

# Supreme Court's Ultra Vires Rulings Represent a Paradigm Shift in The Judicial Review Conducted by Constitutional Judges

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## Abstract

This study focuses on discussing the legal ratio of ultra vires rulings by constitutional judges as a manifestation of judicial activism. The ultra vires ruling has created a dialectic between preventing *rechtsvacuum* to uphold constitutional justice and the threat of judicial autocracy because the Constitutional Court exceeds its authority as a negative law. The purpose of this study is to comprehensively describe the dialectics of affirming ultra vires decisions by the Constitutional Court in accordance with human rights based on constitutional justice, as well as to analyze the application of the ultra vires doctrine to the actions of the Directors in hiring workers/labourers with work agreements for a certain time. The research method used is normative legal research with a legal approach and a contextual approach. The results of this study indicate that ultra vires decisions by constitutional judges are an unavoidable legal necessity. This is because normatively, sociologically, and in principle they are not contradictory. Therefore, ultra vires needs to be done with methods and sources to find the right law/constitutional to prevent *rechtsvacuum* and overlapping judges in dealing with problems that are constantly changing without destroying checks and balances and creating a mini-parliament.

**Keywords:** Constitutional Judges, Judicial Activism, Judicial Review, Ultra Vires

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## INTRODUCTION

As required in Article 1 point 3 of the 1945 Constitution of the Republic of Indonesia, the power of the judiciary as a means of law enforcement, especially in the courtroom, shows Indonesia's commitment to becoming a rule of law state (1945 Constitution). The Constitutional Court is a judicial entity that guarantees the rule of law and the administration of justice. When making decisions on appeal, the Constitutional Court acts independently (independently). Legal certainty is achieved through decisions of the Constitutional Court that are final and binding because it cannot be appealed. The constitutional judge's decision making on the petition is closely related to the idea of judicial activism.

Social forces that require legal adjustments in society give rise to practice *judicial activism* among constitutional judges. As a form *judicial activism*, the implementation of constitutional fundamental values is carried out through the development of constitutional principles in previous decisions (Hulwanullah, 2019; Tulaseket, 2020). As the statement, "Judges and judges of the constitution are obliged to seek, follow, and understand the legal values and sense of justice that live in society". Therefore, the constitutional judges did *judicial activism* necessitate the use of legal findings.

According to Satjipto Rahardjo in (Adiasih, 2017), constitutional judges produce new legal discoveries by investigating sources of law that exist outside the law. These legal sources include the values that exist in society as an answer to the absence of legal sources. Constitutional judges are required to remain guided by legal principles in carrying out their duties. On the other hand, it is undeniable that there are many constitutional court decisions that go beyond what is required (*ultra small*) or decisions that contain new standards (*ultra vires*). There is no clear legal basis for the decisions of constitutional judges to establish new norms or to make new laws. In its decisions in August 2018-2020, the Constitutional Court issued 9 decisions *ultra vires* new standard. These decisions are made in the context of exercising the judicial power of the court. During the 2018-2019 period, the Constitutional Court decided on four new norms which were contained in its two decisions. The new norms are as follows: (a) the expansion of the scope of international agreements must be carried out by law; (b) expansion of proof of identity for electronic KTP registration as a basis for voting in elections; (c) extending the time for adding the Additional Voters List; and (d) extending the vote counting time (Setara Institute, 2019).

In the 2019-2020 period, the Constitutional Court established 5 more new norms out of a total of 4 decisions. These norms are as follows: (a) the procedures for implementing fiduciary guarantees through the same mechanism as implementing court decisions are tightened; (b) the definition of default is emphasized as an agreement between the debtor and the creditor; and (c) the minimum limit for the results of the presidential-vice-presidential election which was only participated by 2 (two) candidate pairs was declared invalid (d) the change in terminology from *Panwas* to Regency/City *Bawaslu* in order to provide legal certainty in Law Number 1 of 2014 concerning Elections Governors, Regents and Mayors; and (e) expanding a more detailed understanding of the terms and conditions for candidates for regional heads who are convicted of corruption. These two changes were made to ensure that Law Number 1 of 2014 complies with all applicable laws (Setara Institute, 2020).

The concept of checks and balances requires that all state institutions have the same status so that they can control and balance each other in the implementation of state activities. However, the capacity of the Constitutional Court to pass judgment *ultra vires* does not reflect this (Andiraharja, 2021), because the Court does not have constitutional jurisdiction to make decisions outside its jurisdiction. Because the constitution identifies itself as a positive legislature, it is considered to have exceeded the legislative authority of the DPR. In addition, deviations from generally accepted legal principles can have a major impact on other legal subsystems (Hutabarat et al., 2022), so the premise of a modern rule of law rule with a constitutional court is to build a system of checks and balances. Constitutionally, the ties between branches of government are broken because the decisions of the Constitutional Court are "final and binding" and come into effect immediately after the decision is rendered (Patra, 2022).

