ANGLIA RUSKIN UNIVERSITY

CONSTITUTIONAL COURTS AND LAW REFORM: A CASE STUDY OF INDONESIA

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In loving memory of my beloved parents,

the late Dra.Hj. Anisah Abdullah who passed away in the Boxing Day Tsunami 2004

and the late Tgk. H. Armia M. Ali, LML, MA who passed away two years after,

your endless love and support for seeking knowledge are always motivating me.

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ANGLIA RUSKIN UNIVERSITY
ABSTRACT

FACULTY OF ARTS, LAW & SOCIAL SCIENCE

DOCTOR OF PHILOSOPHY OF LAW

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This research investigates the constitutional practice in Indonesia through the Indonesian Constitutional Court (ICC). It has played a significant role in safeguarding the Indonesian constitution, indeed has acted more supreme than the constitution itself, through the approach known as the Ultra Petita. This issue requires a research and recommendation for law reform in the ICC. This topic has been analysed and compared from different angles, including other country experiences, ASEAN countries, and the ICC essential role in autonomous provinces.

The research applies several approaches. Firstly the comparative constitutional approach analyses the text of the constitution and how it is interpreted judicially. Supporting this approach, the researcher also uses the black-letter and socio legal approach, and observed personally the operations of the ICC in Indonesia, understand how the ICC operates and produces judgments.

The research has found that the ICC judges have been given authority to expand their jurisdictions by the constitutional system, which implies that some judgments have potentially violated the constitution itself. For the time being, regulations do not prevent ICC judges in making the Ultra Petita, because of the articles in the Constitution arranging the ICC. The nine members of the ICC have also had difficulty in managing its.

The research concludes that the ICC needs change, particularly through the amendment the constitution, namely; 1. The prohibition of judging beyond its jurisdictions, such as Ultra Petita; 2. Centralizing the judicial review of regulations under ICC jurisdictions instead of spreading in several states organ; 3.Creating the mechanism of asking for constitutional opinion; 4. Adding more judges, 5. Arranging all election mechanism, and 5. The supervising state organ.

Key Words: *Indonesia Law Reform, Constitutional Court, Ultra Petita*

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ABBREVIATIONS

APBD	—	Anggaran Pendapatan Belanja Daerah (Local Budget)
APBN	—	Anggaran Pendapatan Belanja Negara (National Revenues And Spending Budget)
ASEAN	—	The Association of Southeast Asian Nations
BPN	—	Badan Pertanahan Nasional (National Land Agencies)
BPA		Badan Pertanahan Aceh (Aceh Land Agencies)
BPUPKI	—	Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (Investigative Committee for the Preparation of Indonesian Independence)
DPA	—	Dewan Pertimbangan Agung (Supreme Advisory Council)
DPD	—	Dewan Perwakilan Daerah (Regional Representative Council)
DPR	—	Dewan Perwakilan Rakyat (House of Representatives)
DPRA	—	Dewan Perwakilan Rakyat Aceh (Aceh House of Representatives)
DPRD	—	Dewan Perwakilan Rakyat Daerah (Regional House of Representatives)
DPRK	—	Dewan Perwakilan Rakyat Kabupaten/Kota (District/City House of Representatives)
EC	—	European Community
ECJ	—	European Court of Justice
GAF	—	General Allocation Fund
GAM	—	Gerakan Aceh Merdeka (Free Aceh Movement)
HIR	—	Herzien Indonesis Reglement (Indonesian Revised Rules)
IC	—	Identity Card
ICC	—	Indonesian Constitutional Court
Keppres	—	Keputusan Presiden (President Decision)
KY	—	Komisi Yudisial (Judicial Commission)
MD	—	Mahmodin (Family Name)
MoU	—	Memorandum of Understanding
MPR	—	Majelis Permusyawaratan Rakyat (People's Consultative Assembly)
MPRS	—	Majelis Permusyawaratan Rakyat Sementara (Provisional People's Consultative Assembly)
Perda	—	Peraturan Daerah (the Provincial Regulation or Local Bylaw)
Perdasi	—	Peraturan Daerah Provinsi (Provincial Bylaw)
Perdasus	—	Peraturan Daerah Khusus (Specific Provincial Bylaw)
PERPPU	—	Peraturan Pemerintah Pengganti Undang-Undang (the president decree produced by president in the emergency situation)
Perpres	—	Peraturan Presiden (President Decree)
PP	—	Peraturan Pemerintah (Government Decree)
RBg	—	Rechtsreglement Buitengewesten (Regulations for Outside Java)
RSF	—	Revenue Sharing Fund
SAF	—	Special Allocation Fund
SG	—	Secretary General
TRC	—	Truth and Reconciliation Commission
US	—	United State

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CHAPTER 1- INTRODUCTION

1.1. Introduction

The law and constitutional reform which began in 1998 have significantly changed Indonesian constitutional law. The researchers of constitutional law should be grateful because since the reformation era, law studies especially constitutional law, have rapidly developed. Furthermore, the development of constitutional law studies in Indonesia has continued in line with the amendment of the 1945 Constitution. During the period of 1999-2002 the amendment was carefully discussed for 2 years and 11 months, and then endorsed in four stages of the annual session of the MPR (1999, 2000, 2001, and 2002).[1]

Indonesia has adopted new principles in constitutional law, chiefly the principle of separation of powers, checks and balances, as well as protecting minority rights.[2] These principles have in part replaced the previous principle of parliamentary supremacy. Implementing the new principles requires specific judicial institutions operated by judges, to control as well as safeguard the political decisions, which are normally based upon the principle of the rule of majority. The function of the judicial review of legislation product is one of the main reasons for solidly embedding the Indonesian Constitutional Court (ICC) in the 1945 Constitution,[3] to prevent abuse of power by parliament.

The ICC's jurisdictions are regulated in the constitution and also in several ICC acts.[4] Those jurisdictions are; namely

a) testing a law against the 1945 Constitution of Indonesia;

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[1]The essential points of the amendment are: Firstly, amendment of the basic norms of statehood, particularly the assertion that the sovereignty is in the hands of the people carried out according to the 1945 constitution. Secondly is the amendment in the institutional state organs, creating the new organs and abolishing the organs inconsistent with the spirit of reformation. Thirdly is the amendment on the relationship among state organs, and lastly is the adoption of human rights principles. Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu* [Constitution and Law in the Controversial Issues]. (Rajawali Pers 2009) 187. See also Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press 2013) 246-258.

[2]Gary F Bell, 'Minority Rights and Regionalism in Indonesia-Will Constitutional Recognition Lead to Disintegration and Discrimination,' (2001) 5 Singapore Journal of International & Comparative Law 784.

[3]On 13August 2003 the Act No. 24 of 2003 on the Indonesian Constitutional Court was validated, and, this date is therefore the birth of the Constitutional Court of Indonesia.

[4]The ICC jurisdictions are also stipulated in the Act No. 24 of 2003 on the Indonesian Constitutional Court.

b) deciding disputes of the state institutions' authorities, granted by the Constitution of the Republic of Indonesia Year 1945;
c) dissolution of political parties; and
d) deciding disputes over election results.

The ICC is also obliged to examine alleged violations of law committed by the President and/or Vice President, which have been proposed by the House of Representatives. This obligation, known as impeachment, is incorporated in the Constitution.[5]

With those jurisdictions, the ICC has been publicly expected to play an essential role as the state organ implementing law reform.[6] However, the existence of the ICC has not always protected the constitution from implemented law reform, as the ICC has often tended to obstruct and expand its judgments outside of its authorities, as regulated by the 1945 Constitution and several acts.

This style of expanded jurisdiction is commonly known in Indonesia as the *Ultra Petita*. In certain cases the ICC not only reviews an article or a clause in an act, but also can invalidate and annul acts. In the last ten years, there has been at least ten cases identified as the *Ultra Petita*,[7] posing serious threats to the implementation of democratic values and also the rule of law – if the ICC can demolish acts with the Ultra Petita mechanism.

Such uncertainty can happen at any time, and *Ultra Petita* judgements have a serious effect on Indonesia's legal reform. *Ultra Petita* supporters claim that in the context of searching justice values the judges have to progressively decide a case beyond a legal text, instead of concentrating on text meaning.[8]

Additionally, Mahfud MD has argued strongly that *Ultra Petita* is parliament's domain as the positive legislator, and not in domain of the ICC, as

[5]See also the 1945 Constitution, in Article 7A and 7B.
[6]See also Timothy Lindsey, 'The IMF and Insolvency Law Reform in Indonesia' (1998) 34 (3) Bulletin of Indonesian Economic Studies 119-124.
[7]See also ICC Judgment No. 001-021-022/PUU-I/2003 on the Electrical Power; Judgment No. 05/PUU-IV/2006 on Judicial Commission; Judgment No. 10/PUU-VI/2008 on the Domicile Requirement for Candidates of DPD; Judgment No. 102/PUU-VII/2009 on the Presidential Election; Judgment No.30/PUU-VIII/2010 on the Mineral and Coal Mining; Judgment No. 32/PUU-VIII/2010 on the Mineral and Coal Mining; Judgment No. 46/PUU-VIII/2010 on the Case of Children Outside of Marriage; Judgment No. 006/PUU-IV/2006 on the Truth and Reconciliation Commission.
[8]Indonesia has developed the legal theory known as the Progressive Law, asserting law is not only in the text of several regulations, but judges have to deeply explore the justice, instead of concentrating only to the text. See also Satjipto Rahardjo, *Membedah Hukum Progresif [*Exploring the Progressive Law] (Penerbit Buku Kompas 2006).

the negative legislator.[9] Contradicting Mahfud MD, Jimly, formerly the ICC head judge, has defended the necessity for *Ultra Petita* in the ICC, arguing that the ICC can make the *Ultra Petita* if the clause or article in an act is the heart of an act.[10] During his period as the head of ICC, Jimly was well-known for invalidating several acts.

DPR members have contradicted Jimly. The effects can be seen after the judgement that the parliament neither redrafted the affected acts, nor brought them back to the sessions. The parliament members can argue that their efforts will be useless, since the ICC can annul them again. In the national legislation agenda, the acts affected by the ICC have increased gradually every year because the DPR hesitated to revise, but have tried to amend the ICC jurisdictions.[11]

Regarding the expanded jurisdiction of the ICC, Butt and Lindsey state that the ICC has acted beyond its power, trespassing upon other state organ jurisdictions, such as the Supreme Court. Several judgments have defined them as conditionally constitutional,[12] judgments not regulated in the constitution or the ICC acts. Mietzner has asserted that the ICC judges, playing judicial activism, have frequently created controversial judgments.[13]

Butt and Lindsey have not specified in which kind, or in which part of state organ jurisdiction the ICC has interfered. Even *Ultra Petita*, broadly discussed regarding the existence of ICC in Indonesia, is little touched. So the current research goes beyond Butt and Lindsay's discussion on expanded jurisdiction, exploring in detail in which state organ jurisdictions the ICC has interfered.

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[9]Moh. Mahfud MD, 'Rambu Pembatas Dan Perluasan Kewenangan Mahkamah Konstitusi [Barrier Signs and Expansion Authority of the Constitutional Court]' (2009) 4 (16) Jurnal Hukum 441-462.

[10]Jimly Asshiddiqie, 'Larangan Ultra Petita MK itu Keliru [Forbidding *Ultra Petita* is Wrong],' accessed 10 May 2015 <http://news.okezone.com/read/2011/06/16/339/469179/jimly-larangan-ultra-petita-mk-itu-keliru>

[11]Leo Tukan, 'Kewenangan MK Dipangkas Karena DPR Terancam [The ICC Jurisdictions Be Cut Because the DPR Threatened],' accessed 21 May 2015 <http://www.hukumonline.com/berita/baca/lt4e012e5c5a8f3/merasa-terancam-dpr-batasi-kewenangan-mk>

[12]Simon Butt and Tim Lindsey. *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing, 2012) 130-139; See also Simon Butt and Tim Lindsey, 'Economic Reform When The Constitution Matters: Indonesia's Constitutional Court and Article 33, (2008) 44(2) Bulletin of Indonesian Economic Studies 239-262; See also Susi Dwi Harijanti, and Tim Lindsey, 'Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court,' (2006) 4 International Journal of Constitutional Law 138; See also Simon Butt, *Corruption and Law in Indonesia* (Routledge 2011).

[13]Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court,' (2010) 10 (3) Journal of East Asian Studies 397-424.

The number of judges in the ICC (nine) has also created a significant debate. The overloaded cases, most importantly in the election season, were not in accordance with the capacity of judges,[14] leading to rushed judgments without deep consideration. A judge can disagree with the majority of the members of the assembly, and the opinion is included as an integral part of the court judgment (called a dissenting opinion). The debate on this matter is whether the dissent needs to be combined within a judgment, or would be better placed somewhere else.

The transition processes of jurisdictions have created other problems. Before the amendment, the Supreme Court (SC) had the judicial power to review all regulations. But after the amendment of the 1945 Constitution, the SC's jurisdictions in reviewing regulations have been limited. This transition process has not been smooth, with the SC reluctant to hand over the jurisdictions. Several ICC judgments have not been fully obeyed by the SC.[15]

The ICC can be said to be a legal transplant from the success story of other countries, thus learning from other countries experience is needed so as to understand theory on the constitutional court, so that the constitutional court does not diverge from its basic principles.

As a country located in the South East Asian region, Indonesia needs also to examine constitutional practice in that area so as to enrich its own constitutional reform. All countries in ASEAN have modified their constitutional practice with parliament, the Supreme Court, constitutional tribunal, and constitutional court - all places to review and examine the regulations, and, in extreme circumstance, to even annul or invalidate an act. Three main models of constitutional practice have been identified in ASEAN: the Westminster Model, the Socialist Model, and the Mixed Model, all of which are briefly explored in this research.

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[14]In a year the ICC have received more than 152 cases. This number can be increased in election years. Mahkamah Konstitusi, 'Inilah Jumlah Perkara Masuk ke MK [This is the Number of the Constitutional Court Cases], accessed 21 May 2015, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=3532#.VV2zxkZ8u1k>

[15]ICC Judgment No. 039/PHPU.C1-II/2009; Judgement No. 4/PUU-V/2007, *General Practitioner*. In this judgement ICC stated that the Articles 29 Clause (1); Article 36, Article 37 (2), Article 73 (1), (2), (3), Article 75 (1), Article 76, Article 77, Article 78, and Article 79 (a) the Act Number 29 of 2004 on General Practitioner is invalid and against the Constitution. In contrast, the SC still uses those articles as the legal sources.

