



REVIEW ARTICLE

THE CONSTITUTIONAL COURT ULTRA
PETITA AS A PROTECTION FORM OF
ECONOMIC RIGHTS IN PANCASILA JUSTICE

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ABSTRACT

Social justice concept has been clearly emphasized at Pancasila (the five fundamental values of Indonesia) as one of common values of Indonesia society. Pancasila also recognized as the philosophical *grondslag* which makes Pancasila as a reference of all Indonesian citizens and State Action, including in governance. The concept of social justice in Pancasila implies that any natural resource management that has the potential to prosper and affect the Indonesian people as a whole must be controlled by the State as well as used for the greatest prosperity of the people. This paper is intended to analyze, describe, and examine the Constitutional Court Decision concerning to social justice especially in terms of economic rights. This paper discusses various decisions of the Constitutional Court that are *ultra petita*. This paper illuminated and highlighted that in two Constitutional Court Decisions on Water Resources and the Decision on the Electricity Law and the Water Resources Law of the Constitutional Court in its decision to make an *ultra petita* decision by canceling the entire two laws, because that the article being tested is the heart of the law, thus seriously affecting the implementation of other articles in the law. Therefore, with the *ultra petita* decision, in the future, the Constitutional Court is expected to be more progressive and responsive in seeing the problems that occur, especially related to the basic economic needs of the Indonesian people. Because the Constitutional Court is the guardian of the constitution whose main function is to maintain Indonesia's highest legal order (constitution).

Keywords: Ultra Petita; Constitutional Court; Economic Rights; Pancasila

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INTRODUCTION

The history of the founding of the Constitutional Court (hereinafter MK) begins with the adoption of the Constitutional Court idea in a constitutional amendment carried out by the People's Consultative Assembly (hereinafter MPR) in 2001.¹ As formulated in the provisions of Article 24 paragraph (2), Article 24C, and Article 7B of the 1945 Constitution² resulted from the Third Amendment which was ratified on November 9, 2001. The idea of establishing the Constitutional Court was one of the developments in legal thoughts and modern state that emerged in the 20th century. Article 24C paragraphs (1) and (2) of the 1945 Constitution are the legal basis for the authority of the Constitutional Court granted by the Constitution, further authority related to the Constitutional Court is regulated in Law Number 8 of 2011 on Amendments to Law Number 24 of 2003 concerning the Constitutional Court.

In the case of the Constitutional Court's authority consisting of: adjudicating at the first and final level in reviewing the Law against the Constitution, deciding on disputes over the authority of governmental

¹ JIMLY ASHIDDIQIE, *PANCASILA DAN EMPAT PILAR KEHIDUPAN BANGSA 13-15* (2019). The history of the formation of the Constitutional Court is very closely related to demands for community rights and justice in the law. In fact, the majority of judicial review decisions by the Constitutional Court only test the laws against the articles of the 1945 Constitution but do not allude to the Pancasila values as the basis for the analysis of decisions. So in the future, the Constitutional Court should be able to examine the law against the principles of Pancasila, Pancasila is not only used as a basis for analysis in the opinion of the Constitutional Court but must also be explicitly stated that a law article is contrary to the values of the Pancasila or not. For more comprehensive comparison, please also see Jimly Asshiddiqie, *Membudayakan Nilai-Nilai Pancasila dan Kaedah-Kaedah Undang-Undang Dasar Negara RI Tahun 1945*, PROSIDING KONGRES PANCASILA III (2011); Jimly Asshiddiqie, *Gagasan Negara Hukum Indonesia*, Paper Presented in the National Legal Development Planning Dialogue Forum Organized by the National Law Development Board of the Ministry of Law and Human Rights (2011, November); Suko Wiyono, *Empat Pilar Kehidupan Berbangsa dan Bernegara sebagai Panduan dalam Mewujudkan Masyarakat Adil Makmur Berdasarkan Pancasila*, 15 LIKHITAPRAJNA. 37, 40-45 (2018); Jimly Asshiddiqie, *Undang-Undang Dasar 1945: Konstitusi Kemajemukan Berbangsa dan Bernegara*, Papers Presented at the Gus Dur Memorial Lecture hosted by the Indonesian Conference on Religion and Peace (ICRP), Jakarta (2011); Udiyo Basuki, *Politik Hukum Mahkamah Konstitusi dalam Membatalkan Konsep Empat Pilar sebagai Upaya Mendudukkan Pancasila Sebagai Dasar Negara*. 4 SUPREMASI HUKUM: JURNAL KAJIAN ILMU HUKUM. 377, 380-386 (2015); Donald E Weatherbee, *Indonesia in 1984: Pancasila, politics, and power*. 25 ASIAN SURVEY. 187, 190-195 (1985); Agustinus Wisnu Dewantara SS, *Pancasila dan Multikulturalisme Indonesia*. 15 STUDIA PHILOSOPHICA ET THEOLOGICA. 109, 115-119 (2015); Michael Morfit, *Pancasila: The Indonesian state ideology according to the new order government*. 21 ASIAN SURVEY. 838, 846-849 (1981).

² The 1945 Basic Constitution of Republic of Indonesia [hereinafter as The 1945 Constitution].

entities whose authority is given by the Constitution, deciding upon the dissolution of political parties and deciding disputes concerning the results of general election. In addition, there are also "legal acts" of the Constitutional Court which are often carried out but the regulations are not explicitly sounded in regulations related to ultra petita. Ultra petita itself in formal law implies the issuing of decisions on cases that are not prosecuted or grant more than requested. Ultra petita, according to Ranuhandoko is more than requested. In terms of the authority of the Constitutional Court, this is often found in cases of judicial review of the laws on the 1945 Constitution. The Constitutional Court (MK) often decides with ultra petita on several of its decisions.³

The issue of ultra petita itself creates pros and cons in academics. The pros consider that this is a form of upholding substantive justice by referring to the progressive theory, while the cons consider that this is a form of non-compliance with procedural law or more on enforcing positivistic theory.

³ In a simple explanation, Ultra Petita is defined as a judge passing a decision on a case beyond what is demanded or requested. Looking a little into civil law, ultra petita is regulated in Article 178 paragraph (2) and (3) HIR and Article 189 paragraph (2) and (3) RBg, in that provision it explicitly prohibits a judge from making decisions beyond what is sued. The reason is simple, all return to obeying the principle of law is passive. The meaning of the principle is that the assembly may not add other matters themselves, and may not give more than requested by the parties (ultra petita non cognoscitur). But we do not stop in the discussion of civil law that focuses on the legal relationship of individuals, on this occasion the author is more focused on Ultra Petita conducted by the Constitutional Court as an institution of judicial power that has a function as a judicial control within the framework of checks and balances. See IPM RANUHANDOKO, *TERMINOLOGI HUKUM* 113-121 (2000). See also Sri Mulyani, *Hak Ex Officio Hakim dalam Perkara Hadanah Kaitannya dengan Asas Ultra Petitem Partium: Analisis Putusan nomor 0864/Pdt. G/2017/PA. Badg. DISS* (2018); Tanto Lailam, *Pro-Kontra Kewenangan Mahkamah Konstitusi dalam Menguji Undang-Undang yang Mengatur Eksistensinya*. 12 *JURNAL KONSTITUSI*. 795, 815-819 (2016); Muslimah Hayati, *Analisis Yuridis Pro Kontra Pendapat Terhadap Putusan Mahkamah Konstitusi Yang Ultra Petita*. 7 *JURNAL WASAKA*. 30, 35-36 (2019); Suwarno Abadi, *Ultra petita dalam pengujian undang-undang oleh Mahkamah Konstitusi*. 12 *JURNAL KONSTITUSI*. 586, 594-598 (2015); Haposan Siallagan, *Masalah putusan ultra petita dalam pengujian undang-undang*. 22 *MIMBAR HUKUM*. 71, 75-78 (2010); Ibnu Sina Chandranegara, *Ultra Petita dalam Pengujian Undang-Undang dan Jalan Mencapai Keadilan Konstitusional*. 9 *JURNAL KONSTITUSI*. 27, 30-35 (2016); Heri Abduh Sasmito, *Putusan Ultra Petita Mahkamah Konstitusi dalam Pengujian Undang-undang (suatu Perspektif Hukum Progresif)*. 6 *LAW REFORM*. 55, 65-73 (2011); Heri Abduh Sasmito, *Ultra Petita Decision of Constitutional Court on Judicial Review (The Perspective of Progressive Law)*. 1 *JILS (JOURNAL OF INDONESIAN LEGAL STUDIES)*. 47, 50-63 (2017); Ach Rubaie, Nyoman Nurjaya, & Moh Ridwan, *Considerations Constitutional Court of Indonesia Decide Verdict Ultra Petita*, 6 *ACADEMIC RESEARCH INTERNATIONAL*. 412, 416-417 (2015); Muhammad Siddiq Armia, *Ultra Petita and the Threat to Constitutional Justice: The Indonesian Experience*. 26 *INTELLECTUAL DISCOURSE*. 903, 915-924 (2018).

