

ULTRA PETITA DECISIONS IN THE CONTEXT OF CRIMINAL LAW ENFORCEMENT IN INDONESIA

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Abstract

The imposition of *ultra petita* decisions in the practice of criminal law enforcement in Indonesia continues to be going on today. This paper tries to examine the *ultra petita* decisions with the provisions in the Criminal Procedure Code, and the principle of freedom and the active role of judges. In answering the problem, the writer makes use of a type of normative legal research that's done by researching positive law. The results of the discussion display that the Criminal Procedure Code doesn't prohibit judges from imposing *ultra petita* decisions. In examining criminal cases, the judge can impose decisions that are outside of the requisition or exceed the requisition of the public prosecutor. The Criminal Procedure Code only stipulates that the basis for the judge in imposing a decision is the bill of indictment. Justification for the imposition of decisions is also based on the principle of judge freedom and judges are active. Under these two principles, judges are free to **impose** decisions without influence from other parties and actively searching for out facts that are revealed in court for the realization of material truth as the aims of criminal procedural law. The writer's recommendations are: 1) Criminal law enforcers (judges, public prosecutors, lawyers/ defendants) need to form a common awareness that *ultra petita* decisions are permitted; 2) The rule by which the judge gives the *ultra petita* decisions needs to be made immediately, each for the short and long term.

Abstrak

Penjatuhan putusan ultra petita dalam praktik penegakan hukum pidana di Indonesia masih terjadi perdebatan hingga saat ini. Tulisan ini mencoba untuk mengkaji putusan ultra petita yang dikaitkan dengan ketentuan dalam KUHAP serta prinsip kebebasan dan peran aktifnya hakim. Dalam menjawab permasalahan, penulis menggunakan jenis penelitian hukum normatif yang dilakukan dengan meneliti hukum positif. Hasil pembahasan menunjukkan bahwa KUHAP tidak melarang penjatuhan putusan ultra petita. Dalam memeriksa perkara pidana, hakim boleh menjatuhkan putusan di luar tuntutan atau melebihi tuntutan penuntut umum. KUHAP hanya mengatur bahwa dasar bagi hakim dalam menjatuhkan putusan adalah surat dakwaan. Pembeneran penjatuhan putusan ultra petita juga didasarkan pada asas kebebasan hakim dan hakim bersifat aktif. Sesuai dengan kedua asas tersebut, hakim bebas dalam menjatuhkan putusan tanpa pengaruh dari pihak lain dan secara aktif menggali fakta-fakta yang terungkap di persidangan demi terwujudnya kebenaran materiil sebagai tujuan hukum acara pidana. Saran penulis, yaitu: 1) Penegak hukum pidana (hakim, penuntut umum, penasihat hukum/terdakwa) perlu ada kesadaran bahwa putusan ultra petita diperbolehkan; 2) Aturan yang mengizinkan hakim menjatuhkan putusan ultra petita perlu segera dibuat baik untuk jangka pendek maupun jangka panjang.

Keywords: Decisions, Ultra Petita, Criminal Law Enforcement.

Introduction

Ultra petita is one of the principles known in the world of justice associated with deciding by a judge on a legal case. The *ultra petita* by Black's Law Dictionary¹, I.P.M. Ranuhandoko², and numerous

¹ See. Iskandar Muda, "Tidak Dinamis Namun Terjadi Dinamika Dalam Hak Uji Konstitusional Norma Zina (Kajian Putusan Mahkamah Konstitusi Nomor 46/PUU-XIV/2016)", *Jurnal Yudisial*, vol. 11, no. 3 (2018): 291–306, pp. 298-299, <https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/316/pdf>, accessed 9 July 2020.

² See. Bambang Sugeng Ariadi Subagyono, Johan Wahyudi, and Razky Akbar, "Kajian Penerapan Asas Ultra Petita Pada Petitum Ex Aequo Et Bono", *Yuridika*, vol. 29, no. 1 (2014): 100–112, pp. 103-104, <https://e-journal.unair.ac.id/YDK/article/view/360/194>, accessed 9 July 2020.

decisions of the Constitutional Court³ has been given the understanding that the judge imposed a decision that was outside the one that is prosecuted or exceeded that which was prosecuted. In the context of criminal justice, the actual application of the *ultra petita* principle continues to being debated today. Currently, most legal professionals do not accept the truth of the application of the *ultra petita* principle in the imposition of criminal case decisions due to the positive law that has prohibited it so that it conflicts with the principle of legality.

The positive law that regulates the exam of criminal cases in Indonesia is generally regulated in the Republic of Indonesia Law Number 8 of 1981 regarding Criminal Procedure Law or typically called the Criminal Procedure Code.⁴ Besides, the regulations concerning criminal case exam also are contained in numerous specific laws, together with the Republic of Indonesia Law Number 11 of 2012 regarding the Juvenile Criminal Justice System, Republic of Indonesia Law Number 35 of 2009 regarding Narcotics, Republic of Indonesia Law Number 31 of 1999 regarding Eradication a Criminal Act of Corruption which has been amended with the Republic of Indonesia Law Number 20 of 2001.

