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**Abstract:**

The doctrine of Ultra Petita has been the subject of much criticism and poses a threat to constitutional justice. This article examines the doctrine in operation Indonesia where the Constitutional Court appears to have expanded its jurisdiction by not only reviewing or analysing but also by invalidating or annulling acts. The impact of this is a creation of a high-degree of legal uncertainty and ambiguity in the judicial process. The article argues that instead of making use of the extra-constitutional Ultra Petita doctrine, the Indonesian Constitutional Court should return to a black letter approach to the law, thereby promoting certainty and coherence.

**Keywords:** Ultra Petita, Constitutional Justice, Indonesian Constitutional Court

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**Abstract**

In the context of reviewing law through judiciary organ the court plays significant role to review several regulation. This idea spreads out worldwide including in Indonesia. Constitutional court and judicial review are two words having inextricably meaning that related each other's. In worldwide the system of reviewing law by involving judges has commonly been practiced by several countries. There are two most significant state organs playing the system, namely constitutional court and supreme court. Mostly countries having no constitutional court will deliver the authority of judicial review through supreme court. It has been added more tasks not only to judge common case but also regarding constitutionality of an act against constitution. This style is commonly known as centralised model such as practicing in America. Countries owning constitutional court will deliver the authority of judicial review via constitutional court. This model is commonly known as Kelsenian's model. In this model, constitutional court will only focus on the constitutionality of regulations, and ensuring those regulations not contradict with the constitution. Supreme Court in this model is only focus on handling common cases instead of
regulations. This two model judicial review (via constitutional court and supreme court) has widely been transplanted in the world legal systems, including in Indonesia. In the authoritarian regime Indonesia transplanted the centralised model, positioned the Supreme Court as the single state organ handling common case and also judicial review. Having difficulty with centralised model, after the constitution amendment in 2003, Indonesia has officially transplanted the constitutional court as the guardian of constitution. However, the Indonesian Constitutional Court (ICC) is only permitted to review the acts against the constitution, and regulations below the acts will still a part of the Supreme Court jurisdiction. This modification is vulnerable to create a clash of judgement between the ICC and the Supreme Court.

**Keywords:** comparative studies, constitutional courts, judicial review, lesson learned

**Abstrak**


**Keywords:** studi perbandingan, mahkamah konstitusi, pengujian
### Introduction

The Ultra Petita cases in the Indonesian Constitutional Court (ICC) are particular challenges for Indonesian law reform. This article will critically discuss several judgments identified as Ultra Petita during 2003 to 2012. There were more than ten cases acknowledged as Ultra Petita with different variations, but only ten are discussed, covering the different variations occurring in that time. To analyse those judgments, the writers use basic theory from Kelsen on the constitutional courts as the negative legislator, and other methodologies including comparative constitutional law (Ran Hirschl 2013) and black-letter law (Michael 2007).

Before going further, it is appropriate to define the term Ultra Petita. It is a Latin term defined legally as beyond that which is sought, or a decision of a court which grants more than was asked for. This implies that a judgment which is Ultra Petita may be successfully appealed as it is not good law. For example, where a court grants more damage than was claimed by the plaintiff (Http://Definitions.Uslegal.Com/U/Ultra-Petita 2014)

In the Indonesian legal system, Ultra Petita is known in the context of private law, derived from the Dutch law called HIR (HIR 1848; R. Tresna 1956) and RBg (RBg 1927; Syaifuddin 2011). A judge is prohibited to give a judgment which is not asked in a claim/suit, or granting more than what a plaintiff asked for; but may reduce a plaintiff’s claim/suit. (HIR 1848; RBg 1927)

In the ICC, Ultra Petita has been widely defined beyond the definition given in HIR and RBg. Based on several judgments produced by ICC, the judges have expanded their jurisdictions regulated by several acts, including judging ICC’s judgment, granting more than what is claimed, interfering in others court’s jurisdiction, and intervening in other state organ’s jurisdictions. The Ultra Petita ICC judgments are not based on the original intent of the constitution, which is known as the highest legal norm in Indonesia. The case of Ultra Petita will happen if the ICC reviews more than asked by applicant. For instance, in some cases an applicant only asks for reviewing a clause or an article in an act. But the ICC may go further, by not only annulling a clause or an article, but also invalidating the whole act.

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|  | This article will critically discuss comparative studies on judicial review in Europe, American and also South African model. The reasons of using these three continents are because they influence the world order, chiefly in law review. The specific comparative point is on how the judiciary system plays its significant role not only judging daily cases but also reviewing and annulling a number of acts and regulations. This comparison has significant point for Indonesian constitutional system as Indonesian judicial review system adopts foreign system coming from other countries. Thus, the lesson learned can be achieved from other countries experiences.

In the broadly discussion of the system of judicial review in the world can be divided into three major models, namely: American model, Austrian model, and French model. These models have developed partially into several variant models. These three models of judicial review has a fascinating side to explore, because of their significant role in influencing the Indonesian’s judicial review system as well as they have also been applying in the constitutional systems. The models will be briefly discussed below.

Firstly is the American model judicial review. The American model importantly is the first time of judiciary that is conducting a judicial review from parliament work. In this model, the Supreme Court is upholding the supremacy of the constitution. The Supreme Court has dispersed as well as decentralized judicial review mechanism among courts in the states and the Federal Supreme Court. The system has been applied in practice since over two hundred years ago in the |
The Supreme Court as the part of judicial power in upholding the supremacy of Constitution has been strongly arranged in the American’s Constitution, specifically in the Section 2 Article III, state that;

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.2

The Section has been seemed that the Constitution has widely given the authorities for the Supreme Court to solve all the cases happening inside or outside the United States. This model, resulting success story in America, has made significant influence for the world wide, including Indonesia. It has, over 58 years,3 practiced the American model under authoritarian

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2 American's Constitution, Section 2 Article III. For the cases law using the Article as the sources can visit the website [http://press-pubs.uchicago.edu/founders/tocs/a3_2_1.html](http://press-pubs.uchicago.edu/founders/tocs/a3_2_1.html), diakses 10 Juni 2017. See also Lee J. Strang, “Originalism’s Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution,” *Southern California Law Review*, Vol. 89, No.3, March 2016, hal. 637.

regime,\textsuperscript{4} positioning the Supreme Court as the central of judicial review power. However, the American model in Indonesia has slightly been modified. The judicial review authority has centralized in the Supreme Court instead of dispersing to the provincial court. Since the existence of the ICC in 2003, the Supreme Court power, to review all of the regulations, has been limited, which only have authority to review the regulations under the acts.

Secondly is the Austrian model judicial review. This model also known as the Kelsenian Court, asserted by Stone as a prototype model of judicial review in Europe.\textsuperscript{5} This model has been very centralized and concentrated only on the one institution called the constitutional court. It can be claimed as the pioneer of judicial review mechanism in Europe.

Whilst the judicial review in the United States have been conducted in the dispersed and decentralized mechanism among courts in the states and the Federal Supreme Court, the model applying Europe have been very centralized and concentrated only on the one institution; popularized in Austria; where furthermore can be claimed as the pioneer of judicial review mechanism in Europe that commonly known as \textit{Austrian model}. This model also known as \textit{the Kelsenian Court} that asserted by Stone as a prototype model of judicial review in Europe.

From the Austrian model has been developed several important variants, one of them is developed in Germany commonly known \textit{Bundes-Verfassungsgerichtshof} (Federal


\textsuperscript{5} Alec Stone have asserted that the Austrian practice is reflected important for Western Europe, and the Kelsen idea on constitutional court is broadly recognized recently as the design of the European model constitutional review, in opposition to the American model. Alec Stone, \textit{The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective}, Oxford: Oxford University Press, 1992, hal. 228. See also Frances E. Lee, “How Party Polarization Affects Governance,” \textit{Annual Review of Political Science}, Vol.18, No.1, February 2015, hal. 261-282.
Constitutional Court), which has a relatively the strong position. Other variants can be seen in the South African Constitutional Court, which is positioned as the highest court.\(^6\) In general the judicial review practicing in Europe has a significant modification to what is commonly settled in the United States.

The development of Austrian model around the world has taken place very quickly, such as happened in Asia countries.\(^7\) Most of them amending their constitution have transplanted the idea of constitutional court in their constitution with some modifications.

This phenomenon has also occurred in Indonesia. After amendment the 1945 Constitution, Indonesia also includes the constitutional court in their constitution, known as the Indonesian Constitutional Court (ICC). Practically, the constitutional court transplanted in Indonesia seems close to Germany model. However, the ICC is not a single court having authority to review all regulations under the constitution. It has to share his power with the Supreme Court to review the regulations. The ICC is only reviewing an act against the constitution; otherwise the Supreme Court is for the regulations below an act. This dualism system of judicial review has seemed easy in idea but has obstacles in the practice. In this dualism system of judicial review, Indonesia has widely modified the system existing in Austria as well as in Germany.

Lastly is the France model with its Constitutional Council, which was formatted in 1958. It has also played an essential role in Europe, as a court conferred with several authorities, particularly, reviewing the constitutionality of legislation. The Constitutional Council is not alike a Supreme Court or constitutional court in Austrian model or American model. The


The general role of this council is ensuring the executive branch, such as president to follow his policy to not against the constitution. Therefore, this Council can be categorized as an advisory body of president instead of judicial institution reviewing an act.

This council has furthermore been developed in some countries including Indonesia. Before the constitution amendment Indonesia also had this institution which called the DPA. Its main task is giving input and consideration for the President to act according to the constitution. After the long debate on its effectiveness among state organs, after amendment of the 1945 Constitution the DPA has erased. However, the president still has the simply state institution giving input as well as consideration, which is called the Watimpres. This institution is consisted of nine members, which is very small if compared with the DPA having 45 members. In sum, both the DPA and the Watimpres are closely similar with the role of the Constitutional Council in France. They have significant role in ensuring the president to run his government in track with constitution, chiefly, reviewing the regulations made by president.

It is also interesting to take into account the fascinating matter which can be compared among other models are that the institutionalization of the function of constitutionality review have clearly arranged in the Kelsenian’s element. The institutionalizations of constitutional justice system have been developed according to the Austrian-German model, such as the recruitment of judges. Moreover, the European’s judges have a


9 Dewan Pertimbangan Agung (Supreme Advisory Council) was special state organ giving advice for the president. Its role and authority was clearly governed in the Act Number 4 of 1978 on the Supreme Advisory Council. The members were consisted 45 persons.

special position; because they are not derived from a judge’s career, whereas, in the United States all judges handling the cases including the constitutional review are the judge’s career.

However, the developing of judicial review institutions, such as the Constitutional Court or the Constitutional Council, have also received the criticism among legal experts. The critics are mostly regarding the legitimacy or lawfulness of the institutions; which have been developed according to the European tradition. Some of legal scholars have claimed that those judges have worked sometimes more political than legal; and frequently they tend to get stuck as a legislator rather than interpreter of the constitution.\textsuperscript{11} Even Harlow claims that judicial review is in threat of flatter a political method, and they need a modification of the current method in view of the possibility of judicial review becoming a free for all.\textsuperscript{12}

Another model which is important to consider is the United Kingdom model. They perceive that the judicial review is not required that up to the present the country does not adopt such review procedures into its national judicial system. Even if the idea of judicial review is applied, such constitutionality review is only confined to the review the area of governance administration law or the so-called administrative actions review.