The amendment of the 1945 Constitution has also had consequences at provincial level with legal delegation of autonomy rights, but with legal constraints upon those rights. This causes a regulation clash between central and local government, for instance, in Aceh Province (the author's home province). With the Act of Governing Aceh, following to the MoU Helsinki, Aceh Province has gained a special legal autonomous status, including rights to explore its natural resources. In fact, the rights are apparently not fully owned by Aceh, because central and local government do not yet agree on the revenue sharing mechanism, and the central government is unwilling to share the value of percentages as stated in the Act. As the guardian of the constitution the ICC should reinforce the general norms, but has remained silent in this situation.

1.2. The Basic Theory of Separation of Powers

Montesquieu is the constitutional law scholar known widely since the 18th century for his theory of Separation of powers. It derived from his concern to fight the absolutism of King Louis XIV in France. His theory was closely influenced by British philosopher John Locke in 1748, published in Two Treaties of Government.[16] It is important to the prosperous working of the government that the person assigned with power in any of the three organs (executive, judiciary and legislature) shall not intrude upon the other organs, or encroach upon their powers.[17] Holding state's authority in a person or a group will potentially produce a dictatorship, the governmental authorities must share and distribute in three different state organs. Every organ has to be independent from the others.[18]

Montesquieu's principle of separation of powers has received criticisms amongst legal scholars. They claim that it is hard to draw a clear line to separate the powers. Thus, in reality there is no pure separation of powers.[19] His opinion has been seen as a resistance to the absolute power at that time, Montesquieu also did not elaborate clearly upon how the powers control each other to prevent

[16]John Locke*, Two Treatises of Government Student Edition* (Mac Master University, 1823) 167-169.
[17]Martin H Redish, and Elizabeth J. Cisar, 'If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory,' (1991) Duke Law Journal 458.
[18]Charles De Montesquieu, *The Spirit of the Laws* (Digireads.com Publishing, 2004) 30.
[19]See also Greg Weiner, *Separation of Powers*, (The Encyclopaedia of Political Thought 2015)

overlapping. Resulting from this argument, the Montesquieu theory had great effect upon the development of administrative law throughout the world.

A clear example of this doctrine is found in the American constitutional system. The Congress has legislative powers; the President has executive power; and the Supreme Court and its subordinate courts have the judicial powers. Although America has preserved separation of power in their constitution, these powers are not complete - the theory separated the executive from legislature, and yet enabled the Supreme Court to declare invalid an act of the legislature.[20]

Indonesian legal scholar Sunny stated that there are two types of separation of powers: material meaning, and formal meaning. In the first, the material meaning is a separation of powers expressly retained in tasks (functions) which are characteristic of the state showing the separation in three parts - the legislative, executive, and judicative.[21] In the second, the formal meaning is if the separation is not maintained by the firm. In the Indonesian context, separation of powers in the material meaning has not been implemented, but rather the formal meaning. In other words, Indonesia has a distribution power without stressing the separation of powers.[22]

During the authoritarian era, before reform in 1998, the separation of power in formal and material meaning did not work well. The power was centralised mainly in the hand of president as executive, with parliament and judicial power under presidential control. In 1998 the authoritarian regime fell, and Indonesia amended its constitution, not only separating the powers amongst state organs, but also distributing the power as well, with the principle of checks and balances.

The judiciary power was distributed in two state organs, namely the ICC and the SC. Their positions are equal in the constitution, but in practice they have disrespected each other - chiefly, in implementing one another's judgments. An

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[20] Jeffrey A. Segal, 'Separation-of-Powers Games in the Positive Theory of Congress and Courts,' (1997) American Political Science Review 28-44. See also Maurice Vile John Crawley, *Constitutionalism and the Separation of Powers* (Liberty Fund Inc 1998)

[21] Ismail Sunny, *Pembagian Kekuasaan Negara* [Separation State Power], (Aksara Baru 1985), hlm. 4. Yamin stated that Indonesian's Constitution is not clearly stating the principle of separation power. M. Yamin, *Proklamasi dan Konstitusi Republik Indonesia* [Proclamation and Constitution of Republic of Indonesia], (Ghalia Indonesia 1982), 341.

[22] Ismail Sunny, ibid.

annulled act by the ICC can be reactivated by the Supreme Court. And so, it seems that the constitution still needs to be amended in order to clarify their respective powers.

1.3. The Simple Model of Judicial Review

Judicial review is best approached through the constitutional interpretation model pronounced by Chief Justice Marshall in Marbury's case, the oldest model of constitutional interpretation in the American constitutional system.[23] The systems of constitutional interpretation have imperfections. For the provisions of the constitution to be accomplished by unbiased means is unsure at best. Studies conducted by political scientists, such as the classic works of Glendon Schubert and Harold Spaeth, have examined the different political approaches and standards of justices, which are closely connected to their voting performance in cases of disagreement.[24]

Elements of progressive opinions by Judge Hugo Black interact with those of Marshall to give clearness and coherence in performance. The constitutional principle that there is no essential inconsistency between the practice of judicial review and the values of democratic government applied in the American constitutional system, rather than a parliamentary system such as United Kingdom.[25]

A parliamentary system is one in which the acts by the national legislature inhabit an equal foothold with the other devices of Britain's unwritten constitution, derived from legal documents such as Magna Carta (1215)[26] and the Bill of Rights (1689).[27] Parliament is supreme because the assembly can amend the constitution at will. America's constitutional system set the boundary of all state organs - the constitution being supreme, rather than the legislature.

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[23]William E. Nelson, *Marbury v Madison: The Origins of Judicial Review* (University of Kansas 2000) 1-10.
[24]Glendon Schubert, *The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices* (Northwestern University Press 1965) 155. See also Harold J. Spaeth, *Supreme Court Policy Making: Explanation and Prediction* (WH Freeman 1979); Jeffrey A.Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993)
[25]John Mabry Mathews, *the American Constitutional System* (McGraw-Hill 1940) 50.
[26]Ellis Sandoz, *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*. (University of Missouri Press 1993)
[27]Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998).

The relation between constitutional power and judicial review leads to two significant opinions. *Firstly,* the constitution and guidelines are considered as the supreme law,[28] and rules personified in legislation are inferior. If a bill passed by Congress clashes with the constitution, the inferior rules should give way to the superior ones. There would have to be a constitutional review, rather than judicial review. *Secondly,* Chief Justice Marshall's point of view in Marbury's case was that the constitutional purpose is interpreted in the courts with justices, implementing rules to facts in order to resolve cases.[29]

The traditional approach to constitutional interpretation is personified by what is commonly called "strict construction".[30] It means understanding constitutional provisions plainly, so that government is allowed to prepare nothing more than what is obviously indicated in the text.

Judicial review is a reasonable concern of exercising judicial power, and the autonomous superiority of the American constitutional system is restricted by their constitutional personality. The traditional concept of constitutional interpretation needs some supplementary conditions, connecting justice to the constitutional law being applied. These are the appropriate texts of the constitution, arranging the standards for assessing procedures positioned by Congress and the President or others. The standard for assessing constitutionality has to be the text of the constitution itself, commonly called the "original intent",[31] which is not on what the justices would prefer the constitution to mean.

1.4. Kelsen's Theory on the Constitutional Court

There are two main discussions in this section. *Firstly,* a brief explanation of Kelsen's Pure Theory of Law, and, *secondly,* the importance of the constitutional court. Hans Kelsen is a legal scholar famously known for his Pure Theory of Law - a milestone in the improvement of modern jurisprudence.[32] The

[28]Charles A Beard, *the Supreme Court and the Constitution* (Courier Dover Publications 2012) 15.
[29]Craig R Ducat, *Constitutional Interpretation Power of Government* (Cengage Learning 2012) 77.
[30]Sotirios A Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press 2007) 27.
[31]Jack N. Rakove, ed. *Interpreting the Constitution: The Debate over Original Intent* (Northeastern University Press 1990) 459-462.
[32]Hans Kelsen [1881-1973] was legal adviser to Austria's last emperor and its first republican government, the founder and permanent advisor of the Supreme Constitutional Court of Austria,

Pure Theory of Law sees law as a structure of norms created by the state, relying upon the legitimacy of a generally accepted Basic Norm (*Grundnorm*), particularly, the supremacy of the constitution. It discards any ideas derived from metaphysics, politics, ethics, sociology, or the natural sciences.

Opening with the old-fashioned reception of Roman law, traditional jurisprudence has preserved a twin structure of: subjective law (the rights of a person), and objective law (the system of norms).[33] This dual system is a useful tool positioning the law in the service of politics, mainly by leaders or the ruling political parties. The Pure Theory of Law abolishes this dualism by replacing it with a unitary system of objective positive law, shielded from political manipulation, and is conceivably the most important jurisprudential development of the twentieth century.

Kelsen claimed that the Pure Theory of Law is concerned with the part of knowledge dealing with law, but does not strictly own the subject matter of law; which endeavours to free the science of law from all foreign fundamentals. A theory of law should contract with law as it is actually arranged, and not as it ought to be. Legal theory is knowledge and not wishes; knowledge of what the law is, not of what the law ought to be. A theory of law must be distinguished from law itself, and should be uniform, appropriate to all periods, and to all places.[34]

Kelsen maintained that legal theory is not concerned with the success of legal norms. A norm is a proposition in theoretical form, and the mission of legal theory is to illuminate the relations between the highest and all lower norms, not to say whether the highest norm itself is good or bad. Those are parts of political science, ethics, or religion.[35] Kelsen disputed the presence of sovereign as a personal object, and also rejects the existence of the state as an entity different from law. State is neither more, nor less than the law - which is an object of normative juristic information in its ideal feature.

Regarding the separation of powers, Kelsen stated that legislative, executive and judicial processes are all norm producing agencies. For Kelsen the

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and the author of Austria's Constitution, which was enacted in 1920, abolished during the Anschluss, and restored in 1945. < http://www.geni.com/people/Dr-Jur-Hans-Kelsen/6000000002765697327>

[33]Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 3-23.

[34]Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange 1945) 58-64.

[35]Ibid, 20.

difference between functional and practical law is relative, with procedure assuming greater significance. The state is nothing but a legal structure, observed as a system of human conduct and an order of compulsion. There is no distinction between physical and juristic persons. All legal personality presumes its validity from a greater norm. Therefore, the concept of person is merely a step in the process of concretisation. Kelsen's theory has widely influenced legal science, covering the concepts of state; sovereignty; private and public law; legal personality; right and duty; and international law. The conclusion is that state and law are identical, but it does not mean that every legal order is a state.

The constitutional court was officially introduced in Austria on 25 January 1919, and became the first constitutional court in the world. A year after, in 1920, Kelsen was appointed to be the judge of the Constitutional Court, in place of his teacher, Edmund Berntzik, who had died shortly before.[36] The jurisdictions of Austria's Constitutional Court derive from the constitution in more than ten articles.[37] The main purposes of the court was to mediate a conflict of competency; and also a possible clash between the central institution and the Laender (province/federal state), which could lead to a destruction of political rights. Kelsen believed in constitutional authority as an essential tool for harmonising relations between the centre and the regions within the Federal State.[38]

Thus, the constitutional court not only engaged itself with protection of citizens, but also with state provisions, the freedom to vote, as well as the public law.[39] The constitutional court became the essential mechanism for protecting citizens' rights; verifying the constitutionality of the acts and decrees, coming from member states, or Laender; and keeping equilibrium between the higher and the lower government system.

In regard to the constitutional court, Kelsen announced the *ex officio* procedure. The constitutional court was to be recognised as objective protector of

[36]Sara Lagi, 'Hans Kelsen and the Austrian Constitutional Court (1918-1929),' (2012) 9(16) Co-herencia 273-295.
[37]See Austrian Federal Constitutional Law, Article 137-147. In those Articles explain clearly the position and jurisdiction in the Austrian legal systems.
[38]Gerhard Schmitz, 'The Constitutional Court of the Republic of Austria 1918-1929,' (2003) 2 Ratio Juris 240-256.
[39]Sara Lagi (n36).

the constitution, a principle to which Kelsen was committed.[40] For Kelsen, constitutional and administrative jurisdiction signified two of the more important institutions introduced into the new Austria, indispensable to conserving the balance between the federation and the regions, and preserving the essential unity of the state. Kelsen provided a significant reflection on the meaning and value of constitutional, and administrative jurisdiction. Kelsen noted also that the Federal Constitution was rapidly enacted by the Constituent National Assembly, in order to prevent the Laender from taking a drawn-out decision-making process to appreciate the constitution by agreement, and thus transform Austria into a confederation. Kelsen inferred the Austrian Constitution as the law of a unitary state transformed into a federal state.[41]

1.5. Critical Review of Constitutional Court as the Guardian of Constitution

A basic principle of a constitutional court is to guard a state's constitution. For this reason, constitutional court is widely known as "the guardian of constitution", which has attracted criticism as a quasi-guardian,[42] instead of a real guardian.[43] Dahl specified that there is necessarily an opposite ratio between the power of the quasi-guardian, and the authority of the people and its legislatures. The scope of rights and interests subject to last verdict by the quasi-guardian limits the democratic process.[44] This shows the important problem of the lawfulness of quasi-guardians such as constitutional courts, when exercising the supremacy to annul democratically enacted acts on the basis of judges' own understanding of constitutional rights.

An inconsistency faced by constitutional courts is their legitimacy, considering themselves as negative legislators, an abstract/concentrated (Kelsenian) system of judicial review, especially as guards of minorities and minority rights. The legality of constitutional judicial review has proceeded on the

[40]See also Hans Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press, 1992).
[41]Sara Lagi (n36).
[42]By 'quasi guardians' Dahl means the official charged with the protection of fundamental rights and interests who are not themselves democratically controlled – such as the judges endowed with the power to declare legislation unconstitutional. Robert A. Dahl, *Democracy and Its Critics* (Yale University Press 1989)188.
[43]Wojciech Sadurski, *Rights Before Courts*, (Springer 2014) 45-90.
[44]Robert A. Dahl (n42)

basis of the nature of constitutionalism,[45] an intentionally counter-majoritarian means. Judicial review is usually reinforced by an objectivist theory, according to which the correct meaning of rights is objectively obvious by human reason. According to Michael Moore:

> When a moral realist judge today invalidates the expression of majority will that a statute presumptively represents, he does so in the name of something beyond his power to change and beyond the power of a societal consensus to change. His justification for judicial review is straightforward, and so is his mode of practising it: he will seek to discover the true nature of the rights referred to by building the best theory he can muster about the nature of equality, the nature of liberty, etc.[46]

From this standpoint, an extra-majoritarian institution is essential, ensuring that the performance of chosen branches of government conforms to the constitutional restrictions. According to Alec Stone Sweet, a principle of the new constitutionalism is that regimes are not democratically legitimate if they do not constrain majority rule through rights and review.[47] The understanding of majoritarian politics with respect for rights balances parliamentary rule against the supremacy of the constitutional court to overturn legislation. In this context, public may disagree on the meaning of any specific right, even though they may all agree about the value of a right, when stated in its abstract, and necessarily unclear constitutional form.