Hence, the ultra petita is often a debate and battle between the two theories above.

Furthermore, ultra petita basically have been regulated in Law Number 8 of 2011 on Amendments to Law Number 24 of 2003 concerning the Constitutional Court. Amendments to the law expressly forbid the Constitutional Court to make an ultra petita decision. In Article 45A which reads: "Decision of the Constitutional Court may not contain an injunction which is not requested by the applicant or exceeds the petition of the applicant, except for certain matters related to the principal application". Furthermore, Article 59 paragraph (2) states: "If necessary changes to the laws that have been tested, the Parliament or the president immediately follows up on the Constitutional Court's decision as referred to in paragraph (1) in accordance with statutory regulations". But in reality, the "prohibition" provision was finally overturned by the Constitutional Court itself in a judicial review, with the granting of decision number 48 / PUU-IX / 2011 and decision number 49 / PUU-IX / 2011. Based on the two decisions, it can be simply understood that the provisions of the ultra petita are "legal" only by the Court. Because these provisions are not permitted, they are also not prohibited by strict regulatory provisions.

The Constitutional Court' ultra Petita in a number of judicial review decisions on the 1945 Constitution contained an ultra petita act which in fact was in the interests of the basic needs of the Indonesian people, especially in terms of economic rights. This can be found in the ultra petita's decisions in testing electricity law and water resources law. Later this article will discuss, how the decisions of the Constitutional Court with ultra petita value turn out to be more oriented to the protection of the basic needs of the Indonesian people, especially in terms of protecting economic rights. In fact, the protection of basic needs in terms of economic rights is part of the protection of constitutional norms, as well as carrying out the mandate of the Pancasila state, especially in the fifth principle "*social justice for all Indonesian people*". Thus, the Constitutional Court was not just carrying out the needs of the ultra petita, but more than that, the Court became one of the institutions that participated in carrying out the goals, objectives in the ideology of Pancasila.

METHOD

I. RESEARCH PARADIGM

Paradigm is originated from the Greek "*paradeigma*", from "para" (beside, next to) and "*dekynai*", (showing; which means: model examples, archetypes, Ideal). According to the Oxford English Dictionary, "paradigm" is an example or pattern. However, in the scientific community the paradigm is understood as something more conceptual and significant, although it is not something taboo to debate.⁴

Science has its own paradigm, sometimes we find scientists who hold to certain paradigms, even they are very rigid and closed, which causes them to be trapped into the trenches of knowledge. Some scientists and researchers use a more open paradigm, this group can be said to not be adherents of the single or mono paradigm in research but belong to the category of multiple paradigm adherents.⁵

This research uses the constructivism paradigm, which views law as plural and plastic. It is said to be plural because the law is expressed in various symbols, languages, and discourses. The nature of legal plastic is defined as the nature and characteristics of the law that can be formed in accordance with human needs. And this constructivist paradigm flows more empirical legal theories. Roscoe Pound emerged with the concept of "*sociological jurisprudence*", which was then followed by Karl Llewellyn & Jerome Frank with "*realistic jurisprudence*" (legal realism).⁶

⁴ OTJE SALMAN & ANTON F. SUSANTO, TEORI HUKUM MENINGAT, MENGUMPULKAN DAN MEMBUKA KEMBALI 43-58 (2008). See also Paul Van den Hoven, *Analysing Discursive Practices in Legal Research: How a Single Remark Implies a Paradigm*. 13 UTRECHT L. REV. 43, 56-58 (2017); Amita Dhanda, *Conversations between the proponents of the new paradigm of legal capacity*. 13 INTERNATIONAL JOURNAL OF LAW IN CONTEXT. 87, 91-93 (2017); Laurensiu Arliman, *Peranan Metodologi Penelitian Hukum di dalam Perkembangan Ilmu Hukum di Indonesia*. 1 SOUMATERA LAW REVIEW. 112, 117-120 (2018).

⁵ *Id.*

⁶ Legal realism developed in tandem with the Sociological Jurisprudence, namely in the 20th century. The background to the emergence of legal realism is because: (1) there is a lawsuit against traditional values that are maintained and well-established, namely values that assume that law is ideal, (2) because the development of behavioral sciences, such as sociology and psychology that make people driven by myths such as religion, and (3) as a result of survey reports on the performance of the law, namely the rule of law and law enforcement. Legal realism is a school of thought that began in the United States. Famous figures from this realism are John Grayman, Oliver Wendell Holmes, Jerome Frank, and Karl Lewellyn. Legal realism means a study of law as

The constructivism paradigm traced from Max Weber's thought assesses that human behavior is fundamentally different from natural behavior, because humans act as agents who construct in their social reality, both through giving meaning and understanding behavior according to Weber, explaining that the substance of life forms in society is not only seen only from an objective assessment, but rather seen from individual actions arising from subjective reasons.⁷

something actually carried out, rather than just law as a series of rules contained in legislation. The philosophical basis of realism rests on the belief that when we perceive, we are aware of things that are independently of us. Therefore, this belief implicitly involves a rejection of the view that what is perceived is nothing more than personal data. The doctrine applied to the investigation of a phenomenon involves the application of objective procedures which are not influenced by a sentiment/idealism. See Charles L. Barzun, *Jerome Frank, Lon Fuller, and a Romantic Pragmatism*. 29 YALE JL & HUMAN. 129, 137-140 (2017); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 117-128 (2016); James J. Chriss, *On Karl N. Llewellyn, Jurisprudence: Realism in Theory and Practice. Classic Writings in Law and Society* 105-115 (2017). TEGUH PRASETYO & ABDUL HALIM BARKATULLAH, FILSAFAT, TEORI DAN ILMU HUKUM: PEMIKIRAN MENUJU MASYARAKAT YANG BERKEADILAN DAN BERMARTABAT 65-74 (2012); Hanoch Dagan, "Contemporary Legal Realism", *Encyclopedia for Law and Social Philosophy*, Mortimer Sellers and Stephan Kirste (eds.), (2017); BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 237-241 (2017). Meanwhile, Sociological jurisprudence is a study that has a characteristic of the rule of law, which is an aspect of actual legal science, which is a branch of normative sciences, which aims at making laws effective in its implementation, based on subjective values. Sociological jurisprudence is a study that sees law as a means of social control, a descriptive science that utilizes empirical techniques. This relates to the question of why legal instruments and their duties are made, sociological jurisprudence sees law as a product of a social system and as a tool to control and change that system. Sociological jurisprudence views law as a social reality. The basic attitude of the Sociological jurisprudence is suspicion and see the law in action. Sociological jurisprudence views that law is not autonomous. But it is influenced by non-legal factors in society such as economic, political, cultural, social and others. Sociological jurisprudence views law as *das sein* (in reality). Sociological jurisprudence also holds an empirical view. The method used by the adherents of Sociological jurisprudence is descriptive. See also ROGER COTTERRELL, SOCIOLOGICAL JURISPRUDENCE: JURISTIC THOUGHT AND SOCIAL INQUIRY 234-238 (2017); Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present*. LAW & SOCIAL INQUIRY, 1-28 (2019); Noga Morag-Levine, Sociological Jurisprudence and The Spirit of The Common Law. *The Oxford Handbook of Legal History* (2018); EUGENE EHRLICH & KLAUS A. ZIEGERT, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 314-321 (2017); ROSCOE POUND, NEW PATHS OF THE LAW: FIRST LECTURES IN THE ROSCOE POUND LECTURESHIP SERIES, 125-132 (2006); NATALIE EH HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 278-284 (1997); ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 67-79 (1997); Roscoe Pound, *Law in books and law in action*. 44 AMERICAN LAW REVIEW. 12, 25-34 (1910).