According to Hilaire Barnett, A.V. Dicey perceives the judicial review as the right way to preserve the parliament’s sovereignty doctrine simultaneous to enforce the law supremacy. This means that the judicial review in terms of the administrative law context is acceptable, but the idea of law constitutionality review in United Kingdom is absolutely denied. Through the administrative actions review, all the


government’s actions are controlled to assure that they are walking within the corridor of law. Such review system has commonly become accepted since the beginning of the 20th century. A.V. Dicey developed this idea through his analysis of the case of Board of Education versus Rice in 1911 and the case of Local Government Board versus Arlidge in 1915.\textsuperscript{13}

In reality, furthermore, United Kingdom does not have an explicitly codified constitution draft like that recognised in the countries that follow the constitutional democracy principle. Therefore, this country is known widely as the unwritten constitution’s country. However, Pilkington does not fully agree that British do not have an unwritten constitution. British really have a written constitution that have spread across a hundred different documents, decrees, statute, acts, reference works, and so forth.\textsuperscript{14} This argument has been strengthened by MacCormick who stated that the Act of Parliament has explicitly been positioned as a constitution.\textsuperscript{15} In other words can be said that British does not have a codified constitution, instead of an unwritten constitution.

It implies that the institution performing the constitutional review function is one of the bicameral chambers of the England’s supreme parliaments, which are known as the House of Lords and House of Common, not the judicial or justice institution.

In practice, however, there happened a preventive measure which was centrally performed by the Supreme Court through its consultative function upon request by the parliament or concerned parties. The Supreme Court judgment over such

\textsuperscript{13} Judicial review signifies the means by which the sovereignty of parliament is supported and the rule of law implemented. Hilaire Barnett, \textit{Constitutional and Administrative Law}, United Kingdom: Cavendish Publishing, 2004, hal.88.


| 3 | **Ultra Petita and its future challenges**  
Ultra Petita judgments have been widely criticized in Indonesia by academics, newspapers, and social media. The future challenge faced by the ICC regarding Ultra Petita is the judges’ unlimited power potentially violating a value of democratic justice. ICC can easily choose a specific act which can be annulled easily. Ni’matulhuda stated that the Ultra Petita judgment has appeared because the ICC had case is absolute as an *erga omnes* (towards all or towards everyone).  
The rational or justified reasoning for a judicial review has been widely opposed by the British academicians. Forsyth emphasised the urgency of preserving the ultra vires doctrine that has been acknowledged since long time ago. On the contrary, Craig bases his argument on the justice principle and public power-control concerns, accepting the parliament supremacy doctrine. His idea of judicial review has nothing to do with either the parliamentary intent or the ultra vires rules doctrines.  
In other sides, Jowell comes with a compromising idea or the third proposition, placing the judges as the final decision maker of the law regarding how to administer the power according to a democratic system. Meanwhile, Oliver added that the judges are well suited to adjudicate on procedural matters but are not constitutionally qualified to make broad decisions on social and economic policy. The courts do not and should not unilaterally and arbitrarily impose substantive constraints on administrative action. |

**B. Research Questions**  
Based on above background, there are several key points which will be discussed in this article, firstly how constitutional courts play its central role in judicial review, secondly how American model judicial review influence world system, and lastly how South African model judicial
an improvisation sense in the tribunal process. Ultra Petita judgments may happen again in coming years (Ni’matulhuda 2010).

Moreover, Mahfud also insisted that the ICC has claimed itself as a superior state institution, sheltering its final judgments under the constitution. For this reason, in some cases the ICC has made judgments that come from out of ICC’s authorities. The judgments can base on judge’s argument instead of article in Indonesian’s constitution (Mahfud 2009). Adnan has also given a critic on Ultra Petita judgement. He claimed that the controversial judgment of Ultra Petita judgement have indicated the judges arrogance. Adnan has claimed that the ICC has infringed legal tradition and legal doctrine of the court, with the judges become the final arbiter, with no chance for further appeal the injustice (Adnan 2014). The expanded jurisdiction by the ICC has also occurred in other countries, often making it hard to draw the line between legal and political questions.

Furthermore, to get comparative constitutional approach, Germany’s Constitutional Court (GCC) can be selected as an example. The reason is that most of ICC’s authorities have some similarities with Germany’s Constitutional. The GCC’s jurisdictions consist of constitutional complaint, abstract regulation control, specific regulation control, federal dispute, state–federal dispute, investigation committee control, federal election scrutiny, impeachment procedure, and prohibition of a political party. The GCC will only process a case which submitted by applicant. Thus, the judges have required to base their consideration on the constitution (Mancini 2018).

In some cases, the justices try to send a message to the legislature or other state bodies through statement in passing (called obiter dicta). An example is the Classroom Crucifix case. The GCC decided that putting the crucifix symbol was unconstitutional by the panel majority. The mere presence of a cross in the classroom does not compel the pupils to particular modes of conduct, nor make the school into a missionary organization. Nor does the cross change the nature of the Christian nondenominational school; instead it is, as a symbol common to the Christian confessions, particularly suitable for acting as a symbol for the constitutionally admissible educational content of that form of school. The affixation of a cross in a classroom does not exclude consideration of other philosophical and religious contents and values in education. The form of teaching is, additionally, subject to the precept of Art. 136(1) BV, according to which, at all schools, the religious feelings of review combine two system American and Europe system judicial Review. Those research questions will be explored briefly in conceptual framework and analysis.

C. Research Aims

The research aims in this article is to give explanation and exploration on Constitutional Courts as Central Organ of Judicial Review in European countries, discussing American model judicial review, and exploring South African model judicial review. This research also gives analysis on the role of American model and European model judicial review, chiefly on how those system influence judicial review system in world order. In this discussion also will explain the South African model judicial review that successfully combine American model judicial review and European judicial review, using its extra-systemic approach which also used in Indonesian Constitutional Court in the death penalty case.
others are to be respected (FCCG 2014). The Federal Constitutional Court, furthermore, stated in connection with the precept of neutrality, that the school, insofar as it may influence children’s decisions as to belief and conscience, may contain only the minimum of elements of compulsion. It may not be a missionary school nor claim binding validity for Christian beliefs, and must be open to other philosophical and religious contents and values. In this case, GCC not annulled the regulation, just giving some note for the regulation. Thus, it accords with the judicial review concepts of Kelsen, not to annul the entire statute. Kelsen’s concept is clear that constitutional court has a function of reviewing a mistake in a regulation, and not making a new regulation through the court’s judgment (Hans Kelsen 1942).

Another comparison can be made with South Korea’s Constitutional Court, which has just had its twentieth anniversary, an important milestone. Of the five designated constitutional courts in East and Southeast Asia (the others being Indonesia, Taiwan, Thailand and Mongolia), it is arguably the most important, and merits close examination as a case study in constitutional politics in Asia. The Act of South Korea Constitutional Court (SKCC) has allowed the Court to expand its jurisdiction for invalidating an act:

The Constitutional Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional: Provided, that if it is deemed that the whole provisions of the statute are unable to enforce due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute (South Korea Constitutional Court Act, Article 45).²

The Article above states that the SKCC can only magnify access to constitutional justice and can apply their authorities to cover ordinary court decisions. In 1995 the court confirmed a tax law as partly illegitimate, and said that it might only be applied on a particularly narrow interpretation by ordinary courts (Tom Ginsburg 2003).

This comparison shows two models of expanded jurisdictions in the constitutional court. From the German case, the court is not too bold of expanding its jurisdiction out of the regulation, whilst South Korea is brave enough to expand its jurisdiction, because its regulation has allowed for that. In the context of Indonesia, ICC does not
4 Analysis of Ultra Petita cases

Intervening parliament’s jurisdiction

To review an act that contradicting with the constitution, the ICC has only permitted to interpret the constitution that refer on the constitution. The ICC has been allowed to declare whether an act conflicts with the constitution, or cannot be justified by the constitution. Therefore, the ICC cannot be permitted intervention into parliament’s jurisdiction that including to amend an act or to revise it. Amending and revising an act are the parliament’s jurisdiction. So, the ICC has only authority to say that an act has some mistakes, and let the parliament to fix those mistakes through parliamentary session. Unfortunately, this is not happened in the case of Ultra Petita that ICC has also intervened parliament’s jurisdiction, including to amend and to revise a mistake in an act.

The jurisdiction border between ICC and parliament are clear. ICC has to find a mistake in an act, and parliament must amend and revise a mistaken act. In Kelsen’s terminology states that ICC has an essential role as negative legislator (known as the norm canceller), and parliament has a role as the positive legislator (known as norm maker) (Kelsen 1942). Constitutionally, the ICC is prohibited to cross the border of parliament jurisdiction (Carías 2011). The theory and reality have not always been followed. In some cases, the ICC has intervened parliament jurisdiction, by making several changes within an act.

Consider the Case of Children Outside of Marriage, Machica Vs the Act No.1 of 1974 on Marriage (ICC 2010). On 20 December, 1993, Machica married with Moerdiono in Jakarta, and had a son one year later. The marriage was held in the

II. CONCEPTUAL FRAMEWORK

A. Constitutional Courts as Central Organ of Judicial Review

One of the pivotal theories in the area of governance administrative law is the theory of law proposed by Hans Kelsen. Many arguments stating the existence of Constitution Court in Europe have theoretically well-introduced by Hans Kelsen. He uttered that the implementation of constitution provision regarding legislation can only be effectively secured, when there is one organ apart from the legislative body is authorised, to review the constitutionality of a judiciary product.

To that extend, it is required to establish a special organ in terms of justice area called the Constitution Court (constitutional court). This special legal controlling organ is authorised to completely eliminate a law found to be unconstitutional to enable its implementation by any other organs.21 The thought of Kelsen encourage the establishment of an institution called “Verfassungsgerichtshoft” or Constitutional Court that is independent from the Supreme Court. In that, this model is often named The Kelsenian Model.22

The development of the Constitution Court power implementation has encouraged developing the theoretical studies of governance administrative law. Of Some required field of legal theories that currently start to develop are, for example,

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Islamic tradition fulfilling all requirements in Islamic law. Unfortunately, in that time, Machica and her husband did not register their marriage in the Marriage Office. Their marriage was held legitimate fifteen years later, receiving a Religious Court judgment in 2008 (IRCJ 2008).

On 7 October 2011, her husband passed away, and Machica claimed the inheritance for his son, but the Religious Court denied her inheritance claim, arguing that his son was not legitimate because the marriage was not held in the Marriage Office, and had not been officially registered. Machica claimed judicial review of the clause within the Marriage Act to the ICC. She argued that with the enactment of Article 43 (1) of the Act No.1 of 1974 on the Marriage has violated her constitutional rights as a mother and also her son. Thus, she cannot receive legal endorsement of her marriage, and also cannot legalize the status of her son. Even though her marriage is guaranteed by Article 28B paragraph (1) and paragraph (2) and Article 28D (1) of the 1945 Constitution stating that: (1) Every person shall have the rights to establish a family and to procreate based upon lawful marriage. (2) Every child shall have the rights to live, to grow and to develop, and as well as of protection from violence and discrimination. To strengthen the Article 28B, the 1945 Constitution also regulates the recognition rights in Article 28D of Clause (1) stating that Every person shall have the rights of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.

After judiciary process and long debate, finally, the ICC reviewed and amended the Article 43 (1) of the Act No.1 of 1974 on the Marriage:

Children born outside of marriage only have a civil relationship with their mother and their mother’s family.