In Indonesia, the presence of Indonesian Constitutional Court (ICC) has led to a long debate around the interpretation of the 1945 Constitution. The arbitrary interpretation of the constitution indicates that the position of the ICC is equally supreme to the 1945 Constitution itself. In several cases, there are no differences between the position of the 1945 Constitution and that of the ICC, implying that the ICC is no longer the guardian of the 1945 Constitution because the guardian and the guarded have melted down into one unity. According to the principle of constitution supremacy defined by Hans Kelsen, the guardian is

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[45]Jeffrey Jowell QC, 'Of Vires and Vacumm: The Constitutional Context of Judicial Review,' in Christopher Forsyth, ed, *Judicial Review and the Constitution* (Hart publishing, 2000) 327-339.
[46]Michael S.Moore, 'Law as a Functional Kind', in Robert P.George, ed, *Natural Law Theory; Contemporary Essays* (Oxford University Press 1992) 229.
[47]Alec Stone Sweet, 'Constitutional Court', in Michel Rosenfeld and Andras Sajo, ed, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 828.

supposed to submit to, and is placed below the guarded because the highest norms are in the constitution.[48]

The guardian of the constitution functions to be performed accordingly both in the form of law and in the implementation of its mandates and obligations. The ICC functions as the interpreter of the constitution, performed through its making and issuing of decisions based on the authorities. Judgments should represent legal considerations and arguments; and the constitution provisions should be interpreted and executed in the form of law, and in any other forms according to the authorities and obligation granted to the ICC.[49]

The existence of the ICC has placed the 1945 Constitution as the supreme law that has to be implemented with high consistency. The ICC holds the court in an open way by summoning various parties for judicial hearing; it encourages people and the community to be involved, or at least to be interested in following how a constitution provision should be interpreted. The parties involved in the ICC are also allowed to air their thoughts regarding the law interpretation, although in the end all decision belongs to the ICC's judges.

The positive reform of ICC has encouraged the development of administrative law theory.[50] In the past, administrative law only focused on the political activities within the institutions of parliament and the Presidential administration, and its discussions were merely about issues of governmental institutions, the relationship between them, and human rights. After the reform, the current issues of the constitution start to touch some wider aspects, involving more parties who are not restricted to the legal experts.

1.6. Research Methodology

The two main methods used in research methodology are the qualitative and the quantitative. The qualitative method is employed traditionally in social sciences and in market research. This research will mainly use the qualitative

[48]Hans Kelsen (n40) 123-129.
[49]See also Martin H. Redish, and Matthew B. Arnould, 'Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a Controlled Activism Alternative,' (2012) 64 Florida Law Review 1485.
[50]Taufi Qurrohman Syahuri, 'Putusan Mahkamah Konstitusi Tentang Perselisihan Hasil Penghitungan Suara Pemilihan Umum Berdasarkan Undang-Undang No. 24 Tahun 2003 [Constitutional Court Judgment on the Dispute Election of the Counted Vote based on the Act Number 24 of 2003 on the Constitutional Court],' (2009) 2 (1) Jurnal Konstitusi 14.

research method, to emphasize law and social issues - in particular, the constitutional court judgments. A researcher explores his capability to be an interviewer or observer in collecting data regarding his research.

Related research methods are comparative law research, discourse analysis, empirical research, and case studies.[51] The researcher also conducts empirical research and observation over the process of law review in Indonesia's legal system.

1.6.1. Research Aims

The research aims addressed in this study are as follows:

- To reconsider the limit of judges' interpretation, particularly in *Ultra Petita* cases.
- To analyse the case law of the Constitutional Court of Indonesia, and its role in law reform.
- To compare other countries' approach to law reform and the role of constitutional courts.
- To propose future improvements in the Indonesia Constitutional Court through amendment of the constitution.
- To seek the future mechanism for protecting a special autonomy province in the constitution.

The research questions in this study are as follows:

- How does the ICC address *Ultra Petita* issue in law reform?
- How does the ICC learn from other country experience of judicial review?
- How does the ICC safeguard the rights of a special autonomy province, such as Aceh?
- What is the future role for the ICC in implementing law reform?

1.6.2. Research Method Approach

This research requires the understanding of other constitutional courts. For comparison, this research selects the supreme judicial institutions in Europe,

[51] See also Jay Campbell Sanderson and Kim Kelly, *A Practical Guide to Legal Research* (Thomson Reuters 2014)

America, and ASEAN countries. A comparative approach provides a valuable analytical framework to explain conflicts between legal concepts and particular provisions; and attempts to identify possible common solutions.

The comparative approach addresses both the needs of legal practitioners to gain a better knowledge of foreign legal systems, and allows the states to develop suitable legislation to meet the requirements of the international community in the changing political world order. The approach has provided a distinctive understanding of how law develops and works in different cultures. Innovative methodologies in the comparative approach have placed it at the forefront of interdisciplinary legal scholarship, combining such disciplines as history; sociology; and anthropology with legal analysis and jurisprudence.

The research uses comparative constitutional studies method to evaluate other countries' constitutional documents; trace patterns of convergence alongside persisting divergence in constitutional jurisprudence across polities; and relate constitutional courts to the wider international legal context.[52] Comparative constitutional law can assist law reform, providing a tool of construction to understand legal rules, or to contribute towards the systematic unification and harmonisation of law.[53] It can evaluate an approach to a legal problem in terms of a jurisdiction's cultural, economic, political and legal background; and is a valued tool for legal examination of national legal systems.

Two supporting legal approaches are used. *Firstly*, "black letter law" refers to the basic standard elements or principles of law, which are generally known and are free from doubt or dispute. It describes the basic principles of law accepted by a majority of judges in most states. For example, it can be the standard elements for a contract, or the technical definition of assault. This research method examines legal texts, including case law. When people use this term, the implication is that the law in question is accepted, and not open to argument. On the other hand, with other types of laws, they may be widely open to interpretation.[54]

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[52]Ran Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies,' (2013) 11 (1) International Journal of Constitutional Law 1-12.
[53]Konrad Zweigert, Hein Kötz and Tony Weir, *Introduction to Comparative Law*, (Clarendon Press Oxford 1998) 15-31.
[54]Joseph M. Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review,' (1994) 63 Fordham Law Review 281.

Since lawyers often question, challenge, and reinterpret the law as part of their work, it is important to distinguish black letter law from other types of law. The legal community may delegate whether a law is uncontroversial. The older a law is and more frequently it has been upheld in court and in legal treatises, the more likely it is to be generally accepted. Changing societies call for changing laws and differing interpretations on existing legal precedent. Black letter law is used to support various interpretations of the law. This method of research is an essentially descriptive analysis of a large number of technical and co-ordinate legal rules from main sources.[55]

The ICC judgements are primary source material for black letter law. There are some ten *Ultra Petita* judgments, explored through the black letter law method. Secondly, the socio-legal approach is defined as a law wider social and political structure. The separation between the sociology of law and socio-legal studies underlines the development of the social scientific studies of law.[56] Socio-legal researchers are alert to different approaches in sociology, and the role of methodological debate. Sociologists and social anthropologists increasingly, recognise the need to address and understand the content of law.[57] What binds the socio-legal community is an approach to the study of legal phenomena informed by research in other disciplines. Traditionally, socio-legal scholars bridge the divide between law and sociology; social policy; and economics.

1.6.3. Sources

The sources of legal study in this research come from Indonesian and English based materials. Indonesian sources include a number of ICC judgments (as the primary data). The ICC has never formally published their judgments in any languages other than Indonesian with perspectives from Indonesian books, law reports, journals, newspapers, electronic media, and so forth. English language material is still needed, specifically when comparing practices in other countries.

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[55]Lawteacher, *Writing Law Dissertation,* accessed 26 May 2014, <http://www.lawteacher.net/dissertation_help/writing-law-dissertation-methodology.php>

[56]See also Stefan Larsson, 'Karl Renner and (Intellectual) Property—How Cognitive Theory Can Enrich a Sociolegal Analysis of Contemporary Copyright,' (2014) 48 (1) Law & Society Review 3-33.

[57]Ibid.

The sources in this research have been divided into three types; namely, (1) primary, (2) secondary, and (3) tertiary. The primary sources comprise[58]

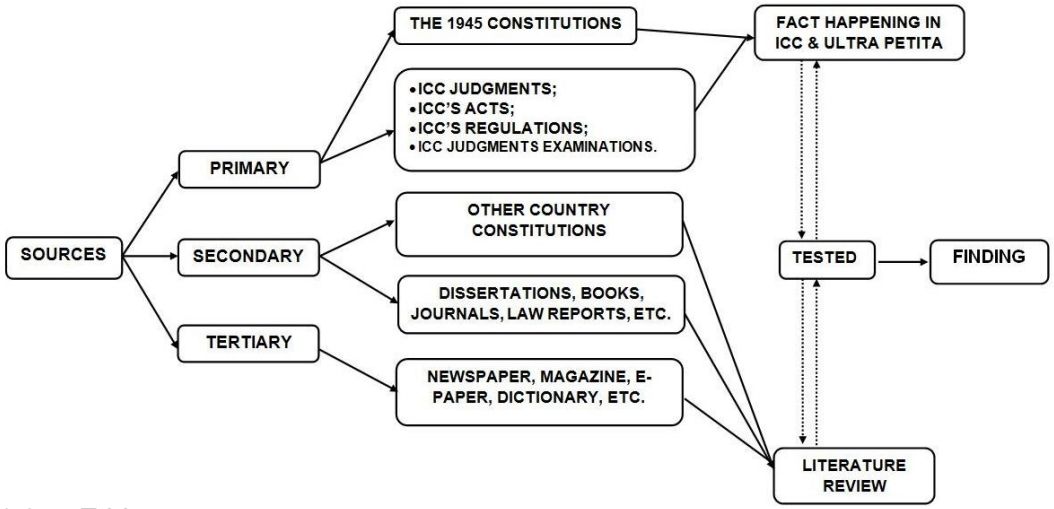
a. law reports, such as case judgments ;
b. statute material; and
c. new statutes.

Secondary sources comprise

a. text books, such as case books;
b. legal journals, editorial notes/case notes, academic articles, weeklies, and professional journals; and
c. internet materials.

Tertiary data provides overviews of topics by synthesizing information gathered from other resources. Tertiary resources often provide data in a convenient form, and help a general overview of a subject, but rarely contain original material.

Table 1: The sources collecting and processing



1.6.4. Ethics

Ethics is a way of thinking through every aspect and stage of research. Chiefly, be fair and respectful, efficient and also aim towards high scientific and ethical standards. This research involves neither human subject nor other living things, but uses the text materials, court judgements, books, journals, and so forth.

[58]Phillip H. Kenny, *Studying Law* (London Butterworths 1998) 66-82.

1.6.5. Field Work

From June to October, 2013, the researcher undertook field work to the ICC in the capital city of Jakarta. I observed directly how the ICC operates; the way of the ICC judges examining the witnesses; hearing expert opinions; reading judgment;[59] and so forth. This helped understand the judgement making process, from registering cases, attending a session, and its final judgement. The ICC is the final arbiter, with no further appeal.

The ICC building is modern with good access to allow the public to attend the session. Recent and previous judgements are distributed and can be downloaded easily through the website after the judges have read their judgement. The ICC also has a modern library, with collections both physically and electronically of the judgements, journals, books, and so forth. The public are welcome to the facility, once registered. However, the numbering process of the cases available on the website can be confusing, chronological order, or the type cases (such as judicial review, election disputes, state organ dispute, and dissolution political party). The researcher also used other resources, such as local or international media, following law discussion, and accessing online law materials not found in the ICC.

In the ICC, the public are not allowed to use electronical devices, distract the session, threaten the judges, bring a weapon, and so forth. The ICC provides a teleconference facility in each province, which is important as Indonesia consists of thousands of islands, but the facilities sometimes suffer from weather conditions, and poor IT connectivity.

1.7. Conceptual Framework

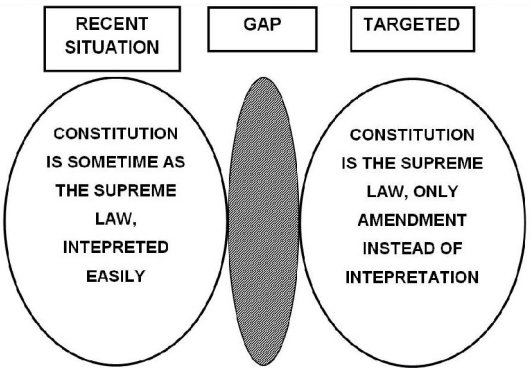
This research started because of a gap in knowledge in the Indonesian constitutional system.[60] The constitution is supposed to be positioned as the

[59]The process of a judgment has relatively depended on the case. The ICC does not have a clear regulation on the time frame of a case. Based on the previous cases, so far, the shortest process of a judgment was 11 days. See also the ICC Judgment No.101/PUU-X/2012 on the Presidential Election. The longest process of a judgment was 309 days. See also the ICC Judgment No.10/PUU-X/2012 on the Mineral and Coal. See also Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* [The Procedural Law on the Judicial Review] (Konstitusi Press 2006) 28.

