CHAPTER ONE

INTRODUCTION

A. Background

One of the most important elements in the modern legal state system is the existence of Constitutional Court.[1] In Indonesia, the Constitutional Court was established in 2003 through Law Number 24 of 2003 on the Constitutional Court.[2] It has influenced since then the development of law and Indonesian Constitutional System.[3] Article 24C paragraph 1 and 2 of 1945 Constitution mentions among the authorities of the Constitutional Court are: constitutional review of Act; determining disputes over the authorities of state institutions whose powers are given by the Constitution; deciding over the dissolution of a political party; deciding over dispute on the result of a general election; and issuing a decision over a petition from the House of Representative concerning alleged violations by the President and/or the Vice-President as provided by the Constitutions (impeachment). The constitutional authority granted to the Constitutional Court can be understood that the Constitutional Court was established to guarantee the constitutional rights of citizens who may be infringed or marginalized through a legislative product.

---

[1] Abdul Latif, 2007, *Mahkamah Konstitusi Dalam Upaya Mewujudkan Negara Hukum Demokrasi*, Yogyakarta, CV. Kreasi Total Media, p. 21.

[2] Mahkamah Konstitusi, "Sejarah Pembentukan Mahkamah Konstitusi", taken from http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=1&menu=2, accessed on 16th Oct, 2017 at 4.34 pm.

[3] Hery Abduh Sasmito, "*Ultra Petita* Decision of Constitutional Court on Judicial Review The Perspective of Progressive Law", *Journal of Indonesian Legal Studies*, Volume 1, Issues 01, ISSN: 2548-1584, (November, 2016), p. 48.

The role and functions of the Constitutional Court have influenced the concept and the development of Indonesian Constitution. As a new institution in the constitutional system of the Republic of Indonesia, the decisions of the Constitutional Court in conducting constitutional review have generated different responses. Several decisions of the Constitutional Court in a constitutional review are considered as controversial decisions because the decision exceeds what the petitioners have requested or otherwise known as an *ultra petita* decision.[4]

Based on the news published by Republika on January 29th 2017, it is reported that the Constitutional Court has issued the *ultra petita* decision on rejection of the justices of the Constitutional Court to be supervised by the Judicial Commission.[5] The news explains that there is controversy which arises from the *ultra petita* decision issued by the Constitutional Court. In fact, the constitutional justices have been twice involved in corruption cases because the constitutional justice ethics are not properly supervised.[6] This Constitutional Court decision has more value than the original request. In fact, the constitutional review is related to the public interest in which the law must be obeyed by all people or *erga omnes*. It is in contrasts with the

[4] Djoko Imbawani Atmadjaja, "*Ultra Petita* dalam Putusan Mahkamah Konstitusi", *Jurnal Konstitusi*, Volume 1, No. 1, (November, 2012), p. 36.
[5] See further the Constitutional Court decision No. 005/PUU-IV/2006 on Constitutional Review on Law No. 22 of 2004 on the Judicial Commission and Law No. 4 of 2004 on the Judicial Power.
[6] Fauziah Mursid, "MK Pernah Keluarkan Putusan Ultra Petita Menolak untuk Diawasi", taken from http://nasional.republika.co.id/berita/nasional/hukum/17/01/29/oki7ol365-mk-pernah-keluarkan-putusan-ultra-petita-menolak-untuk-diawasi, accessed on 16th Oct, 2017 at 4.39 pm.

decision of the civil law which has intra parties' principle which means the decision only binds the parties.[7]

From the explanation above, the *ultra petita* decision contains the interest of Constitutional Court which is designed to be free from Judicial Commission or is not supervised by Judicial Commission as it runs their obligation to supervise the judge of Supreme Court and the lowest rank.[8] The definition of *ultra petita* itself is a judgment of the judges over a case which is not requested or decided exceeds the request. *Herzien Inlandsch Reglement* (HIR)[9] Artcile 178 section (2) and (3) describes that a judge is prohibited to decide the case exceeds the request.[10] Judge who decides beyond the *petitum* of the plaintiff will recognize as *ultra vires* or conducting beyond his/her authority. Therefore, *ultra petita* decision must be declared as invalid decision even it is done in good faith and for the public interest.[11]

Labertus Johannes van Apeldoorn[12] stated that the judge in the civil court is unable to do anything more than the plaintiff requested.[13] His statement is in

---

[7] Miftakhul Huda, "*Ultra Petita* dalam Pengujian Undang-Undang", taken from http://www.miftakhulhuda.com/2009/06/ultra-petita-dalam-pengujian-undang.html, accessed on 7th January, 2018 at 6.05 pm.

[8] Hery Abduh Sasmito, *Op. Cit*., p. 49.

[9] *Herzien Inlandsch Reglement* (HIR) is the procedural law in civil proceedings and criminal proceedings in Java and Madura. This regulation applies in the era of Hindia Belanda.

[10] See *Herzien Inlandsch Reglement* (HIR) Article 178 section (2) and (3). Article 178 section (2) stated the judge is required to adjudicate all parts of the claim, Article 178 section (3) stated judges are prohibited to decide cases that are not claimed, or giving more than what is requested.