Utilizing the authority of the Constitutional Court as *negative legislation* can be of one shape *checks and balances* used to ward off the power of the Constitutional Court. However, if you look at Decision Number 005/PUU-IV/2006, which includes the supervision of the Constitutional Court by the Judicial Commission, it creates an imbalance *checks and balances* because the Constitutional Court rejected the request or status. decision. This is because the supervision of the Constitutional Court by the Judicial Commission is part of the decision.

Because of this decision, it is no longer possible for another entity, the Judicial Commission, to monitor the activities of the Constitutional Court. In addition, the Constitutional Court's decision is *final and binding* and characteristic *checks and balances* will not happen again if MK can create new norms and become *positive legislature*. This is because if these norms are reviewed, then these norms are no longer meaningful or useful. Because it will be examined by the Constitutional Court itself.

Regarding the Constitutional Court's decision which contains more new rules, such as decision number 21/PUU/XII/2014, so. This can be seen from the statement that the object being petitioned for is illegal, if matters relating to the object such as the determination of the suspect, search and seizure are not misunderstood. One form *judicial activism* known as *ultra vires* is the exercise of the power of constitutional judges outside their authority. Jimly Asshiddiqie argues that the role of the Constitutional Court as a protector of democracy (*the guardian of the democracy*), protector of citizens' constitutional rights (*the protector of the citizen's constitutional rights*), and human rights defenders (*the protector of human rights*) is reflected in terms *judicial activism* which describes the role of the Court as an enforcer of constitutional justice in society (Constitutional Court, 2004). However, without changing the basic principles of Pancasila, efforts to uphold justice are carried out based on the public interest or people's demands for a new law and regulation that has not been regulated in law.

It is very important in a constitutional or constitutional state that human rights are protected as one of the goals of *judicial activism* by constitutional judges. This is consistent with the purpose of the constitution, which is to set the framework for the relationship between the government and its citizens in terms of their basic rights. The essay shows that the Supreme Court does not only consider laws, but also social justice, as required by Article 24 paragraph 1 of the 1945 Constitution of the Republic of Indonesia.

As part of their duty to uphold the law, constitutional judges have sworn to uphold a document outlining the universally accepted principles of decency and human equality. Therefore, the Constitutional Court cannot blindly rely on laws or legal principles that limit its ability to uphold justice. Instead, it must protect the constitution itself. In addition, constitutional judges have the authority to conduct *judicial activism* in the form of a decision *ultra vires* with a note for the sake of justice, even though the law does not regulate and prohibits these actions contrary to principal *check and balances*.

Confusion and unclear authority of the constitutional court in assessing a petition *ultra vires* or not, has piqued the curiosity of researchers who want to explore this topic more deeply. This topic relates to the confirmation of decision *ultra vires* by constitutional judges as one form *judicial activism* incorporated in the 1945 Constitution of the Republic of Indonesia in the name of public interest or human rights.

A company as a legal entity which is an artificial person, of course, cannot absolutely be equated with humans as natural persons. This causes the Company to need a separate entity that will realize the Company as a legal subject that has daily activities and has goals to be achieved. Therefore, the Limited Liability Company Law, precisely in Article 1 point 2, stipulates that the organs of the Company are the General Meeting of Shareholders (hereinafter referred to as the GMS), the Board of Directors and the Board of Commissioners.

Under the pretext of getting more profits for the Company, it is not uncommon to find the Directors in managing the Company base their policies on reducing the Company's expenses

by reducing the cost of workers/labor. This effort is often realized in the form of using workers/laborers with work agreements for a certain time which according to the International Labor Organization are cheap workers/laborers, either because of lower wages or because of workers/laborers not being entitled to various social security benefits. (Organization, 2016)) A specified time work agreement is a type of agreement whose arrangements are specifically regulated through the provisions of Law Number 13 of 2003 concerning Manpower (hereinafter referred to as the Manpower Law) whose arrangements have been amended most recently through Law Number 11 of 2020 concerning Job Creation. (Hereinafter referred to as the Job Creation Law).

In Decision Number 156/Pdt.Sus-PHI/2019/PN Bdg juncto Decision Number 434 K/Pdt.Sus-PHI/2020, the Company is proven to employ workers/laborers with work agreements for a certain time for work which, according to the nature or type of work, is permanent. 6 Furthermore, in Decision Number 10/Pdt.Sus-PHI/2019/PN Kdi juncto Decision Number 74 K/Pdt.Sus-PHI/2020, the Company was proven to employ workers/laborers with work agreements for a certain time for work carried out continuously.

Waiver of the limitations that have been regulated in the provisions of Article 81 Number 15 of the Job Creation Law as contained in the decision above, causes a change in the status of the worker/laborer in the Company. This is in accordance with the provisions contained in Article 81 Number 15 of the Job Creation Law which amends the provisions of Article 59 paragraph (3) of the Manpower Law. Therefore, workers/laborers who were initially bound by a working relationship with the Company through a work agreement for a certain time are declared by law to switch to a work relationship with a work agreement for an indefinite time.

