which supervised by the Commission judicial.
  - ***ultra Petita* In Testing Constitution : Perspective Law Progressive**
  - The ambiguity of the text that regulates the type and content that must be in the decision Court Constitution make debate which until moment this not yet ends. As one of the impacts, the Constitutional Court's *ultra petita decision is currently under review* Constitution also Becomes controversy in here and there. Party which pro consider that the procedural law of the Constitutional Court (MK) does not regulate *ultra petita,* because it is permissible for the Court to make *ultra petita decisions* . *Ultra petita* law logic only there is in law event civil, because *objectum lytic* in MK different withJustice the civil protect individual, whereas in MK more characteristicpublic law, not only protecting the interests of the litigants, will but is *erga omnes* . In connection with the unregulated procedural law provisions detailed including *ultra petita* , the Constitutional Court has the right to regulate the elaboration in PMK and in journey find the law in power judge. [38]

Opened a new precedent through its first ruling in the judicial review The Electricity Law is a solution to solving inherent normative deadlocks on the Constitutional Court Law and PMK Number 05/PMK/2005 related to the *ultra* -ban conundrum *petita* . The decision that has canceled the liberalization spirit of the electricity sector in Law Number 20 of 2002 concerning Electricity has become the antidote public concern over their constitutional rights that could potentially be violated by the law. Although the provisions are seen as contradictory constitution on basically just Chapter 16, 17 paragraph (3), as well as 68, specifically which for maintenance country and enforcement law in Indonesia. Regardless from this controversy, it would be better if it was examined, what actually prompted it and background para judge constitution for Secrete decision super petita. Through legal considerations verdict we will find legal reasoning judge, including the paradigm that underlies the decisions handed down. That way it will it becomes clear to understand what the judges really want to achieve/go forthrough the verdict. In context discussion about *super petita* this, We can obtaining legal principles in jurisprudence made by the Constitutional Court, so that by therefore could determined boundaries to what extent super petita could conducted by the Constitutional Court in reviewing the law. Below will served a number of case the:

[25] Maruarar damn, 2008, **Constitution 1945 as Constitution which life** , General Secretariat MKRI, Jakarta. page 394.

[26] Decision Number 001-021-022/PUU-I/2003, page 347.

regarding *unbundling* and competition, but because these articles are heart of Law Number 20 of 2002, the Electricity Law must be repealed in a manner whole.

Even though the regulations are still multi-interpreted, the change process does not have to be always centered on existing regulations, but on the creativity of legal actors in the context. In the context of this case the MK judges have dared to be creative and legal breakthroughs in making rules more meaningful and functional for creation of justice. The Constitutional Court has carried out *rule breaking* in the framework break blur (*obscure)* terms in UU MK and PMK for give birth to embryos type decision new which can used for realize justice substantive in future testing periods. This is what Satjipto Rahardjo did it is said that the essence of law is always in the process of becoming (*law as a process in thelaw making*). [39]

With thus could said, precedent on he made decision which containing *ultra petita* in the procedural law of testing the law can we categorize it as a progressive law enforcement action. However, necessary underlined, that any creativity carried out by law enforcers can be meaningless progressive when not to realize substantive justice, put justice, benefit and human happiness as the ultimate goal. With say other, can just judgments containing *super petita* that rather injure justice and expediency.

In the context of decisions containing *ultra petita* , as has been described in the previous sub-chapter, it can be said that not all decisions the decision shows the side of substantive justice, and therefore also cannot called as shape enforcement law which progressive. In decision *super petita*the cancellation of the TRC Law (Case Number 006/PUU-IV/2006) for example, the MK was deemed to have only drip weight on aspect juridical only. [40] Decision TRC also has bring unrest among victims, who so far have seen the existence of the TRC Law as one hope for realizing justice on what which they experience in period then. [41]

The case of reducing the authority of the KY (Case Number 005/PUU-IV/2006) which cut Authority Commission judicial, related with issued judge From the side supervised by the Judicial Commission, the Constitutional Court also showed an attitude discriminatory and tends to be legalistic, because it only pays attention to the *original intense aspect* Constitution 45 just as consideration the law. That's justice procedural, becauseit is true that during the discussion in PAH I of the MPR, no name appeared at all constitutional judges as parties supervised by KY. Historically these legal facts it cannot be denied, but do the nuances of the Constitutional Court's decision above reflect values justice and expediency, especially if associated with cancellation whole authority KY in supervise judge in the middle thread tangled mafia Justice.