The judge who devotes *ultra petita* is deemed to have exceeded their authority or *ultra vires*. A decision is considered *ultra vires* if it exceeds jurisdiction, contravenes procedural requirements, or ignores rule and fairness. The decision should be declared flawed even though it's based on good faith or in the public interest. Yahya Harahap said that a judge who violates the principle *ultra petita* is the same as violates the rule of law principle.⁵

In this case, some still view the *ultra petita* principle as prohibited, and some view the opposite. Numerous court decisions that are

³ Sec. Yagie Sagita Putra, "Penerapan Prinsip Ultra Petita Dalam Hukum Acara Pidana Dipandang Dari Aspek Pertimbangan Hukum Putusan Perkara Pidana", *University Of Bengkulu Law Journal*, vol. 2, no. 1 (2017): 14–28, p. 16, <https://ejournal.unib.ac.id/index.php/ubelaj/article/view/8009/4117>, accessed 9 July 2020.

⁴ Sec. Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana, Pasal 285 serta penjelasannya, https://www.kpk.go.id/images/pdf/Undang-undang/uu_8_1981.pdf, accessed 9 July 2020.

⁵ Bambang Sugeng Ariadi Subagyo, Johan Wahyudi, and Razky Akbar, "Kajian Penerapan Asas...", p. 104.

considered *ultra petita* in nature, such as the decisions in the corruption case with the defendant Nurdin Basirun,⁶ decision number: 17/Pid.Sus/Tpk/2014/Pn.Jkt.Pst in a corruption case with the defendant Susi Tur Handayani,⁷ and decision number: 1537/Pid.B/2016/PN.Jkt.Utr in the religious blasphemy case with the defendant Ir. Basuki Tjahja Purnama or Ahok.⁸ The decision in the Ahok case has arisen a polemic, where some see it as a fair decision and some view it as a legally flawed decision.⁹ This shows that not all parties agree on the actions of the judge renders a decision out of requisition or exceeds the requisition of the public prosecutor (*ultra petita*).

This situation is inversely proportional to the case of sprinkling tough water on Novel Baswedan. In this case, the defendant changed into being prosecuted by the public prosecutor for one year in prison. This requisition is visible by the public as very a long way from the feel of justice in society. Therefore, in this case, it's miles essential to apply the *ultra petita* principle, wherein the judge renders a decision out of requisition or exceeds the requisition of the public prosecutor. One the way, the two defendants who sprinkled tough water, Novel Baswedan, have been sentenced exceeds the public prosecutor's requisition, namely two years imprisonment for Rahmat Kadir and one year and six months for Rony Bugis.¹⁰

From the circumstances defined above, I am interested in examining in-depth the *ultra petita* decision in the context of criminal law enforcement in Indonesia. This research aims to describe and give an explanation for *ultra petita* decisions in criminal law enforcement in Indonesia. The problems, namely: 1) Are *ultra petita* decisions in criminal law enforcement in Indonesia justified by positive law (Criminal

⁶ Official Website Persatuan Jaksa Indonesia, <http://pji.kejaksaan.go.id/index.php/home/berita/833>, accessed 10 July 2020.

⁷ Yagie Sagita Putra, "Penerapan Prinsip Ultra...", p. 16.

⁸ Official Website Persatuan Jaksa Indonesia..., See too. Tirto.id, "Ahli Hukum Pidana: Vonis Ahok Tak Bisa Disebut Ultra Petita", <https://tirto.id/ahli-hukum-pidana-vonis-ahok-tak-bisa-disebut-ultra-petita-cooL>, accessed 9 July 2020.

⁹ See. Joy Akbar, "Polemik Ultra Petita Dan Penahanan Dalam Vonis Ahok," <https://tirto.id/polemik-ultra-petita-dan-penahanan-dalam-vonis-ahok-cop1>, accessed 29 March 2021.

¹⁰ Kompas.com, "Soal Putusan Kasus Novel Baswedan, Hakim Dinilai Punya Beban Berat", <https://nasional.kompas.com/read/2020/07/17/06582731/soal-putusan-kasus-novel-baswedan-hakim-dinilai-punya-beban-berat>, accessed 20 July 2020.

Procedure Code)? How can the *ultra petita* decision in criminal law enforcement in Indonesia be visible from the principle of freedom and the active role of judges?. This research is important because *ultra petita* decisions in Indonesian law enforcement practices are still being debated.

The purpose of this study is to explain and analyze *ultra petita* decisions in positive law and to connect them with the principle of freedom and the active role of judges in criminal cases. The results of this study are expected to provide theoretical benefits, namely the development of criminal law science, particularly criminal procedural law. At a practical level, this research is expected to be of benefit to criminal law enforcement officers, as well as to contribute to state institutions authorized to form legal rules.

Research Methode

In answering this problem, the writer makes use of a type of normative legal research, which in keeping with Soerjono Soekanto & Sri Mamudji is research on positive law.¹¹ Following this type of research, there are numerous approaches that the writer makes use of, which including a statute approach, a political approach, and a philosophical approach. The type of data used is primary legal materials, namely data obtained from library materials. This type of data comes from three legal materials, namely primary legal materials, secondary legal materials, and tertiary legal materials. The three types of legal materials **were collected** using a literature study or document study. The collected research material is then processed and analyzed qualitatively, which is then attracted to a conclusion with deductive thinking logic. The results of this research are **expected** to be **useful** in the practice of criminal law enforcement in Indonesia **regarding** the imposition of *ultra petita* decisions and **maybe protected** in efforts to reform the criminal procedural code in Indonesia.

¹¹ Ramiyanto, “Penjatuhan Pidana Penjara Bersyarat Dalam Tindak Pidana Perbankan (Kajian Putusan Nomor 1554K/Pid.Sus/2014)”, *Jurnal Yudisial*, vol. 9, no. 3 (2016): 317–338, p. 325, <https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/14/14>, accessed 9 Jul 2020.