The actions of the Board of Directors as referred to a quo which are not in accordance with the interests of the Company are closely related to the limitation of the authority of the Board of Directors. These restrictions are known through the doctrine of ultra vires. Ultra vires is defined as an action by the Board of Directors that is not in accordance with the aims and objectives and business activities are actions beyond their control. (Harahap, 2011)

Research conducted (Anagnostaras, 2021) entitled "Activating Ultra Vires Review: The German Federal Constitutional Court Decides Weiss", this judgment is based on an erroneous interpretation of the relationship between the principle of proportionality and grants and is a covert attempt to redefine the method of interpreting laws EU law and to enforce the constitutional court's traditional perception of the role of the central government. banking and the existence of an absolute and inviolable separation between monetary and economic policies. At the same time, the constitutional court reneged on its promise to carry out an ultra vires review in a cooperative spirit and failed to use the institutional means available to it to resolve the matter in a lawful and peaceful manner which would not in essence amount to a precarious attempt to bring an economic trial to justice.

The results of the study (Waruwu, 2022) found that the application of the ultra vires doctrine in Indonesia is more associated with criminal acts committed by directors or management, which were committed outside or outside the authority stipulated in the company's Articles of Association. This is what legislators should pay special attention to in terms of formulating things that can be used as benchmarks for actions that are called ultra vires, so that legal certainty can be achieved.

Research conducted by (Nasution, 2017) is related to the application of the ultra vires doctrine to the actions of the Directors which cause harm to both shareholders, the Company's creditors, workers/laborers, and the Company's constituents. The research conducted by Ainul Mardiah Nasution has similarities with the research that will be conducted by the author, namely the application of the ultra vires doctrine to the actions of the Directors. However, the difference is that research by Ainun Mardiah Nasution emphasizes the accountability of the Board of Directors for ultra vires actions towards third parties while the authors emphasize the application of the ultra vires doctrine to acts against the law of the Directors in employing workers/laborers with work agreements for a certain time and regarding legal protection for workers/ workers for the ultra vires actions of the Board of Directors.

## RESEARCH METHODS

The research in this article uses a type of normative legal research that examines legal issues based on literature (Susanti et al., 2022). Normative legal research focuses on analyzing rules or principles, principles, and legal doctrines to answer the concept of affirmation of decisions *ultra vires*. This research approach uses a statutory approach (*statute approach*) in which to review all laws and regulations related to the decision *ultra vires* by constitutional judges as a manifestation of *judicial activism* (Marzuki, 2017) and conceptual approach (*conceptual approach*) (Dachi, 2017).

Primary, secondary, and tertiary sources are used in this study. Primary legal materials, such as statutory regulations, official records, and treatises on drafting statutory regulations, are authoritative in nature. Guides, legal literature, legal encyclopedias, legal scholarly publications, legal magazines, legal news, and websites are examples of secondary legal materials. Additional sources, such as the English-Indonesian Dictionary and the Big Indonesian Dictionary, as well as encyclopedias and websites, fall into the category of tertiary legal material. The techniques used in this research include the data collection technique used is library research, data processing techniques are based on interpretations of legal materials collected to be simplified, data analysis techniques use descriptive analysis methods, and conclusions draw techniques using deductive mindset.

## RESULT AND DISCUSSION

### A. Verdict Affirmation Concept Ultra Vires in Activity Judicial Activism Constitutional Court

The Constitutional Court is a judicial body in charge of carrying out constitutional oversight. But in 1660, Oliver Cromwell connected the notion of Basic Law (*Grundgezets*) with understanding *Intrumens of Government*, which then becomes a reference in the process of administering government. Constitution has the same meaning as *Grundgezets* (Loi, 2017). The political interpretation of the term "constitution" refers to all the written and unwritten rules that serve the purpose of administering government, whereas the Basic Law is an example of a constitution in the form of a text outlining the main responsibilities and functions of the three branches of government that make up a democracy (Executive, Legislative, and Judicial) in running the government (Munir, 2017).

The constitutional examination carried out by constitutional judges aims to keep the constitution on track or does not deviate from the criteria outlined in the 1945 Constitution of

the Republic of Indonesia. To enforce it, constitutional judges have on several occasions been involved in what is known as *Judicial activism* by deciding that *ultra vires* and *ultra small*. *Judicial activism* refers to the process by which constitutional judges interpret laws while simultaneously engaging in *Judicial activism*. The two are interrelated because *judicial activism* is the activity of judges to find laws that have been regulated and those that have not been regulated but there is ambiguity in their application.

The process of determining the meaning of a legal text by the court, like the strategy adopted by constitutional judges, is known as legal interpretation. According to Article 5 paragraph (1) and Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, "Judges and constitutional judges are required to explore, follow, and understand legal values and a sense of justice that lives in society." in accordance with the meaning of legal interpretation.

In accordance with the previous article, constitutional judges are required to investigate, or seek laws by interpreting the laws applied. In addition, it is recommended to pay attention to and understand the legal principles of society and a sense of justice. This fragment of the phrase shows that constitutional judges must not only fully refer to the language of the constitution, but also understand the substance of a law and assess it with a unique sense of justice that exists in society. Moreover, the meaning of a sense of justice that exists in society is realized because of difficulties, benchmarks, and the dynamic mindset of society, which requires constitutional judges to adjust in considering a petition so that a sense of justice can be realized.