It is different in the context of the cancellation of the legal basis of the Corruption Court (Case Number 012-016-019/PUU-IV/2006). According to economical writer decision this showingprogressive side of law enforcement. MK in this case trying to bring together three values of legal objectives, namely: justice, certainty and expediency. From the aspect of fairness, The Constitutional Court considers that the existence of the Corruption Court makes dualism and double standards for defendants in corruption cases. On the aspect of legal certainty, MK look that in a manner formal there is error in base founding The Corruption Court should be made in a separate law. From aspect expediency seen from effort MK for avoid chaos law which can generated by because canceled base law Court Corruption withgive limitation time 3 (three) year for party legislature for form UUCourt Corruption.

Thus a conclusion can be made that not all decisionsThe Constitutional Court in examining laws containing *ultra petita* contains characteristics enforcement law which progressive. Bravery MK for be creative in the verdict indeed good, as long as these actions are used in context and within the framework realize substantive justice.

Of course there are always parties who are dissatisfied with the actions of the Constitutional Court make a decision by applying *the principle of rule breaking* as stated in the decision which is *ultra petita* and *positive legislature* . This is inseparable from the sect and paradigm thinking positivity law which of course control part big practitioner

Completion Violation HAM in Period then , Position paper Elsam To Decision MK Cancel UUTRC, Jakarta, 20 0 6.

and academics law Indonesia. Worries as this no only occurred in Indonesia, but also in several countries that have testing systems constitutional. In this case, the Constitutional Court of the Republic of Indonesia has also entered the area that in the *common law* tradition known as *judicial activism* , a judge's internal thinking decision which sometimes seen liberal-progressive in consideration lawthe verdict.

However, the practice of *judicial activism* tends to be judicial *heavy* could Becomes negative and destructive if used for look after conservatismjudiciary or smooth the subjective preferences of elites and judges alone. If that happen, with authority which big, institution judicial could metamorphosis Becomes institution which authoritarian (*judicial authoritarian*) which precisely deny principle base *separation of power* and *check and balances* asheld tight all this time. Power always shows its true face always tend to be oppressive and corrupt. as Lord Acton hum, " *powera to corrupt, and absolute power absolutely corrupt.*

Use *judicial activism* in a manner excessive precisely could causing climatewhich no healthy for growth democracy that alone. For take care of it, so activism judicial need always escorted with criticism academic which constructive, so that court no will lost legitimacy. [42] Look in the mirror on reality law enforcement above, then the idea of limiting power can also be offered The Constitutional Court through progressive changes to the Constitutional Court Law as an alternative improvement administrative justice system country in Indonesia.

D. CONCLUSION

Provisions for the prohibition of *ultra petita* in principle are regulated in article 178 paragraph (3) *Het Herziene Indonesisch Reglement*, which in this case can be interpreted in two ways aspects, first, judges are prohibited from granting things that are not requested by the plaintiff, and secondly, the judge is prohibited from granting more than that requested by the plaintiff. Even though the Constitutional Court Law does not regulate assertive regarding ban *super petita* this, will but with approach interpretation systemic, it can be concluded that the provisions in Law Number 24Year 2003 about Court Constitution and Regulation MK Number 006/PMK/2005 (in format) does not allow constitutional judges to make an amar ruling containing *ultra petita.* However deep In practice, there have been several Constitutional Court decisions containing amar *ultra petita* and bytherefore could used as source law jurisprudence MK.Jurisprudence itself is a source of formal law in law law review event. Nor is the *ultra petita* prohibition provision a doctrinewhich apply general and bind all judge, with reason as following: In development, ban super petita in law event civilno apply absolute based on jurisprudence LET Number 556K/Sip/1971 which give rule law that grant more than claimed is permissible as long as it is still in compliance circumstances material. In the criminal procedural law, this *ultra petita prohibition* is only related to letters indictment which its nature *lytic contestatio* for inspection the judge, and otherwise not apply in relation with demands criminal ; In law event Administrative Court, although in a manner normative payload *super petita*prohibited because according to the Supreme Court Law it can be used as a reason for filing review return, will but in development amar decision *reformatio in peius it is* possible to be dropped.