After the judgement, it was stated:

“Children born outside of marriage only have a civil relationship with their mother and their mother’s family as well as with men as her father, who can be proved based on science and technology and/or other evidences under the law to have a blood relationship, including civil relationship with his family (ICC 2010).”

Theories of legal norms are required, for example, to distinguish the abstract legal norms from the private concrete legal norms. The discussion of theories on legal norms is also required to structure the hierarchy of laws in order that the development of national legal system can be adjusted to the constitution framework.

Further, the theories that receive more attention and are growing are the interpretation theories. In terms of legal study, law interpretation has a central position because all legal activities are all around the norms and provisions of the law and constitution that will be applied into a real event (imputation). Interpretation is becoming more crucial when the reflection or understanding of a constitution norm is employed to determine other norms, the ones out of the former. Both norms should be fully understood ranging from the background, objective, and the interpretation ahead for their implementation. Therefore, through using the linguistic interpretation study, the study of law has developed a lot. Simultaneously, with it, other theories have also developed very significantly.


This discussion will focus on the member of EU countries
The judgement shows the ICC expanding its jurisdictions. Editing and changing the article in an act is the DPR’s jurisdiction. The ICC should simply state that the act is invalid and have no legal power to enforce, and allow the DPR to fix it.

Judging itself

The ICC has infrequently judged the act, ruling itself. The ICC has infrequently judged the act, ruling itself. In this case, ICC has reviewed all acts having connection with the jurisdiction with ICC authority. If an act has reduced ICC power, the act will be annulled. This category is against the principle of *Nemo iudex in causa sua*, a Latin phrase that means, literally, no-one should be a judge in his own cause. In this case, ICC has invalidated jurisdiction of the Judicial Commission to observe the behaviour of ICC’s judges (ICC 2006). They ruled that the Judicial Commission has constitutionally no jurisdiction to observe the constitutional court’s judges, rather the jurisdiction to observe belongs only to the Supreme Court’s judges.

This judgment has violated the Act of Judicial Power (Judicial Power 2004), which stated that a judge, or a registrar, must resign from a session if they have a direct or indirect interest with the case being examined. If a judge, or a registrar, are still continuing a case regardless of the act, then their judgments are invalid. A judge also will receive administrative sanctions, or will be sentenced based on the regulations. In fact, in this case ICC have still continued the case, and the judgment has had also a legal enforcement.

The reason for forming the Judicial Commission was to build the checks and balances mechanism among state organs, mainly in the judiciary power. The having constitutional courts. They are frequently influenced by the existence of the European Court of Justice (ECJ) as well as the European Court of Human Rights, over the sovereignty of constitutional court in EU countries.

It is not an easy tasks for the constitutional courts in EU countries to adapt with the existence of EU laws. The jurisdiction of the constitutional court in Europe, therefore, has changed after the establishment Europe Union. The constitutional court decision is no longer binding as usual, due to it can be reviewed by European Court of Justice, which has to be respected unconditionally.

In one hands, the country has a sovereignty to uphold their constitution via the constitutional court, on the other hands they have to fully obey on the EU laws. In maintaining the harmony among EU countries, particularly with the constitutional court, the EU judiciary system has made some doctrines to create better understanding and legal certainty for the EU members. Owing to the fact, the EU judges has created several doctrines in maintaining the supremacy of EU laws. Further, the doctrines will briefly be discussed and be explored below.

Firstly is Italian constitutional doctrine. To avoid the contradiction between the EU laws and Italian’s regulations, the Italian Constitutional Court has inferred such a doctrine from Article 117 (1) of the Italian Constitution, which stipulates that:

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23 It this circumstance, Keyaerts have recommended that the role of EU Courts as the regulatory watchdog is necessary. David Keyaerts, ‘Courts as Regulatory Watchdogs. Does the European Court of Justice Bark or Bite?’, in Patricia Popelier, Armen Mazmanyak, and Werner Vandenbruwaene, ed., *The Role of Constitutional Courts in Multilevel Governance*, Cambridge: Intersentia, 2013, hal. 289.


commission, born by the reformation era, has prevented a judicial mafia during the authoritarian era. The invalidation of this watchdog function has placed the ICC as the superior court. Unfortunately, after seven years of this judgment, a worrying judicial mafia has been created.

In October 2013, the head of the ICC was caught red-handed by the Corruption Eradication Commission accepting bribery from the election case that he was handling. After this case, all judgments’ involving the bribed judge have been questioned, whether to be validated or re-examined. Thus, the idea of establishing a watchdog body for the ICC is back on the reform agenda.

Reviewing president decree
The constitution states that the ICC can only review an act. In fact, the ICC also has reviewed several president’s decrees, such as president emergency decree (known as Peraturan Pemerintah Pengganti Undang-Undang - Perppu). The presidential decree has had a lower level in Indonesia’s legal system, which means that it is not the jurisdiction of ICC to review, but the Supreme Court’s jurisdiction. Nevertheless, Perppu is not equal to an act and does not have a same hierarchical power in Indonesian legal system. There is no clause in the constitution or other acts, that states a Perppu can be reviewed by the ICC. Constitutionally, Perppu is legislated by the president in an emergency situation. Perppu can only implement for two years, unless the DPR upgrades Perppu status to be an act. If, in two years, Perppu has not been upgraded, a Perppu cannot be enforced as Indonesian law. The mechanism of reviewing Perppu belongs to the DPR, whether it will be accepted or be rejected. If the ICC really wanted to review a Perppu, the ICC has to wait until the Perppu becomes an act (Siddiq 2014).

Inconsistent on judgment format
The formats of ICC’s judgments’ have been regulated within constitution and in Act Number 24 of 2003 on the Constitutional Court (ICC 2003). However, ICC have not

Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from Community law and international obligations.26

The constitutional foundation of the resulting limits placed on national authority has been provided by the Article 117. Implicitly the article stated that Italy agrees to limitations on sovereignty subject to definite conditions and mutuality. It is right that this provision was not laid down expressly in view of European integration. The article has also been constantly interpreted by both political forces and judges as the constitutional basis for European integration.

The article later then furthermore is being one of the important doctrine in EU community recognised as Italian constitutional doctrine.27 The doctrine is very authentic to the Kelsenian essence stirring the centralized model. Consequently, a national statute contradicting with EC laws is not only directly opposing to EC laws but also indirectly opposing to the Italian Constitution, which is connecting the Italian country to international environment.

This holding protected the dominance of EC laws in Italy. Another consequence is preserving the supremacy of the Italian Constitutional Court inside the Italian system. If a regular judge settled that a national statue dishonoured EC laws, judge had to elevate the question to the Italian Constitutional Court. The judge could not established the statue away on his or her own expert. In this situation the Court is not only confirmed that EC laws principles can be engaged as standards for review of internal legislation, but also it is specifying in their

26 See also Italian Constitution Article 117 (1)
fully obeyed to those imposed judgement-formats, and creating new judgement-formats which not coming from Act of ICC. The official judgement-formats of ICC consist of:

1) **Denying:** The denying judgment is where ICC believes that the applicant and/or the application do not fulfil the requirements requested by the ICC.

2) **Granting:** The granting judgment is where ICC believes that the application is reasonable. It is also used for a judgment where the disputed formulation of an act does not fulfil the requirements stipulated by the constitution.

3) **Rejecting:** The rejecting judgment is where the disputed act does not contravene the constitution, either on its formation, parts, or overall material content.

4) **Not-legally-binding:** The not-legally-binding judgment is where the material content of a sub-article, article, and/or parts of the act, contradicts the constitution. The ICC may state that the formulation of an act, referred to in the application, does not fulfil the requirement of the constitution.

5) **Justifying the DPR’s petition:** The justifying the DPR’s petition judgment is when the ICC decides that the President and/or the Vice President is proven to violate the law through an act of a treason, corruption, bribery, serious criminal offence, or through moral turpitude; and/or no longer qualifies as President and/or Vice President.

6) **Rejecting the DPR’s Petition:** The rejecting the DPR’s Petition judgment is when the ICC decides that the President and/or the Vice President is not proven to violate the law through an act of a treason, corruption, bribery, serious criminal offence, or through moral turpitude; and/or no longer qualifies as President and/or Vice President.

These formats have not always been applied by the ICC, which has made new formats, not in the constitution or the Act, as follows: 1) the conditionally constitutional judgment, and 2) conditionally unconstitutional judgment (ICC 2004).

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30 The necessity to turn to a more broad, analytic and familiar style has been claimed by Weiler. See also Joseph. H. H. Weiler, ‘Epilogue: The Judicial Après Nice’, in G. de Burca and J. H. H. Weiler, Ed., The European Court of Justice, Oxford: Oxford University Press, 2001, hal. 225.
1) The conditionally constitutional judgment states that an act provision is not contradicted by the constitution, with giving a condition to a state organ implementing an act provision, for considering the ICC’s interpretation, on the constitutionality of an act provision, which has been reviewed. In contrast, 2) a conditionally unconstitutional judgment states that an act provision is not fulfilling the requirement stated in the ICC’s judgment.

An example of ICC own-format-judgment is the case of the Presidential Election 2009 (ICC 2009). The Act of Presidential Election stated that voters must be registered in the election list to get their right to vote. Unfortunately, the plaintiff, because of administration failure by the Election Commission, was not registered as a voter, asked the ICC for his voter rights, and won. The ICC made its own-format-judgment that the plaintiff could vote by showing his ID, such as Passport, ID card, or other valid ID documents—ID types not stated in the act, or the Constitution. Was his right to vote constitutional? These judgments’ take the ICC into the jurisdiction of the DPR, as legislative. The ICC has bravely abolished the clause stated in an act, and made its own version, acting as a positive legislator (rule maker) rather than a negative legislator (rule canceller).

Invaliding all over act
The ICC can annul or invalidate an act, although not asked to do so. Two cases illustrate the fact: firstly is the invalidation of Act number 27 of 2004 on the Truth and Reconciliation Commission. The human rights organization called Elsam, which asked the ICC to judicially review Act 27 of 2004 on the Truth and Reconciliation since some of the most essential constitutive doctrines of the Community legal structure were enclosed exactly in reply to the locations developing from Italian constitutional adjudication.31

Particularly, before attainment the assumption that the Constitutional Court has included Article 234 EC32 and 35 EU33 as advantaged channels for judicial collaboration with the ECJ, an investigation of its recent statements in bright of present EU judicial construction may be beneficial. Likewise, it was highly pointed out that in deteriorating to refer under preliminary decision procedures, the Constitutional Court rather than controlling EU national agreement, was misplacing an important chance to establish a serious discussion with the ECJ.

As consequence of Italian constitutional doctrine, EC laws is the only kind of legal foundation that may adjust domestic constitutional law, with the distinguished exception of both essential human rights and the supreme institutional values. It follows that EC law has a supreme status than the national law. With this situation affirming the two legal orders are united. EC law may even adapt constitutional norms. A fortiori, it yields binding impacts with concerning to national and provincial legislation. Of course, a dualist style have carried diverse conclusions from those that develop from a vision based on the agreement of the legal order.

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31 Predominantly the important cases on the sovereignty doctrine are both responses to previous more restrictive pronouncements by the Italian Constitutional Court. With its Internal Primacy Doctrine furthermore ECJ states that one of the main task of national court including constitutional court is to enforce EC rules over conflicting national legislation. Helle Porsdam, From Civil to Human Rights: Dialogues on Law and Humanities in the United States and Europe, United Kingdom: Edward Elgar Publishing, 2009, hal. 73-74.