There is a legal umbrella for judges to make legal discoveries, because judges cannot refuse applications submitted to court, as contained in Article 10 paragraph (1): the law does not exist or is unclear, but it is obligatory to examine and adjudicate it."

The previous rule emphasized that judges, especially constitutional judges, were expected to grant requests without objection if there was no applicable law. In other words, this term can be interpreted that constitutional judges are required to analyze or interpret the law (*judicial activism*) because there are no laws and regulations that limit it, which in fact results in: (a) the judge violating the decision *ultra vires* (creating new norms) because there is no law that regulates them or for other reasons to achieve justice; (b) the judge makes a decision *ultra small* (decisions containing more than asked for).

According to Constitutional Court spokesman Fajar Lasksono, decisions can be granted, rejected, or not accepted, and fall into one of three general categories. However, constitutional judges are, from time to time, required to deviate from these normative standards to ensure that the law is clear and fair. Specifically, the decisions of the Constitutional Court are in the form of: (a) Decisions based on conditional constitutions (*conditionally constitution*) which stipulates that the a quo article or statutory provisions remain constitutional or do not conflict with the 1945 Constitution of the Republic of Indonesia, but are equipped with provisions and limitations; (b) Conditional unconstitutional decision (*conditionally inconstitution*) for stating the article a quo or the provisions of the law are contrary to the 1945 Constitution of the Republic of Indonesia if the conditions outlined by the Constitutional Court are not fulfilled; this makes the decision unconstitutional in a conditional sense.; (c) The Constitutional Court of the Republic of Indonesia has decided to suspend the enactment of a law which has been decided not to directly conflict with the 1945 Constitution, unless certain criteria are met; (d) Formulation of norms in decisions that contain options that change or create new norms from

the laws and regulations being reviewed so that they are different from the previously valid legal norms. (Asy'ari et al., 2017).

*Amar* The final decision delivered in the manner mentioned above is an example of a constitutional judge who made *judicial activism*. The rationale behind this decision is that it is deemed insufficient to fulfill the sense of justice and legal certainty of the community. Therefore, it is anticipated that this decision will prevent a legal vacuum and present a sense of justice for the community (Memi, 2019). However, of the four decisions presented above, the inclusion of the new norms has sparked the most controversial and differing debates.

*Statement* This contradiction arises because the Constitutional Court acts as *Positive Legislature* because setting norms is not the authority of the Constitutional Court, but the DPR. What is meant by *ultra vires* is every decision that deviates from the prevailing rules. Terminology *ultra vires*, as previously defined, refers to the practice of the Constitutional Court creating new standards in its rulings, which go beyond the scope of the court's legal jurisdiction. Moreover, the Constitutional Court's decision is *final and binding*, until there is no *check and balances* in government administration. Therefore, the decision of the Constitutional Court cannot be reviewed by any other body. Since no other body can evaluate Constitutional Court decisions, its operations are deemed too powerful.

Article 5 paragraph 1 of Law Number 48 of 2009 concerning Judicial Power which has increased the position of the constitutional court in considering decisions *ultra vires* provide normative support for assertion. Obviously, this is because constitutional judges are expected to investigate or find laws regarding the current situation. In addition, the revocation of paragraph (2a) of Article 57 of the Third Amendment Law on Law No. 24 of 2003 concerning the Constitutional Court. The abolition of the provisions of Article 57 paragraph 2a adds to the position of the Constitutional Court as guardian of the constitution and constitutional judges in carrying out matters *judicial activism*, especially in form *ultra vires*. The provisions of the article read: "The Constitutional Court's decision does not contain:

1. Amar other than as referred to in paragraph (1) and paragraph (2).
2. Orders to law makers; and
3. Formulation of norms as a substitute for norms from laws that are declared contrary to the 1945 Constitution of the Republic of Indonesia."

According to the previous article, the Constitutional Court has the authority to formulate norms as a substitute for norms that are contrary to the 1945 Constitution of the Republic of Indonesia if the constitutional judges judge that the provisions of a quo article being applied for are contrary to the 1945 Constitution. The 1945 Constitution of the Republic of Indonesia must become the basis for all norms adopted by the state.

Affirmations sociologically can be based on views *non-originalist equitable* because it places judges as interpreters of law, which is a problem, either because it is unclear or because of a legal vacuum. Where the legal discovery made with the interpretation of this law aims to seek justice and a balance of interests. Legal interpretation *not original fair* is not the only method that must be applied by the judge. The method of interpretation of law by judges is *flexible* or free. This relates to the principle of independence and the freedom of constitutional judges in deciding on an application, that there is no obligation or special rule for judges to use a particular method of interpretation. In relation to this matter, the Constitutional Court stated

in its decision that: "Independence also means that judges are free decide according to the values they believe in through the interpretation of the law, even though decisions based on such interpretations and beliefs may be contrary to those who have political and administrative power."

Basic *due process of law* in the judicial process is primarily responsible for upholding decision *ultra vires* made by constitutional judges. The application of this principle is carried out by constitutional judges who carry out judicial activities. In this regard, the constitution or laws and regulations must really reflect what lives in society, as has been said in the previous sentence. In the case of *Edwards vs Attorney General of Canada in Person Case*, Chancellor Lord Sankey saw that one could describe the law as *Living Tree* or constitution in the form of a tree. This metaphor is also often associated with the term "living law" which describes a situation in which a constitution or law develops over time because of various interpretations placed on various legal issues in each era or the law itself.