[60]Jans Maringka, 'Empowering the Prosecution Service in the Constitutional System of the Republik of Indonesia', (2015) 3 (6) International Journal 1064-1070. The implementation of constitutional system has also had a significant challenge in European Community. See also Brian Libgober, 'Can

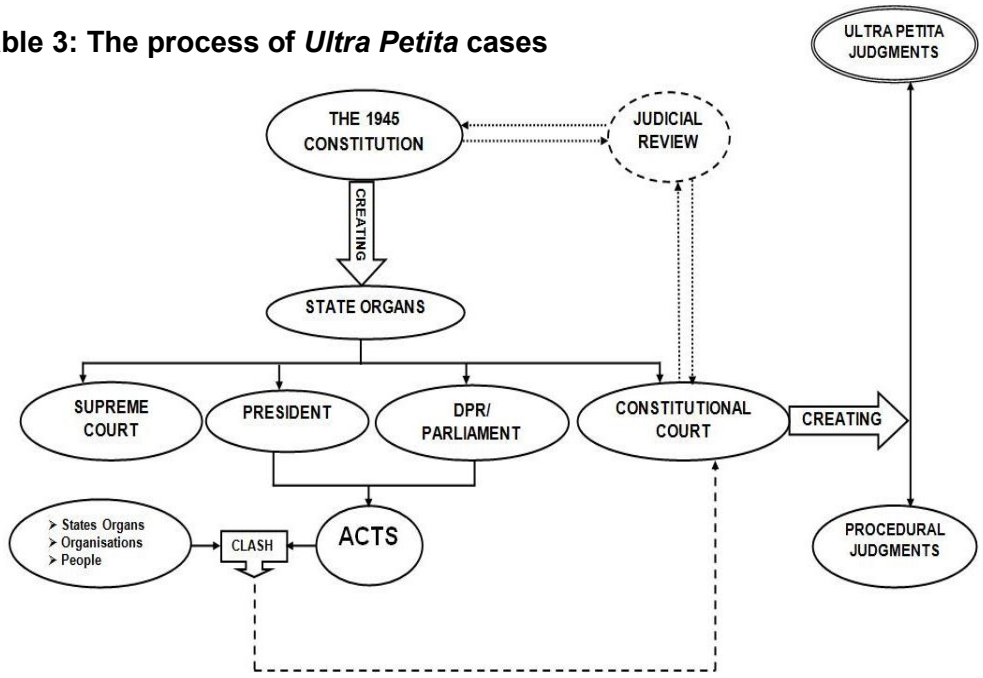
supreme law - protecting and guaranteeing the rights of citizens, but the opposite has happened. The constitution is broadly interpreted in the name of justice but sometimes is not accepted as the supreme law.

Table 2: The gap of knowledge happening in Indonesia constitutional system



The ICC is one state organ having constitutional power to interpret the constitution. The ICC has often applied the judges' perspective only, cases commonly known as the *Ultra Petita*.

Table 3: The process of *Ultra Petita* cases



the EU Be a Constitutional System without Universal Access to Judicial Review?' (2015) 36 Michigan Journal of International Law 353-353.

Table 2 shows the working of the Indonesian constitutional system. The 1945 Constitution creates four significant state organs playing important roles. The President and DPR/Parliament are given the specific authorities to legislate acts. Indonesian citizens as individuals or represented, they have the constitutional rights to object an act through the ICC. This is commonly called the "judicial review" procedure. After several sessions, the ICC can make procedural judgments, or the surprising one known as the *Ultra Petita*, positioning above the 1945 Constitution itself.

Table 4: The research steps

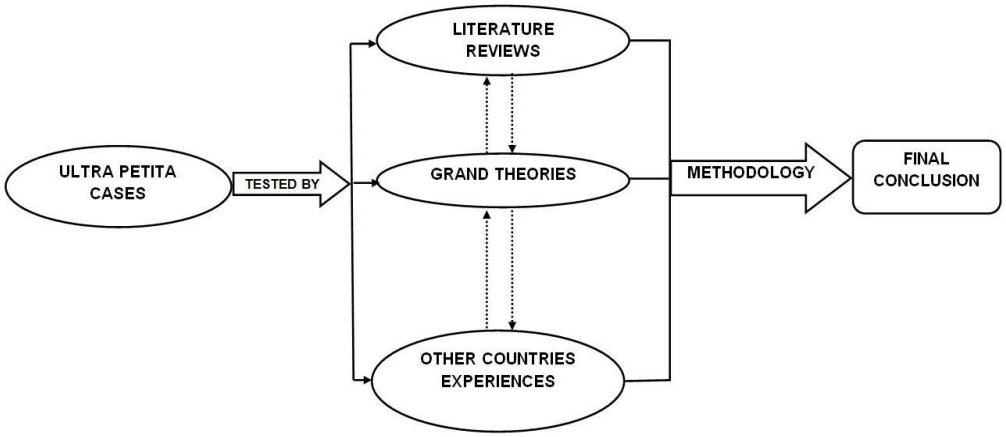


Table 3 describes the stages of this research. Selected *Ultra Petita* cases are tested through literature review, grand theories, and other country experiences.

1.8. The Original Contribution to Knowledge

The original doctoral contribution to knowledge is a key question in gaining PhD level. Doctorate originality has a variety of definitions and explanations.[61] Different law schools may have their own style when defining "doctorate originality".[62] This research uses the approach of Winter:

[61]The research conducted by Clarke has had significant finding that either Ph.D candidates or examiners have different interpretation in understanding the concepts of originality in the Ph.D. Gillian Clarke and Ingrid Lunt, 'The Concept of 'Originality' in the Ph.D : How Is It Interpreted by Examiners?' (2014) 39 (7) Assessment & Evaluation in Higher Education 803-820.
[62]Gail J. Hupper, 'Academic Doctorate in Law: A Vehicle for Legal Transplants,' (2008) 58 Journal of Legal Education 413.

1. a report of work which others would want to read;
2. tell a compelling story articulately, whilst pre-empting inevitable critiques;
3. carry the reader into complex realms, and inform and educate him/her; and
4. be sufficiently speculative or original to command respectful peer attention.[63]

The main original doctoral contribution to knowledge is the discussion of the *Ultra Petita*,[64] defined as a decision of a court which grants more than what is asked for, expanding the court jurisdiction even beyond the constitution itself. Ten cases have been identified as *Ultra Petita*, which have had serious impact on legal reform, with parliament abandoning the affected acts, invalidated acts increase every year, with serious threat to democracy as well as the rule of law. *Ultra Petita* cases have been caused by the absolute power of judges, poor quality of legislation, and lack of judiciary training.

A second doctoral original area is the issue of special autonomy in Indonesia, focusing on the Aceh Province case study, explored in Chapter 8. Indonesia has faced a serious problem in the implementation of the autonomic regulations, with frequent regulation clashes between central government and provincial level. Central government has given power for provincial level to self-govern, but has been reluctant to reduce its central power. The ICC judges have played a significant role in solving and preventing clashes, but have no power to stop this in future because of the Indonesian constitutional system.

A third doctoral original contribution is comparative research on constitutional court and judicial review in other countries, specially EU countries, South Africa, the United Kingdom, and the United States of America. The justification is because Indonesian constitutional systems have tended to adopt legal transplants from those countries.

Transplantation can create problems, for instance, in the number of judges. Austria, with some 8.5 million population[65] has a constitutional court with twenty judges, including six substitute judges, who rotate their judiciary duty

[63]Richard Winter, Morwenna Griffiths, and Kath Green, 'The Academic Qualities of Practice: What Are the Criteria for a Practice-Based PhD?' (2000) 25 (1) Studies in Higher Education 36.
[64]Even some researchers concerning on the ICC discussion have not really captured this important idea. See also Simon Butt (n12).
[65]Migration, 'Geography and Population,' accessed 26 August 2015, <http://www.migration.gv.at/en/living-and-working-in-austria/austria-at-a-glance/geography-and-population.html>

depending up caseload. In Indonesia, with about a 237.6 million population[66] have only nine constitutional court judges, making it hard for the judges to produce a high quality judgement, especially in election disputes (when they have a tight timetable to announce the winner).

Another comparative approach uses the Southeast Asia countries (ASEAN), because Indonesia is located in this region and plays a significant role in multilateral relationships. We focus on the constitutional practice in this region, in Chapter 3.

The ICC was chosen as the research topic for two reasons. *Firstly,* the researcher has been involved in comparative constitutional law, particularly the ICC since it was professionally established in 2003. As a university lecturer in constitutional law, he updates on the latest developments in the ICC, following the recent judgments; debate on crucial issues; judgment examination; conducting research; and so forth.

Secondly, the ICC has been expected by the public to give a justice that cannot be achieved in the ordinary court. The ICC has become the favourite court because its daily practice is different from ordinary court, being rather based on the interpretation of the 1945 Constitution. ICC judgments can breakthrough a static act, but create a long debate over flexibility interpretation. Thus, the ICC role has potential as topic for future research development.

1.9. Thesis Structure

Chapter 2 (Comparative Case Studies), discusses the comparative judicial review experience of several countries - the American model of judicial review, the Kelsenian model in Europe, and the South Africa model of constitutional court.

Chapter 3 (Constitutional Practice in the Southeast Asian [ASEAN] Countries) describes constitutional implementation in ASEAN countries, under the Westminster model, the Socialist model, and the Mixed model.

[66]Badan Pusat Statistik, 'Jumlah dan Distribusi Penduduk [Amount and Population Distribution],' accessed 26 August 2015, < http://sp2010.bps.go.id/>

Chapter 4 (Operation of Indonesian Constitutional Court) explains the ICC constitutional authority process; the need for supervision; election authority; and potential abuse of power.

Chapter 5 (Indonesian Constitutional Court Role In Law Reform) discusses the procedures of selecting judges, the ICC under five presidents, the ICC role in law reform in Indonesia, and role being related to negative and positive legislator.

Chapter 6 (*Ultra Petita*) explains *Ultra Petita* and its future challenges, analyses ten *Ultra Petita* Cases, the causes of *Ultra Petita*, discusses the impact of constitutional court judgment, and arrangement of *Ultra Petita* in ICC ordinance.

Chapter 7 (Judicial Review) explains the background of judicial review in the Indonesian legal system, both before and after constitutional amendment.

Chapter 8 (Special Autonomy In Aceh) describes the potential conflict of regulation between central government and provincial level; looks at the various types of autonomy in Indonesia; discusses the special autonomy for the Aceh Province; examines the potential conflict of regulation between central government and provincial level; and considers the ICC involvement in Aceh Province, in solving election disputes, and determining disputes over the authorities of state institutions.

Chapter 9 (Conclusion) returns to the original research questions, and offers some recommendations for future of the ICC.

CHAPTER 2 - CONSTITUTIONAL COURTS AND JUDICIAL REVIEW: COMPARATIVE CASE STUDIES

2.1. Introduction

Reviewing an act through judiciary process can be classified into two procedures: judicial review, or courts that have a duty to review the law itself (see Table 5). Some countries do not involve their court in reviewing their laws, but undertake an executive review or parliament review. This chapter will focus on judicial review.

The Supreme Court as the single highest court deals not only with appeals, but also reviews an act against the constitution. This system has been practiced in United State since 1803 in the Marbury vs Madison case, and is widely known as the American model of judicial review. In this model, the Supreme Court has dispersed as well as decentralized judicial review mechanism among courts in the states and the Federal Supreme Court.

Following success in America some countries, including Indonesia, have officially adopted this model, with some modifications. For over 58 years,[1] the Indonesian constitutional system implemented this model under its authoritarian regime;[2] which positioned the Supreme Court as the judicial review power. In this period, the Supreme Court remained silent on the issue of law review because of political interference in the judicial system.

The second classification is forming a specific court to review a law considered to be against the constitution, known as the Kelsenian model in Europe, and claimed as a prototype model of judicial review in the European continent.[3] This model concentrates on the Constitutional Court, and is the pioneer of judicial review mechanism in Europe. The Austrian model has

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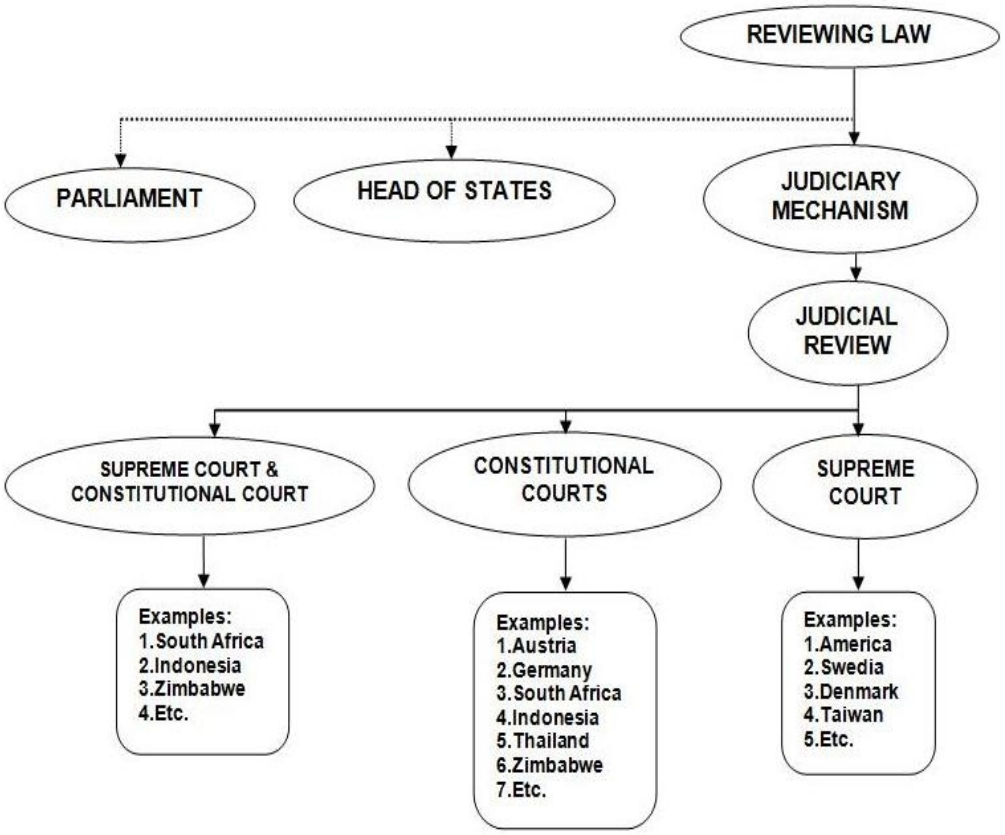
[1]From 1945 to 2003 Indonesian's judicial review system adopted the American model of judicial review under its Supreme Court. Zainal AM Husein, *Judicial Review di Mahkamah Agung RI: Tiga Dekade Pengujian Peraturan Perundang-Undangan* [The Judicial Review in the Supreme Court; Three Decades of Judicial Review of the Regulations] (Rajawali Pers 2009) 21-27.

[2]See also Thomas B Pepinsky, *Economic Crises and the Breakdown of Authoritarian Regimes: Indonesia and Malaysia in Comparative Perspective* (Cambridge University Press 2009)

[3]Alec Stone has asserted that the Austrian practice is important for Western Europe, and the Kelsen idea on constitutional court is recognized recently in the design of the European model of constitutional review, in opposition to the American model. Alec Stone, *the Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992) 228.

developed several variants, such as in Germany with *Bundes-Verfassungsgerichtshof* (Federal Constitutional Court), and the South African Constitutional Court.[4] This will be discussed in the subchapter on South African model of Constitutional Court. The development of Austrian occurred quickly, with some Asian countries,[5] amending their constitution to transplant the idea of constitutional court with modifications. After amending the 1945 Constitution, Indonesia included the constitutional court. The ICC does not have authority to review all regulations under the constitution, but has to share power to review the regulations with the Supreme Court. The ICC only reviews an act against the constitution, while the Supreme Court deals with the regulations below an act. (see Table 5 diagram).