32 Article 234 EC Stated that The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Please visit the complete article at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E234:EN:HTML, diakses 10 Juni 2017.

33 Article 35 EU stated that 1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them. Please visit the complete article at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12002M035, diakses 10 Juni 2017.
Commission. Elsam found unfairness within Articles 1, 27, and 44, about restitution, compensation, and rehabilitation for victims affected by gross human rights violation during Indonesia’s authoritarian era. After the reviewing process, on the contrary, ICC abolished and annulled all over the act in ICC's judgment, making the act cannot be enforced. This judgment made the plaintiff, Elsam, feel hopelessly confused because they never asked for the abolishment and annulment, only for review. This Ultra Petita judgment has produced long debate on the authority of the ICC, whether having authority to annul an act or only reviewing the specific article submitted by plaintiff.

Secondly, in the case of Act Number 20 of 2002, on the Electricity Power, after reviewing four articles (8, 16, 22, and 68), submitted by plaintiff, the constitutional court annulled the whole act, and asserted that the act was unconstitutional. One court reason was because the act mentioned that electric power is a commodity, the price of which can be increased competitively. This was a free-market price, putting the price that depended on the demands of the market. The ICC similarly argued that the act unpowered the role of state in safeguarding public interest.

The ICC judges argued that the state does not fully have control to enhance the benefit of electricity for the people’s needs, because the price might be controlled by the market and private sector (ICC 2003). Subsequently, the ICC interpreted that the act was dangerous on protecting energy security, because it did not belong to the state. The judges also stated that the act has contradicted with Article 33 (Clause 2) of Indonesian's Constitution. The Article 33 (Clause 2) states that production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state. This implies that the annulment of the Act Number 20 of 2002 on the Electrical Power influenced on the law certainty. Owing to this situation, the government has to refer to the previous act, the Act Number 15 of 1985 on the Electrical Power, although it was the old-fashion and it was not constitutional.

This doctrine has accordingly been adopted by Indonesia in the mechanism of the ICC. It has positioned the 1945 Constitution as the supreme law, including the cases produced during the existence of the ICC. With this consequences, every single person living under the 1945 Constitution have to fully obey to the any single ICC judgments; although in real life it is hard to be implemented. It is because the characters of ICC judgments have no similarity with the ordinary judgments; which have the power to enforce strongly.

Secondly is Simmenthal doctrine which born in the case of the Simmenthal company vs Italian Minister of Finance in 1978. The point of this doctrine is that the precedence of Community law applies even with regard to a subsequent national law. The doctrines can be said as the opposition of Italian constitutional doctrine. Although some country such Italia has adopted the EU law in their constitution, in some cases, if the contradiction happened, the national court has to review their decision based on EU laws. This doctrines has widely been adopted by EU member in preventing the clash among regulations.

The European Court of Justice (ECJ) have arranged the basics for a devolved system of judicial review. It stated that a national court is entitled upon to implement the provisions of Community law, which is under a responsibility to provide full influence to those provisions. If compulsory refusing of its own indication to implement any conflicting provision of national statute. Thus, it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

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the House of Representative had been considering the new act.

Incorrect judgment code
This judgment followed the Aceh Election of 2012, to elect a governor and vice governor, and head of regency and vice. This election was unique in implementing the election law in a special autonomy province. The Election has to follow Election Law regulation, yet Aceh has its own autonomy law. It followed a long debate pertaining to which law could cover the election, and became more complicated because of the political interest amongst candidates who took part in this election. After long debate, the ICC made the judgment, but unfortunately put the code judgment with PHPU (Disputes on General Election Results), whilst the election result was not released yet. The ICC was still stating the judgment’s code as the Disputes on General Election Results, and was reluctant to revise it (ICC 2011).

Intervening Supreme Court authority
Clash with other state organs has often occurred, including the Supreme Court. A plaintiff who failed in the ICC could win in the Supreme Court, and vice versa. A parliament candidate could be judged by the ICC as unable to contest because they do not fulfill the requirements, but the Supreme Court could permit a candidate to join the election process. This case has happened frequently, because the Supreme Court and constitutional court has the same jurisdiction in handling election disputes (Akil Mochtar 2013).

Ultra Petita has usually happened in election dispute cases. The ICC has frequently decided to hold re-election in some places, instead of examining carefully each of the cases. In the election cases, most of the plaintiffs have filed a lawsuit to the ICC, seeking an election justice rather than hold re-election. Now elections have cost a lot of time and energy. Election dispute cases are the most prominent cases in the ICC. The election in Indonesia has consisted of presidential election, parliaments,

In this situation all national justices have responsibility on the specific tasks on their own power, including to invalidate any local statute contradicting European Community (EC) laws. They furthermore must not stay the proceedings and wait for the formal annulment of that statute by the national constitutional court.

This phenomenon has visibly renovated the significant role of ordinary judges in Europe. They have directly now approved to criticism, by themselves, the legitimacy of parliamentary legislation under a higher norms such as EC laws.

This simply implies that constitutional courts have vanished their previous control. In other words, constitutional courts have still held their control over the willpower of the authority of laws under the national constitution, but they have lost their wide-ranging control over statutes; because a regular court can also now be checking them under EC laws.

In its daily operation, the European supranational court has American style in practicing judicial review of legislation, including the varied follower states of the European Union such as Netherlands. It has used a more confident character, when they reflect the constitutionality of statue. Even if they cannot establish aside the statute on constitutional grounds, they do express legal censure of it. This change have not easily recognised in all jurisdictions, however. It has occupied some time for the doctrine to yield democratic basis.36

The diverse countries in Europe, additionally, have originally interpreted the Simmenthal doctrine into national constitutional texts in the different ways; such as French’s

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governor, until district level. In 2010 the ICC made more than 230 judgments on election cases (ICC 2014). The number of judgments can increase in election seasons.

The ICC’s record in handling election cases has not always been good. Occasionally, a crucial mistake has been made. In the parliament election 2009 dispute involving the Democrat Party and the National Amanat Party at Donggala district, Centre Sulawesi, the ICC decided that the National Amanat Party won one chair in the parliament (ICC 2009). Feeling unsatisfied, the Democrat Party filed a lawsuit to the district court. Astonishingly, the district court decided the Democrat Party as the winner. The National Amanat Party was found guilty of inflating the number of voters. This fact of trial could not be identified during the session in the ICC, because it was manipulated by the election commission member.

Judging based on other country experiences

Based on research by Zhang, between 2003-2008, the ICC has adopted foreign resources rather than the constitution itself. In her qualitative research, Zhang discovered 813 foreign references scattered in 62 ICC judgments, referring to 34 international agreements, legislations and case law from 26 foreign countries, as well as the jurisprudence of supranational courts. To interpret the constitution, the ICC has referred to international agreements, case law and practices of other countries, the United Nation resolution, the general opinion of the Human Rights Council, and customary international law (Diane Zhang 2010). Using other foreign resources instead of the constitution could be as Ultra Petita, the ICC’s judges being regarded reluctant to use the constitution as the supreme resource, with several implications.

Firstly, the constitution should be placed as an expression of national interest. Using foreign law in constitutional adjudication has no legitimacy because the preparation of foreign law is not made by the representatives of the people elected

Constitution in Article 55 clearly honours international treaties a higher rank to statutes.37 Though, the principle is now quite well established. It should request into the validation, explore as well as supporting the Kelsenian system.

Principally, it has two essential point of views on why the ECJ depend on to defend its holding in Simmenthal.38 Firstly is for theeffectiveness of handling cases. The effective enforcement of EC laws would be weakened, if the ordinary courts in charge of handling specific disputes were not authorized to immediately set apart national statutes contradicted with EC laws.

Should the courts must stay the proceedings and request the national constitutional court to intrude, there would be an interval in solving cases. This interval would quantify to a weakness to the full effectiveness of EC laws. Thus, the courts have to direct and immediate in the establishment of EC laws.39 This point of view can sound like an undoubted argument, notwithstanding, the countries establishing constitutional court should not be mesmerised by it.

Secondly is that the integrated model of judicial review is grounded on the supposition that the postponement is a value of worth paying-provided. To be sure that the postponement is not irrationally long. The matter elevated by an act can be ultimately established by the constitutional court from the very commencement.

There is no necessity to postpone a case to get judged by the highest courts after several appeals. A judgment by the

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37 The Article 55 stated that Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party. See also Mario Mendez, “Constitutional Review Of Treaties: Lessons For Comparative Constitutional Design And Practice,” International Journal of Constitutional Law, Vol.15, No.1, March 2017, hal. 84-109. See also David H. Moore, ”Constitutional Commitment to International Law Compliance,” Virginia Law Review, Vol. 102, April 2016, hal. 367.


democratically.

Secondly, it is impossible for judges and legal practitioners to know the context and historical background of other countries, which have influenced the development of foreign law to address cases in their countries.

Lastly, each case has constitutional views, opinions, and positions, which are different in other parts of the world. There are no agreements amongst the judges to use one methodology in making a judgment, which can lead to reasoning that can support the personal views of each judge. If the ICC really wanted to adopt foreign law, the constitution itself should give a license for picking other sources. In this issue the constitution must have a license to use comparative foreign law for the court as part of the constitutional authority (Mark 2000), such as in South Africa.

Not all ICC judges agree on adopting foreign law as ICC sources. Some judges had a dissenting opinion in the case of imposing the death penalty for drug dealers, where the ICC’s judgment was decided by 9 judges attending the session, of whom four disagreed with the judgment. In this judgment, the ICC neglected the constitution protecting the life of a human being, and referred to the International Covenant on Civil and Political Rights (ICCPR) (ICC 2007).

Using foreign sources instead of the constitution may strengthen judges’ opinion, because if they were to use the black-letter approach, the opinions could be against the constitution itself.

Judging based on scholarly theory
The ICC’s judgments have often adopted several legal theories, instead of the constitution. However, the ICC’s judgment should not be based on theories not clearly embraced by the constitution—because it is very much theory, and a variety of options. Theories contradict other theory, which affects law certainty. One such theory picked by the ICC in its judgment is the theory by Quinney (Richard 1970), regarding ICC’s judgment on the death penalty for the drug dealer (ICC 2007).

constitutional court calling off the statute, likewise, has the supremacy to bind instantly all justices. These benefits of centralism appear flawlessly appropriate, most importantly when national legislation is to be revised for the congeniality with E.C. law.40

It is important to state that the EC laws in general are very dissimilar from national constitutions. The constitutions have specifically contained the text articulating comprehensive and morally emotional values. Thus, the interpretation is deeply controversial when tested by judiciary process. The clash between a statute and the constitutions are frequently the clash between a comprehensive legal provision and a somewhat intangible and fundamental norm.

In contrast, EC laws are ultimately legislated by a usual legislation expressing in slightly exact terms. The clash between a national provision and EC laws between two pieces of usual legislation. Thus, the disputes over national statutes conformed to EC laws will not be as deep as constitutional disputes. Dispersed systems in the EC laws are thus more allowable. Though, this dissimilarity cannot be reserved too far. Some parts of EC laws do look like constitutional models. For instance, the market freedoms safeguarded by EC law can be constrained by participant states in the name of a convincing community interest. Justices have to implement the norm of proportionality and select whether the restriction is eventually justified.41

EC laws, in the same way, are also sheltering the essential rights as fragment of secondary legislation. Member states are

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40 The Report of the Group of Wise Persons to the Committee of Ministers The Report of the Group of Wise Persons to the Committee of Ministers have endorsed an instrument that would allow national courts including constitutional court, to request an opinion by the ECHR on legal questions relating to the interpretation of the convention. This instrument does have a legal binding like preliminary references. https://wcd.coe.int/ViewDoc.jsp?id=1063779, diakses 25 Februari 2015.