Result and Discussion

Ultra Petita Decisions According to the Criminal Procedure Code

Ultra petita in the context of a criminal case as formerly defined is a principle which states that the judge renders a decision out of requisition or exceeds the requisition of the public prosecutor. In positive law, each the Criminal Procedure Code and special criminal laws, there aren't any rules that explicitly prohibit judges from imposing decisions that are outside of the requisition or exceeding the requisition of the public prosecutor. Historically, this prohibition was regulated in the *Het Herzienne Inlandsch Reglement* (H.I.R) or the Updated Indonesian Reglemen (R.I.B) as stated in Article 178 paragraphs (3) H.I.R/R.I.B.¹² Since the access into the pressure of the Criminal Procedure Code, H.I.R is not legitimate due to the fact its validity is expressly revoked.¹³

Thus, H.I.R/R.I.B can no longer be used as a guideline for criminal law enforcement officers in examining criminal cases, which includes the prohibition of imposing *ultra petita* decisions. The prohibition of *ultra petita* decisions is intently associated with the basic problem of the decisions, namely requisition. In this case, the judge in imposing a decision is based on the requisition of public prosecution. When talking about the basis of the decision, the Criminal Procedure Code itself has determined explicitly from numerous provisions, namely 1) Article 182 paragraphs (4) of the Criminal Procedure Code stipulates that a judge's deliberation in deciding must be basic on a bill of an indictment; 2) Article 191 paragraph (1) and paragraph (2) and Article 193 paragraph (1) which also determines that a judge in imposing a decision is based on the bill of an indictment.

Referring to the three provisions of the Criminal Procedure Code above, it can be understood that the judge in imposing a decision is guided by the bill of indictment. This provision is considered by some as an incarnation or reflection of the *non-ultra petita* principle so that judges are prohibited from imposing decisions that are outside of the

¹² Hukumonline.com, "Herzien Inlandsch Reglement (H.I.R) (S. 1941-44)", [https://www.hukumonline.com/pusatdata/detail/27228/nprt/2/herzien-inlandsch-reglement-\(h.i.r\)-\(s.-1941-44\)-reglemen-indonesia-yang-diperbaharui-\(r.i.b\)#](https://www.hukumonline.com/pusatdata/detail/27228/nprt/2/herzien-inlandsch-reglement-(h.i.r)-(s.-1941-44)-reglemen-indonesia-yang-diperbaharui-(r.i.b)#), accessed 16 August 2020.

¹³ See. Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana, Konsiderans Mencabut dan Penjelasan Umum...

requisition or exceed the requisition of the public prosecutor. In a different word, the Criminal Procedure Code is visible to has mentioned that judges should be imposing decisions following the requisition of the public prosecutor. Is it true? In answering this question, it's miles essential to study the bounds of the bill indictment and warrant in positive law (Criminal Procedure Code).

The Criminal Procedure Code doesn't provide a limitation on the definition of "requisition" but only limits the prosecution as referred to in Article 1 point 7, namely the actions of the public prosecutor, which include: 1) Delegation of criminal cases to the equipped district court; and 2) With a request to be tested and decided by judges in a court session.¹⁴ This provision is also emphasized in Article 137 of the Criminal Procedure Code which states that prosecution is the authority of the public prosecutor that is exercised in opposition to anybody who's an indictment of committing a criminal act inside his jurisdiction by delegating the case to the competent court.¹⁵

M. Yahya Harahap, by referring to the two provisions of the Criminal Procedure Code (Article 1 number 7 in conjunction with Article 137) said, that prosecution is a stage in the process of examining a criminal act, namely continuing to complete the investigative examination stage to the level of the delegation process and examination in court by the judge for deciding on the criminal case concerned.¹⁶ The prosecution authority is then explained in detail in Article 14 of the Criminal Procedure Code. Following these provisions, the public prosecutor has numerous powers at the prosecution stage, among others are makes the indictment letter and carrying out the prosecution.

Thus, making a bill of indictment and prosecution is part of the prosecution process, namely the actions of the public prosecutor in the form of transferring criminal cases to the competent court with a request to be examined, tried, and decided. The authority of the public prosecutor in the shape of prosecution is what the author thinks is known as submitting requisition after the case examination is declared complete such as referred to in Article 182 paragraph (1) letter (a) of the

¹⁴ For comparison, see. M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP (Penyidikan Dan Penuntutan)*, (Jakarta: Sinar Grafika, 2014), p. 385.

¹⁵ For comparison, see. M. Yahya Harahap, *Pembahasan Permasalahan.... (Penyidikan)*, p. 385.

¹⁶ M. Yahya Harahap, *Pembahasan Permasalahan.... (Penyidikan)*, p. 386.

Criminal Procedure Code. So it's clear that the bill of indictment and warrant are different things when viewed from the stages, but they nonetheless a part of the prosecution process. Besides, the distinction between the bill of indictment and the warrant also can be visible in terms of their substance (content).