Affirmations in principle can be seen as in books *Modern Political Constitutional* by C.F Strong that *constitutional is like a tree*, this sentence means that the constitution is like a tree, meaning that the law or constitution always develops like a tree. As a result, the Constitutional Court decisions which developed in this case and contained new norms in their decisions (*ultra vires*) were also considered constitutional developments. This is because the decision of the Constitutional Court is included in the constitution itself.

Antithesis of the affirmation of the verdict *ultra vires* by constitutional judges normatively namely the existence of "the principle of the law can not be contested" (*redeemable*) in the principle of statutory regulations. This principle is regulated in Article 95 paragraph (2) of the Provisional Constitution of the Republic of Indonesia (UUDS 1950), it states that "the Law cannot be contested". The background for the regulation of this article is due to the strong influence of the Netherlands and the People's Representative Council (DPR) as the legislator or *positive legislature*.

Theoretically, the principle of inviolability of laws is no longer valid because the current 1945 Constitution of the Republic of Indonesia (the Fourth Amendment) does not rule out the possibility for the judiciary to examine laws that violate the 1945 Constitution. Therefore, theoretically academically it is possible to compare laws with the 1945 Constitution. This is also since Article 1 number 2 of the 1945 Constitution places people's sovereignty directly in the hands of the people, so that legislators (President and DPR) are not implementing people's sovereignty as the basis for implementing the principle that the law cannot be contested (Aziz, 2016). In this sense, the legal principle cannot be questioned, and can be used by constitutional judges to legitimize decisions *ultra vires*.

About the affirmation of constitutional judges in deciding a petition that is *ultra vires*, constitutional supremacy is the reason behind these activities. The supremacy of the constitution as described above shows the constitution as the highest authority in which the Constitutional Court is the bodyguard and the form of manifestation of the people in administering the constitution. Article 24C paragraph 1 of the 1945 Constitution has been amended to make the Constitutional Court the only government institution authorized to evaluate laws so that they are in accordance with the Constitution, that "The Constitutional Court has the authority to try at the first and last levels whose decision is final to examine laws against laws Constitution, decide on disputes over the authority of state institutions whose

authority is granted by the Constitution, decide on the dissolution of political parties, and decide on disputes about the results of general elections.

Decision Number 21/PUU-XII/2014 Regarding Review of Law Number 8 of 1981 Regarding the Criminal Procedure Code is one of the decisions *ultra vires* studied in the past (KUHP). Where in its decision, the Constitutional Court granted part of the petition against article *a quo* and the statement "... has no permanent legal force as long as it is not considered to include the determination of the suspect, search and confiscation". This statement is a new norm because it decides whether Article 77 letter a of Law Number 8 of 1981 concerning the Criminal Procedure Code is valid, with notes regarding special definitions.

Addendum "... as long as it does not cover the determination of the suspect, search and seizure." indicates that the Constitutional Court has added a standard to the provisions of an article, which has implications for the entry into force of that article. Anwar Usman, a constitutional judge, explained that the Constitutional Court issued the new rule because Law Number 8 of 1981 concerning the Criminal Procedure Code was considered to have failed to implement the protection of individual citizens' rights as human beings with dignity, especially in the field of legal proceedings (*according to due process of law*).

In Article 1 number 14, Article 17, and Article 21 paragraph (1) of the Criminal Procedure Code, the Constitutional Court also provides additional meanings to the terms "preliminary evidence", "sufficient initial evidence", and "sufficient evidence". This term is understood to mean "at least two pieces of evidence". According to Constitutional Justice Wahiduddin Adams, the concept of "at least two pieces of evidence" in the phrases "initial evidence", "sufficient initial evidence", and "sufficient evidence" is an attempt to uphold the norms of due process of law.

## **B. Basic Considerations of Constitutional Judges in Deciding Cases of a Characteristic *Ultra vires* With a Human Rights Approach**

Efforts to protect human rights or justice through the formation of new regulations by the Constitutional Court, such as the revision of Article 183 of the Criminal Procedure Code, which states that the conviction of a person must be proven by at least two people. proof. However, in the article being tested in the Constitutional Court Decision Number 21/PUU-XII/2014, "preliminary evidence" is used to determine the guilt or innocence of a suspect. Any of these interpretations or ambiguities can damage the suspect. In other words, the article or articles being petitioned for have the potential to violate the human rights of a suspect because there is no specific phrase that can be used as a criterion to determine the guilt or innocence of a suspect. Because, in its most fundamental form, the legal process, be it an arrest, an investigation or an investigation, does not necessarily end with the determination of the suspect or the accused being convicted.