ICC’s judgments also should not be based on what works in other countries, even though those countries are well developed. This is because in other countries, the provisions of the constitution have a difference between each other (Mahfud MD 2009). Therefore, it should be the content of the constitution which will be the basis, and all of its original intent of ICC resources.

Adding jurisdiction in handling provincial and district election
As regulated in the Constitution, the ICC’s jurisdiction only consists of reviewing laws, determining disputes over the authorities of state institutions, deciding over the dissolution of a political party, deciding over disputes on the result of general election, and to issue a judgment over a petition concerning alleged violations by the President and/or the Vice-President as provided by the constitution (ICC 2007). Regarding “general election”, Article 22E Clause (2), states that: General elections shall be conducted to elect the members of the House of Representatives, the Regional Representative Council, the President and the Vice President, and the Regional House of Representatives (ICC 2007). In fact, ICC has extended its jurisdiction to adjudicate provincial and district election disputes, even though that jurisdiction was not stipulated within the constitution, which has excluded the provincial and district election disputes, including the governor and mayor elections, as part of the meaning of “general election”. In the beginning, the disputes of those elections were handled by the Supreme Court. At that time, the ICC still focused on its jurisdiction in reviewing the act against the constitution.

assured by such rights when they perform in a part governed by EC laws. National justices may disagree among themselves when they must double-check national legislation to ensure the consistency with EC laws in some cases. To prevent this case happened; the ECJ fortunately has made the mechanism ensuring the uniformity that is called the preliminary-reference procedure. With the mechanism, the national justices have jurisdiction to examine openly whenever they are requiring the guidance from the ECJ; most importantly if an interpretive difficult appears under EC laws.

The ECJ involvement has significantly been needed, because its judgements are broadly supposed to be officially binding. The solutions providing in the procedure of preliminary rulings are to be obeyed. It is not only by the justices raising the appropriate questions, but by all other justices in all member states as well. The ECJ has clearly attracted this power, and the majority of scholars have recognised it.

Lastly is clear act doctrine. In this doctrine ECJ has announced a concession to the responsibility of national courts of last option to ask a preliminary question. The national courts need not to request for a preliminary ruling when there is no sensible doubt about the meaning of the important EC laws. If the question that is being inspected by the national court is same to a question already judged by the ECJ, there is no necessity to

42 The instrument arranged by ECHR would permit the constitutional courts or the courts of last case to demand a recommended opinion from ECHR. Please visit https://wcd.coe.int/ViewDoc.jsp?id=1063779, diakses 25 Februari 2015.
44 Although it is hard for the Justices to speak in a same voice, they have to agree in final decision as final binding. Michael Malecki, "Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers," Journal of European Public Policy, Vol. 19, No. 1, December 2011, hal. 59-75.
45 In this context, the courts has to respect international treaties, or if they disagree, can make reservation. This reservation procedure is only for non EU countries unwilling to ratify international law. See also Benedetto Conforti, International Law And The Role Of Domestic Legal Systems, Leiden: Martinus Nijhoff Publishers, 1993, hal. 255. See also Victor Ferreres Comella, Constitutional Courts & Democratic Values: A European Perspective, New Haven: Yale University Press, 2009, hal. 125.
The ECJ collaborates diligently with all the courts of the EU state’s members. There are the regular courts in substances of EU law. The regular courts have a vital function to guarantee the effectiveness and uniformity, including the application of European Union legislation; and also to narrowly avert deviating elucidations of EU laws.

The regular courts or national courts in the EU’s members, infrequently, must closely discuss with ECJ, in particular, to simplify considerably the interpretation EU law. The courts, consequently, may receive a clear explanation, whether their country’s legislation process is against EU laws, or they are ruling in the right track. The reference for a preliminary governing might also apprehension to the evaluation of the validity of an act approved by the European Union’s bodies.

The reply answer from ECJ is not chastely an opinion. Notwithstanding, it takes the form of a judgement or well-structured order. The courts in EU countries making the reference to the ECJ, have been assured by the interpretation given.

In deciding the dispute, the ECJ’s judgments, equally, bind coherently other national courts. Certainly, the references for preliminary rulings, therefore, have the substantial benefit for any European citizen. The process can give a chance for EU citizen to seek clarification of the European Union’s rules which might be affecting them personally.

Indeed, the reference can be prepared simply by a national court, the Member States and the European Union’s institutions, which may take part in the proceedings before the

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46 The precedents, which may come from preliminary preference or judgements, in EU countries is importance as the legal sources. See also Andreja Pegan, “The Role Of Personal Parliamentary Assistants In The European Parliament,” West European Politics, Vol.40, No.2, June 2016, hal. 295-315.
In that approach, the vital principles of European Union law have been definitely established, in particular, on the source of questions stated for preliminary rulings.

These activities have clearly allowed the ECJ to control the EU members, whether or not they have earnestly fulfilled their obligations below European Union laws. Furthermore, before carrying the case in front of the ECJ, the Commission conducts a secretarial phase, in which the EU Member concerned, is agreed the opportunity to reply to the complaints against it.

On the condition of the conclusion stage, furthermore, the EU member has not placed an end to the infraction. An action may be seriously taken before the ECJ. The action may be delivered either by the ECJ for the ordinary case or by the EU member. Should the ECJ discovers that a duty has not been achieved, the State in question must put an end to the contravention without postponement.

If, after a more action is carried by the Commission, the ECJ catches that the EU member concerned has not fully complied with its judgment, it may enforce on it a fixed or periodic financial consequence. In the same way, in cases of miscarriage to inform the Commission of measures moving directives adopted by a legislative procedure, the ECJ may legally enforce a pecuniary penalty.

Currently, when assignment control are rightly supposed as major concerns for the controlling of the EU laws, regionalisation through clear act doctrine or sector entrustment to national courts are mostly recognised strategies, even though their backside is likely to result in a lower or less well-versed application of Community law. Application of clear act doctrine has therefore exposed

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surprising mistakes, because of the way the Constitutional Court carrying out its review on justification. Most importantly, its implementation of the principles of review usually engaged in domestic issues have seemed unreliable with the objection of the ECJ, placing EC laws in its detailed context and interpreting it in light of its purposes.48

5 The causes of Ultra Petita

In general, Ultra Petita not only has created a significant impact to Indonesian legal system, but also to the constitutional rights of Indonesian citizen. The causes of Ultra Petita have been indicated by several factors, including the judges, the approach of judicial interpretation, the undisclosed recruitment process, and political interference, as discussed below.

The judges

The ICC judges’ decisions have received praise and criticism for their judgments’. The ICC has nine judges: three derived from representatives of the DPR, three from the President, and three from the Supreme Court. The three judges coming from Supreme Court have more experiences from their judiciary record. In contrast, the six judges representing the DPR and President have a lack of judiciary experiences, some of them none at all. This is because most of them come from different backgrounds, such as academician, politician, and solicitor or barrister. For educational qualification, a master degree can register to be ICC judge although does not have experience in judicial mechanism. This policy has potential chance to create Ultra Petita, because of lack understanding on constitutional court (ICC 2015).

The ICC’s Act not clearly stated on what mechanism can be used for selecting the judges, making it hard to select a judge with integrity. Moreover, the three states organs representing the ICC’s judge do not have a specific regulation regarding the recruitment mechanism (ICC 2003). The judges from DPR and the President have lack experience in tribunal process. Most of them have not been trained before becoming a judge, and also do not have knowledge background in

B. American Model Judicial Review

Before the idea of establishing constitutional court was developed, in fact, the idea of constitutional review or judicial review (an act reviewed by judge) was ever practiced by the Supreme Court of the United States since the early 19th century, precisely the case of Marbury vs Madison, judged by the Supreme Court of United States in 1803.

Since that time, the idea of constitutional review and judicial review invite a controversial debate in the legal discussion, chiefly, debate on the rights of judge to interpret the constitution. Indeed, the idea eventually has been accepted as a necessity in practice in all modern democratic country in the world until now; known widely as the American model judicial review.

In this model, the constitutional review has been entirely run by the Supreme Court with the status as the guardian of the constitution. In addition, according to the doctrine, which then can also be referred to as the doctrine of John Marshall (John Marshall’s doctrine), judicial review have also conducted on the issues of constitutionality by all ordinary courts, through a procedure called a decentralized or diffuse or dispersed review in the cases examined in the ordinary courts.

That is, such review, non-institutional as a stand-alone case, but included in the other cases being examined by the judge

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constitutional law. Usually they follow the ICC-judges-selection because are not elected as parliament members. Some cases have happened in the selecting process of ICC judges, where the judge candidate who was unelected in the DPR selection, will often be switched to the President selection, because the President selection process is very simple, only needing a political and personal approach compared with the DPR, who have cognitive and interview tests (Patrialis Akbar 2014).

The approach of judicial interpretation
The judicial interpretation in the ICC is supposed to be based on the constitution. However, the ICC’s judges have used international conventions instead of constitution, such as referring Protocol to the International Covenant on Civil and Political Rights, Aiming At The Abolition Of The Death Penalty (ICC 2007). Another example can be seen in the case of supervising the ICC’s judges, where the word “judges” stated in the Act of Judicial Commission excludes the ICC’s judges. The excluding of ICC’s judges has made ICC’s judges more superior, and cannot be supervised through Judicial Commission (ICC 2006).

From those cases, it seems that the ICC has used unlimited interpretation in making a judgment. It means that the interpretation has come purely from the judges understanding and interpretation, without considering acts, regulations, and even the constitution itself. The unlimited interpretation has made a diversity of meaning, and is also vulnerable to misuse for personal interest, such as happened in the Akil’s case. In this case, Akil has used unlimited interpretation to get some cash from election cases.

The undisclosed recruitment processes
The undisclosed recruitment process has commonly occurred. This secret process can select a judge who can collaborate with political party that selecting a judge. Thus, this kind of judge have chance to produce Ultra Petita judgment if required by someone who selected him previously. It can be seen from the elected judges, in all layers of the court. Therefore, by scholars, the American model is also commonly referred to as decentralized model.

The constitutional review, which has been conducted in a spread constitutional system, can be categorized as a posteriori review. It means that the judgment has only a final binding on the parties involved in the case (inter parties). It has an exception in the framework of the principle of stare decisis, however. This principle requires the court at a later bound to follow a similar judgment, which has been judged previously by another judge or in other cases. Meanwhile, the Supreme Court in the system provides a mechanism for the unity of the system as a whole (the uniformity of jurisdiction). In essence, a judgment regarding the unconstitutionality of an act is declaratory and retrospective.

In terms of institutional perspective, judicial review system carried out by the Supreme Court of the United States is clearly different from the same tradition in Austria. In the US system that adheres to the tradition of common law, the role of the judge is very importance, particularly in the law-making process in accordance with the principle of precedent.

Even the law in the common law systems have usually referred to the judge-made law. Therefore, when John Marshall initiating the practice of constitutional review of an act by the Supreme Court, previously the judges at all levels in the United States has inherited the tradition of reviewing or overrides the enactment of an act. This is considered contrary to the ideals of justice in examining each case faced to the judges. This fact has described that the role of judges in the United States have significantly influenced the law enforcement.