⁷ Social behavior is behavior that is specifically directed at others. According to Max Weber Behavior influences social action in society which then causes problems. Weber recognized the problems in society as an interpretation. As for the degree that a behavior is rational (according to the measure of logic or science or according to scientific logic standards), then this can be understood directly. Weber mentioned that social behavior is a function of people and their situation. What is meant here is that every human being will act differently in a greeting situation,

Constructivism of this paradigm views that reality is the result of the construction or formation of humans themselves. That reality is dual, can be formed and is one wholeness. Reality exists as a result of the formation of one's thinking ability. Knowledge produced by humans is not permanent but continues to grow. Qualitative is based on the constructivist paradigm which holds that knowledge is not only the result of experience of facts, but also the result of the construction of the thought of the subject under study. Human recognition of social reality is centered on the subject and not on the object, this means that science is not merely the result of experience, but is also the result of construction by thought.⁸

II. TYPES AND APPROACHES OF RESEARCH

Type of this research is doctrinal/normative/positivism legal research. Normative research is legal research conducted by examining mere literature or secondary data. Then the data collection technique used is to use library techniques, namely reviewing and examining existing library materials and documents, which are in accordance with the field of research of this dissertation. Normative legal research in this paper includes:

- a. Research on legal principles
- b. Research on legal systematics
- c. Research on the level of vertical and horizontal synchronization.⁹

In this paper the data collection technique used is the secondary data collection method, which is carried out by means of a literature study or document study of legal materials consisting of; primary, secondary and tertiary legal materials.

each person's behavior reflects a collection of unique traits that are brought into a certain atmosphere that is behavior that is shown to someone else. See MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 46-57 (2009); Friedrich H. Tenbruck, & Max Weber, *The problem of thematic unity in the works of Max Weber*. 31 THE BRITISH JOURNAL OF SOCIOLOGY. 316, 328-337 (1980); Guenther Roth & Max Weber, *History and sociology in the work of Max Weber*. 27 THE BRITISH JOURNAL OF SOCIOLOGY. 306, 310-314 (1976); SAM WHIMSTER (ed), MAX WEBER AND THE CULTURE OF ANARCHY 57-68 (2016); EDITH HANKE, LAWRENCE A. SCAFF, & SAM WHIMSTER (eds), THE OXFORD HANDBOOK OF MAX WEBER 345-368 (2019).

⁸ ARIFIN ZAINAL, PENELITIAN PENDIDIKAN METODE DAN PARADIGMA BARU 45-47 (2012).

⁹ SOERJONO SOEKANTO & SRI MAMUDJI, PENELITIAN HUKUM NORMATIF: SUATU TINJAUAN SINGKAT 35-39 (1990)

This research approach in normative juridical research uses the doctrinal research approach. The law approach is carried out by examining all the laws and regulations relating to the legal issues being addressed. Normative research certainly has to use a legislative approach because what will be examined are various legal rules which are the focus as well as the central theme of a study. For this reason, researchers must see the law as a closed system that has comprehensive characteristics (legal norms related to one another), all inclusive (a collection of legal norms that adequately accommodate existing legal problems), systemic (legal norms arranged systematically and hierarchies).¹⁰

III. SOURCES OF DATA AND DATA ANALYSIS

The type of data used in this paper is secondary data, which consists of primary legal materials, secondary legal materials and tertiary legal materials. Secondary data sourced from:

- a) Primary legal materials, namely binding legal materials, consisting of:
 - 1) Pancasila
 - 2) The 1945 Constitution
 - 3) Law Number 8 of 2011 Amendment to Law Number 24 of 2003 concerning the Constitutional Court
- b) Secondary legal material is legal material that provides an explanation of primary legal material, consisting of: Research results and books
- c) Tertiary legal materials are legal materials that provide instructions and explanations for primary and secondary legal materials such as: Dictionaries, Encyclopedias, and the Internet.

To get secondary data in this paper, the Author use data collection method by Literature study and document study.

The final step in conducting this paper is data analysis. Analysis can be formulated as a process of decomposition in a systematic and consistent manner against certain symptoms. Systematic description of the symptoms or data that has been obtained either through a library approach that will be done in a descriptive qualitative way. The data collected from this paper is analyzed descriptively qualitatively, that is, the data obtained in the study

¹⁰ JOHNNY IBRAHIM, TEORI DAN METODOLOGI PENELITIAN HUKUM NORMATIF 45-53 (2007)

are described and arranged systematically in the form of sentence descriptions that are taken as meanings or conclusions. Descriptive analytical research is in addition to providing a detailed description, writing and reporting an object or an event will also take general conclusions from the problems discussed. From the two methods of data analysis above, both of them use the same method in their writing, namely the inductive method.

Analysis of the data used in this paper is to use secondary data consisting of primary legal materials, secondary and tertiary legal materials, which are then processed and analyzed using various legal theories, legal principles, legal history, and other relevant regulations. From this normative study, the data were then analyzed using qualitative descriptive data analysis methods.

ULTRA PETITA IN VARIOUS CONSTITUTIONAL COURT DECISIONS: HOW DOES THE COURT PROTECT THE BASIC RIGHTS OF THE PEOPLE?

Amendments to the 1945 Constitution resulted in Article 1 being added to paragraph (3), which is related to the status of the State of Indonesia as a State of law. The consequence of a rule of law is that what is done by the state and citizens must be based on and subject to the law. In Indonesia, law is not just what is written in a sole law. Indonesia is familiar with written and unwritten law. The unwritten law itself is the law that applies in society such as the customary law, decency and politeness in the community. In addition, there are still customary law and Islamic law which also enter as a legal system in force. Therefore, in the matter of making Indonesia a constitutional state, it is not only what is sounded through the legislation alone. Moreover, exploring the existing law in society is more fundamental than just reading the text of a norm.

After the big demands in 1998, changes in the state administration and all sides of Indonesian law experienced many changes and led to a more responsive legal system as needed by the community. Therefore, since 1999 many laws and state institutions or supporting institutions (State Auxiliary Organs) were born. Some are based on the 1945 Constitution with four

amendments and some are born based on legal orders such as the Corruption Eradication Commission, the Commission for the Supervision of Business Competition and others

The Constitutional Court (MK) itself is one of the institutions born from the results of constitutional amendments. The addition of Article 24C makes the Constitutional Court as an institution mandated as a guardian of the 1945 Constitution. Its authority as stated in Article 24C paragraph (1) of the 1945 Constitution was mentioned; "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final to examine the Law against the Basic Law, decide upon disputes over the authority of state institutions whose authority is given by the Constitution, decide upon the dissolution of political parties and decide on disputes concerning the results of general election."¹¹

Based on the object of this paper, out of the four authorities and one obligation of the Constitutional Court which is most inherent and *ultra petita* decisions are often related to the authority to examine laws against the 1945 Constitution. It does not mean the Constitutional Court's authority is "without limits", Article 24C of the 1945 Constitution has limited the powers of the Constitutional Court. The authority to regulate (*regeling*) remains a legislative domain based on the principle of people's sovereignty as the exclusive right of sovereign people's representatives to restrict someone. Other powers can govern as long as it is mandated. In addition to the verdict handed down, the Constitutional Court also has power in regulation (judicial legislation) as the Supreme Court. The Constitutional Court's power is limited according to its position and function. Its relationship with other powers is bound by the principle of checks and balances.

Some time ago, the academic world came to grips with the actions of Constitutional Court who made *ultra petita* in its decision. The previous Constitutional Court's law did not sound the provisions relating to *ultra petita*, but with the advent of changes to the Constitutional Court's law made by the House of Representatives. The authority of the Constitutional Court expressly "prohibits" in accordance with Article 45A of the Constitution, which reads: "The decision of the Constitutional Court shall not contain a verdict which is not sought by the applicant or

¹¹ *Supra* note 2.

beyond the applicant's request, except in certain cases relating to application principle." But the decision of No. 48 / PUU-IX / 2011 and the decision of No. 49 / PUU-IX / 2011 seem to emphasize that the "ultra petita" provision is something that "can" be done by the Constitutional Court.

In case of ultra petita act, in fact this is almost the same form of inclusion as the Islamic legal term *ijtihad* which means as "earnest effort" in a case, especially in the form of deciding a case. Judges are obliged to explore and seek answers to a case that is not necessarily found in written law. Therefore, the "*ijtihad*" of the judges must, explore written and unwritten laws that have a value of justice for the community. Even though justice is not balanced for the parties, it can at least balance the legal orders (written and unwritten) with the needs of the community.