In the HIR/RBG, "bill of indictment" is referred just like the term "lawsuit" made by the Head of the District Court formulated in *Acte Van Verwijzing*, namely the deed that submits the case to the court and contains the accused acts.¹⁷ In explaining the indictment letter, Andi Hamzah made similarities and differences with the lawsuit. The similarity is that the bill of an indictment or lawsuit is the basis for the judge in examining a case and the same period limits the judge in making a decision. The fundamental difference is that a lawsuit is prepared by the injured party, while the bill of an indictment is made by the public prosecutor, without regardless to depends on the will of the victim (except in the complaint offense).¹⁸

Furthermore, Andi Hamzah also said that the indictment is an essential foundation for criminal procedural law due to based on the matters contained in the letters a judge will examine the case. The examination is the basis of the bill of an indictment, and according to *Nederburg*, the exam isn't null if the limits are exceeding, but the judge's decision can only be concerning events that lie inside that restriction.¹⁹ Likewise, Leden Marpaung said that the indictment is the basis for further examination of a case, each exam at the District Court (first level), as well as the level of appeal, cassation and, review, even the indictment is a limitation of the requisition. Defendants cannot be prosecuted or found guilty and punished for acts not listed in the bill of indictment.²⁰

When discussing the Criminal Procedure Code, the government stated that the contents of the accusation letter (bill of an indictment) were significant matters that should not ignore because they had a close relationship with a person's human rights in the criminal proceeding.

¹⁷ Leden Marpaung, *Proses Penanganan Perkara Pidana (Di Kejaksaaan & Pengadilan, Upaya Hukum & Kasasi)*, (Jakarta: Sinar Grafika, 2011), p. 21.

¹⁸ Andi Hamzah, *Hukum Acara Pidana Indonesia*, (Jakarta: Sinar Grafika, 2014), p. 167.

¹⁹ Andi Hamzah, *Hukum Acara....*, p. 167.

²⁰ Leden Marpaung, *Proses Penanganan Perkara ...*, p. 21.

The accusation letter determines the limits for the examination and judgment of the judge, according to the alleged facts, and the judge may only decide cases based on these facts, and can't be less or more.²¹ So, when viewed from a politics of law perspective, the Criminal Procedure Code formers at that time wanted the bill of an indictment to be the basis for criminal case examination and judge assessment.

The criminal Procedure Code has determined the contents of the bill of an indictment stated in Article 143 paragraphs (3). According to this provision, the bill of an indictment made is dated and signed. The bill of an indictment also contains the identity of the suspect and the criminal offense indictment. The identification of the suspect consists of complete name, place of birth, age or date of birth, gender, nationality, residence, religion, and occupation. Criminal offenses the indictment described carefully, clearly, and complete by mentioning the time and place wherein the criminal offense was committing. Observe of those provisions, the bill of indictment contains, amongst different matters, a description of the criminal offense that is being indicted carefully, clearly, and complete by mentioning the time and place wherein the criminal offense was committing. On a practical level, the bill of indictment has now no longer said the requisition of the public prosecutor. That isn't the same as a warrant, which contains the requisition or *petitum*.²²

One of the matters contained in the warrant is the requisition of the public prosecutor. In the warrant (*requisitoir*), the main thing is a juridical discussion that contains factors of offense and evidence supporting the factors of the offense, which include the perception of a word or formula in the indictment that is in power in the application of the regulation, for example, coercion. This is described each based on evidence and based on professional (scientific) opinions so that the perception of something is not wrong in its application. Thus, the warrant contains proof based on legitimate evidence of the offense of the elements formulated in the indictment.²³ Practically, a requisition in a public prosecutor's warrant usually uses the word "prosecute" which

²¹ Dewan Perwakilan Rakyat Republik Indonesia, "Risalah Sementara Pembahasan Tingkat I (Keterangan Pemerintah) Atas RUU Tentang HAP", Persidangan I, Rapat Paripurna Terbuka Ke-5, Hari Selasa, p. 42.

²² See. Leden Marpaung, *Proses Penanganan Perkara*...., p. 124.

²³ Leden Marpaung, *Proses Penanganan Perkara*...., p. 124.

asks the panel of judges to impose a decision in the form of declaring the defendant guilty or innocent, imposing a penalty or acquitting the defendant, and so on.²⁴

Thus, the indictment differs from the requisition in terms of substance. There isn't requisition in the bill of indictment, while in the warrant, there's requisition that uses the word "prosecute." Therefore, the indictment and requisition are two different things, but they are equally part of the prosecution process. So, the provisions of 184 paragraphs (2), Article 191 paragraphs (1) and (2), as well as Article 193 paragraphs (3) of the Criminal Procedure Code aren't a reflection or an embodiment of the non-ultra petita principle, namely that judges are prohibiting from imposing decisions outside the requisition of or exceeding the requisition of the public prosecutor. In this context, the ultra petita decision isn't prohibiting by positive law (Criminal Procedure Code). The judge is justified/may decide outside of the requisition or exceed the requisition of the public prosecutor. Judges are only prohibiting from deciding criminal cases outside the indictment or exceeding the punishment threat in the article indictment by the public prosecutor.²⁵

Ultra Petita Decisions were Seen from the Principle of Freedom and Active Role of Judges

Freedom of judges is a principle as an elaboration of independent judicial power to administer the judiciary to uphold law and justice as stipulated in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia the second amendment.²⁶ This provision is then spelled out in the Republic of Indonesia Law Number 48 of 2009 regarding Judicial Power (Law No. 48 of 2009). Article 1 point 1 of the law states that judges in carrying out their duties and functions are obliged to maintain the independence of the judiciary. In the explanation of the provisions, it's explained that what is supposed by the independence of the judiciary is free from outside interference and free from all forms of pressure, each physical and psychological.

²⁴ For comparison, see. Leden Marpaung, *Proses Penanganan Perkara....*, p. 265.

²⁵ Tirto.id, "Ahli Hukum Pidana...".

²⁶ Redaksi Sinar Grafika, *UUD 1945 Hasil Amandemen & Proses Amandemen UUD 1945 Secara Lengkap*, (Jakarta: Sinar Grafika, 2008), p. 17.