The amount of legislation, moreover, in common law

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49 *Stare decisis* is essentially the doctrine of precedent. Courts cite to *stare decisis* when an issue has been previously brought to the court and a ruling already issued. [http://www.law.cornell.edu/wex/stare_decisis](http://www.law.cornell.edu/wex/stare_decisis), diakses 26 Februari 2015. See also Jack Knight and Lee Epstein, "The Norm Of Stare Decisis," American Journal of Political Science, Vol. 40, No.4, November 1996, hal. 1018-1035.
Patrialis Akbar (Patrialis Akbar 2017) and Maria Farida, who have been elected by
President without any fit and proper tests, leading to public protest and a lawsuit in
the Administration Court, which decided that the recruitment process invalidated.

In this case, the Administration Court was giving a consideration that the
recruitment process should be publicly declared, instead of being hidden by the
President. ICC’s judge is a public office; consequently, the public should know all of
the process, from the beginning (Akbar and Maria 2013). The judges have continued
their job pending on appeal to the Supreme Court. Morally, they should be
suspected, respecting the first judgment from the Administration Court because
publicly they are unaccepted for the judge position.

Another incongruity was Akil selection process behind closed doors violating
the ICC-judges-selection, because the quota of DPR attended members was
insufficient. Also, in that time, Akil did not attend the fit and proper test, as is one of
the requirements to becoming an ICC judge (Martin 2014). Usually, as the state organ
having authority to select the ICC judges, the DPR starts the selection process by
publishing in public media, including newspapers, television, and so forth.
Furthermore, the selected candidate fulfilling all of requirements will be attending the
fit and proper test in the DPR, but being extended. He was caught-red handed by the
Corruption Eradication Commission accepting bribery in an election dispute case.

The political interference
Akil’s case have indicated that political interference has contaminated ICC’s
judgment. Akil have made a confession that he designed to make Ratu Atut as the
winner of governor election in Banten. Akil and Ratu Atut have known later as a
colleague in Golkar Party. As reported by the head of Corruption Eradication
system is not as much; if compared with the tradition of civil law
in Europe Continental, that from time to time the parliamentary
institutions have continuously produced a written rules, such as
act, decree, provisions, and so forth. Therefore, the application
of judicial review or constitutional review system does not
require a new institution, but simply associated with function
existing Supreme Court. The Supreme Court, in this
circumstance, will act as a guard or protector of the Constitution,
commonly known as the Guardian or Protector of the Constitution.

The American’s judicial review has clearly shown that the
democratic values could own a sharp effect on societies. The
democracy and constitutionalism could be at balances. By
reinforcement the proper instruments by which peoples grip
courts responsible, polities can decline the informal instruments,
by which attention groups pursue to shape constitutional
sense.

The courts, which are reviewing the laws, have the
obligation to be appropriately free from the interest group of
politics to hold legitimacy; but it is not so free as to challenge
popular input into constitutional evolution. The courts have to
play a positive long-standing part in preserving constitutions.
The judicial freedom has to be optimized, not maximized.

When judicial review has widely spread around the
world, the American system assisted as model and anti-model.

Commission, Akil abused his power in several provincial election cases (Abraham 2014). The warning of abuse power by Akil had been indicated since 2010, until in October 2013, his was caught red-handed receiving an amount of money from provincial election cases, namely the provincial elections of Lebak and Gunung Mas. Thus, interference of a political party does occur, and the ICC has no mechanism to prevent interferences. Six judges of ICC have potential to be interfered by political interest. Those six judges have selected through political process by political party and president. Thus, the selected judges have been indebted to political party and president. This causes several judgments vulnerable to be dictated by political attention. For future ICC judges, special arrangement is needed to select them, including their relationship with political party.

The modern constitution-makers have to draw from a relatively different from those animating the framers of the American Constitution. As a consequence, most other nations have accepted different and stronger rules with which to embrace courts politically responsible. The courts overseas, as in the United States, are governmentally powerful and their judgements may irritate the citizens. Any political reaction motivated by this development in judicial power, nevertheless, is possible to take a different form than it ensures in the United States. In particular, interest groups are less likely to compete over activities overseas than in the United States.

Some academicians have miscarried to correctly escalate the exceptionalism of the US Supreme Court, because they have principally overlooked on why judicial review was changed when it spread around the world. Because of this miscarriage, it has a lack of judicial responsibility. In fact the constitutional courts could be responsible either ex ante or post facto. Ex ante controls stay appointment instruments; post facto controls contain amendments and a legislative dominate of judicial decisions. Furthermore a political liability, whether ex ante or post facto, could be either weak or strong.

The US Supreme Court, unfortunately, is weakly

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56 The term ex-ante is a phrase meaning before the event. Ex-ante is used most commonly in the commercial world, where results of a particular action, or series of actions, are forecast in advance (or intended). [http://en.wikipedia.org/wiki/Ex-ante](http://en.wikipedia.org/wiki/Ex-ante), accessed 27 February 2015.
57 An ex post facto law is a law that retroactively changes the legal consequences (or status) of actions that were committed, or relationships that existed, before the enactment of the law. [http://en.wikipedia.org/wiki/Ex_post_facto_law](http://en.wikipedia.org/wiki/Ex_post_facto_law), accessed 27 February 2015.
59 There are other procedures of general control, such as impeachment or parliamentary control over prerogative, however they have largely dropped into neglect both in the United States and overseas as they have weaken judicial freedom. John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," *New York University Law Review*, Vol. 77, No.4, October 2002, hal. 962.
accountable both *ex ante* and *post facto*. Validation of presidential appointments by the Senate only needs majority agreement. It allows factions to have a real voice in appointments. The unnecessary independence gave the US Supreme Court and the difficulty in amending the Constitution.\(^{60}\) It will make the Supreme Court an alluring target for interest group capture.

Parties which care totally about the sense of the Constitution have no options except struggling over their appointments. Supreme courts are toughly liable, conversely, if their judgments can be more eagerly overruled, or if judicial actions replicate the wishes of a dominant one.

As the comparison, the political court model of judicial review, known as the constitutional court, has been adopted by Germany for the implementing constitutional democracies. The Germany’s model illustrates the significance of *ex ante* controls; whilst the Canada’s model illustrates the value of *post facto* controls.

### C. The South African Model Judicial Review

Following the success story in Europe, several African countries, chiefly South African, have formed to transplant constitutional review mechanism ruled by single court called the constitutional court. After amending its constitution, the South African’s scholar finally agreed to establish the Constitutional Court in 1993, which is positioned strongly in the constitution as the Superior Court.

This model is very different compared with European’s model constitutional court. The South African’s model Constitutional Court has not only able to review the act against the constitution, but can review the ordinary cases which are

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\(^{60}\) The United States has one of the most difficult constitutions in the world to change, as super majority agreement is required both in Congress and among the states. The difficulty of changing the Constitution is demonstrated by the fact that the Supreme Court has produced substantial public opposition but has been overruled only four times by amendment. See Donald S. Lutz, *Principles of Constitutional Design*, Cambridge: Cambridge University Press, 2006, hal. 171.
at the main problems connected with drafting, interpreting, and applying legislation, though there are many lesser problems (Bennion 2009).

Furthermore, juridical formalism allows courts to conceal legal improvement under the guise of constitutional interpretation. The shift from formalism to balancing marks a key transition in the emergence of courts as self-confident actors have a creative role in constitutional maintenance (Miguel Schor 2009).

Above all, the decisions handed down by courts are self-validating in the sense that they situate themselves within a context representing the source of their authority. Authentication is a co-operative social process in which legal theory generates an evolving structure of reasoning. Responding this fact, Alexander insisted what remains from pluralism and cosmo-pluralism, unless they are recast as a version of monism, is the mutually assured trust in capacities of problem solving. This self-confidence is shared among networks of international actors whose free-floating and self-ascribed authority lacks an impeccable legal pedigree. (Alexander 2012). Thus, the basic philosophy behind the establishment of a constitutional court is to protect the constitutional rights of the citizen. The constitutions are often seen as creating a closed and hierarchically organized system of law. Constitutional systems are taken as closed to claims of legality from outside the system, setting forth a hierarchy of norms and institutions within the system. This consolidation of authority is predominantly associated with a radical political reestablishment of the state.

Furthermore, the constitutional rights have the character of individual rights against the DPR; they are positions which by definition form legislative duties and limit legislative powers (Daniel 2012). Similarly, the mere existence of a constitutional court has created legislative breaches of duty, and also has abused of powers for constitutional reasons. The establishment of constitutional court does not mean a jurisdiction transfer from parliament to constitutional court. If the constitution grants to the individual rights against the legislature and intends there to be a

appealed from ordinary court as well. The structure of the Constitutional Court, furthermore, is headed over by the Chief Justice, the Deputy Chief Justice and nine other justices. A material carried before the Constitutional Court must be received by at least eight judges.61

The court hierarchy in South Africa is fixed out clearly in Section 166 of the Constitution of the Republic of South Africa, 1996 (the Constitution).62 The courts are (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Court of South Africa, and (d) the Magistrates’ Courts.

In terms of sec 6 of the Superior Courts Act 10 of 2013, the High Court contains of nine divisions, one for each of the nine provinces of South Africa. The High Courts, the Supreme Court of Appeal and the Constitutional Court are known as the Superior Courts.

The Magistrates’ Courts run as courts of first instance in less serious matters at the level of the city or district. High Courts work as courts of first instance in serious matters at provincial level. Appeal lies from the Magistrates’ Court to the High Court of the province. From the High Court appeal lies, with leave having been approved, to the Supreme Court of Appeal and/or the Constitutional Court (as courts with national jurisdiction).

The first case handled by the Constitutional Court was about the constitutionality of the death sentence;63 which being a sensitive debate in human rights discussion.64 That was a

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constitutional court in the field of legislation to uphold these rights is not an unconstitutional assumption of legislative competence; it is not only constitutionally permitted, but also required (Robert 2002). In this context Comella have insisted that constitutional courts cannot be a passive court when reviewing legislation. Constitutional court judges cannot easily abstain from ruling on constitutional matters that they might otherwise wish to avoid; nor can be extremely deferential toward the governmental majority. Despite some dangers, this tendency toward activism is not a trait we should condemn (Victor 2009).

The impact for the parliament
The DPR as the lawmaker has always been involved in judicial review by ICC, which has to give attention and consideration in earnest testimony given by the DPR as the lawmaker. Instead of being a good partner, the DPR is a state organ which has been aggrieved by ICC judgment. Thus, ICC judgment has reduced DPR sovereignty and positioned DPR as one of weak state organ not as the strong organ, although having sovereign power and as representative of people power.

The process of act legislating is a parliamentary process, related closely to the political bargaining or the majority domination, which is potentially to bring into legal inconsistency against the constitution. For this reason, most Indonesian scholars are fully aware, that the judges have to be involved throughout the process of democracy, chiefly to protect the constitution. Furthermore, constitutional court has function as agent of constitutional rights. These courts, when considered as functional solutions to the mixed dilemmas of contracting and commitment, appear to conform, paradigmatically, as it were, to the delegation theorist’s preferred logic of institutional design (Alee Stone 2002).