Table 5: Diagram Process of Reviewing Law in General



[4]C. G. Van der Merwe and J. E. Du Plessis, *Introduction to the Law of South Africa* (Kluwer Law International 2004) 71-72.
[5]Tom Ginsburg, *Judicial Review in New Democracies Constitutional Court in Asian Cases* (Cambridge University Press 2003) 247.

2.2. American Model of Judicial Review

Before the constitutional court was developed world wide, constitutional review or judicial review (an act reviewed by judge) was practiced by the Supreme Court of the United States, and implemented following the case of Marbury vs Madison. Since that time, constitutional review and judicial review has given rights to judges and to interpret the constitution, and has been accepted as a necessity in modern democratic countries throughout the world.

In the American model, the Supreme Court is the guardian of the constitution. Under the Marshall doctrine, judicial review is conducted by all ordinary courts, through a procedure called a "decentralized" or "dispersed" review. Such review, as a stand-alone case, is included in cases examined by the judge, commonly referred to as the decentralized model.

This constitutional review can be categorized as a *posteriori* review, and the judgment is binding upon the parties involved (inter parties). The exception is the principle of *stare decisis,*[6] which requires the court to follow a previous judgment. The Supreme Court provides for the unity of the system as a whole (uniformity of jurisdiction). In essence, a judgment on the unconstitutionality of an act is declaratory and retrospective.

Judicial review by the Supreme Court of the United States differs from the same tradition in Austria. In the US common law tradition, the role of the judge is important, in accordance with the principle of precedent, and is usually called judge-made law.

When John Marshall initiated the practice of constitutional review of an act by the Supreme Court, previously the judges at all levels in the United States had inherited the tradition of reviewing an act considered contrary to the ideals of justice. The amount of legislation, in the common law system is less than the tradition of civil law in continental Europe which has parliamentary institutions producing written rules, such as acts, decrees, provisions, and so forth.[7] Therefore, the application of judicial review or constitutional review systems does

[6] *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. Accessed 26 February 2015 <*www.law.cornell.edu/wex/stare_decisis*>. See also Knight, Jack, and Lee Epstein, 'The Norm of Stare Decisis' (1996) *American Journal of Political Science* 1018-1035.

[7] Wolfgang C. Müller and Ulrich Sieberer, *Procedure and Rules in Legislatures* (Oxford University Press 2014) 323.

not require a new institution, the Supreme Court acting as the Guardian or Protector of the Constitution.

The court in reviewing laws is obligated to be free from political interest, but not challenging popular input into constitutional evolution. The courts have to play a positive long-standing part in preserving constitutions.[8]

The modern constitution-makers operate in a different context from the framers of the American Constitution. Most other nations have different and stronger rules with which to embrace courts' political responsibility. Any political reaction motivated by this development in judicial power may take a different form than in the United States, and interest groups are less likely to compete over activities overseas than in the United States. The constitutional courts could be responsible either *ex ante*[9] or *post facto*.[10] *Ex ante* controls stay appointment instruments; *post facto* controls contain amendments and a legislative dominate of judicial decisions.[11] Furthermore a political liability, whether *ex ante* or *post facto*, could be either weak or strong.[12]

The US Supreme Court is weakly accountable both *ex ante* and *post facto*. Validation of presidential appointments by the Senate needs only majority agreement, and allows factions to have a real voice in appointments, making the Supreme Court an alluring target for interest group capture. Parties which care about the sense of the constitution have no options, except struggling over appointments. Supreme courts judgments can be more eagerly overruled, or if judicial actions replicate the wishes of a dominant one.

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[8]Owen M. Fiss, 'The Right Degree of Independence,' in Irwin P. Skotzky, ed., *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press 1993) 55.

[9]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). Accessed 27 February 2015 < http://en.wikipedia.org/wiki/Ex-ante>.

[10]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. Accessed 27 February 2015 <http://en.wikipedia.org/wiki/Ex_post_facto_law>

[11]Miguel Schor, 'Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty' (2007) 16 Minnesota Journal of International Law 61.

[12]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 weakened judicial freedom. John A. Ferejohn & Larry D. Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 New York University Law Review 962.

2.3. A Comparative Analysis of the European Model and the American Model of Judicial Review

Legal academicians in Europe have considered the effects of American constitutionalism in the nineteenth century.[13] American constitutional concepts were debated in the German National Assembly in Frankfurt in 1848.[14] The Frankfurt Constitution suffered political defeat, but became an important text for German democratic constitutional improvement.[15] Whilst the optimism of America's model dominated the debates on judicial review in Frankfurt, scholars argued that conservative courts in the United States had derailed needed social legislation.[16]

Hans Kelsen faced problems in theorising on how judicial review might fit into mainland Europe's constitutional and political background. The civil law courts lacked an organ with authority for constitutional interpretation because those courts were operated on a daily basis by civil servants, ideologically accustomed to being passive to legislatures.[17] A specialized constitutional court could have an independent authoritative voice,[18] equal with the legislature. After the Second World War governments in Western Europe not only controlled constitutions, but also the political systems. The success of judicial review in Europe centred, therefore, upon filling both legislators of the judiciary and justice power; and upon a pan-European association of legal intellectuals, who preferred installing American judicial review onto the region.[19]

Kelsen rejected the American idea, that depending on legislatures in positive law making. However the authority to declare regulation unconstitutional was also a form of law-making, though a negative one.[20] The supremacy of constitutional courts could, therefore, be constrained by carefully drafting

[13]Helmut Steinberger, 'Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review' (1998) 36 Columbia Journal of Transnational Law 189.
[14]Ibid, 194-201.
[15]See also Helmut Steinberger, *American Constitutionalism and German Constitutional Development*. (Columbia University Press, 1990)
[16]Alec Stone (n 3) 37-40.
[17]John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 2007) 49-52.
[18]Kelsen was anxious that diffuse review as implemented in the United States would carriage too great a risk of non-uniformity. Hans Kelsen, 'Judicial Review of legislation: A Comparative study of the Austrian and the American Constitution' (1942) 4 (2) Journal of Politics 183-200.
[19]Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) Michigan Law Review 2766.
[20]Ibid, 2766-68.

constitutions to eliminate from justice capability in the general principles, particularly, equality, justice, and liberty. Kelsen claimed that in the field of constitutional justice, such principles can play a dangerous role.[21] Judicial review was essential to influence horizontal and vertical separation of powers, but the courts would gain too much influence if they had a wide-ranging authority to create rights.

Kelsen's approach to limit the power of courts to interpret rights was disallowed in post-war Europe, with Germany and other continental democracies committed to uphold a comprehensive set of judicially enforceable rights.[22] His heritage is detectable in the structures of the political court model of judicial review, adopted by the democracies of Western Europe after the war. Those structures are: *firstly,* the judicial review mechanism focussed into the one constitutional court; *secondly*, the judicial review has not required a case or controversy, but can renew legislation conceptually; and *thirdly,* is the appointment requiring a legislative super-majority.[23]

Legal scholars have argued the comparative merits of concentrated versus diffuse review,[24] but these differences are less than imagined, since both supreme courts and constitutional courts have done an allowable job of effectuating rights and moving political criticism. By accepting super-majority appointment dealings, the political court model of judicial review has abridged the power of parties to sway constitutional interpretation, so that actions will turn on deals brokered between diverse political parties.[25] Whilst never perfect, a super-majority selection process has worked by delivering uneven balance between different parties and districts.[26] Majoritarian democracies have inclined to be more discordant than those requiring a higher degree of agreement.[27]

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[21]Alec Stone Sweet (n19)
[22]See also Philip Michael Hett Bell, *The Origins of the Second World War in Europe* (Routledge 2014)123.
[23]Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 46-49.
[24]See also Michel Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' (2004) 2 (2) International Journal of Constitutional Law 197-198.
[25]Christine Landfreid, 'The Selection Process of Constitutional Court Judges in Germany' in Kate Malleson & Peter H. Russell, eds., Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World (University of Toronto Press 2006) 196.
[26]Lisa Hilbink, 'Beyond Manicheanism: Assessing the New Constitutionalism' (2006) 65 Maryland Law Review 15.
[27]Ibid, 300-08.

The value of agreement is explained by how super-majoritarian choosing procedures have prohibited the divisive political choosing battles familiar in the United States.[28] Europe did not answer the problem modelled by *Lochner*—that peoples are sometimes frustrated by judicial judgements—but it did better the malicious significances of *Lochner*-type judgments by dampening the supremacy of parties to form judicial activities.

2.4. The Kelsenian Model in Europe

The Kelsenian model in Europe has been transplanted around the world. Those countries have modified the model of constitutional court work.[29] The judges in the ICC have been given the power to independently interpret the constitution, creating long debate on the theory of the constitutional system and administrative law. Theories of legal norms distinguish the abstract from private concrete legal norms, and structure the hierarchy, so that a national legal system can be developed with the constitutional framework. Law interpretation now has a central position because all legal activities are around the norms and provisions of the law and constitution, applied in a real event (*imputation*). Interpretation is more crucial when the reflection or understanding of a constitution norm is employed to determine other norms. Both norms should be understood in background, objective, and interpretation for the purpose of implementation.

In the European Union (EU) sixteen member states have constitutional courts.[30] Other countries have a court with similar function as the guardian of the constitution, but with slightly different terminology (Constitutional Tribunal in both Spain and Poland, the Constitutional Council in France). This discussion will focus on those with constitutional courts. The European Court of Justice (ECJ),

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[28]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, *Principles of Constitutional Design* (Cambridge University Press 2006) 171.

[29]The Austrian constitution regulates specifically 16 Articles relating to the Constitutional Court and the articles have more detail clauses. So, constitutionally the Austrian's constitutional court have more well-prepared. In contrast, in Indonesian constitution shortly regulates 3 Articles regarding the constitutional court. These articles are too simple and short in the facing of complexity of Indonesian constitutional cases. See also the Austrian Federal Constitutional Laws and the 1945 Constitution of Indonesia.

[30]Those countries consist of 1. Austria; 2. Belgium; 3. Bulgaria; 4. Croatia; 5. Czech Republic; 6. Germany; 7. Hungary; 8. Italy; 9. Latvia; 10. Lithuania; 11. Luxembourg; 12. Malta; 13. Portugal; 14. Romania; 15. Slovakia; and 16. Slovenia.

as well as the European Court of Human Rights, also influence constitutional courts in EU countries.[31]

It is not easy for the constitutional courts in EU countries to coexist with several EU laws. The jurisdiction of the constitutional court in Europe has changed after the establishment of the Europe Union. The constitutional court decision is no longer binding since the constitutional court judgment can be reviewed by the European Court of Justice, which has to be respected unconditionally.[32]

The country has sovereignty to uphold their constitution via the constitutional court, but have to fully obey the EU laws. In maintaining harmony the EU judiciary system has made some doctrines for better understanding and legal certainty. Owing to this fact the EU will briefly be explored.

2.4.1. Italian Constitutional Doctrine

In avoiding a contradiction between EU laws and Italy's regulations,[33] the Italian Constitutional Court has inferred such a doctrine from Article 117 (1) of the Italian Constitution, which stipulates that

> 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.[34]

The article states that Italy agrees to limitations on sovereignty subject to definite conditions and mutuality, and has been constantly interpreted by both political forces and judges, as the constitutional basis for European integration. The so-called "Italian constitutional doctrine"[35] is very authentic to the Kelsenian model. Consequently, a national statute contradicting EC laws also indirectly opposes the Italian Constitution, connecting the country Italy to the international

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[31]Keyaerts has 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 Mazmanyan, and Werner Vandenbruwaene, ed., *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 289.

[32]Matej Avbelj and Jan KomÃirek, (ed)., *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 1-37.

[33]See also Oreste Pollicino, 'The Italian Constitutional Court and the European Court of Justice: a Progressive Overlapping between the Supranational and the Domestic Dimensions,' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning, (ed), *Constitutional Conversations in Europe-Actors, Topics and Procedures*, (Intersentia 2012) 101-124.

[34]See also Italian Constitution Article 117 (1).

[35]Victor Ferreres Comella, *Constitutional Courts & Democratic Values: A European Perspective* (Yale University Press 2009) 125.

environment. This protects the dominance of EC laws in Italy, and preserves the supremacy of the Italian Constitutional Court inside the Italian system. If a judge settled that a national statute dishonoured EC laws, the judge would have to refer the question to the Italian Constitutional Court, not establish the statute on his or her own opinion. In this situation, the court not only confirmed that EC law principles can be engaged as standards for review of internal legislation, but also specifies implementation of the interpretation. The Italian Constitutional Court has seemed agreeable to these requests, and has encouraged scholarly discussion. In contributing to a much more open judicial space, the constitutional court has endorsed a method, which from both a European and national angle, may seem quite unfamiliar.[36]

Several national constitutional and supreme courts have hesitated to clash on EU matters,[37] and the ECJ does not appear to be completely persuaded to leave its autonomous style of adjudication, and instead create genuine and open relationships with national debaters.[38] In this framework, the primary exchange towards negotiation clearly articulated by the Italian Constitutional Court approaches as evidence of EU faithfulness.

The new method of the Italian Constitutional Court is even more outstanding when seen against its past judgements. It can also be categorised as one of the critical speakers regarding the ECJ, since some of the most essential constitutive doctrines of the Community legal structure were derived exactly in reply to the locations developing from Italian constitutional adjudication.[39] Before

[36]Marta Cartabia, *"Taking Dialogue Seriously" The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union*. No. 12. Jean Monnet Chair, 2007. Pp. 35-38. Accessed 26 February 2015. <http://www.jeanmonnetprogram.org/papers/07/071201.html>

[37]Well-expressed in this regard are some of the most recent statements by Constitutional Courts of the new member states. Wojciech Sadurski, 'Solange, chapter 3': Constitutional Courts in Central Europe—Democracy—European Union' (2008) 14 (1) European Law Journal 1-35.

[38]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 University Press 2001) 225.

[39]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 tasks 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* (Edward Elgar Publishing 2009) 73-74. See also Alexander Murray, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts,' (2013) 2 (1) International Human Rights Law Review 57-81.

assuming that the constitutional court has included Article 234 EC[40] and 35 EU[41] as advantaged channels for judicial collaboration with the ECJ, an investigation of its recent statements in light of present EU judicial construction may be beneficial. The constitutional court rather than controlling EU national agreement has missed an important chance to establish a serious discussion with the ECJ.