The purpose of the legal decision itself is one of them to get justice apart from the benefits and legal certainty. Internal justice is known as substantive justice and procedural justice. Substantive justice is justice created by judges in their decisions based on the results of their excavation from a sense of justice in society, not only what is sounded in the law itself. Examples of cases in the same act could be sentenced differently, depending on the results of the judge's excavation of a sense of justice. Substantive justice (substantive justice) is often opposed to procedural justice (procedural justice), namely judges' decisions or law enforcement processes that are entirely based on sound laws.¹²

¹² Moh. Mahfud MD, *Keadilan Substantif*, KORAN SINDO (2014). Furthermore, Mahfud MD also emphasized that in terms, this substantive justice contained philosophical meaning that the judge did not have to be shackled by formal-procedural rules or the sound of the Act. Judges may make their own law outside the Act if the existing law is inadequate or does not provide a sense of justice. This philosophical meaning can be understood, for example, from President Soekarno's statement when on July 10, 1945, stated before the BPUPKI session that *formalitet* procedures should be thrown into the garbage bin if they did not provide benefits. The attitude of the Constitutional Court as stated in the 2009 Presidential Election dispute verdict, upholding substantive justice "may" come out of the sound of unfair laws, but "not necessarily" always out of the provisions or contents of the Act. As long as a sense of justice can still be found in the Act, the court must enforce the contents of the Act. Judge, it is only permissible to leave the contents of the Act if, after being dug in such a way, the sense of justice still cannot be found in it. Thus, the enforcement of substantive justice opens up opportunities for judges to make their own legal verdicts outside the Act in accordance with their sense of justice, while at the same time opening opportunities to enact the contents of the Act as long as a sense of justice can be found. Ideally, substantive justice brings together public common sense with the articles of the Act and / or with the judge's conviction in deciding. See also Moh. Mahfud MD, *Kelirumologi Keadilan Substantif*, KORAN SINDO (2014). For more comprehensive reading, please also see Rahayu Prasetyaningih, *Penafsiran Konstitusi oleh Mahkamah Konstitusi Menuju Keadilan Substantif*. 3 JURNAL KONSTITUSI. 133, 143-147(2011); Moh. Mahfud M.D., *Peran Mahkamah Konstitusi dalam Mengawal Hak Konstitusional*

The followings are some decisions of the Constitutional Court. The decisions of which have been made with *ultra petita*. From some of the decisions below, there are tests of laws whose substance is related to the basic needs of the community - economic rights, such as testing of water resources law and electricity law.

- a) Decision of the Constitutional Court Number 001-021-022 / PUU-I / 2003 concerning Judicial Review of Law Number 20 Year 2002 concerning Electricity. Initially the Petitioner filed that Article 1 letter 18, Article 7, Article 15 paragraph (2), Article 17 paragraph (1), Article 20 paragraph (1), Article 32 paragraph (1), Article 67 letter b of Law No. 20 of 2002 contradict the 1945 Constitution of the Republic of Indonesia. However, the Constitutional Court is of the opinion that the entire contents of the Electricity Law are contradictory to the 1945 Constitution of the Republic of Indonesia, thus invalidating it and Stating that Law Number 15 of 1985 concerning Electricity is in effect while awaiting the formation of the law the law established a new law on electricity.
- b) Decision of the Constitutional Court Number 003 / PUU-V / 2006 concerning Judicial Review of Law Number 31 of 1999 concerning Eradication of Corruption Crimes as amended by Law No. 20 of 2001 concerning Amendment to Law No. 31 of 1999 concerning Eradication of Corruption. The applicant submitted a review of Article 2 paragraph (1), Elucidation of Article 2 paragraph (1), Article 3, Elucidation of Article 3 (insofar as the word "can"), and Article 15 (as long as the word "trial") is applied. In addition to the article tested by the Constitutional Court petitioners, it nullifies the article "unlawfully" because it is considered to be in conflict with the 1945 Constitution. Article against the law automatically since the verdict is read in court will automatically no longer be valid.

Warga Negara < http://www.mahfudmd.com/public/makalah/Makalah_21.pdf. > (2003); Mahrus Ali, *Mahkamah Konstitusi dan Penafsiran Hukum yang Progresif*. 7 JURNAL KONSTITUSI. 67, 76-80 (2016); Sulistyani Eka Lestari, *Pancasila dalam Konstruksi Sistem Hukum Nasional*. 7 NEGARA DAN KEADILAN. 85, 87-89 (2018); Achmad Rubaie, *Dilematis Hukum Mahkamah Konstitusi dalam Perspektif Putusan*. 2 AJUDIKASI: JURNAL ILMU HUKUM. 117, 121-123 (2018); Kudrat Abdillah, *Progresivitas Hukum dalam Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010*. 6 JURNAL YURIDIS. 94, 97-99 (2019); Sarifudin & Kudrat Abdillah, *Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 dalam Bingkai Hukum Progresif*. 6 JURNAL YURIDIS. 94, 96-98 (2019).

- c) Constitutional Court Decision No. 006 / PUU-IV / 2006 concerning Judicial Review of Law Number 27 of 2004 concerning the Truth and Reconciliation Commission. The petition submitted by the petitioner initially did not require this Act to be canceled. The Petitioner only questioned that the victims' rights would be granted if the perpetrators of human rights violations received amnesty. However, the Constitutional Court thought differently that by declaring the Article contrary to the 1945 Constitution it would automatically nullify the provisions of the Truth and Reconciliation Commission Law
- d) Constitutional Court Decision No. 005 / PUU-IV / 2006 concerning Judicial Review of Law Number 4 of 2004 concerning Judicial Power. The Constitutional Court's decision was initially proposed to affirm the Supreme Court justices and Constitutional Court judges from the supervision conducted by the Judicial Commission. It turned out that the Constitutional Court decided that only constitutional judges were not included in the Judicial Commission's supervision object. In addition, the most controversial is to cancel Article 34 paragraph (3) of the Judicial Power Act, which means amputating the authority of the Judicial Commission to supervise Supreme Court justices and constitutional justices. Although this decision received the attention of many parties, up to now the decision is still being carried out. Judicial Commission does not make constitutional judges the object of its supervision.
- e) Decision of the Constitutional Court No. 012-016-019 / PUU-IV / 2006 concerning Judicial Review of Law No.30 of 2002 concerning the Corruption Eradication Commission. The Constitutional Court decided that the existence of the Corruption Court is contrary to the 1945 Constitution because this decision has given rise to judicial dualism. The Constitutional Court gave three years to legislators (DPR and the Government) to form a new Corruption Court Law. The new law must regulate the Corruption Court as the only justice system for criminal acts of corruption. This decision ordered the establishment of the Corruption Court Law until the deadline of December 19, 2009, which had been implemented by the Government and the Parliament by passing Law No. 46 of 2009 concerning the Corruption Court on October 29, 2009. The law contributed the Corruption Court the

authority to adjudicate corruption cases and be part of the Indonesian justice system.

- f) Decision of the Constitutional Court No. 28 / PUU-XI / 2013 concerning Testing Law No. 17 of 2012 concerning Cooperatives. The applicant submits a review of Article 1 number 1, Article 50 paragraph (1), Article 5 paragraph (1), Article 56 paragraph (1), Article 66, Article 67, Article 68, Article 69, Article 70, Article 71, Article 72, Article 73, Article 74, Article, 75, Article 76, Article 77, Article 80, Article 82, and Article 83 of Law Number 17 of 2012 concerning Cooperatives. However, the Constitutional Court is of the opinion that because Article 1 contradicts the 1945 Constitution of the Republic of Indonesia, the Constitutional Court states that this Cooperative Law does not apply to all.
- g) Constitutional Court Decree No. 85 / PUU-XI / 2013 on Law No. 7 of 2004 on Water Resources. The case piled by the Muhammadiyah National Leaders was initially the application for Law No. 7 of 2004 only to be specific to: Article 5; Article 6; Article 7; Article 8; Article 9; Article 10; Article 26; Article 29 paragraph (2) and paragraph (5); Article 45; Article 46; Article 48 paragraph (1); Article 49 paragraph (1); Article 80; Article 91; and Article 92 paragraph (1), paragraph (2) and paragraph (3). However, during the preliminary hearing, the judge advised that Muhammadiyah National Leaders as the applicant could request that the entire Article of Law No. 7 of 2004 be cancelled or repealed, so that in the revision of the application of the Muhammadiyah National Leaders, one of the points requesting repeal of the No. 7 Law of 2004 to fill the vacancy of the law was re-enacted Law No. 11 of 1974 on Irrigation.

I. ULTRA PETITA IN ELECTRICITY LAW

The reason for submitting an examination of the Electricity Law which was eventually terminated by the ultra petita as the Law on Water Resources, is because the Electricity Law contradicts Article 33 of the 1945 Constitution. It has encouraged the privatization of electricity as an important branch of production and controls the livelihoods of many people, which should be controlled by the state, as the Constitutional Court's decision is the people

themselves, is actually more beneficial for certain private parties, groups or business entities.