*Judicial activism* in the Constitutional Court Decision Number 21/PUU-XII/2014 ending in a decision which contains a new norm: "... contrary to the 1945 Constitution of the Republic of Indonesia as long as it does not mean that "preliminary evidence", "sufficient initial evidence", and "sufficient evidence" is at least two pieces of evidence contained in Article 184 of Law Number 8 of 1981 concerning Criminal Procedure Code;" and "... does not have binding legal force as long as it is not interpreted that "preliminary evidence", "sufficient initial evidence", and "sufficient evidence" are at least two pieces of evidence contained in Article 184

of Law Number 8 of 1981 concerning Procedural Law Criminal ; ” Both decisions contain the word "is", which if taken literally means explaining the purpose or meaning or statement of the previous clause. In this case, the previous clause refers to "preliminary evidence", as previously mentioned. In addition to providing an explanation of how much preliminary evidence is required, the Constitutional Court also stipulates a new rule by noting that two preliminary or preliminary evidence is sufficient, because previously not strictly regulated.

Provisions of constitutional judges in making decisions *ultra vires* with Decision Number 21/PUU-XII/2014 as an example it can be justified on the grounds that based on Article 10 paragraph (1) letter a of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, that "testing law against the 1945 Constitution of the Republic of Indonesia", where the Constitutional Court examined the constitutionality of Law Number 8 of 1981 concerning Criminal Procedure Code against the 1945 Constitution of the Republic of Indonesia which was deemed detrimental to the rights and/or authorities of the applicant (Indonesian citizens).

Judges as law enforcers in judicial institutions are expected to be fair in making their decisions. However, there is no denying the subjective nature of judges. This has been attempted, one of which is in Article 17 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court that constitutional judges are prohibited from concurrently serving as other state officials, members of political parties, businessmen, advocates, and civil servants. This article is intended to prevent or reduce the personal interests of judges in deciding a decision.

Article 18 paragraph (1) of Law Number 7 of 2020 concerning the Constitutional Court states that the Supreme Court, the DPR and the President each propose three candidates for constitutional judges. The difference is intended so that perspectives in interpreting law come from different fields or thoughts. Differences in the backgrounds of constitutional judges can influence decisions which in turn have implications for the basis that becomes the consideration of constitutional judges in deciding an application.

Impartiality in carrying out their duties in court (*within the exercise of the judicial function*) (Adji, 1980) and free from the intervention of other parties is one of the appointments of constitutional judges from different backgrounds. The implication is that in deciding an application, there is no judge's opinion as a reference or priority, because they come from different backgrounds and are an odd number which makes it easier to make decisions in court.

In deciding cases based on Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, constitutional judges usually consider the following factors: (a) Norms in the 1945 Constitution of the Republic of Indonesia; (b) Justice based on the One God; (c) Material contrary to the 1945 Constitution; (d) Prejudice to the constitutional rights and/or authorities of individuals or Indonesian citizens; (and) Loss of constitutional rights and/or authorities must be specific and *actual* or at least reasoning has the potential to happen; (f) There is a causal relationship (*causal verb and*) between the applicability of the law being petitioned for review and the loss of constitutional rights and/or authorities of the applicant; (g) There is a possibility of loss of constitutional rights and/or authorities of the applicant will not occur again if the Constitutional Court judge grants the request.

The essence of Decision Number 21/PUU-XII/2014 is that constitutional judges view "justice" as the basis for their considerations in determining whether a petition deemed contrary to the 1945 Constitution violates norms. Given the efforts made to maintain the principle *legal due process* in Decision Number 21/PUU-XII/2014.

Justice, or rather *legal due process*, is not the only basis for the constitutional court to pass decisions that contain new principles (*ultra vires*). In Decision Number 21/PUU-XII/2014, the constitutional judges also considered the following fundamental factors: (a) The Petitioner argued that, as an individual Indonesian citizen, he has constitutional rights to "recognition, guarantee, protection, and certainty rights" justice" and the constitutional rights of *legal due process* as regulated in Article 28D paragraph (1) of the 1945 Constitution; (b) The Petitioner is of the opinion that the application of Article 1 point 2, Article 1 point 14, Article 17 and Article 21 paragraph (1) has sacrificed his constitutional rights; In this case due to the enactment of the criminal process of the Petitioner's determination; (c) The Constitutional Court determines that the constitutional rights of the applicant are specific and actual, so that there is a causal relationship (*causal verb and*) between the loss of constitutional rights and the enactment of the law being petitioned for review; and (d) If the Petitioner's petition is granted, there will be a loss of constitutional rights argued by the Petitioner.

The Petitioner has fulfilled the requirements to apply for a quo article in Law Number 8 of 1981 concerning the Criminal Procedure Code based on Article 51 of Law Number 7 of 2020 concerning the Constitutional Court. For constitutional judges to exercise their oversight role and ensure justice is served, they must adhere to basic principles when making their decisions.

The description of the decision of the Constitutional Court which has included the new norms above is a reflection that judges are not only mouthpieces of law, and it is indeed necessary to find laws by judges to realize justice. The essence of a good judge's decision must fulfill two conditions, namely theoretical needs, and practical needs. Theoretically, legal facts (norms contained in laws) remain a consideration or reference for constitutional judges in deciding an application. This is intended so that later the results of the decisions of constitutional judges can be accounted for from a legal perspective. While in practice, decisions made by constitutional judges are intended to be able to resolve legal issues/disputes being requested and acceptable as well as provide legal protection for the community.