As a consequence of Italian constitutional doctrine, EC laws are 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. EC law has supremacy over national law, and may even adapt constitutional norms. A fortiori, it yields binding impacts concerning national and provincial legislation. Of course, a dualist style has carried diverse conclusions, differing from those which develop from a vision based upon the agreement of the legal order.

2.4.2. Simmenthal Doctrine

The Simmenthal doctrine follows the case of the *Simmenthal Company* vs. *Italian Minister of Finance* in 1978 that the precedence of Community law applies to a subsequent national law.[42] The doctrine can be seen as the opposite of Italian constitutional doctrine. Although some member states have adopted the EU law in their constitution, if a contradiction happened, the national court has to review their decision based upon EU laws. In preventing the clash amongst regulations, this doctrine has been adopted widely by EU member states. The European Court of Justice (ECJ) has arranged the basics for a devolved system of judicial review. It stated that a national court should implement the provisions of Community law, and is under a responsibility to provide full influence to those

[40]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. Visit the complete article at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E234:EN:HTML>

[41]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. Visit the complete article at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12002M035>

[42]<www.cvce.eu/obj/judgment_of_the_court_of_justice_simmenthal_case_106_77_9_march_1978-en-82c8d76f-b272-4e8f-99e1-7940acbbc090.html> Accessed 17 February 2015.

provisions. It is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.[43]

This doctrine was adopted by Indonesia in the mechanism of the ICC. It positioned the 1945 Constitution as the supreme law, including the cases produced during the existence of the ICC. Every person under the 1945 Constitution has to fully obey ICC judgments, although, in real life it is hard to implement because ICC judgments differ from ordinary judgments.

2.4.3. Clear-Act Doctrine

The ECJ has announced a concession to the responsibility of national courts of last option to ask a preliminary question. The national courts need not request a preliminary ruling when there is no sensible doubt about the meaning of the important EC laws.[44] If the question being inspected by the national court is the same as one already judged by the ECJ, then there is no necessity to refer, as the answer is clear from ECJ precedents.[45]

The ECJ collaborates with the courts of the EU member states, and the regular courts have to guarantee the application of European Union legislation; and also to avoid deviating from EU laws. The regular courts or national courts in the EU member states may discuss with the ECJ to clarify interpretation of EU law, whether their country's legislation process is against EU laws, and they are ruling on the right track. The reply from ECJ takes the form of a judgement, or well-structured order. The ECJ's judgments bind coherently other national courts. References for preliminary rulings, therefore, have substantial benefit for any European citizen. The process gives a chance for an EU citizen to seek clarification of EU rules, which might affect them personally. The reference can

[43]The national legal systems have numerous techniques to coexist with the European Convention on Human Rights. See also those techniques in Jorg Polakiewicz, ' The Status of the Convention in National Law,' in Robert Blackmun and Jorg Polakiewiz, ed., *Fundamental Rights in Europe: The European Convention on Human Rights and Its Member States, 1950-2000* (Oxford University Press 2001) 31-53. See also Helen Keller and Alec Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008)

[44]In this context, the court 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* (Martinus Nijhoff Publishers 1993) 255.

[45]The precedent, which may come from preliminary preference or judgements, in EU countries is importance as the legal sources. Margaret McCown, 'The European Parliament Before the Bench: ECJ Precedent and EP Litigation Strategies' (2003) 10 (6) Journal of European Public Policy 974-995.

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 ECJ.

These activities allow the ECJ to control EU members, whether or not they have fulfilled their obligations under EU law. Before a case goes before the ECJ, the Commission conducts a secretarial phase, in which the EU Member has an opportunity to reply to the complaints against it. Should the ECJ discover a duty not achieved, the state in question must end the contravention without postponement. The ECJ, if the EU member has not complied, may enforce upon it a fixed or periodic financial penalty.[46]

Application of clear-act doctrine has exposed surprising mistakes, because of the way the constitutional court operates. Most importantly, its implementation of the principles of review, usually engaged in domestic issues, may go to the objection of the ECJ placing EC laws in detailed context and interpreting those laws in light of purposes.[47]

2.5. The South African Model of Constitutional Court

The South African Constitutional Court has also influenced the ICC, as can be seen in ICC judgments.[48] Before amending the 1945 Constitution, Indonesian parliament members visited the South African Constitutional Court to observe directly how it operated and legal sources for its judgments.[49] The uses of external sources were not regulated in the Indonesian constitution, so in the first period of ICC its judges occasionally used this mechanism.

The South African Constitutional Court may not only review the act against the constitution, but also cases appealed from ordinary court. The Constitutional Court is a Chief Justice, a Deputy Chief Justice, and nine other justices. Material before the Constitutional Court must be received by at least eight judges.[50] The court hierarchy in South Africa is set out in Section 166 of the

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[46]Hjalte Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37 (5) Common Market Law Review 1107-1110.

[47]G. Federico Mancini and David T. Keeling, 'From CILFIT to ERT: The Constitutional Challenge Facing the European Court' (1991) 11 Yearbook of European Law 1-13.

[48]ICC's Judgement Number 2-3/PUU-V/2007 on the Narcotics.

[49]Mahkamah Konstitusi, 'Hilangkan Periodisasi Masa Jabatan Hakim Konstitusi [Removing the ICC Judges of Period Term],' accessed 21 September 2015, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=2687#.VgBsASsYODQ>

[50]See the Section 167(1) of the South Africa Constitution, as amended by Act 34 of 2001, the Constitutional Court. See also Lynn Berat, 'Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice' (2005) 3 International Journal Constitutional Law 39.

Constitution of the Republic of South Africa, 1996 (the Constitution').[51] 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. The High Court contains 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 city or district, and High Courts run as courts of first instance in serious matters at provincial level.

The first case handled by the Constitutional Court was about the constitutionality of the death sentence,[52] a sensitive human rights issue,[53] where the Court determined that the death sentence was unconstitutional. The case showed the difficult connection between the Constitutional Court and the political divisions of government, and also between the Court and other Superior Courts.[54]

Most matters coming before the Constitutional Court are referred on appeal from the Supreme Court of Appeal or the High Court, but some are kept for the exclusive and original jurisdiction of the Constitutional Court. Thus, the constitution has clearly arranged the jurisdictions to

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, and the competence or duties of these state organs;
(b) decide on the constitutionality of any parliamentary or provincial bill, but only in terms of section 79 or 121;
(c) 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;
(d) decide on the constitutionality of any amendment to 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.[55]

[51]South Africa Constitution Section 166. See also George E. Devenish, *A Commentary on the South African Constitution* (Butterworth-Heinemann 1998).
[52]The case was held on 15 February 1995 that become the first sitting of the Constitutional Court. James L. Gibson, and Gregory A. Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court' (2003) 65 (1) Journal of Politics 1-30.
[53] See also the section of Bill of Rights. Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Bloomsbury Publishing 2010).
[54]Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000) 18-23.
[55]South African Constitution, Section 167(4).

All other matters concerning constitutional issues will begin in a High Court, unless the Constitutional Court grants direct access to itself. No order of unconstitutionality given by the Supreme Court of Appeal, a High Court, or a court with similar status is lawful until confirmed by the Constitutional Court, which thus makes the final decision on the constitutionality of an Act of Parliament, on a provincial act, or on the conduct of the President.[56] Compared with the Indonesian Constitutional Court, which often invalidates an act, the South African Constitutional Court has to approve the validity of any order invalidity of an Act of Parliament,[57] 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.[58]

The constitution established in post-apartheid South Africa is the only one known with an express provision allowing the judges to use extra-systemic evidence for interpreting the constitution.[59] Section 39, of the 1996 Constitution, states that the Constitutional Court when interpreting the Bill of Rights, should uphold the principles that underlie an open and democratic society, and consider international public law and foreign law.[60] Section 39 also empowered the judges to integrate *extra-systemic legal information* for interpreting the post-apartheid Bill of Rights as an innovative hermeneutical technique. For this reason, South African constitutional judgement has become interesting on a world-wide level because the judges in Johannesburg have set the criteria and bounds of this practice.[61]

Dugard identifies three reasons for adopting the provision into the constitution.[62] *Firstly* is the need for international legality after decades of remoteness under the apartheid regime, which intentionally disregarded international values on fundamental rights. *Secondly* is the search for an international orientation to help interpret a new constitutional version, intended to

[56]Willem Adolf Joubert and T. Johan Scott, *The Law of South Africa* (Butterworths 1981) 130.
[57]Jackie Dugard, 'Court of First Instance?: Towards a Pro-poor Jurisdiction for the South African Constitutional Court' (2006) 22 (2) South African Journal on Human Rights 261-263.
[58]South African Constitution, Section 167(5).
[59]Hoyt Webb, 'Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law, (1998) 1 University of Pennsylvania Journal of Constitutional Law 205-283.
[60]South African Constitution, Section 39.
[61]Andrea Lollini, 'South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law' (2012) 8 Utrecht Law Review 55.
[62]See also John Dugard, 'International Law and the South African Constitution,' (1997) 8 European Journal of International Law 77.

reinforce the law of the 1910 South African Union, which allowed rights and guarantees to non-white people. *Lastly,* judicial review in South Africa changes the whole legal structure, introducing a pedagogical approach for participants of the regular judiciary and the constitutional judges themselves. The constitutional judges argue to explain constitutional procedural law, since judicial review, previously strange to the South African system, required grounding and agreement amongst the various legal actors.

2.6. Conclusion

Reviewing law through court process has two major aspects. The first focuses on the Supreme Court as the single highest court. The second allows a constitutional court for law review instead of centralising on the Supreme Court. These classifications have emerged from several countries' practice with their judicial review, involving the judicial process to review laws.

Those aspects follow variant models. Positioning the Supreme Court as the single highest court, is known as the American model of judicial review, with the Supreme Court safeguarding the supremacy of constitution, and allowing dispersed and decentralized mechanism amongst courts in the states. This model has spread around the world, including Indonesia, which implemented this model for 58 years during the authoritarian regime, modified to fit the Indonesian legal system. During the ICC era since 2003, the Supreme Court authorities have been reduced, being no longer authorized to review the acts, only regulations under the acts.

The second aspect establishes a particular court for law review, replacing the domination of the Supreme Court. This is known as the Kelsenian model in Europe, concentrating on the constitutional court as the innovator of judicial review. The Kelsenian model has been applied in Asia, where they have modified their constitutions to transplant the idea of constitutional court, in reaction against the American model of judicial review. Kelsen argued that judicial review in America had no specific method for constitutional interpretation. The impact of World War II also influenced the European approach to the governmental system, with Kelsen rejecting the American model, and arguing that the constitution is the supreme law holding political nature. The authorities declaring a regulation unconstitutional are automatically creating law, as well as a new norm. For this

reason, it has been essential to form specific constitutional courts, controlling horizontal and vertical separation of powers.

Another variant of the Austrian model is the South Africa Constitutional Court, reviewing the act against the constitution, and cases appealed from ordinary court. Extra-systemic legal sources opened the South African constitutional system to international law or imported laws. The extra-systemic mechanism happened in the ICC, absorbing the international covenant whilst reviewing death penalty issues.

In Indonesia both the Supreme Court and Constitutional Court still operate in reviewing law. The Supreme Court has power to review regulations, the ICC to review acts. This dualism has overlapped in some cases, and been criticised. This modification moves away from the basic Kelsenian model, positioning the constitutional court as the single court to review all kinds of regulations. Another modification is using external resources for consideration of making judgment, derived from the South Africa Constitutional Court.

CHAPTER 3 – CONSTITUTIONAL PRACTICE IN SOUTHEAST ASIAN (ASEAN) COUNTRIES

3.1. Introduction

Southeast Asian countries are associated through the union known as ASEAN (Association of Southeast Asian Nations), with ten country members; namely, Indonesia, Brunei Darussalam, Cambodia, Laos, Malaysia, Myanmar (Burma), The Philippines, Singapore, Thailand, and Vietnam; and was established on 8 August 1967 in Bangkok. The main aims of the Declaration were cooperation in economic, social, cultural, technical, educational and other fields; and it also promoted regional peace and stability through respect for justice and the rule of law; and loyalty to the values of the United Nations Charter.[1] The ratification and adoption of the ASEAN Charter is a landmark in the regional organization's development, codifying established practices of regional cooperation, and creating a normative framework for the region.

Following the adoption of the Charter, ASEAN created a regional human rights body, the ASEAN Intergovernmental Commission on Human Rights (AICHR), and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). In 2004 it approved a *Declaration on the Elimination of Violence against Women in the ASEAN Region;* and in 2007 the *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*. In November 2012, the *ASEAN Human Rights Declaration* (AHRD) was agreed at the 21st ASEAN Summit in Phnom Penh, Cambodia.[2]

The Charter has not always been a success story. Its character as soft law (informal and non-binding procedures of judgement making) has been criticized.[3] The Charter has a low implementation record for rule-based, more legitimate, and therefore, more effective regional action. It has not raised the Charter from a state-centric organization to a citizen-oriented association. The request of ASEAN activists to form an ASEAN Court of Justice has not been

[1]ASEAN, 'History', accessed 29 September 2015, <http://www.asean.org/asean/about-asean/history>

[2]Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia,'(2015) 33 (3) Journal of Current Southeast Asian Affairs 107-129.

[3]Jean-Claude Piris and Walter Woon, *Towards a Rules-Based Community: An ASEAN Legal Service* (Cambridge University Press 2015) 157-158.

incorporated into the Charter,[4] nor have sanctions on member countries failing to obey obligations. Similarly, AICHR and ACWC have not installed mechanisms for human rights victims to complain; neither does the AHRD.

A non-binding Charter has also influenced the ASEAN constitutional system discussed in this chapter. Although some ASEAN countries (such as Indonesia, Thailand, Malaysia, and so forth), have amended their constitution several times, the ASEAN Charter has not yet been adjusted. This chapter discusses constitutional practice in ASEAN countries, referring to three major models: the Westminster Model, the Socialist Model, and the Mixed Model, to explain on how constitutions protect citizen rights, and weakness in some issues, particularly discrimination and absolute power of some state organs.

Table 6: ASEAN Map

Source: www.asean.org

3.2. ASEAN Constitutional Practice

ASEAN has had various models of constitutional practice, adopted from the post-colonial era, and has been re-evaluating existing rules.[5] Three models of constitutional practice have been identified, the Westminster Model, the Socialist

[4]See also Lasse Schuldt, 'Southeast Asian Hesitation: ASEAN Countries and the International Criminal Court,' (2015) 16 German Law Journal 75.
[5]Shaik Mohd. Hussain, Noor Alam S. M., 'Coercive Consent: The Law in Some Asean Jurisdictions' (1996) 43(1) Netherlands International Law Review 33.