This duty is carried out through the integrity of the freedom of judges in examining and deciding cases as regulated in Article 39 paragraphs (4) of Law No. 48 of 2009²⁷.

Referring to the provisions above, the freedom of judges is a consequence of the independence of the judiciary (judicial independence) as a translation of independent judicial power. Judges are actors of judicial power²⁸ so that judges in carrying out their duties and functions in the field of justice must be independent. Moosa Akefi Ghazi argues that judicial independence is recognized as an absolute prerequisite for a free society under the rule of law. Independence implies freedom from executive or legislative interference in carrying out judicial functions.²⁹

The principle of judicial independence is fundamental for democratic countries.³⁰ Under modern constitutionalism that the independence of judges and the judiciary as a whole is the main and most important guarantee of the right to a fair trial as guaranteed by the European Convention on Human Rights of 1950. Paragraphs 2 and 3 of the Magna Carta of Judge (fundamental principles) state, that judicial independence and impartiality are important requirements for a judicial process.³¹

²⁷ See. Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman, Pasal 39, https://dpr.go.id/dokjih/document/uu/UU_2009_48.pdf, accessed 8 July 2020.

²⁸ See. Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman, Pasal 19....

²⁹ Nurul Qamar, "Independence of Judges in The Implementation Powers of Justice", *Jurnal Dinamika Hukum*, vol. 15, no. 1 (2015): 51-56, p. 52, <http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/362/356>, accessed 11 July 2020.

³⁰ Lunga Siyo and John Cantius Mubangizi, "The Independence of South African Judges: A Constitutional and Legislative Perspective", *Potchefstroom Electronic Law Journal*, vol. 18, no. 4 (2015), p.817, https://www.researchgate.net/publication/292344938_The_independence_of_South_African_judges_A_constitutional_and_legislative_perspective, accessed 12 July 2020.

³¹ Grzegorz Borkowski and Olga Sovgyria, "Current Judicial Reform in Ukraine and Poland: Constitutional and European Legal Aspect in the Context of Independent Judiciary", *Access to Justice in Eastern Europe*, vol. 2, no. 3 (2019), p. 7, http://ajee-journal.com/upload/attaches/att_1560677669.pdf, accessed 12 July 2020.

The meaning contained in the principle of judicial independence is that the judiciary is free from interference by other parties and free from all forms of pressure, both physical and psychological.³² Intervention and pressure can affect the independence of the judiciary in exercising an independent judicial power. In the Declaration of the Code of Ethics and Behavior of Constitutional Justices of the Republic of Indonesia quoted by Maruar Siahaan,³³ it is stated that the influence that comes from outside the judge's self is in the form of intervention which directly or indirectly affects in the form of persuasion, pressure, coercion, threats, or retaliation for certain political or economic interests. From the government or political power in power, certain groups or groups, with rewards or promises in the form of office allowances, economic benefits, or other forms.

In a broad sense, a judiciary that is free from outside interference and free from any form of pressure by Djohansyah is categorized as individual-substantial independence, namely independence from the influence of all parties in deciding a case.³⁴ This independence is related to the ability of a judge to apply his mind impartially and independently to a problem without undue influence.³⁵ Harlord See sees such independence from the perspective of independence in the form of democracy in taking decisions that are tied to the special obligations of courts in a rule of law. Here the court functions to ensure that the law established by the state protects the independence of judges in deciding cases and is free from the influence of various parties.³⁶

³² See. Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman, Penjelasan Pasal 1 angka 1....

³³ Kasmin, Suko Wiyono, and Slamet Suhartono, "Independence of Constitutional Court Judgment in Reaching Justice Law", *International Journal of Multicultural and Multireligious Understanding*, vol. 6, no. 6 (Desember 2019), p. 94, <https://ijmmu.com/index.php/ijmmu/article/view/1211/911>, accessed 17 July 2020.

³⁴ Ery Setyanegara, "Kebebasan Hakim dalam Memutus Perkara dalam Konteks Pancasila (Ditinjau Dari Keadilan Substantif)", *Jurnal Hukum dan Pembangunan*, vol. 43, no. 4 (Desember 2013), p. 440, <http://jhp.ui.ac.id/index.php/home/article/view/31/31>, accessed 3 August 2020.

³⁵ Lunga Siyo and John Cantius Mubangizi, "The Independence of", pp.817-818.

³⁶ Nurul Qamar, "Independence of Judges", p.52.

As explained on the previous page, judges are the actors of judicial power in the framework of administering the judiciary. Therefore, the principle of judicial independence is also attached to a judge, which then gives birth to the principle of judge freedom. In this context, judges are free from interference from outside parties and free from various forms of pressure to carry out their duties and functions in the field of justice (judicial power). Muhammad Asrun said that the freedom possessed by a judge can be tested by two things, namely:³⁷ 1) impartiality; and 2) disconnection from political actors.

In general, impartiality is understood as the state of mind or attitude of the judge court regarding the problem and the parties in a particular case as stated in *Valente v The Quee* 1985 2 SCR 673 67.³⁸ Impartiality is a principle inherent in a judge, which includes a neutral attitude, accompanied by a deep appreciation of the importance of balancing interests with the case.³⁹ Siyo & Mubangizi said that the essence of the concept of impartiality is the absence of bias, both actual and perceived.⁴⁰

Merkevičius argues that court bias by, for example, can be detected in court decisions accusing, orders rejecting the accused's request to collect factual/up-to-date data (such as asking a specific person as a witness, assigning or assigning expert examinations or document examinations), questions posed to the accused or witnesses, court behavior when listening to the defendant's lawyer (for example, if comments are directed at the defendant "not to follow the theory or maxims of the copybook"), and in the conduct of the court organization (for example, not allowing the defendant to make an audio recording of a trial)".⁴¹

³⁷ Ery Setyanegara, "Kebebasan Hakim dalam...", p. 439.