In contrast, the National Legislation Program designed yearly has seemed that the DPR has tended to avoid an act affected by the ICC judgment. For instance, the Electrical Power Act invalidated in 2004, and the Truth and Reconciliation Act invalidated in 2006, those acts had not been redrafted until 2014 by the DPR (National Legislation 2014). Even though, DPR has redrafted and made a new one, the ICC still has power to annul or invalidate it again in the future. Because ICC has debatable question, which the legislators should have decided during the provisional discussions, but opportunistically absent for the Court to decide. Under the conditions, the job of the Court was to approach constitutional value from political realism.65

As the superior court, therefore, the Constitutional Court has strongly lined the legislation, powering the death sentence, was unconstitutional. These cases have not only strained responsiveness to the difficult connection between the Constitutional Court and the political divisions of government, but also between the Court and other Superior Courts within the jurisdictional division of government itself.

Most of the matters coming before the Constitutional Court are referred to it on appeal from the Supreme Court of Appeal or the High Court. There are, however, certain kinds of constitutional substances, which are kept for the exclusive and original jurisdiction of the Constitutional Court, and which are introduced only in the Constitutional Court. Thus, the Constitution have clearly arranged the jurisdictions, that only allowed;

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<td>(a)</td>
<td>decide disputes between organs of State in the national or provincial sphere concerning the constitutional status, competence or duties of these State organs;</td>
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<td>(b)</td>
<td>decide on the constitutionality of any parliamentary or provincial Bill, but only in terms of section 79 or 121;</td>
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<td>(c)</td>
<td>decide on an application brought by members of the National Assembly or a Provincial Council for an order declaring all or part of an Act unconstitutional in terms of section 80 or 122;</td>
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<td>(d)</td>
<td>decide on the constitutionality of any amendment to</td>
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power to interpret the Indonesian constitution independently, and ensuring the application constitution through ICC judgements (Carías 2011).

This implies that the presence of the ICC has not only manufactured positive impacts in the Indonesian judicial system, but also has created a long debate over the interpretation over the 1945 Constitution. The subjective interpretation of the constitution has been made by the judges. This has indicated that the position of the ICC is equal with the supremacy of the 1945 Constitution, even in some cases are higher than the 1945 Constitution.

The impact for the president
As the holder of executive power, the president directly affects the ICC’s judgments because he constitutionally has the role as the partner of the DPR. Although the legislator is constitutionally parliament, in the process of discussion with the DPR in matters such as mutual consent, the president plays a large role, and so is also involved in the process of the legislation of an act. For the President, the ICC judgments moreover are hard judgments. This means that the President must implement what the ICC judgments order to do, including to solve dispute amongst state institutions, dissolution political party, dispute on general election, and impeachment issues.

For instance, ICC have reviewed the Act Number 22 of 2001 on the Oil and Earth Gas, that have indicated to break the Article 33 in the Indonesian’s constitution. The ICC, significantly, has made other breakthroughs in protecting energy security, most importantly, the annulment of some articles in the Act Number 22 of 2001 on the Oil and Earth Gas. In its judgement ICC stated that the function of the Executive Organ (Badan Pelaksana) in the act is against the constitution. Consequently, the function of the Executive Organ has reduced a stated role in ensuring and controlling the distribution of the oil and gas, which could have a deep impact on the providing the Constitution;

(e) decide whether Parliament or the President has failed to comply with a constitutional obligation;
(f) certify a provincial constitution in terms of section 144 of the final Constitution.66

All matters concerning constitutional issues other than those listed above will initiate in a High Court, unless the Constitutional Court grants an application for direct access to it. No order of unconstitutionality given by the Supreme Court of Appeal, a High Court or a court with similar status is lawful until that order has been confirmed by the Constitutional Court. Thus, it takes the final decision on the constitutionality of an Act of Parliament, a provincial Act or the conduct of the President.67

If compared with the Indonesian Constitutional Court, which is easily invalidating an act, nevertheless, the South African Constitutional Court is obligatory to approve any order invalidity of an Act of Parliament,68 a provincial Act or conduct of the President ‘made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.69

66 South African Constitution, Section 167(4).
69 South African Constitution, Section 167(5).
of energy security in Indonesia (ICC 2012).

On its decision, the ICC explained that the act was unconstitutional and does not have a binding power. The ICC asserted that the act had openly liberated the oil and gas management, because of influence by foreign parties. The unbundling method, separating upper course and lower course, indicates that the strange parties want to split national industry on oil and gas. So, the foreign company can easily occupy the oil and gas industry in Indonesia. In this case the president was quickly to react, responding by making a new president decree.

**The impact for the Supreme Court**

Like other judgments, the Supreme Court has also been affected by the ICC judgment. Constitutionally, the Supreme Court has to fully obey all of the ICC judgments. However, the Supreme Court has sometime seemed reluctant to fully obey ICC judgments, in some cases even ignoring a judgment. This can be seen in the Dr. Bambang’s case, where the Supreme Court made judgment based on an article abolished by the ICC in 12 June, 2007, which was nevertheless used by the Supreme Court in 20 October 2013 (ICC 2007). Dr. Bambang was sentenced to 18 months in prison (Imam Anshori 2014). Responding this case, the Judicial Commission has suggested Dr. Bambang to use the appealing mechanism to final stages for reconsideration. The Commission has seriously concerned to the case, and has also looked further indication of violation code of conduct and undignified behaviour by the Supreme Court’s judges.

From that case, it can be analysed that the ICC judgments has not widely impacted to the Supreme Court. Because the ICC does not have power to force its judgment to be implemented by other state institutions. On this it seemed that the ICC’s judgments were voluntarily judgments, which only have power to be obeyed voluntarily. In this case, the Supreme Court has seemingly classified the judgment as soft judgment, which is allowed to not be immediately implemented after the judgment is declared by the judges, even displaying a tendency to ignore the judgment.

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**The arrangement of Ultra Petita in ICC ordinance**

Ultra Petita is a serious violation for the existence of the ICC. Constitutionally, there are no single acts or other regulations allowing the ICC to decide more than what is

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### III. Analysis

#### A. Comparative Analysis of European and American Model Judicial Review
asked for. As stated in ICC’s Ordinance, every request has to be clear in its legal standing, containing the plaintiff claim on the rights and authorities in the constitution which has been aggrieved by the implementation an act (ICC 2005).

The legal uncertainty in ICC procedural law creates difficulty for the ICC judges. For the time being, the procedural law implemented in the ICC is the ICC’s Ordinance Number 06/2005 on the Guidelines for the Hearing Judicial Review Cases. This procedural law still does not arrange the limit of Ultra Petita that allowed in the ICC.

For this reason, ICC has adopted other countries experiences, justifying the need of Ultra Petita. The ICC has also stated “public interest” as the reason for the legal background of establishing Ultra Petita. They have interpreted that, if the public interest is more important than the plaintiff’s claim, then the judges can expand their jurisdiction to protect public interest (Ha posan 2010). This point of view is highly subjective, the judges could decide anything on behalf of public interest, although this does not happen. The situation can lead a judge becoming an authoritarian person with his interpretation power.

Responding to the superiority of ICC, Mahfud MD stated that the Ultra Petita has not only been forbidden in the civil court, but has also been restricted in the ICC; because if Ultra Petita has been allowed in the ICC, all contents in the act could be reviewed, although not asked for. In this situation, the ICC can justify that it is very important and necessary for public interest (Mahfud MD 2007).

Therefore, even though the ICC has been given the mandate by the constitution as the single interpreter of constitution, it does not mean that its interpretation can be made in a limitless manner, including using other resources.

The legal academicin in Europe have begun to think on the effects of American constitutionalism in the nineteenth century. American constitutional concepts, including judicial review and constitutional review, have widely played an essential part in the debates of the German National Assembly in Frankfurt in 1848. The Frankfurt Constitution has suffered political defeat, but it has become one of the most important texts for the upcoming of German democratic constitutional improvement.

Whilst the optimism of American's model have dominated the debates on judicial review in Frankfurt, the pan-European debate have taken into account a diverse and more realist. An effort adopting American’s model have been ultimately conquered by scholars, who argued that conservative courts in the United States had derailed needed social legislation.

One of the important person in the European argument on judicial review is Hans Kelsen. He has clearly faced two substantial problems in theorising on how judicial review might fit in mainland Europe’s constitutional and political background. Firstly is that the civil law courts have had not eye-catching organs to provide with the authority of constitutional interpretation; because those courts have been operated daily by civil servants, who have been ideologically accustomed to being passive to legislatures. It has have been required in that time

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71 ibid. at 194-201.

72 See also Helmut Steinberger, American Constitutionalism and German Constitutional Development, New York: Columbia University Press, 1990.


instead of the constitution, demolishing supervising mechanisms, and becoming more supreme than parliament.

In carrying out its duties and responsibilities, the ICC must follow the existence of rule of law, instead of rule by law. In rule of law, the law is something the ICC serves; in rule by law, the ICC uses law as the most convenient way to judge and interpret. Otherwise, the ICC would truly be the state organ called 'the superior one.

was a specialized constitutional courts. It has been expected to voice independently, authoritative voice\(^\text{76}\) and holding equal self-respect with the legislature.

Secondly was the impact of Second World War. The governments in Western Europe were not only controlled over constitutions, but also the political systems. The success of judicial review in Europe centred, therefore, on filling both legislators of the judiciary and justice power, and a pan-European association of protruding legal intellectuals who preferred installing American judicial review on the region.\(^\text{77}\)

Kelsen’s visionary answer was to reject the American idea that the constitution was types of law and to hold its political nature.\(^\text{78}\) He said that whilst legislatures have strongly engaged in the positive law making, the authority to declare regulation unconstitutional was also a form of law making, though a purely negative one.\(^\text{79}\)

The supremacy of constitutional courts would, therefore, be constrained by carefully drafting constitutions to eliminate from justice capability in the general principles, particularly, equality, justice, and liberty.\(^\text{80}\) Kelsen claimed that in the field of constitutional justice, such principles can play an extremely dangerous role.\(^\text{81}\) In brief, judicial review was essential to influence horizontal and vertical the idea of separation powers;


\(^{81}\) *Ibid.*
however the courts would gain too much influence if they had a wide-ranging authority to create rights.\textsuperscript{82}

Kelsen’s awareness to border the power of courts to interpret rights was disallowed in post-war Europe. The aspiration to contract with the fears of the Second World War has managed Germany and other continental democracies to hold a comprehensive set of judicially enforceable rights.\textsuperscript{83} His heritage is detectable, however, in the three structures have illustrated the political court model of judicial review, that adopted by the democracies of Western Europe after the war. Those structures are; \textit{firstly}, the judicial review mechanism has been focussed in the one constitutional court; rather than distribute diffusely throughout the judicial system as in the United States. \textit{Secondly}, the judicial review has not required a case or controversy. As legislation can be revised conceptually before it drives into result; and thirdly is the appointment requiring a legislative super-majority.\textsuperscript{84}

The legal scholars have dropped substantial ink arguing the comparative merits of concentrated versus diffuse review, and intangible versus tangible review, and whether these transformations lead to an overly debated form of judicial review.\textsuperscript{85} However, these differences finally might not substance as much as imagined by legal scholars; since both supreme courts and constitutional courts have really done an allowable job of effectuating rights and moving political criticism.