Model, and the Mixed Model. After the independence, the ASEAN countries have tried to create their own identity through constitution. Some have formed their constitution in a new format, whilst others have continued their previous colonial system with some modifications of colonial rule legacy.[6] For instance, Brunei Darussalam is still maintaining its constitutional practice with the United Kingdom in the mechanism of the Privy Council.[7]

Table 7: The Overview of ASEAN Governmental System 2015

NO	COUNTRIES	CAPITAL	AREA (km^2)	POPULATION	GDP per cap.	CONSTITUTION			STATE FORM	LEADERS	
						FIRST EST.	LAST AMENDED	AMENDED		HEAD OF STATE	HEAD OF GOVT.
1	Indonesia	Jakarta	1,904,569	255,461,700	10,641	1945	2003	4 times	Constitutional Republic	Joko Widodo	
2	Philippines	Manila	300	101,974,400	6,962	1986	0	0 times	Constitutional Republic	Benigno Aquino III	
3	Vietnam	Hanoi	331,69	91,812,000	5,635	1946	2013	4 times	Socialist Republic	Trương Tấn Sang	Nguyễn Tấn Dũng
4	Thailand	Bangkok	513,115	65,104,000	14,354	1932	2014	18 times	Constitutional Monarchy	Bhumibol Adulyadej	Prayut Chan-o-cha
5	Myanmar	Naypyidaw	676,578	51,486,253	4,706	1948	2008	4 times	Constitutional Republic	Thein Sein	
6	Malaysia	Kuala Lumpur	329,847	30,513,848	24,654	1957	1963	1 times	Constitutional Monarchy	Abdul Halim	Najib Razak
7	Cambodia	Phnom Penh	181,035	15,708,756	3,263	1947	2006	11 times	Constitutional Monarchy	Norodom Sihamoni	Hun Sen
8	Laos	Vientiane	236,8	6,911,544	4,987	1947	1991	2 times	Socialist Republic	Choummaly Sayasone	Thongsing Thammavong
9	Singapore	Singapore	707.1	5,469,700	82,762	1963	1994	46 times	Parliamentary Republic	Tony Tan	Lee Hsien Loong
10	Brunei	Bandar Seri Begawan	5,765	429,646	73,233	1959	2004	2 times	Absolute Monarchy	Hassanal Bolkiah	

Source: www.asean.org

3.2.1. Westminster Model

The Westminster Model of constitutional practice is followed in the former British colonies of Malaysia, Singapore and Brunei Darussalam,[8] whose legal structures are based on British common law, statute laws and case law.

[6] In Indonesia the Dutch Penal Act have still existed and practiced as the sources of criminal law. Daniel S Lev, 'Colonial Law and the Genesis of the Indonesian State,' (1985) 40 Indonesia 57-74.

[7] JCPC, 'The Role of the JCPC, accessed 1 October 2015, <https://www.jcpc.uk/about/role-of-the-jcpc.html#Commonwealth>. See also Bachamiya Abdul Hussainmiya, *The Brunei Constitution of 1959: An Inside History* (Brunei Press 2000).

[8] Tilman Remme, *Britain and Regional Cooperation in South-East Asia, 1945-49* (Routledge 2015) 96-99.

Parliament law-making has been sovereign, such as in Malaysia. Singapore positioned the President as the head of state instead of the king/queen. In Brunei Darussalam, the centralised power holder was the Sultan, but Parliament still has power to legislate.[9] Legislation in those countries is similar to British acts and regulations. Statutes form the basic source of law, with case law being resorted to for explanatory purposes.

3.2.1.1. Malaysia

Malaysia has a federal constitutional elective monarchy. The head of state is called the Yang di-Pertuan Agong, commonly referred to as the King, elected for a five-year term by and from amongst the nine hereditary rulers of the Malay states. Malaysia's constitution was set at independence in 1957, following the Westminster Model. The bicameral parliament consists of the House of Representatives and the Senate. They are called the Houses of Parliament. The King as the Head of State is the third component of Parliament. As the ultimate legislative body in Malaysia, the Parliament is responsible for passing, amending and repealing acts of law.[10] Malaysia's constitution has no constitutional court, with judicial review of an act under the authority of Houses of Parliament. Parliament has prevented the Supreme Court to annul or review an act (federal law) produced by the Parliament; but it can review or strike down some state laws (produced by state parliament), because the state laws have been positioned below the federal laws.[11]

The superiority of federal laws has created a serious public debate on human rights issues, such as the Internal Security Act (ISA) 1960. This 'untouchable act' meant to counter communist activity in Malaysia allows detention without trial or criminal charges where national security is alleged to be at risk. It has been used to capture thousands of persons including trade unionists, student leaders, labour activists, political activists, religious groups, academics, and NGO activists. The ISA has been criticised as an old-fashioned

[9]Rhodes, Rod AW, and Patrick Weller. *Westminster Transplanted and Westminster Implanted: Exploring political change* (UNSW Press 2005) 2-5.
[10]The Constitution of Malaysia, Article Number 39.
[11]Dheraj Bhar, Judicial Review in Malaysia, 13 August 2014 <http://bsbharco.com/wp-content/uploads/2013/11/Judicial_Review_in_Malaysia-BSB.pdf>

tool used by the government to control public life and stifle open debate.[12] Parliament amended the ISA Act, but was reluctant to repeal it, limiting periods of detention to no more than two years.[13]

Other problems of Malaysian's constitutional practice relate to 'indigenous race', asserted in the Article 153 and 161a of the constitution.[14] The Bumiputra are defined as the indigenous race, whilst the non-Bumiputra (Chinese, Indians, and other races) are subject to discrimination.[15] Preferential treatment of the Bumiputras is pursued in association with other objectives, such as economic growth, officially attributed to concern about poverty among the Bumiputras. In no other area of public policy has reverse discrimination been more acute than in higher education.[16] The non-Bumiputras have limited access to government facilities such as education and procurement. The law imposes ratios between Bumiputra and non-Bumiputra, with Bumiputra getting more benefits than the non-Bumiputra.

3.2.1.2. Brunei Darussalam

Brunei Darussalam is a monarchy with a constitutional sultanate appointed by the Council of Succession.[17] Under the 1959 Constitution, the Sultan is the head of state, with full executive authority, advised by five councils – the Religious Council, the Privy Council, the Council of Cabinet Ministers, the Legislative Council, and the Council of Succession.

The national ideology, Melayu Islam Beraja (MIB), invokes Islam and Brunei's history in support of the Sultan's absolute power, and the paramountcy of the Malays in Brunei.[18] In September 2004, a Legislative Council was revived and 21 members appointed, with no immediate timetable for election of the

[12]Anthea Mulakala, 'Will Malaysia Repeal its Internal Security Act?' accessed 13 August 2014 <http://asiafoundation.org/in-asia/2011/09/21/will-malaysia-repeal-its-internal-security-act/>
[13]Laws of Malaysia, Act 82 Internal Security Act 1960, Chapter II Power of Preventive Detention.
[14]The Constitution of Malaysia.
[15]See also Rajeswary Ampalavanar and Rajeswary Ampalavanar Brown, *The Indian Minority and Political Change in Malaya, 1945-1957* (Oxford University Press 1981) 14.
[16]Zafiris Tzannatos. 'Reverse Racial Discrimination In Higher Education in Malaysia: Has It Reduced Inequality And At What Cost To The Poor?' (1991) 11(3) International Journal of Educational Development 177.
[17]CLGF, 'Brunei Darussalam,' accessed 4 November 2013. <http://www.clgf.org.uk/brunei-darussalam>.
[18]CommonwealthGovernance, 'Brunei Darussalam Judicial System,' accessed 15 August 2013. <http://www.commonwealthgovernance.org/countries/asia/brunei_darussalam/judicial-system/>.

proposed 15 directly elected members. In September 2005, the Sultan dissolved the existing Legislative Council and appointed 29 new members.

There are two parallel justice systems: one presided over by the Supreme Court and the other by the Sharia courts. The Supreme Court comprises the Court of Appeal and the High Court. Criminal cases that do not carry a death sentence and fewer serious civil cases are conducted by the intermediate courts before judges, or the subordinate courts before magistrates. Appeals are heard by the Court of Appeal, which in criminal cases is the final court of appeal. In civil cases appeals may be made to the Privy Council in the UK. Judges are appointed by the Sultan for three-year terms.[19]

Brunei's constitution does not have a judicial review mechanism. The Supreme Court's jurisdiction is only to prosecute ordinary cases, not reviewing acts. It is the Legislative Council that makes and reviews laws. This lack of judicial review mechanism has been criticised because there is no space for public debate about citizen rights. The Attorney General has stated that the courts may review administrative actions, but an adversarial system of judicial review is not suitable for Brunei Darussalam.[20]

The immunity of the royal family circle has created public debate, with a widely known case of royal family corruption. Sultan Hassanal Bolkiah's brother Prince Jefri allegedly embezzled billions of dollars from the Brunei Investment Agency in 2000, but after private reconciliation with Sultan Bolkiah, the case was closed.[21] It was almost impossible to reach the royal family circle through the Prevention of Corruption Act. Law scholars have argued that the act must have the principle of equality before the law, and the absolute power of the Sultan violates justice because executive, legislative, and judicative powers are concentrate in one hand.

Education has emerged as a constitutional issue. The government does not subsidise non-native language instruction.[22] Ethnic Chinese Bruneians who

[19]CommonwealthGovernance, 'Brunei Darussalam Judicial System,' accessed 15 August 2013. <http://www.commonwealthgovernance.org/countries/asia/brunei_darussalam/judicial-system/>.
[20]The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kili, in a Speech made at the Opening of the Legal Year, on 27 March 2007, last accessed 7 April 2011, <http://www.agc.gov.bn/>
[21]Joel Ng, *Brunei Darussalam- Rule of Law for Human Rights in the ASEAN Region: A Base-line Study* (Human Rights Resource Centre 2011) 40.
[22]Leo Suryadinata. 'Ethnic Chinese in Southeast Asia: Overseas Chinese, Chinese Overseas or Southeast Asians?' (1997) 1 Ethnic Chinese as Southeast Asians 13.

want their children educated in the mother language, have to register them in expensive private schools. Unlike Malaysia, affirmative action and positive discrimination in educational policies to favour native Malays in Brunei are less evident, because the Brunei constitution does not award special rights to the Malays. A form of latent positive discrimination exists in the educational policies of Brunei. Most ethnic Chinese have permanent residence status or are stateless. Chinese who are not full citizens in Brunei are disregarded in education. This is a hidden affirmative action policy which caps the ethnic Chinese university enrolment numbers, particularly those from poor households.[23]

3.2.1.3. Singapore

Singapore has a unique global position. Its city-state status, multi-ethnic society, and connection to the world, lead to original solutions to its challenges, combining home-grown aspects with global trends.[24]

A written constitution, the text of which took effect on 9 August 1965, is derived from the Constitution of the State of Singapore 1963, by which provisions of the Federal Constitution of Malaysia are made applicable to Singapore by the Republic of Singapore Independence Act 1965 (No. 9 of 1965, 1985 Rev. Ed.), and the Republic of Singapore Independence Act. The Constitution has become the supreme law in Singapore, and soft constitutional law has been used to build a constitutional or national character based on a communitarian 'Asian' culture, promoting social solidarity. It regulates behaviour of citizens into observing the ground rules for interaction within a secular democracy, and securing racial and religious concord.[25]

The Singapore Constitution does not explicitly include judicial review. Nevertheless, the Supreme Court has implicitly been given jurisdiction to interpret constitutional rights. The courts must use their authorities of judicial review to guarantee that legislations accord with the rule of law and separation of powers; and are also not inconsistent with the constitution. The Supreme Court has internal limitations on judicial powers and will reduce jurisdiction where they do

[23]Seng Piew Loo, 'Ethnicity and Educational Policies in Malaysia and Brunei Darussalam' (2010) Education and Ethnicity: Comparative Perspectives 119-155.
[24]Tarn How Tan, *Singapore Perspectives 2010* (World Scientific Publishing Company 2010)1.
[25]Li-ann Thio, 'Soft Constitutional Law in Non-Liberal Asian Constitutional Democracies' (2010) 8(4) International Journal of Constitutional Law 1-30.

not have the essential expertise, or where it is inappropriate for the courts to intervene.[26] Ultimately, the courts should not develop an adversarial relationship with the Executive, but rather promote good administrative practices.

Most judicial review cases arise when, losing in the ordinary court, the plaintiff appeals to the High Court, and finally to the Supreme Court. In the Shopping-Centre-Toilet case, Ravi, as solicitor, was defending his client named Tan Eng Hong, who was accused under 377A of Penal Code 2010, of male-male sex in a shopping centre toilet. Ravi argued that the Penal Code was against the human rights guaranteed within the constitution, and challenged the validity of the Penal Code to the High Court. This case is not yet determined, but is expected to fail. [27]

The norm of "impartial treatment" stated in Article 154 of the Singapore Constitution has not always been enforced easily. Chinese citizens, as the single majority, have enjoyed favoured treatment over those with Indian, Malay, or other backgrounds. Identity cards require stating a specified race is a must. In 2010, the government announced the double-barrelled race identity card (IC) category, permitting Singapore citizens with mixed parentage to embrace both races of their parents in their IC, such a citizen with a Chinese father and Indian mother can have 'Chinese-Indian' specified as their race. This embracing of mixed-raced Singaporeans opens up the three race classifications (Chinese, Malay, and Indian).[28] Some job ads assert that the position is for a Chinese person, but may include subtler boundaries.[29] Separation along racial lines is a daily reality in Singapore, although it prides itself on being a metropolitan non-racial nation. The political and economic elite of the country is less egalitarian or multiracial than its population, compounded by lack of legal certainty on matters of race, ethnicity,

[26]Chan Ying Lin, 'Judicial Review in Singapore,' 14 August 2014 <http://www.singaporelawreview.org/2013/09/judicial-review-in-singapore/>

[27]Ng Yi-Sheng, 'Singapore: AGC Warns of "Incrementalist Homosexual Agenda", High Court Reserves Judgment', accessed 14 August 2014, <http://www.fridae.asia/gay-news/2013/03/06/12259.singapore-agc-warns-of-incrementalist-homosexual-agenda-high-court-reserves-judgment>

[28]Amir Yusof, 'Confessions of an Racial Minority,' accessed 31 July 2015 <http://www.nanyangchronicle.ntu.edu.sg/2014/09/confessions-of-a-racial-minority/>

[29]Internations, 'Discrimination in Singapore,' accessed 31 July 2015 <http://www.internations.org/singapore-expats/guide/16087-safety-security/discrimination-in-singapore-16090>

and religion. It is thus difficult to address publicly the problem of discrimination in Singapore, for instance in the Sedition Act.[30]

3.2.2. Socialist Model

Socialism can be defined as a society where private property in the form of capital has been eliminated and replaced by common ownership of the means of production, permitting equality and fraternity in social relations.[31] The single-party model is the only real governing and planning body within the socialist legal system. Once it decides a particular policy, it communicates its plans to all its constituent organs, carried out by legislative, executive and judicial agencies.[32] Southeast Asia has such a model in Vietnam and Laos. The domination of military power in the government and political system is marked, occupying parliament and judicial jurisdiction.