³⁸ Lunga Siyo and John Cantius Mubangizi, "The Independence of ...", p. 819.

³⁹ Kasmin, Suko Wiyono, and Slamet Suhartono, "Independence of Constitutional...", p. 95.

⁴⁰ Lunga Siyo and John Cantius Mubangizi, "The Independence of ...", p.819.

⁴¹ Rasa Žibaitė-Neliubšienė, "The Judge As An Impartial Subject In Criminal Proceedings: The Case Of Lithuania", *International Comparative Jurisprudence*, vol. 1, no. 1 (2019), p. 95, <https://www3.mruni.eu/ojs/international-comparative-jurisprudence/article/view/5056/4555>, accessed 3 August 2020.

Full independence and freedom must be possessed by a judge in imposing a decision. The judge is free to determine his confidence based on the evidence presented at trial. Outside that framework, there should be no things that can influence him in imposing a decision.⁴² Oemar Seno Adji stated that in implementing the principle of freedom to impose the right decision, the judge carried out the interpretation of *rechtsverfijning* (legal refinement) and legal construction as well as possible. A legal expert in general and especially a judge must go into the midst of community life to get to know, feel, and explore the feelings of law and the sense of justice that live in society.⁴³ Oemar Seno Adji statement is in line with the provisions of Article 5 paragraph (1) of Law No. 48 of 2009 which has the formulation "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and the sense of justice of the people who live in a society".

Judges in carrying out their duties and functions even though they are given freedom are limited in nature and not multicultural. This means that the freedom possessed by a judge remains within certain limits. In this case, Oemar Seno Adji thinks that a free court (judge) doesn't mean that the court (judge) acts arbitrarily in carrying out its duties, but is bound by the law.⁴⁴ Sudikno Mertokusumo said that the freedom of judges was also limited by the legal interests of the parties, and Pancasila was given the position as the source of all sources of law. Judges in carrying out their duties must not conflict with Pancasila.⁴⁵

According to Paulus Effendi Lotulung, the aim of limiting the freedom of judges in law is so that judges do not violate the law and act arbitrarily. Rights are subordinated to law and cannot act contrary to law (*contra legem*). The freedom of judges is also tied to responsibility or

⁴² Vivi Ariyanti, "Kebebasan Hakim Dan Kepastian Hukum Dalam Menangani Perkara Pidana Di Indonesia", *Mahkamah: Jurnal Kajian Hukum Islam*, vol. 4, no. 2 (Desember 2019), pp. 164-165, <https://www.syekhnuurjati.ac.id/jurnal/index.php/mahkamah/article/view/5374/2477>, accessed 3 August 2020.

⁴³ Vivi Ariyanti, "Kebebasan Hakim...", p. 165.

⁴⁴ Firman Floranta Adonara, "Prinsip Kebebasan Hakim Dalam Memutus Perkara Sebagai Amanat Konstitusi (Principles of Freedom of Justice in Decidene The Case as a Constitutional Mandate)", *Jurnal Konstitusi*, vol. 12, no. 2 (2015), p. 223, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/1222/61>, accessed 4 August 2020.

⁴⁵ Ery Setyanegara, "Kebebasan Hakim dalam...", p. 440.

accountability because the two are interrelated. The freedom of judges must also be balanced with judicial accountability. The form of judicial responsibility is social accountability because judicial institutions carry out public services in the field of justice.⁴⁶ So, the limitations of the judge's freedom are contained in the law (each written and unwritten), the legal interests of the parties, Pancasila, and the responsibility or accountability of the judge.

The freedom of judges in rendering decisions of penalization has been limited by Article 183 of the Criminal Procedure Code. According to this provision, a judge may only impose a penalty if there are at least two legitimate of evidence, after which the judge is confident that a criminal act has occurred and the defendant is guilty of committing it. Here, the judge is free to use his confidence to determine whether the defendant is guilty or not guilty, but it must be based on at least two legitimate of evidence presented at trial. Judging from the context of impartiality, according to Agung Prasetyo Wibowo, the judge's decision is based on the law and facts of the trial, not based on his relationship with one of the parties in the case.⁴⁷

Theoretically, Article 183 the Criminal Procedure Code adheres to a system of proof according to the law negatively (*negatief wettelijke bewijstheorie*). This theory states that to prove whether the defendant is guilty or not is based on the means and means of evidence specified in the law and the judge's confidence. In such a context, it means that the judge's confidence in whether or not a defendant is guilty is based on the means and means of evidence determined by law (Criminal Procedure Code).⁴⁸ In this theory of proof, the penalization is based on proofs (*Dubbel en grondslag* according to D. Simons), namely statutory regulations and judge confidence, and according to law, the basis for the judge's confidence is based on statutory regulations.⁴⁹

The proof system adopted by Article 183 of the Criminal Procedure Code combines "objective" and "subjective" elements in determining whether or not a defendant is guilty. Among these

⁴⁶ Ery Setyanegara, "Kebebasan Hakim dalam....", pp. 440-441.

⁴⁷ Nurul Qamar, "Independence of Judges...", p.52.

⁴⁸ M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP (Pemeriksaan Sidang Pengadilan, Banding, Kasasi, Dan Peninjauan Kembali)*, (Jakarta: Sinar Grafika, 2012), p. 279.