[11] Agus Budi Santoso, "Tinjauan Yuridis Terhadap Larangan Mekanisme *Ultra Petita* Pada Putusan Perkara oleh Mahkamah Konstitusi", *Jurnal Pasca Sarjana Hukum UNS*, 5th edition, (January-June, 2015), p. 22.

[12] Labertus Johannes van Apeldoorn (13rd December, 1886 – 15th August 1979) was a professor of legal history and the introduction of law at the University of Amsterdam.

[13] Ibnu Sina Chandranegara, "Ultra Petita dalam Pengujian Undang-Undang dan Jalan Mencapai Keadilan Konstitusi", *Jurnal Konstitusi*, Volume 9, No. 1, (March, 2012), p. 41.

accordance with the principle of passive judges which contain in the Civil Law. The passive judge's principle means that the judges can only consider the things that demanded by the parties.[14] The basic *ultra petita* principle which applied in the scope of civil court is to protect the party who defeated in the civil court process. If the judge decides the case with the *ultra petita* principle, it may be injustice. If the *ultra petita* principle is implemented in the civil court, people worry that the judge will take sides with one party only.[15]

It is different from the Constitutional Court which issued some decision that contains *ultra petita* principle.[16] Actually, the certainty of Constitutional Court Justices may impose *ultra petita* decision or not is not regulated in Law No. 24 of 2003 on Constitutional Court.[17]

To prevent Constitutional Court from making the *ultra petita* decision, on the amendment of Law on Constitutional Court embodied to Law Number 8 of 2011 on the amendment of Law Number 24 of 2003 on Constitutional Court, it is affirmed in Article 45A[18] which regulates the authority of the Constitutional Court that the

---

[14] *Ibid*, p. 28.
[15] *Ibid*, p. 44.
[16] See the Indonesian Constitutional Court decisions No. 001-021-022/PUU-I/2003 on Constitutional Review on Law No. 22 of 2002 on the Electrification, No. 007/PUU-III/2005 on Constitutional Review on Law No. 40 of 2004 on the Social Security System, No. 003/PUU-IV/2006 on Constitutional Review on Law No. 31 of 1999 on the Eradication of Corruption, No. 005/PUU-IV/2006 on Constitutional Review on Law No. 22 of 2004 on the Judicial Commission and Law No. 4 of 2004 on the Judicial Power, No. 006/PUU-IV/2006 on Constitutional Review on Law. 27 of 2004 on the Truth and Reconciliation Commission.
[17] Hery Abduh Sasmito, "Putusan Ultra Petita Mahkamah Konstitusi dalam Pengujian Undang-Undang (Suatu Perspektif Hukum Progresif)", *Jurnal Law Reform*, Volume 6, No. 2, (October, 2011), p. 55.
[18] See Article 45A of Law Numbe 8 of 2011 on amendment of Law Number 24 of 2003 on Constitutional Court, it stated the Constitutional Court's decision cannot contain a decision that is not

Constitutional Court can't make an *ultra petita* decision or decide something beyond of the petitioners request.[19] But the provision on the prohibition of *ultra petita* has been nullified by the Constitutional Court through its decisions No. 48/PUU-IX/2011 and No. 49/PUU-IX/2011.[20] Through this decision, it seems, with a contrario interpretation, the Constitutional Court allows the constitutional justices to make *ultra petita* decision.

Referring to the theory of responsive law popularized by Philippe Nonet[21] and Philip Selznick[22], the Constitutional Court is valid to issue the *ultra petita* decision in constitutional review. Nonet-Selznick argues that the law should be prioritized on social objectives. If the constitutional review is merely a review, it will be immerse into a tendency that the objectives of constitutional review are not reached for benefit of public interest.[23] That's why it needs further study to know the proper mechanism of *ultra petita* decision made by the Constitutional Court.

---

requested by the applicant or exceeds the applicant's request, except to the particular case relating to the main application.

[19] Agus Budi Santoso, *Loc. Cit.*

[20] See the Indonesian Constitutional Court decision No. 48/PUU-IX/2011 on Constitutional Review on Law No. 35 of 2009 on Narcotic and Law No. 8 of 2011 on amendment of Law No. 24 of 2003 on Constitutional Court, and Constitutional Court decision No. 49/PUU-IX/2011 on Constitutional Review on Law No. 8 of 2011 on amendment of Law No. 24 of 2003 on Constitutional Court.

[21] Philippe Nonet was the author of Administrative Justice and Law and Society, he was a professor of Law and Sociology, Emeritus.

[22] Philip Selznick was a professor of sociology and law at University of California, Berkeley.

[23] Ibnu Sina Chandranegara, *Op. Cit*., p. 46.

B. Research Problem

Based on the discussion above, it can be formulated a research problem on how is the position of *ultra petita* principle in Constitutional Court decision?

C. Objective of Research

The objectives of research are:

a. To understand the definition of *ultra petita*;
b. To describe and analyze the position of *ultra petita* in Constitutional Court decision;
c. To propose recommendation for a better concept *ultra petita* in Constitutional Court decision.

D. Benefit of Research

The benefits of research are:

1. Theoretical Benefit

   This research will provide the understanding on *ultra petita* decision, Constitutional Court, and others supported instruments. This research will enrich the view of the proper *ultra petita* in Constitutional Court decision.

2. Practical Benefit

   The result of research is expected to give recommendation for a better concept of *ultra petita* that can be made by the Constitutional Court.