### **C. Implications of the Decision *Ultra vires* on the Board of Directors' Actions in Carrying out the Management of the Company**

An act of the Board of Directors qualifies as an act of the Board of Directors which *ultra vires* if the action exceeds its authority. In the Law on Limited Liability Companies, to be precise in the provisions of Article 1 Number 5 it is stipulated that the Board of Directors has the authority and full responsibility for managing the Company for the benefit of the Company, in accordance with the aims and objectives of the Company and representing the Company both inside and outside the court in accordance with the provisions of the articles of association. So that the authority of a director is divided into two, namely:

1. Managerial authority, namely the authority of the Board of Directors to properly manage the Company as a leader.
2. Authority of representation, namely the authority of the Board of Directors to represent the Company both outside the court and in court.

Furthermore, the provisions of Article 97 paragraph (1) of the Limited Liability Company Law stipulate that the Board of Directors is responsible for managing the Company as referred to in Article 92 paragraph (1). Article 92 paragraph (1) of the Limited Liability Company Law itself stipulates that the Directors carry out the management of the Company for the benefit of the Company and in accordance with the aims and objectives of the Company.

The elucidation of Article 92 paragraph (1) then also provides an explanation that the provisions of Article 92 paragraph (1) assign the Board of Directors to manage the Company which, among other things, includes the day-to-day management of the Company. Regarding the explanation of Article 92 paragraph (1), Yahya Harahap interprets day-to-day management as the implementation of the management of the Company by the Directors which includes the actions of the Directors in managing and leading the Company to achieve the aims and objectives of the Company being established.

Based on this, the enormous authority for a Board of Directors is clearly illustrated. A Board of Directors is authorized to carry out the management of the Company which includes the authority to manage and lead the Company daily to achieve the aims and objectives of the Company.

The enormous authority for a Director in a Company, of course, is accompanied by a very large opportunity for arbitrariness to be carried out by the Directors when carrying out the management of the Company. Therefore, together with the authority possessed by a director in managing the Company, it is very large. It is necessary to attach a limitation of authority for a director to suppress the possibility of arbitrariness in carrying out the management of the Company.

The Limited Liability Company Law as the legal umbrella for the Company then seeks to limit the authority of the Board of Directors. Efforts to limit the authority of a director can be found through the provisions contained in the provisions of Article 92 paragraph (1) of the Limited Liability Company Law which provide limits for Directors in managing the Company. The limitation lies in the necessity for a director to carry out the daily management of the Company in accordance with the interests of the Company and in accordance with the aims and objectives of the Company.

From what has been described above, it can be understood that a Board of Directors carries out the management of the Company by guiding and coaching all forms of activities or activities of the Company, limited by two things. First, namely the interests of the company. Second, namely the aims and objectives of the Company.

The first limitation on the authority of the Board of Directors is realized through the interests of the Company. Yahya Harahap interprets the management of the Company by the Board of Directors for the benefit of the Company, as management by the Board of Directors which is only for the benefit of the Company and not for personal gain. Management based on the interests of the Company must also be carried out without containing a conflict of interest (*conflict of interest*). Do not use the Company's assets or take advantage of the position of the Board of Directors to achieve profit or the personal interests of the Board of Directors. Not withholding or taking part of the Company's profits for personal gain.

More than that, the Company as a capital association certainly has an interest in maintaining capital and benefiting from capital management within the Company. Not only for shareholders but also for other shareholders of the Company, including among them workers/laborers of the Company.

The second limitation for the Board of Directors in carrying out the management of the Company as mentioned above is through the aims and objectives of the Company. Arrangements regarding the aims and objectives of the Company can be found in the articles of association of a Company, as regulated through the provisions of Article 15 paragraph (1) of the Limited Liability Company Law.

The aims and objectives of the Company are defined as the main business of the company, this is in accordance with the provisions contained in the provisions of Article 18 of the Limited Liability Company Law. Meanwhile, the Company's business activities are defined as activities carried out by the Company to achieve its aims and objectives, which must be clearly specified in the articles of association, and these details must not conflict with the articles of association. So that the limitation of the authority of the Board of Directors by the provisions of the aims and objectives of the Company means that the management of the Company by the Directors must be in accordance with what is the main business of the Company as stated in the articles of association.

The two limitations on the authority of the Board of Directors in carrying out the management of the Company have shown the range of limits on the authority of the Board of Directors in carrying out their authority. The scope of these limits is in the form of a requirement for the Board of Directors to manage and lead the Company solely for the benefit of the Company by considering the main business of the Company.

The scope of the limits of the Board of Directors' authority in managing the Company as described by the author above also attached an obligation for the Board of Directors to manage the Company in good faith and with full responsibility. This is regulated through the provisions of Article 97 paragraph (2) of the Limited Liability Company Law which contains provisions that the management of the Company must be carried out by the Board of Directors in good faith and with full responsibility. This provision has the meaning as a guideline for the behavior of a Board of Directors in carrying out their authority. Therefore, the management of the Company by the Directors in accordance with the interests of the Company and in accordance with the aims and objectives of the Company must be carried out by the Directors in good faith and with full responsibility.