⁴⁹ Andi Hamzah, *Hukum Acara....*, p. 256.

elements, none is the most dominant.⁵⁰ The objective element is related to matters that are outside the judge's self in the form of legitimate of evidence that is presented at the trial. Meanwhile, the subjective element relates to matters within the judge in the form of confidence. These two elements are equally important (neither of which is the most dominant) and complement each other. The judge may not impose a penalty if it is only based on a minimum of two legitimate of evidence. Likewise, the judge also may not impose a penalty if it is only based on his confidence. Legal evidence that is presented at the trial is the source of the judge's confidence, or in other words, the judge's confidence comes from legitimate evidence presented at trial.

Thus, the principle of judge freedom implies that judges in carrying out their duties and functions are free from outside interference and free from all forms of pressure. The freedom of judges to imposing the decision of penalization (*veroordeling*) is limited by Article 183 Criminal Procedure Code. This provision explicitly states that the imposition penalty must be based on a minimum of two legitimate of evidence presented at the hearing which then the judge is confident that a criminal act has occurred and the accused is guilty of committing it. So, the judge's confidence can only be obtained from a minimum of two legitimate of evidence presented at the trial.

Judges are given the freedom to use their confidence to determine whether the defendant is guilty or not, but that confidence is limited by provisions that must be based on at least two legitimate of evidences. This means that a judge's confidence is deemed never to exist if it is not obtained from at least two legitimate of evidence. Without at least two legitimate of evidence, there is no confidence for the judge. After the judge believes the defendant is guilty, then the judge uses his conscience that matches the value of justice that he believes as stated by Witanto & Negara Kutawaringin.⁵¹ The value of justice that is believed by the judge needs to be adjusted to the sense of justice that lives in the community as referred to in Article 5 paragraph (1) of Law No. 48 of 2009.

Referring to the principle of judge freedom, judges in criminal cases are allowed to impose decisions of penalization outside of requisition or in exceeding the requisition of the public prosecutor.

⁵⁰ M. Yahya Harahap, *Pembahasan Permasalahan.... (Pemeriksaan)*, p. 279.

⁵¹ Vivi Ariyanti, "Kebebasan Hakim....", p. 167.

Obliging judges to comply with the requisition of the public prosecutor means curbing the judge's freedom to use his confidence and conscience when imposing criminal sanctions in his decisions. Whereas the Criminal Procedure Code has given the freedom to judges to use their belief in deciding based on at least two legitimate evidences. Besides, judges are also free to use their conscience when imposing a decision based on the value of justice. Therefore, the *ultra petita* decision in criminal law enforcement in Indonesia is justified when viewed from the principle of judge freedom in the framework of administering justice for the sake of upholding law and justice.

Granting freedom to judges in imposing penalization decisions, without being tied to the requisition of the public prosecutor will provide a greater sense of justice for the community and the realization of material truth. Judges in this context can be said to be potential actors to achieve public justice, or what is called the active aspect of judges, which is commonly known as judicial activism.⁵² Judicial activism is a philosophy of judicial deciding when a judge considers his views or personal knowledge about the public interest among other factors as a guide to impose a decision. Judges must understand judicial activism because it can be used in the context of deciding on a case. Judges can fill the legal void and can realize justice in decisions passed through judicial activism. Besides, there are judge's characteristics that are ideally needed for the achievement of justice itself.⁵³

In the context of criminal cases, Andi Hamzah stated that a judge must actively ask questions and provide opportunities for the parties (public prosecutors and defendants) to explore and find material truth. This is very different from judges in the United States (who adhere to the accusatory principle) who only act as referees (referee).⁵⁴

⁵² Moh. Eka Kartika EM, "Hukum Yang Berkeadilan : Pembentukan Hukum Oleh Hakim the Construction of the Rule of Law By Judges", *Jurnal IUS Kajian Hukum dan Keadilan*, vol. 4, no. 3 (Desember 2016), pp. 391-392., <http://jurnalius.ac.id/ojs/index.php/jurnalIUS/article/view/410>, accessed 8 July 2020.

⁵³ Moh. Eka Kartika EM, "Hukum yang Berkeadilan...", p. 392.

⁵⁴ Anggita Doramia Lumbanraja, "Urgensi Peran Aktif Hakim Pada Peradilan Tindak Pidana Informasi Elektronik", *Jurnal Crepido (Jurnal Mengenai Dasar-Dasar Pemikiran Hukum: Filsafat dan Ilmu Hukum)*, vol. 01, no. 01 (Juli 2019), p. 4, <https://ejournal2.undip.ac.id/index.php/crepido/article/view/5775/3195>, accessed 8 August 2020.

Lilik Mulyadi stated that judges in upholding law and justice are one of the main and main basic pillars. When a judge handles a case, it is expected that he can act wisely and wisely, uphold the value of justice and material truth, be active and dynamic, based on positive legal instruments, carry out logical reasoning that is appropriate and in line with theory and practice, so that it all boils down to on the decisions to be taken that can be accounted for.⁵⁵

The active role of the judge makes him not only as a mouthpiece for the law (*la bouche de la loi*) as stated by Montesquiu “*Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur.*”⁵⁶ Montesquieu argued that judges could only voice the law, or only as of the law. The judge can not change the strength and rigor of the law. This means that judges can not change, add, reduce, or even make new regulations, apart from the prevailing laws. This is due to the formation/making of new laws is only in the hands of the legislature.⁵⁷

The adage “judge as a mouthpiece of law” (*la de bouche de la loi*) has now been abandoned, even in countries with a continental legal system, such as the Netherlands, where the legal roots are the same as the law in Indonesia.⁵⁸ The manifestation of the commitment to leave the adage “*la de bounce de la lo?*” in Indonesia can be seen in the provisions of Article 5 paragraph (1) of Law no. 48 of 2009, which requires judges to explore, follow, and understand legal values and a sense of justice for people who live in society. Under this provision, legal values and a sense of justice in society must be explored, followed, and understood by judges in deciding a case (including a criminal case). Judges should not ignore legal values and a sense of community justice.