Article tested is Article 1 letter 18, Article 7, Article 15 paragraph (2), Article 17 paragraph (1), Article 20 paragraph (1), Article 32 paragraph (1), Article 67 letter b of Law No. 20 of 2002, which was considered contrary to the 1945 Constitution. In the Constitutional Court's decision, the court actually canceled the entire contents of the electricity law. As for the considerations of the Constitutional Court assemblies, which in principle are:

- a) Electric power is an important branch of production for the state and which controls the livelihoods of many people as Article 33 paragraph (2), so that the true branch of electricity production must be controlled by the state for the prosperity of the people of Indonesia.
- b) The provisions deemed contrary to the constitution are basically article 16, 17 paragraph (3), as well as article 68, especially those relating to unbundling and competition, but because these articles are at the heart of Law Number 20 of 2002 which is the entire paradigm the underlying law for electricity is competition or competition in management with an unbundling system in electricity. This is in fact not in accordance with the soul and spirit of article 33 paragraph (2) of the 1945 Constitution which is the basic norm of the Indonesian national economy.
- c) The reality of State-owned enterprises' (BUMN) inefficiency arising from factors of miss-management and corruption, collusion and nepotism, cannot be used as a reason to ignore article 33 of the 1945 Constitution, like the saying "ugly face breaks the mirror". Corrections must be made to strengthen state control in order to carry out its constitutional obligations as referred to in article 33 of the 1945 Constitution.
- d) The production branch in article 33 paragraph (2) of the 1945 Constitution in the electricity sector must be interpreted as a unity between the generator, transmission, and distribution even though only certain articles, paragraphs, or parts of paragraphs in the a quo law are it was stated that it did not have binding legal force but this resulted in Law No. 22 of 2002 as a whole not being able to be maintained, because it would cause chaos and legal uncertainty in its application.

II. ULTRA PETITA IN WATER RESOURCES LAW

The testing of Water Resources Law by the Muhammadiyah organization and several other factions is only justified in Article 5; Article 6; Article 7; Article 8; Article 9; Article 10; Article 26; Article 29 paragraph (2) and paragraph (5); Article 45; Article 46; Article 48 paragraph (1); Article 49 paragraph (1); Article 80; Article 91; and Article 92 paragraph (1), paragraph (2) and paragraph (3) only. But the decision of Constitutional Court instead invalidated the whole law. This is done by preceding the application for the applicant to seek a complete revocation of the Water Resources Law upon the panel of juries' legal opinion.

The reason for the submission of the law is because the Water Resources Law does not provide clear water management limits to the private sector resulting in uncertainty in the implementation of the water resources law. In addition, the application of the Act opens the opportunity for privatization and commercialization of the private sector for the management of water resources that harms the community as water users. This is exacerbated by the existence of government regulations, Article 1 number 9 Government Regulation Number 16 of 2005 concerning the Development of Drinking Water Supply Systems (SPAM) which states that the SPAM development providers are State-owned Enterprises (BUMN), cooperatives, private business entities, or community groups. On the other hand, Article 40 paragraph (2) of the Water Resources Law has stated that the development of SPAM is the responsibility of the central government / local government. These conditions make regulations related to natural resources, especially the basic needs of the people, which in this case relate to the economic rights of the Indonesian people are increasingly eroded by the need for privatization rather than paying attention to the needs of the people.

Meanwhile, as the constitution has firmly affirmed as article 33 of the 1945 Constitution that:

- 1) The economy is structured as a joint effort based on family principles.
- 2) Production branches which are important for the state and which control the livelihoods of the public are controlled by the state.

- 3) The earth and water and the natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people.
- 4) The national economy shall be implemented based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity.
- 5) Further provisions regarding the implementation of this article are regulated in the law.

ULTRA PETITA IN PROGRESSIVE AND RESPONSIVE THEORY

The form of application of ultra petita is a form of application of legal decisions that cannot be separated from progressive and responsive theories. Ultra petita will only emerge when the paradigm used is to respond quickly to the needs of the community which could be those needs are not written on paper in the legislation. Progressive theory by Satjipto Raharjo, which was the first to spark the idea of progressive law. Satjipto Rahardjo offers a new perspective, spirit, and way of overcoming "legal paralysis" in Indonesia. Progressive is derived from the word progress, which means progress. Law should be able to keep up with the times, be able to respond to changing times with all the basics in it and be able to serve the community by relying on the morality aspect of law enforcement human resources. Satjipto Rahardjo then concluded that one of the causes of the decline in the performance and quality of law enforcement in Indonesia is the dominance of the positivism paradigm with the inherent nature of formality. In other words, law exists in human society, in every society there is always a legal system, there is a community there is a law: *yam societasi jus*.¹³

¹³ SUDIKNO MERTOKUSUMO, MENGENAL HUKUM: SUATU PENGANTAR 34-41 (2013). The progressive legal paradigm initiated by the legal expert Prof. Dr. Satjipto Rahardjo is a phenomenal idea aimed at law enforcement officials, especially to the Judge so as not to be shackled by legal positivism which has been giving a lot of injustice to *yustisiabeleenn* (justice seekers) in upholding the law because law enforcement is a series of processes to describe values, ideas, a pretty abstract mind which is the goal of law. Legal goals or legal ideals start moral values, such as justice and truth. These values must be able to be realized in real reality. The existence of law is recognized if the moral values contained in the law are able to be implemented or not. According to Soerjono Soekanto, conceptually the core of the meaning of law enforcement lies in the activity of harmonizing the relationships of values that are spelled out in solid rules and

Progressive law offers another way that is different from the main mindstream of the law in Indonesia. Honesty and sincerity become the crown of law enforcement. Empathy, care and dedication to bring justice, become the spirit of law enforcement. Human interests (welfare and happiness) become the point of orientation and the ultimate goal of law. Law enforcers are at the forefront of change. Facing a rule, even though the rule is not aspirational for example, progressive law enforcement officials do not have to dismiss the existence of that rule. He can every time make a new interpretation of these rules to provide justice and happiness to justice seekers.¹⁴

Apart from the progressive theory which is the basis of the judge's thinking in conducting *ultra petita*, there are also other theories, namely responsive as a theory that is in line with the previous progressives. Both theories are considered to be two theories that are at odds with the positivism theory. Between progressive responsiveness and positivism theory often has a basis, goals and ways of working that are not in line. So naturally when these two streams are met, they are unable to solve the problem except by using a voting system.

Responsive law is a theory initiated by Selznick in the midst of scathing criticism of liberal legism. In fact, liberal legalism presupposes law as an independent institution with an objective, impartial and truly autonomous system of rules and procedures. Actually, behind the doctrine of legal autonomy, there is a hidden ideology of the status quo. And the status quo is a bastion of protection for established people, the rich people. In the midst

manifesting the attitude of action as a series of translation of the final stage of values, to create, preserve and maintain peaceful social relations. Furthermore, it is also emphasized that law enforcement as a means to achieve legal objectives, then all energy should be mobilized so that the law is able to work to realize moral values in law. The failure of the law to realize the value of the law is a threat to the dangers of existing laws. Poor law implementation of moral values will be distant and isolated from the community. The success of law enforcement will determine and become a barometer of legal legitimacy amidst social reality. See also SATJIPTO RAHARDJO, HUKUM PROGRESIF: SEBUAH SINTESA HUKUM INDONESIA 112-123 (2009); SATJIPTO RAHARDJO, MEMBEDAH HUKUM PROGRESIF 34-41 (2010); Satjipto Rahardjo, *Hukum Progresif: Hukum yang Membebaskan*. 1 JURNAL HUKUM PROGRESIF. 1, 15-19 (2005); Sudijono Sasatroatmodjo, *Konfigurasi Hukum Progresif*. 8 JURNAL ILMU HUKUM. 185, 19—197 (2005); A Sukris Sarmadi, *Membebaskan Postivisme Hukum ke Ranah Hukum Progresif (Studi Pembacaan Teks Hukum bagi Penegak Hukum)*. 12 JURNAL DINAMIKA HUKUM. 331, 338-340 (2012); M. SYAMSUDIN, KONSTRUKSI BARU BUDAYA HUKUM HAKI M BERBASIS HUKUM PROGRESIF 55-60 (2011); Dey Ravena, *Wacana Konsep Hukum Progresif dalam Penegakan Hukum di Indonesia*. 23 JURNAL WAWASAN YURIDIKA. 155, 160-163 (2014).

¹⁴ Sudijono Sasatroatmodjo, *Konfigurasi Hukum Progresif*, Id.

of criticism of the reality of the legal authority crisis, Nonet-Selznick proposed a responsive law. Social change and social justice require a responsive legal order. This need has become the main theme of all experts who agree with a functional, pragmatic, and purposive spirit (goal oriented).¹⁵

Therefore, the two theories that are used as a foothold in making ultra petita decisions, are considered appropriate in answering legal issues that are too rigid and have not been able to answer the needs and protect the basic rights of the community, especially in matters of economic rights. Progressive and responsive theories seem to be a breath of fresh air in the world of law, even when laws are unable to provide a sense of justice. The application of laws related to basic economic needs is full of gaps that are not easy to fix and put on trial. So that the courage of the Court in using the two theories above seemed to emphasize that the law is what is in society, not what is ordered by the law itself.