The dissimilarity that does substance is the one that legal academician mostly overlook, which is that activities to a


A super-majoritarian position mechanism has respited on a diverse idea of democracy, than does a majoritarian instrument. Democracy can unpleasant either regulation by a bare majority or regulation by as many as possible.\textsuperscript{89} Majoritarian democracies have inclined to be more discordant than those requiring a higher degree of agreement.\textsuperscript{90} The worth of agreement is sufficiently explained by how super-majoritarian choosing procedures have prohibited the divisive political choosing battles, which have developed familiar in the United States.\textsuperscript{91} However, in the Europe did not answer the problem modelled by \textit{Lochner}—that peoples are sometimes intensely frustrated by judicial judgements—but it did better the malicious significances of \textit{Lochner}-type judgments by dampening the supremacy of parties to form judicial activities.

B. Using Extra-Systemic Evidence in Interpreting

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\textsuperscript{87} Christine Landfreid, “The Selection Process of Constitutional Court Judges in Germany” in Kate Malleson & Peter H. Russell, eds., \textit{Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World}, Toronto: University of Toronto Press, 2006, hal. 196.


\textsuperscript{90} Ibid. at 300-08.

\textsuperscript{91} Another aspect playing a part in reducing the authority of parties is that amendments in Europe usually need only a super-majority in parliament so that constitutional court judgment can be more readily dominated than in the United States. See Donald S. Lutz, \textit{Principles of Constitutional Design}, Cambridge: Cambridge University Press, 2006, hal. 171.
Constitution

The Constitution established post-apartheid South Africa is the only one having an express provision, which have allowed the judges to usage an extra-systemic evidence for interpreting the constitution. In the Section 39 of the 1996 Constitution states clearly the position of Constitutional Court. Specifically, when the Court interpreting the Bill of Rights have to uphold the principles that underlie an open and democratic society; and also must consider international public law and may take foreign law into consideration.

Section 39 of the 1996 Constitution has also empowered the judges to integrate extra-systemic legal information for interpreting the post-apartheid Bill of Rights. Because of this provision, the South African Constitutional Court established an innovative hermeneutical technique based on extra-systemic inferences. This section in fact has been seemed to reinforce the openness of the South African constitutional system toward extra-systemic sources by eliminating the criteria of evaluating the applicability (‘where applicable’) of international public law or foreign law.

For this reason, South African constitutional judgement has become one of the most fascinating on a world-wide level; because the judges in Johannesburg had to challenge the problem of systematically setting up the criteria and bounds of this practice.

Regarding the Section 39, Dugard state that there are

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93 South African Constitution, Section 39.
three main reasons for adopting the provision into the constitution. The regime had intentionally disregarded international values on fundamental rights mankind.

Formally is the exploration for international arguments of orientation, which is accomplished of assisting the interpretive effort of a new constitutional version. It has directed the Constitutional Court to articulate a particular form of past interpretation of the Constitution intended at bracing the common law of the 1910 South African Union; which moderately known the rights and guarantees of non-white people.

Lastly is the consciousness of presenting judicial review in South Africa that require a period of lawful and cultural understanding. The change of the whole legal structure has already had a main effort for all the members in the South African legal structure. It has also introduced the constitutional justice, in particular, in developing a pedagogical approach for participants of the regular judiciary and the constitutional judges themselves.

In the opening, the constitutional judges made tutorial and descriptive efforts to explain in detail constitutional procedural law. This method is described by the fact that judicial review, which was previously strange in the South African system, required grounding and agreement among the various legal actors.

### Conclusion

Ultra Petita judgment has received many criticisms, which addressed judges as the key actor. Regarding constitutional practice in the ICC, Ultra Petita judgments are not based on the original intent of the constitution, and the ICC has widely expanded its

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jurisdiction, not only reviewing or analysing, but also invalidating or annulling all over of act.

The Ultra Petita judgments’ can be classified into several categories; namely, 1. intervening parliament’s jurisdictions; 2. judging itself; 3. reviewing president decree; 4. inconsistent on judgment formats; 5. invalidate all over act; 6. incorrect judgment code; 7. intervening supreme court authorities; 8. judging based on other countries experiences; 9. judging based on scholar theory; and 10. adding jurisdiction in handling provincial and district election.

So far, the Ultra Petita has been caused by several aspects; namely, 1. the judges; 2. approach of judicial interpretation; 3. undisclosed recruitment process; and 4. political interference.

The ICC’s Ultra Petita has slightly manufactured the positive impacts in the Indonesian judicial system, rather than creating negative impact. The clear impact is a legal uncertainty, because an annulled act as a result of Ultra Petita cannot be replaced in the near future. Therefore, the DPR has tended to avoid an act affected by the ICC judgment. For instance, the Electrical Power Act invalidated in 2004 and the Truth and Reconciliation Act invalidated in 2006 have still not redrafted by the DPR until 2014. This can be understood. If the DPR had redrafted and made a new one, the ICC would still have the power to annul or invalidate it again in the future.

As the part of executive institution, President has also been affected by the Ultra Petita, because of his role as the partner of parliament. In process of law making the legislator is the DPR but the President still plays a significant role and also involved in the process of the legislation of an act.

In the Supreme Court, by contrast, the ICC judgments’ have not strongly impacted. The Supreme Court has seemingly classified the ICC’s judgment as soft judgment, which is allowed to not be implemented immediately after the judgment is declared by the judges, even displaying a tendency to ignore the judgment. The ICC does not have power to force its judgment to be implemented by other state institutions. On this, it seemed that ICC judgments’ have looked like voluntarily judgments, which only have power to be obeyed voluntarily.

In terms of a supervising mechanism, the recent mechanism has a crucial weakness. The judge monitoring mechanism basically involves two supervising bodies, namely, the internal monitoring supervisor, and external monitoring supervisor (which involves institutions outside the organizational structure). In order to review all regulations under the constitution, because share his power with the Supreme Court to review the regulations under an act. Whilst the ICC is reviewing an act against the constitution, the Supreme Court is reviewing the regulations under the acts. These two ways of judicial review is vulnerable to overlapping and creating a serious homework for the existence of ICC.

In addition, other variant of Austrian models need to be considered in developing ICC is the South Africa model, not only reviewing the act against the constitution, but also reviewing the usual cases appealed from ordinary court. Their extra-systemic legal source system can be considered to be adopted. This mechanism in fact has been looked to reinforce the directness of the South African constitutional system toward international law or imported laws. By taking this method, the ICC does not have to be afraid anymore for violating the constitution. This situation was happened when the ICC took the international covenant as the consideration of their judgments whilst reviewing death penalty issues. To adopt the extra-systemic mechanism, consequently, the constitution must be amended.

The France's Constitutional Council has also influenced Indonesian's constitutional system. Their main task is advising the President to role its power under the constitution, chiefly, reviewing the regulations made by president. Recently, this institution is consisted of nine members, which is very small if compared with the previous one before the amendment having 45 members.

The existence of American model judicial review has raised a serious debate among legal scholar; whether suitable in Europe context or only appropriate in America. Responding this debate Hans Kelsen has given two substantial reasons; first of all, civil law court, which is practising judicial review in America, does not have a specific mechanism in providing constitutional
to uphold the honour, the dignity, and to maintain the behaviour of judges, the need of an independent agency to supervise judges’ behaviour and also be free from the interference of other institutions is absolutely necessary. This is a part of making good and clean governance. If not, the ICC will truly be the state organ called the superior one.

The ICC authority to handle provincial and district election has drawn too many critics. This jurisdiction has positioned the ICC as the ‘election bin’. With a limited number of judges, the court needs to decide cases within a limited time. In 2013, there were 178 provincial elections in Indonesia, of which more than 90% were brought to the ICC. This means, more than 160 provincial election disputes were brought to the ICC. If a year is 360 days, and excluding holidays and weekend is roughly 300 days, this means that every 2 days ICC had to judge 1 case of provincial election dispute. The session has only three times chances, and then hearing a judgment. With these statistics and logic, quality judgments’ and judicial fairness are almost impossible to achieve. The situation is vulnerable to abuse of power.

The main change that must be made regarding the ICC is changing the constitution, because the main problem of ICC is strongly located within the constitution—called the “Fifth Amendment of Constitution”. The main points for amending the constitution are; namely 1. the prohibition of judging beyond its jurisdictions, such as Ultra Petita; 2. centralizing the judicial review of regulations under ICC jurisdictions; 3. creating the mechanism of asking for constitutional opinion; and 4. supervising state organs. At this time, the supervising state organ has been abolished by ICC judgment, stating that the ICC’s judges did not find necessary a supervising body. This judgment makes an ICC judge vulnerable to abusing his power.

If we compare with another country such as Germany, it seemed that the court is not too bold in expanding its jurisdiction out of the regulations. Unlike the case of South Korea that is brave enough to largely expand its jurisdiction, because their regulations have allowed for it. In the context of Indonesia, the ICC does not have a tool, such as South Korea to expand its jurisdiction, but in practice ICC has regularly made its own tool to expand its jurisdiction, known broadly in Indonesia as Ultra Petita.

Finally, whilst waiting for the new amendment of the constitutional court, the ICC must return to the principle of black-letter law, deciding based on what is stated interpretation.

B. Recommendation
From above explanation seems that Indonesia almost adopts all of world model judicial review. It will raise a difficulty in its daily system. For instance, in the system of law review, delivering authorities for constitutional court and Supreme Court. An act can only be reviewed by Constitutional Court and regulations below an act can only be reviewed by Supreme Court. This dualism model judicial review is vulnerable to clash each other between these two courts, chiefly if having no system coordination and communication. One of recommendation to solve this problem is strengthening the information technology (IT) system using specific designed software. With this system the regulations reviewing in Supreme Court and having connection with an act reviewing in Constitutional Court will be stopped automatically. So, the regulation will not be proceed if still have link with an act testing in Constitutional Court. If this system not implemented, the clash of law review may be occurred, and Constitutional Court and Supreme Court can review a regulation having strong connection each other.
in the constitution, without expanding or interpreting more widely. This is one of the ways to prevent Ultra Petita in years to come. The ICC judges should be negative legislator, rather than the positive legislator.

**EndNote**

1. Obiter dicta (sometimes referred to merely as dicta), is a Latin expression literally meaning “said by the way” or a “statement in passing”. It is used for statements, remarks or observations made by a judge that re incidental or supplementary in deciding a case, upon a matter not essential to the decision. Thus, although they are included in the body of the court’s opinion, such statements do not form a necessary part of the court’s decision. Under the doctrine of stare decisis, statements constituting obiter dicta are therefore not binding, although in some jurisdictions, they can be strongly persuasive.

2. South Korea Constitutional Court Act, Article 45 (Decision of Unconstitutionality).

3. Marriage Office is called Kantor Urusan Agama (KU).

4. Article 43 Clause 2 the Act No.1 of 1974 on the Marriage, stated that Children born outside of marriage only have a civil relationship with her mother and her mother’s family.

5. Clause 2 Article 2 the Act No.1 of 1974 on the Marriage stated that each marriage has to register according to the act.

6. Peraturan Pemerintah Pengganti Undang (Perppu) is the president decree produced by president in the emergency situation. This decree is fully the rights of president to announce it, even though; the state situation is not really emergency. The rights to decide whether state in emergency or not are under president’s overviews.

7. DPR (Dewan Perwakilan Rakyat) is House of Representative of Indonesian. See [http://www.dpr.go.id/](http://www.dpr.go.id/) (Detailing information about the role of DPR)
8. In the Article 33 (2) imply that sectors of production, which are important for the country and affect a life of people shall be under the powers of the state.

9. Regarding relationship between the President and Parliament is regulated in the Indonesian Constitution Article 20 Clause (5)

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