Regarding the meaning of the phrase good faith in the provisions above, the Limited Liability Company Law itself does not provide a meaning regarding good faith for the Board of Directors in managing the Company. However, the good faith of a director in managing the Company is correlated with principles *fiduciary duty* attached to the relationship between the Company and the Board of Directors.

*Fiduciary duty* is defined as a relationship that arises when a person gives delegation or authority to another person based on trust to carry out certain legal actions for and on behalf of and in the interests of the party giving the authority.<sup>76</sup> Therefore, the Board of Directors is a person who is delegated or authorized by the shareholders in a Company based on trust to manage the Company. This trust requires the Board of Directors to carry out the management of the Company in good faith.

In showing the good faith of a director in managing the Company by using the principles *fiduciary duty* the following indicators need to be considered:

*The duty to act bona fide in the interest of the company*

This provision requires the Board of Directors to carry out the management of the Company in the interests of the Company as a whole. The Board of Directors' actions must also be believed to bring benefits to the Company.

*The duty to act for a proper purpose*

This provision requires that the Directors in managing the Company must always be based on reasonable objectives. This is because the Board of Directors is the only organ of the Company that has the right to carry out the management of the Company so that all actions in managing the Company by the Board of Directors must always have reasonable objectives that do not harm shareholders and other creditors.

*The duty to retain their discreditory powers*

This provision provides an opportunity for the Board of Directors to act as broadly as possible without limiting the authority they have if these actions will benefit the Company.

*The duty to avoid conflicts of interests*

This provision requires the Board of Directors to avoid conflicts of interest while running the management of the Company. This is because a conflict of interest will make the Board of Directors no longer able to act fairly in managing the Company.

Apart from being required to carry out the management of the Company in good faith, a director is also required to carry out the management of the Company with full responsibility. The phrase "full responsibility" in the elucidation section of Article 97 paragraph (2) is interpreted as paying close and diligent attention to the Company. Therefore, it is known that the actions of the Board of Directors in managing the Company must also be carried out by the Board of Directors in a thorough and diligent manner.

The phrases careful and diligent in the elucidation of the article above are closely related to the principle related to the obligations of the Board of Directors which is known in company law as *duty of care and skill* which requires the Board of Directors to act carefully or prudently as well as diligently based on their best abilities. Therefore, the phrases are thorough and diligent in the explanation of the article as intended *a quo can* be interpreted that the Board of Directors in carrying out the management of the Company must be based on an expertise and participate in acting with full concern for the interests and aims and objectives of the Company.

As a logical consequence of the limitation of authority for the Board of Directors in carrying out their authority. The Limited Liability Company Law in Article 97 paragraph (3) then also imposes a consequence if the Board of Directors does not carry out the management of the Company in accordance with what has become their authority in managing the Company or even exceeds their authority causing losses to the Company. The consequence is in the form of the personal responsibility of the Board of Directors of the Company which exceeds the limited responsibility of a director.

Based on the series of explanations above, based on the understanding that the doctrine *ultra vires* is a doctrine that substantially addresses the matter of the excess of authority by the Company's organs which causes the Company to not have the authority to authorize the action. So based on Indonesian company law, the actions of the Directors in managing the Company

will qualify as actions of the Directors who *ultra vires* when the action meets the formula of indicators below:

- 1) The actions of the Board of Directors in managing the Company cause losses to the Company.
- 2) The Company's losses arise from the mistakes or negligence of the Board of Directors in managing the Company; and
- 3) Actions that harm the Company are carried out by the Board of Directors with no good intentions and not full responsibility.

When the actions of the Board of Directors meet the three formulations of the doctrine *ultra vires* If this is fulfilled, then the action of the Board of Directors can be categorized as an action that *ultra vires* and all the characteristics of that action *ultra vires* will apply to the Board of Directors from the moment the action fulfils the three formulations as stated above.

## CONCLUSION

1. The Constitutional Court's duty is to protect the constitutional rights of citizens. However, judicial review decisions that have been issued by the Constitutional Court must be in line with the concept of progressive law, in which the decision must have a value that can be useful and beneficial for human welfare. The purpose of using progressive law in every decision of the Constitutional Court must be interpreted so that the law contained in the decisions that have been issued by the Constitutional Court is appropriate and commensurate with humans.
2. In the legal process, be it arrest, investigation or investigation, it does not end with the determination of the suspect or the detention of the convict. Differences in the backgrounds of constitutional judges can influence decisions which in turn have implications for the basis that becomes the consideration of constitutional judges in deciding an application.
3. An action by the Board of Directors as an *ultra vires* action is first considered whether the actions of the Board of Directors in managing the Company cause harm to the Company. Furthermore, the losses for the Company must arise from the wrong or negligent actions of the Board of Directors in carrying out the management of the Company. The last formulation related to the actions of the Board of Directors which are categorized as *ultra vires* actions are the mistakes or negligence of the Directors which cause losses to the Company which is the result of the management of the Company by the Directors who are not in good faith and are not full of responsibility.

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