¹⁵ In the concept of law, Philippe Nonet and Philip Selznick distinguish three types of law, namely repressive law, autonomous law, and responsive law. The emphasis of the concept of law proposed by Nonet and Selznick is the aspect of Jurisprudence and Social Sciences based on Sociological Jurisprudence. there is a responsive legal level, the purpose of the law to be achieved is competence. From the perspective of responsive law, good law should offer something more than just procedural justice. Good law must be competent and also fair, able to recognize the wishes of the public and be committed to achieving substantive justice. Responsive law is a law that reflects a sense of justice and meets the expectations of the community. In the process of making responsive legal products, social groups or individuals in society are given a large role and full participation. The results of this process are legal products that are responsive to all interests, both the community and the Government. Prominent characteristics of the concept of responsive law are the shifting of rules from the rules to the principles and objectives, and the importance of democracy both as a goal and a way to achieve it. According to Satjicpto Rahardjo, responsive law is a law that is more sensitive to the community in an effort to realize legal certainty, legal protection, and internal justice. See PHILIPPE NONET, PHILIP SELZNICK, & ROBERT A. KAGAN. LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 67-70 (2017); NONET PHILIPPE & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 115-120 (1978); NONET PHILIPPE & PHILIP SELZNICK, TOWARD RESPONSIVE LAW: LAW AND SOCIETY IN TRANSITION, 67-74 (2001); SABIAN UTSMAN, MENUJU PENEGAKAN HUKUM RESPONSIF: KONSEP PHILIPPE NONET & PHILIP SELZNICK: PERBANDINGAN CIVIL LAW SYSTEM & COMMON LAW SYSTEM, SPIRAL KEKERASAN & PENEGAKAN HUKUM, 43-51 (2008); Li Han, *Responding to the Society, Leap of the Legal Reform: from Repression to Response: Review on Law and Society in Transition: toward Responsive Law*. 2 TRIBUNE OF POLITICAL SCIENCE AND LAW. 15, 16-17 (2018); Ahmadi, *Kontroversi Penerapan Hukum: Telaah Sintesa Hukum Represif, Hukum Otonom dan Hukum Responsif*. 9 AL-'ADL. 1, 10-13 (2018); Wimmy Haliim, *Demokrasi Deliberatif Indonesia: Konsep Partisipasi Masyarakat dalam Membentuk Demokrasi dan Hukum yang Responsif*. 42 MASYARAKAT INDONESIA. 19, 23-25 (2016).

THE PROTECTION OF BASIC RIGHTS OF PEOPLE BY ULTRA PETITA DECISIONS

I. CONSTITUTIONAL COURT'S ULTRA PETITA ON PROTECTING ECONOMIC RIGHTS

Ultra petita in the world of constitutional law is basically not very well known, in fact, the prohibition is only in the scope of civil proceedings. The ultra petita prohibition is regulated in Article 178 paragraph (2) and (3) of the Het Herziene Indonesisch Reglement (HIR) as well as in Article 189 paragraph (2) and (3) RBg which prohibits a judge from making decisions beyond what is demanded (*petitum*). In civil law, ultra petita decisions are considered as an act that exceeds the authority because the judge decides not in accordance with what is requested (*petitum*). Whereas in the sphere of constitutional law it requires a long debate and discussion because the Constitutional Court is a court that has a direct impact on the entire community.

Civil procedural law applies the principle of a judge being passive or a judge is waiting. In the trial the judge is not allowed to take the initiative to make changes or reductions, although it is reasonable for the sake of a sense of justice. The decision was still not justified in the corridor of civil procedural law. Judges' decisions are basically determined by litigants. The judge only considers matters raised by the parties and lawsuits based on them (*iudex non ultra petita* or *ultra petita non cognoscitur*). The judge only determines whether there are things that are submitted and proven by the petitioners or the plaintiff.¹⁶

The Ultra Petita of the Constitutional Court was a pro and contra as if it were a debate over the enforcement of substantive justice and procedural justice as discussed previously. Even so, this does not mean that the ultra petita is weak in terms of basis and purpose. Therefore, below the importance of ultra petita in the Constitutional Court will be explained below:

¹⁶ YAHYA HARAHAP, HUKUM ACARA PERDDATA 37-40 (2016).

- a) The Constitutional Court in making ultra petita decisions related to judicial review of laws against the Constitution whose decisions exceed what is requested. According to Yahya Harahap, if a judge violates the principle of ultra petita, then it is the same as a violation of the rule of law principle. It seems these conditions are not entirely correct. Because Indonesia uses a *rechstaat* system not a rule of law. Moreover, the difference in principle between *rechstaat* and rule of law one of which lies in the existence of an administrative justice system in the *rechstaat* legal system.
- b) The need for a trial in the Constitutional Court is different from the need for a trial in an ordinary court. This can be seen from the impact of a decision. The opinion above may be for civil cases whose decisions are binding only for litigants. Whereas in the Constitutional Court the decision is binding for the whole community (*erga omnes*). The authority to examine the laws possessed by the Constitutional Court is public, even if the submission can come from each individual. Then the *erga omnes* decision cannot make decision that only thinks of the loss of one person or group alone, but the Constitutional Court's decision must be able to assess how the impact of the decision for all Indonesian people.
- c) One of the principles in the procedural law applicable in Indonesia is that judges are prohibited from rejecting a case. Judges are required to explore legal values and a sense of justice that lives in society. Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power states that: "Judges and constitutional judges must explore, follow, and understand the legal values and a sense of justice that lives in society". Judge according to the law in accordance with the Indonesian state of law, not only in written regulations, but also in unwritten law as previously explained. Judges are not merely "mouthpieces of law", more than that judges must find a law (*rechtsvinding*) that is considered fair. So when the law (written law) is not able to answer the needs of the community, the judge must be able to find other laws that can answer the needs of justice seekers.

In the case of judges using various perspectives on different theories and paradigms, this is normal in the academic world. Even the state administration debate is the first debate in the formation of a state and will

never be completed to find an ideal state. Whereas related to the courage of the court in making decisions with the *ultra petita* in fact has a significant legal impact in the life of the state. Just a simple description, when testing the Law on Water Resources and the Law on Electricity, if regulations still firmly "prohibit" decisions beyond what is requested, then what happens is that the application of the two laws becomes "commercial" and multiple interpretations in norms, so that the application is vulnerable to be misused for the benefit of individuals and groups on the produce contained in the two laws.

II. ULTRA PETITA ECONOMIC RIGHTS IN THE FORM OF PANCASILA JUSTICE

The constitution in the Republic of Indonesia is a written constitution called the 1945 Constitution. The 1945 Constitution can be seen as its body, while Pancasila is its spirit. Therefore, the 1945 Constitution cannot be understood separately or outside the context of its spirit, namely Pancasila. Conversely, Pancasila also cannot be seen to stand alone but must be read and understood in the context of the constitutional norm system which is its body, namely the norms of the 1945 Constitution.¹⁷

Pancasila as *staatfilosofie* or *weltanschauung* and *lebenanschauung*; then as an ideology that is as a set of ideas (a series of ideals and ideas). After becoming an ideology, Pancasila was again deposited as the basis of the State as an implementation of its ideals and ideas and implemented by State politics as a legal basis. In its implementation, the redefinition, reinterpretation and revitalization of Pancasila values are unavoidable. The position of the Pancasila as *staatfilosofie* or *weltanschauung*, and *lebenanschauung*, ideology and the legal basis continue to experience changes through the practice of State politics or the behavior of its people. The different positions of Pancasila prove that Pancasila has an important role in the socio-historical practice of the Indonesian people.¹⁸ Pancasila as stated by Sukarno was excavated in the original culture of the Indonesian people. After from the beginning of his speech on June 1, 1945, Sukarno explained that the view of

¹⁷ *Supra* note 1.