In a number of the verdict, MK has decide exceed from which requested (*super petita*). Between judgments the is: Case Number 001-021-022/PUU-I/2003, Case Number 007/PUU-III/2005, Case Number 003/PUU-IV/2006, Case Number 005/PUU-IV/2006, Case read Number 006/PUU-IV/2006, Case Number 012-016-019/PUU-IV/2006, Case Number 101/PUU-VII/2009, Case Number 11-14-21-126-136/PUU-VII/2009, and so on. From the several decisions discussed above, it can be concluded that there are 4 groups of judges' considerations that underlie their decisions amar *ultra petita* verdict , di in between is: Part of the law (paragraph, article, explanation, etc.) requested to be tested is "heart" from Constitution, so that whole chapter no could

held and must stated no strength law tieentirely. Part of the law (paragraph, article, explanation, etc.) requested to be tested related to other articles that cannot be separated, so The related articles were finally declared to have no legal force also. In order to avoid legal confusion, a delay in enforcement was taken binding decision while waiting for the establishment of the amending rules new. The Constitutional Court's legal considerations in *ultra petita issues* are only related to the main legal considerations of the application, not infrequently it even seems to appearin a manner suddenly.

Even though the regulation regarding the prohibition of *ultra petita* is still multi-interpretable, in the perspective of progressive law, the process of change does not always have to be centered on regulation which there is, will but on creativity perpetrator law in the context. In the context of the *ultra petita decision* in examining the law Number 20 Year 2002 about Electricity (Case Number 001-021- 022/PUU-I/2003), MK judges have dared to do creativity and breakthroughs breakthrough law in making rules more meaning and functional forcreation justice. Will but, need striped bottom, that creativitywhatever which conducted by enforcer law could Becomes no meaning progressive when no for realize justice substantive, put justice, expediency and happiness man as purpose finally. Therefore, progressive changes to the Constitutional Court Law are an alternative realization enforcement law which progressive.

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[27] Article 5 paragraph (2) reads: "Since the enactment of this law, the existing social security administering bodies expressed as Body Organizer Guarantee Social according to Constitution this"

[28] In his application Dawud Jatmiko argued that the provisions in Article 2 paragraph (1), Explanation of Article 2 paragraph (1), Article 3, Explanation of Article 3, and Article 15 (as far as the words "trial" and "can") PTPK Law in a manner real has contrary to Chapter 28D paragraph (1) UUD 45

[29] Decision Number 003/PUU-IV/2006. see page 74.

[30] Court Constitution Republic Indonesia : Report Annual 20 1 6, page 33.

[31] Gaius Lumbar in article Decision MK ultra Petita and Discriminatory, Bulletin Commission judicial, downloaded from page : www.komisiyudisial.go.id .

[32] Decision Number 005/PUU-IV/2005, Part Consideration Law, page 173-174.

[33] Ibid. page 201.

[34] Article 27 UUKKR states that: "Compensation and rehabilitation as referred to in Article 19 cangiven when application amnesty granted."

[35] See Decision Number 006/PUU-IV/2006, Part sit case (description application) page 21.

provide time for process transition which smooth *(smooth transition)* for formation of new rules. [36] This is where the statesmanship and wisdom of the judges, very visible. Breakthroughs like this contain value and benefits justice while aiming for create legal certainty.

[36] Ibid. page 286.

[37] Harjono, **Constitution As Home Nation,** Jakarta, General Secretariat and Secretariat MKRI, 20 1 8. Page 182-185.

[38] Miftahul huda, ***ultra Petita In Testing Act*** , Journal Constitution vol 4 No 3 (September 2007)

[39] Satjipto Rahardjo, ***Progressive Law. The Liberating Law*** . Progressive Law Journal, Vol. 1/No. 1/April 2005,PDIH UNDIP, Semarang page 6.

[40] AM. Fatwas in **Considering Performance Court Constitution** , Magazine Figure, Edition X/Y. 2007.

[41] Indriaswaty D Saptaningrum, SH, LLM, et al , **When Principle Certainty Law Judging Constitutionality Completion Ham violations Period Then View Critical On Decision MK and The implication For**

42 pan Mohamad Faiz, Constitution And activism judicial Source: Column Opinion Journal National, Tuesday, 25-08-20 1 9.

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