As it is known, the provisions in positive criminal law, each in a material and in a formal sense, are undergoing development, so that

⁵⁵ Rosalin Inastika Nooryunianto, “Pengaruh Alat Bukti Keterangan Ahli Terhadap Pertimbangan Hakim Dalam Perkara Perniagaan Satwa Tanpa Ijin (Studi Putusan Nomor: 82/Pid.Sus/2015/PN.Skt)”, *Jurnal Verstek*, vol. 4, no. 3 (2016), p. 197, <http://jurnal.hukum.uns.ac.id/index.php/verstek/article/view/398>, accessed 8 August 2020.

⁵⁶ Anggita Doramia Lumbanraja, “Urgensi Peran Aktif...”, p. 5.

⁵⁷ Anggita Doramia Lumbanraja, “Urgensi Peran Aktif...”, p. 5.

⁵⁸ Enrico Simanjuntak, *Praktek Yurisprudensi Dan Kepastian Hukum Dalam Sistem Civil Law*, Dalam Kumpulan Tulisan Pilihan Pembaruan Peradilan (Jakarta: IJRF [Indonesian Judicial Reform Forum], 2018), pp. 30-31.

judicial activism is necessary. Judges are required to continually think hard, which is not only following the flow of changes that occur but is also required to participate in developing new ideas in the context of developing legal science and developing criminal law to make it more operational in line with Paul Effendi Lotulung statement in concerning with administrative justice.⁵⁹ This needs to be done so that material truth as an objective of criminal procedure law can be realized.

Based on the description above, it can be understood that *ultra petita* decisions in criminal law enforcement practices in Indonesia are justified/allowed/ not prohibited. This is based on the following reasons:

First, the Criminal Procedure Code doesn't explicitly stipulate that judges are prohibited from imposing decisions of penalization out of requisition or exceeding the requisition of the public prosecutor. The Criminal Procedure Code only stipulates that the basis for the decision by the judge is the bill of indictment and everything that is proven in court as stated in Article 183 paragraph (1) letter a, Article 191 paragraph (1) and paragraph (2), and Article 193.

Second, *ultra petita* decisions in criminal law enforcement practices in Indonesia are also justified when viewed from the principle of judge freedom. In other words, the imposition of *ultra petita* decisions is also in line with the principle of judge freedom guaranteed by positive law. Judges in deciding criminal cases are free to use their confidence to determine whether the defendant is guilty or innocent based on at least two evidences. The judge's confidence can only be obtained from the evidence (at least two) that were presented at the trial. When the judge is sure that the defendant is guilty then the judge uses his conscience in imposed the penalty. In this case, the judge determines whether the article used by the public prosecutor in his warrant is correct if it is applied to the accused, whether the duration of the sentence requested by the public prosecutor in his warrant is also correct. All of this is based on the value of justice that the judge believes. When the judge considers the requisition of the public prosecutor to be unfair, in the framework of freedom, the judge can impose a penalty outside of the requisition or exceed the requisition of the public prosecutor's (*ultra petita*). The value of justice that's believed by the judge's conscience is of course the result

⁵⁹ See. Enrico Simanjuntak, *Praktik Yurisprudensi....*, p. 33.

of efforts to explore, follow, and understand the value of law and the sense of justice in society.

Third, judges in deciding criminal cases need to be active so that their decisions provide a sense of justice for the community, which is also known as an active aspect of judges or judicial activism. Under this principle, judges in imposing court decisions of penalization should make efforts to bring justice. When the judge considers the public prosecutor's requisition to be unfair, the judge is justified in imposing decisions out of requisition or exceeding the requisition of the public prosecutor. The principle of the judge as a judge or the active aspect of the judge (judicial activism) is also closely related to the principle of judge freedom.

Conclusion

Based on the description of the above discussion, it can be concluded that in the Criminal Procedure Code no provision prohibits judges in criminal cases from imposing decisions that are out of requisition or exceed the requisition of the public prosecutor. The Criminal Procedure Code only determines that court decisions are based on the bill of indictments and are linked to the results of case examinations at court proceedings. Indictment and requisition are two different things, even though they are both as one unit in the prosecution stage. So, the judge was justified in imposing the *ultra petita* decisions by the Criminal Procedure Code. The justification for deciding out of requisition or exceed the requisition of the public prosecutor is based on the principle of judge freedom and judges to be active. The writer's recommendations, law enforcement officials (judges, public prosecutors, and lawyers/ defendants) need to form a common understanding that the imposition of *ultra petita* decisions isn't prohibited by positive law (Criminal Procedure Code). Besides, it's also necessary to make a rule by which a judge in a criminal case will issue an *ultra petita* decision. In the short term, Mahkamah Agung needs to immediately issue a new regulation for the judge that justifies the application of the *ultra petita* principle. Meanwhile, in the long term, it's necessary to enter into the criminal procedural law that will be or the Draft of Criminal Procedure Code.

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