¹⁸ BELLO PETRUS, IDEOLOGI HUKUM REFLEKSI FILSAFAT ATAS IDEOLOGI DI BALIK HUKUM 33-46 (2013)

life that he was promoting came from the Indonesian people themselves. In his speech on August 17, 1945 he explained this:

"What all the fuss about the day was simply *mefermuleer* the feelings that exist among the people with a few words, just called Pantja Sila Just digging in Indonesian soil and getting five diamonds... I was digging in Indonesian folklore, and I saw in it that Indonesian people live in five senses... Indonesian people since ancient times ... In the customary world, the rights of ownership are limited by the spirit of mutual help, sacrifice and ethnicity. There appears to be a spirit of social justice that mediates the division of land that is democratically governed by treason. A peaceful life..."¹⁹

Soekarno said that Pancasila was excavated in the native culture of the nation. Whereas culture is something that is essentially growing and rich. Not to mention the understanding of the plurality of cultures that develop in Indonesia is based more on presuppositions rather than the certainty of the meaning of culture. The word itself is a puzzle that is not so easy to get the same understanding or understanding. It is assumed that everyone belongs to a certain society with a certain culture. Furthermore, each person has a different background, way of thinking, focus of attention and interest, so it is easy to understand that the formulation and understanding of "culture" also differ from one another, according to their respective perspectives.²⁰

This makes it easier for us to understand the position of the Pancasila in the life of the Indonesian people, which is not static and standard, but dynamic. Because Pancasila was excavated from Indonesian earth, then naturally it was the work of humans who dug it up. And that digging activity is an active and continuous process as long as the world and the earth still exists. The digging done will never finish or end.

Pancasila is a human work intended for humans, born from the labors of human history, for that Pancasila is not ready to use. He did not reject the creative interpretation. He opened the possibility of not becoming dogma. Because it was born from the labors of human history, Pancasila as

¹⁹ *Id.*

²⁰ *Id.*

Weltanschauung, a worldview and life or a philosophical basis, Sukarno called it "*Philosophische Gronslag*" of course he was not the impermeable, solid already final and eternal and perfect, thus eliminating the possibility of a "understanding" break through and take over "that basic philosophy". In other word Pancasila is not something magic, Pancasila actually means meaningful because it is not magic. Pancasila comprises of five (5) principles, namely;

- (1) Belief in the One and Only God
- (2) A just and civilized humanity
- (3) A unified Indonesia
- (4) Democracy, led by the wisdom of the representatives of the people
- (5) Social justice for all Indonesians

Based on the goals and ideals of the state as in the sound of Pancasila above, the ultra petita of the Constitutional Court related to economic rights as has been done in the water resources law and the electricity law, the true form of the Constitutional Court's decision has reaffirmed the Pancasila state goal in the fifth principle: "Social justice for all Indonesian people". This is because electricity law and the previous water resources law both have commercialization norms rather than the welfare of the people. In addition, the two laws also do not have the power of legal certainty, so that in their application they cause conflicts of interest from various parties. So, as to stop this, the two laws were decided by ultra petita, namely by cancelling the entire contents of the two laws.

While related to the constitutional basis of state control as Article 33 of the 1945 Constitution stated in paragraph (3) concerning the meaning of "state control rights". Interpreted as the people's right by giving a mandate to the state to make policies (regulations) and management actions (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudensdaad*) for the ultimate purpose of prosperity of the people.

The fifth principle which serves as one of the grounds in the governance of state life, especially in this case in the implementation of basic economic needs, must be understood that "fair" in the decision is not necessarily able to meet the desires of the parties. The word justice or justice itself, comes from Arabic, the word '*al-adl*' (fair) which literally means "straight", "balanced", justice means treating everyone with the principle of equal

liberty, without discrimination based on subjective feelings, differences in ancestry, religion, and social status.²¹

In Islam justice or justice is also a duty of humanity, the form of the command of Allah SWT as in the Qur'an can be found in several chapters (surah) in the Qur'an, such as; An-Nisa verse 58, An-Nisa verse 135, As-Syuraa verse 15, Al-Maidah verse 8 and so on. As stated in the Letter An-Nisa verse 58 it is said that:

“Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing”.

The conception of Islamic justice according to Qodri has a deeper meaning than what is called distributive justice and Aristotle's final and distributive justice. Formal justice of Roman law or other human conceptions of law made by other people. It penetrated into the innermost being of man, because everyone must do in the name of God as a place where everything starts from motivation and action. The implementation of justice in Islam is based on the Quran and the sovereignty of the people or Muslim community, namely the *ummah*.²²

²¹ YUDI LATIF, NEGARA PARIPURNA: HISTORITAS, RASIONALITAS, DAN AKTUALITAS PANCASILA 67-74 (2011). In his book, Yudi Latif emphasized that Pancasila should be used as a principle of human civilization and the Indonesian people. Various actions and behaviors that are very much in conflict with the precepts of humanitarianism should not color the policies and behavior of the state apparatus in public life. Violence, poverty, injustice, and the happiness of life is a reality that is truly challenged with a sense of justice and humanity, and therefore must be eliminated from the life of the nation. For comparison and comprehensive picture, also see Muhammad Chairul Huda, *Relasi Islam dan Negara (Studi Politik Hukum di Indonesia)*. 6 PAX HUMANA. 154, 160-164 (2020); Sarip & Abdul Wahid, *Kemajemukan Visi Negara Hukum Pancasila dalam Misi Hukum Negara Indonesia*. 2 REFLEKSI HUKUM: JURNAL ILMU HUKUM. 109, 114-117 (2018); Otong Rosadi, *Ide Bernegara dalam Konstitusi Indonesia: Rekonstruksi Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Pasca Amandemen*. 1 PAGARUYUANG LAW JOURNAL. 277, 280-284 (2018); Nurul Huda & Khudzaifah Dimiyati, *Base Transcedental Value on Judge's Decision (Study of Basic Perspective of Pancasila State)*. 18 JURNAL DINAMIKA HUKUM. 139, 140-143 (2018); Faisal Ismail, *Religion, State, and Ideology in Indonesia: A Historical Account of The Acceptance of Pancasila as The Basis of Indonesian State*. 1 INDONESIAN JOURNAL OF INTERDISCIPLINARY ISLAMIC STUDIES (IJIIS). 19, 31-37 (2018).

²² A.A. QODRI, SEBUAH POTRET TEORI DAN PRAKTEK KEADILAM DALAM SEJARAH PEMERINTAHAN MUSLIM 113-116 (1987). Etymologically justice is defined as meaning that it is not biased or can be settled and put things or laws correctly, correctly, and in accordance with their place. Justice can also be interpreted as an act or treatment that is balanced and in accordance with the provisions, does not justify the wrong and does not blame the right, even

Furthermore, in the same context, Kaelan emphasized that in living together both in society, nation and state must be realized a justice (social justice)²³, which includes three things:

- a) Distributive justice (justice divides), namely the state of its citizens
- b) Legal justice, which is citizens' right to their country to obey the laws and regulations
- c) Commutative justice (justice among fellow citizens), namely the reciprocal relationship of justice between citizens.

Gunawan & Kristian also highlighted that Pancasila as an ideal foundation, basic foundation or fundamental foundation for the formation of the entire legal system in the Republic of Indonesia (the legal system in a broad sense which includes legal values, legal concepts, legal institutions and legal norms).²⁴ In general, it can be explained in each of the Pancasila principles, but the author only takes the definition as in the fifth principle. The fifth principle: "social justice for all Indonesian people" is that the implementation of the legal system in Indonesia must be carried out in a balanced and proportionate manner by paying attention to the principle of prosperity so that the legal system in the Republic of Indonesia is always stated on the objectives to be achieved namely to achieve justice, benefit and others so forth, so that it will create a condition that is conducive to national development and ultimately can create the protection and welfare of the community.

though it must face certain consequences. Whereas in terms of justice, it is defined as all forms of actions, decisions and fair treatment, including: (1) not exceeding or even reducing from what is appropriate and reasonable; (2) is impartial and gives a one-sided or mild decision; (3) according to capacity and ability, level or position and expertise; (4) holding fast to the truth; and (5) is not arbitrary. For further comparison, please see Hossein Askari & Abbas Mirakhor, "Introduction and Summary of the Conception of Justice in Islam." CONCEPTIONS OF JUSTICE FROM ISLAM TO THE PRESENT 1-16 (2020); SHADAAB RAHEMTULLA, QUR'AN OF THE OPPRESSED: LIBERATION THEOLOGY AND GENDER JUSTICE IN ISLAM 45-63 (2017); Adnan A. Musallam, *Sayyid Qutb: The Emergence of an Islamist Calling for Social Justice in Islam, 1906-1948*. 42 JOURNAL OF SOUTH ASIAN AND MIDDLE EASTERN STUDIES. 1, 15-17 (2018); Hossein Askari & Abbas Mirakhor, "Conception of Justice in the Age of Enlightenment", CONCEPTIONS OF JUSTICE FROM ISLAM TO THE PRESENT 33-130 (2020); Hossein Askari & Abbas Mirakhor, "Conception of Justice from Rawls to Sen to the Present", CONCEPTIONS OF JUSTICE FROM ISLAM TO THE PRESENT 155-183 (2020); LAWRENCE ROSEN, ISLAM AND THE RULE OF JUSTICE: IMAGE AND REALITY IN MUSLIM LAW AND CULTURE 78-84 (2018).

²³ KAELAN, LIBERALISASI IDEOLOGI NEGARA PANCASILA 65-67 (2015).

²⁴ YOPI GUNAWAN & KRISTIAN, PERKEMBANGAN KONSEP NEGARA HUKUM DAN NEGARA HUKUM PANCASILA 66-69 (2015).

Aside from the opinions of the experts above about social justice, there is a theory of social justice put forward by Mohammad Hashim Kamali as quoted by Kaelan.²⁵ that humans work together to realize equality, like Aristotle, Kamali considered that justice in a condition where one cannot be said without the other, justice cannot be realized without equality and equality is impossible without justice. One of the principles of justice initiated by Kamali is social justice, where people in a country work together to create an equal situation. This equality is based on the principle of justice as an individual right, only to become part of the social.

My principle of justice, one of them is social justice. For me, the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.²⁶

According to Kamali the idea of social justice is to prioritize the individual, so that individual rights cannot be subdued by the social. This becomes the legal basis for the state, so that the state of society can be called fair. Justice does not justify sacrificing the interests of a person or group of people in the interest of the public. Thus, the conception of justice must be able to guarantee that every citizen has something that cannot be erased, which is rooted in justice that even the welfare of society as a whole should not displace it.

Kamali focuses justice on the freedom and equality of each individual in society. He gave birth to the conception of substantive justice which became the basic structure of society, namely the way how social institutions distribute fundamental rights and obligations and determine the distribution of benefits and burdens from social cooperation. In other words, the distribution is in accordance with the agreement of the individuals involved, so that the value of justice obtained by each individual is not harmed through the distribution process. Thus, equality achieved can

²⁵ *Supra* note 23, at 90-94.

²⁶ *Id.* at 96

be mutually beneficial to individuals who are lucky and who are not fortunate.²⁷

Substantive justice in the black's law dictionary 7th edition is interpreted as; justice fairly administered according to rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights. (Justice is provided in accordance with the rules of substantive law, without regard to procedural errors that have no effect on the plaintiff's substantive rights). This means that what is formally procedurally correct can be blamed materially and its substance violates justice.

From Kamali's opinion on the operation of social justice in a country above, it is considered in line with the opinion of its predecessor, John Rawls, that social justice must be fought for two things²⁸, namely:

- a) Making corrections and improvements to the conditions of inequality experienced by the weak by presenting empowering social, economic and political institutions

²⁷ See Maheen Zaman, *Book Reviews-Mohammad Hashim Kamali. The Middle Path of Moderation in Islam: The Qur'anic Principle of Wasatiyyah*. Oxford: Oxford University Press, 2015. Pp. xi+ 320. Hardcover. ISBN: 978-0-19-022683-1. 56 ISLAMIC STUDIES. 151, 152-153 (2017); MOHAMMAD HASHIM KAMALI, SHARIAH LAW 116-124 (2017); MOHAMMAD HASHIM KAMALI, READING THE SIGNS: A QUR'ANIC PERSPECTIVE ON THINKING 45-53 (2018); Mohammad Hashim Kamali, *Classical Islamic Political Thought and its Contemporary Relevance*. 9 ISLAM AND CIVILISATIONAL RENEWAL ICR JOURNAL. 19, 17-24 (2018); Mohammad Hashim Kamali, *Peace in the Islamic Tradition: One Vision, Multiple Pathways*. 7 ISLAM AND CIVILISATIONAL RENEWAL ICR JOURNAL. 115, 118-120 (2016).

²⁸ JOHN RAWLS, THEORY OF JUSTICE 276-280 (1973). According to Rawls, the most fundamental principle of justice is that everyone has the same rights from their natural positions. Therefore, for justice to be achieved the structure of the political, economic, and regulatory constitution regarding property rights must be the same for all people. Such a situation is called a "veil of ignorance", where everyone must put aside the attributes that distinguish them from other people, such as abilities, wealth, social position, religious and philosophical views, and conceptions of values. To establish this fair situation there needs to be a guarantee of a number of basic rights that apply to all, such as freedom of opinion, freedom of thought, freedom of association, freedom of politics, and freedom before the law. Basically, Rawls's theory of justice wants to overcome two things, namely utilitarianism and resolve the controversy regarding the dilemma between Liberty and equality which has been considered impossible to put together. Rawls explicitly positioned his theory to deal with utilitarianism, which since the mid-19th century dominated the normative political-liberal thinking of liberalism. See also WILLIAM A. EDMUNDSON, JOHN RAWLS: RETICENT SOCIALIST 66-69 (2017); Frank I. Michelman, *Constitution (Written or Unwritten): Legitimacy and Legality in the Thought of John Rawls*. 31 RATIO JURIS. 379, 385-386 (2018); Brian Coyne & Rob Reich. "John Rawls." INTERNATIONAL HANDBOOK OF PHILOSOPHY OF EDUCATION 385-394 (2018); Dennis F. Thompson, "John Rawls, Political Liberalism." OXFORD HANDBOOKS ONLINE (2018).

- b) Every rule must position itself as a guide to develop policies to correct injustices experienced by the weak

John Rawls's opinion above illustrates that the enforcement of social justice ultimately leads to law enforcement, it aims for the sake of justice for all people. Justice itself will be reflected if institutions from various fields are running well, and the law stands not merely as a sanction but rather on the giver of limits and direction whether it is considered good or not. Social justice according to John Rawls about Well-ordered society refers to the structure of a society that is socially just. As for social justice, in the end it is not just that all the same or equal freedoms of each person are protected, but especially also that basic freedoms are effectively carried out by all parties in the society concerned, to the extent that the comfort of the atmosphere of freedom feels maximum for the worst off (those who are less fortunate).²⁹

Meanwhile, the worst off that John Rawls meant was that they were the poorest among us, in terms related to certain primary social goods resources, especially income and wealth. In this connection, they need not be unhappy, from the point of view of the *welfarist* or physically or mentally incapable, but John Rawls also uses other terms to refer to these poor or poor people. The term is the least (social and economic) advantaged. According to him, the term refers to the class of society with the simplest place and distribution of income and wealth.

This is in line with the principles of social justice expressed by Kamali,³⁰ namely:

- a) Everyone has the same right to the whole of the broadest system of fundamental freedoms according to the same system of liberty for all.
- b) Social and economic inequality are regulated in such a way that both provide the greatest benefits to the most disadvantaged and open positions and positions for all under conditions of equal opportunity.

Both Pancasila and the 1945 Constitution have a paradigm of protection of economic rights with the aim of welfare for all Indonesian people. So that the "deeds" of the ultra petita's decision by the Constitutional Court, even though it is not clearly permitted or prohibited by a written regulation, these conditions force the court to look for other unwritten laws in people's lives in order to obtain the value of justice to them as the theory of justice .

²⁹ *Supra* note 23.

³⁰ *Supra* note 27, with all accompanying texts.

CONCLUSION

This study concluded that the decision of the ultra petita constitutional court is as one of the efforts of the judiciary to protect the economic rights of the Indonesian people as the sound of Pancasila and the 1945 Constitution. As in the Electricity Law and the Law on Water Resources, both decisions have proven that the ultra petita is one of the steps of the *ijtihad* panel of judges of the constitutional court in exploring the values of justice that may not be found in written law, so that the panel must be more progressive responsive in seeing problems in the field.

The panel of judges as a breaker cannot only read what is written in the law itself. The law has not been able to answer all the needs and developments of the times. In addition, the State of Indonesia is one of the countries by adopting a mixed legal system, the law is not only safe in the law alone, even what is believed and respected by citizens must be interpreted in a decision solely for the sake of seeking substantive justice.

The Constitutional Court's verdict is *erga omnes*'s decision, that is, the verdict is not only submitted by the petitioner, but also affects all the people of Indonesia. So that the interpretation of justice that is often requested by one party is not merely seen as the needs of those who request it. Beyond the justice of the Constitutional Court, the same justice is also expected by all Indonesian people. So it is not an easy task for the Constitutional Court to decide. It takes a variety of legal paradigms to be able to give a fair decision, especially related to the lives of many people.

SUGGESTION

This study suggest that is the need for the wisdom of legislators to make laws by paying more attention to and even prioritizing the basic rights of Indonesian citizens, especially the constitutional rights that have been sounded in the provisions of the 1945 Constitution. Constitutionalism rights must be able to be interpreted by the legislator. Therefore, in the *ius constituendum* paradigm equality is needed the values of constitutional rights in the 1945 Constitution, so that in the future there will be no longer found norms of law that are multiple interpretations and ignores the basic needs of

the Indonesian people, which should take precedence as mandated by article 33 of the 1945 Constitution.

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