3.2.2.1. Vietnam

The current Constitution was adopted by the 8th National Assembly in 1992 and supplemented and amended in 2001 at the 10th National Assembly.[33] The 1992 Constitution institutionalises basic viewpoints of the Communist Party of Viet Nam on economic and political reforms, socialist goals, socialist democracy, and citizens' freedom rights. It comprises a preamble and seven chapters, with 147 articles, stipulating the country's political regime; economy culture; education; science and technology systems; the fundamental rights and duties of the citizens; national assembly; state president; government; people's councils and committees; people's court; national day; flag; emblem; anthem; and capital and constitution amendment.[34]

The Standing Committee of the National Assembly has the power to interpret the constitution, the Laws of the National Assembly, and its Ordinances;[35] but in practice rarely exercises these powers.[36] Legal

[30]See also the Singapore Sedition Act, accessed 31 July 2015 < http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%221f6d9e4b-1cf1-4575-9480-da4bdeff9ef4%22%20Status%3Apublished%20Depth%3A0;rec=0>
[31]Christine Sypnowich, 'The Concept of Socialist Law (PhD Thesis in University of Oxford 1987).
[32]Peter de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing 1995) 185.
[33]The Constitution of The Socialist Republic of Vietnam.
[34]Vietnam Embassy in USA. 'Constitution and Political System,' accessed 21 October 2013. <http://vietnamembassy-usa.org/vietnam/politics>
[35]Article 91 of the Constitution 1992 of Vietnam

interpretations tend mainly be interpretations made by executive organs, raising serious concern on legal certainty, because the executive has intervened in the judicative area.

An example is the case Nguyen Van Nhat v the People's Committee of Tien Phuoc District (District Government in Vietnam) in 1999.[37] Using its executive power, the People's Committee of Tien Phuoc District claimed his land, based on an act produced by the district. He appealed his case to the Supreme People's Court. After several sessions, the court declared the act conducted by the People's Committee of Tay Luong Commune illegal and cancelled. The land use right of Mr. Nhat was then recovered. Based on that case, to prevent the abuse of power by executive power, the Supreme People's Court should be more active in reviewing the legality of administrative decisions (acts).[38] The Supreme People's Court has jurisdiction to review regulations. For a long time, it has concentrated upon adjudication, whilst spending less time on instructing inferior courts on how to apply the law and summarize adjudication experience.

Freedom of religion and belief is constituted in Article 24 of the Vietnam Constitution.[39] But government rules have forbidden those in unrecognized religious groups to speak publicly about their beliefs, and yet some of them freely practice religious training and services. Members of recognized religious organizations have been legally permitted to express their beliefs, and they even encourage other people to convert. The Hòa Hảo group has received this unfair treatment. In July 2005, eight Cao Đài believers, known as Christian minority, were imprisoned for up to 13 years, accused of crossing the border to circulate documents against the government, inflaming protests, and creating public disorder.[40]

[36]Hoang Van Tu, 'Legal Interpretation: Some Basic Theoretical And Practical Issues in Vietnam Legislative Studies,' accessed 5 October 2015, <http://www.nclp.org.vn/nghien-cuu-lap-phap/126-thang-7-2008/nha-nuoc-va-phapluat/giai-thich-phap-luat-mot-van-111e-co-ban-ve-ly-luan-va-thuc-tien-o-viet-nam>

[37]Ngoc Linh, 'On Hearing Some Administrative Cases In Relation To Land Management by Procedures Of Supervision And Review,' (2001) Democracy & Law 79-81.

[38]Nguyen Van Quang, 'Grounds for Judicial Review of Administrative Action: an Analysis of Vietnamese Administrative Law' (Nagoya University Centre for Asian Legal Exchange 2010) 48.

[39]See also the Vietnam Constitution, Article 36, 39, & 94.

[40]Sophie Quinn-Judge, 'Giving Peace a Chance: National Reconciliation and a Neutral South Vietnam, 1954–1964' (2013) 38(4) Peace Change 385.

3.2.2.2. Laos

Laos is one of the few remaining communist states in the world. Communist forces overthrew the monarchy in 1975, heralding years of isolation. Laos began opening up to the world in the 1990s, but despite tentative reforms, it remains poor and dependent on international donations.[41]

Laos is strongly involved two contradiction processes: reifying diversity and homogenising. Pholsena inspects the personal history of local revolutionaries and functionaries, to demonstrate the fluidity and plurality of identities, and how they locate themselves in both cultural spheres as ethnic and persons. The Hmong ethnic minority has faced unfair treatment from the government, because they were closely associated to the US during the Vietnam War, and some are still fighting. This ethnic group had a long history of confrontation and ambitions of liberation from Lao regime control, and after the formation of the Lao People's Democratic Republic in 1975 and collapse of the former regime, many Hmong fled across the border of the country, to US,[42] and in refugee camps in Thailand. In present day Laos majority is not yet hegemonic, while the ethnic minorities cannot be solely perceived as other. Normality (membership of the nation/Majority), and deviancy (being an outcast of the nation/being an Ethnic Minority), are still remain challenging issues.[43]

Lao People's Democratic Republic was proclaimed on 2nd December, 1975, abolishing the monarchy of Royal Lao Government. A new constitution was unanimously endorsed by unicameral eighty-five-member Supreme People's Assembly in 1991, exercising power according to a principle of democratic centralism. According to the 1991 Constitution, the LPRP (Lao People's Revolutionary Party) is responsible for broad policy, and the government manages day-to-day administration, but in reality, the two are almost indistinguishable. The constitution describes the LPRP as the "leading nucleus" of the political system.

The president has the power to appoint or dismiss the prime minister and the government, with the approval of the compliant National Assembly (the legislature). Historically, the prime minister has tended to be more powerful than

[41] BBC. 'Laos Profile' 14 October 2014. <http://www.bbc.co.uk/news/world-asia-pacific-15351898>
[42] Franklin Ng, ed., *Asian American Family Life and Community* (Routledge 2014) 178
[43] Vatthana Pholsena, *Post-War Laos: The Politics of Culture, History and Identity* (Institute of Southeast Asia Studies 2006) 219.

the president. Party factions are defined by personalities rather than ideological differences, although factional disputes do occur on policy issues, such as whether to lean towards Vietnam or to China, or the pace of economic reform.[44]

There is no constitutional court in Laos, and the judicial review process, reviewing an act and amending the constitution, are controlled by the parliament called the National Assembly under the constitution, the National Assembly has fourteen rights and duties, including to prepare, adopt, or amend the constitution; and to consider, adopt, amend, or abrogate laws.[45]

3.2.3 Mixed Model

The Mixed Model follows models from various countries. The countries adopting the mixed model include Indonesia, Thailand, the Philippines, Myanmar, and Cambodia. Such transplantations may develop well, sometimes not as expected.

3.2.3.1. Indonesia

Indonesia has a constitution called the *Undang-Undang Dasar Republik Indonesia 1945* (UUD 1945), or the 1945 Constitution. This constitution is the supreme source of law in Indonesia since declaring its independence on 17 August 1945.[46] The arrangement of Indonesia as a sovereign state is in Article 1 paragraph (3) of the 1945 Constitution, creating a stable society based on legal certainty, expediency and justice.[47] The main contents of the sovereign state are the separation of state power, the protection of human rights, and free judiciary.[48]

The bedrock of the 1945 Constitution is the philosophy called the *Pancasila*,[49] the '*Five Moral Principles*' of Indonesian life and society, mutually

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[44]Galegroup. 'Laos: Constitution and institutions-2003,' accessed 7 November 2013. <http://go.galegroup.com/ps/i.do?id=GALE%7CA103721204&v=2.1&u=anglia_itw&it=r&p=AONE&sw=w&asid=7b497eee4d62c52f6f7906d8f7f1ef9f>

[45](The Constitution of Laos) ,Chapter 5: National Assembly, Article 52 and 53.

[46]Denny Indrayana, 'Indonesian Constitutional Reform 1999-2002 an Evaluation of Constitution-making in Transition' (PhD edn Faculty of Law the University of Melbourne 2005) 4-8.

[47]Abu Daud Busro and Abu Bakar Busro, *Azas-azas Hukum Tata Negara* [The Principles of Constitutional Law] (Ghalia Indonesia Jakarta 1985) 109.

[48]Azyumardi Azra and Komaruddin Hidayat, *Pendidikan Kewargaan, Demokrasi, Hak Asasi Manusia dan Masyarakat Madani* [Civic Education, Democracy, Human Rights, and Civil Society] (Kencana Prenada Media Group 2008) 12.

[49]Indonesia, 'Lambang dan Bentuk Negara [the Coat of Arms],' accessed 4 October 2015,<http://www.indonesia.go.id/in/sekilas-indonesia/lambang-dan-bentuk-negara/lambang-negara>

interlinked and inseparable. Those Five Moral Principles are; namely, 1) belief in the one and only God; 2) just and civilised humanity; 3) the unity of Indonesia; 4) democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives; and 5) social justice for all of the people of Indonesia. The principles are located in the preamble of the 1945 Constitution with a consensus not to be changed.[50] The consequences of those principles have also affected the legislation procedures. All bills be passed to a certain level must be examined referencing those principles.[51]

With the fall of Suharto and his New Order regime in 1998, the 1983 decree and 1985 law were rescinded, clearing the way to make the Constitution more democratic. The amendment was done in four stages, at sessions of the People's Consultative Assembly in 1999, 2000, 2001 and 2002. As a result, the primary Constitution has grown from 37 articles to 73, of which only 11% remain unchanged from the original constitution. The most important changes were

1. limiting presidents to two terms of office;
2. establishing a Regional Representative Council (DPD), which together with the People's Representative Council (DPR) makes up an entirely elected People's Consultative Assembly;
3. purifying and empowering a presidential system of government, instead of a semi-presidential one;
4. stipulating democratic, direct elections for the president, instead of the president being elected by the People's Consultative Assembly;
5. reorganizing the mechanism of horizontal relation among state organs, instead of giving the highest constitutional position to the People's Assembly;
6. abolishing the Supreme Advisory Council;
7. mandating direct, general, free, secret, honest, and fair elections for the House of Representatives and regional legislatures;

[50]Tahir states that each countries have their own specific concept in term of the law-state; similarly Indonesia can be identified as the Pancasila the law-state concept, because of the strong position of the Pancasila in the 1945 Constitution. See also Tahir Azhary, *Negara Hukum: Suatu Studi Tentang Prinsip-Prinsipnya Dilihat Dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah Dan Masa Kini* [The Law-State: A Study About Guiding Principle Viewed From the Islamic Law, Implementation In Medina States Period And Present] (Kencana 2003) 83-102. See also Ahmad Sukarja, *Piagam Madinah dan UUD 1945, Kajian Perbandingan Tentang Dasar Hidup Bersama Dalam Masyarakat Yang Majemuk* [Madinah Charter and the 1945 Constitution, A Comparative Study About Basic Life Together In The Pluralistic Society] (Sinar Grafika 2012)

[51]Jimmy Z Usfunan, 'Pancasila as the Guidelines in the Legislation in Indonesia,' (2015) 6 (1) Academic Research International 272-280.

8. establishing a constitutional court for guarding and defending the constitutional system as set forth in the constitution;
9. establishing a Judicial Commission; and
10. the addition of ten new articles concerning human rights.

The establishment of a constitutional court is regarded as a successful innovation in the Indonesia constitutional system. There are five jurisdictions of the court, i.e. (i) constitutional review of law, (ii) disputes of constitutional jurisdiction between state institutions, (iii) disputes on electoral results, (iv) dissolution of political parties, and (v) impeachment of the president/vice president. The existence of constitutional court reduced the Supreme Court's authority in reviewing acts, limiting it to regulations below the acts, such as decree and any bylaws provided by provincial level.

3.2.3.2. Thailand

Since the takeover in 1932 by the military, Thailand has had seventeen constitutions and charters. Ginsburg asserted that the latest 2007 Constitution is the 'Constitutional Afterlife,' due to the fact that Thailand has several constitutions which rise and disappear in the battle of political struggle between monarchies, the military, and politicians.[52] Since the 2007 Constitution, only half of the Senate was chosen, and the other half was appointed. The executive branch was weakened, and half as many MPs were needed to propose a no-confidence vote when compared to the 1997 Constitution. The judiciary was strengthened, and high-ranking judges became part of the appointment committees for the Senate, the Election Commission, and other independent agencies. The new Constitution was praised for the participative process involved in its drafting, its enshrinement of human rights, and its significant advances in political reform. It was viewed as successful in fostering democratic development, increasing political stability, empowering and protecting citizens.[53]

[52]Tom Ginsburg. 'Constitutional Afterlife: the Continuing Impact of Thailand's Postpolitical Constitution' (2009) 7(1) International Journal of Constitutional Law 83.
[53]Wikipedia, 'Constitution of Thailand' accessed 18 October 2013. <http://en.wikipedia.org/wiki/Constitution_of_Thailand>

A significant amendment is the expanded use of constitutional court's authorities since 1997.[54] The constitutional court, under the constitution 2007, is a high court with jurisdiction over legal issues pertaining to the constitution—the supreme law of the state. The consideration of cases follows an inquisitional system, with the court empowered to seek facts and additional evidence. The court has jurisdiction over the following cases:[55]

1. ruling on the constitutionality of draft acts, or draft organic laws, and draft regulations of the House of Representatives, the Senate, or the National Assembly, which have been approved but not yet published in the Royal Gazette;
2. ruling on the constitutionality of the provision of any law on any case, both found out by the Court itself and raised in objection by a party to a case; and
3. ruling on the authorities of constitutional agencies. The decision of the constitutional court shall be deemed final and binding on the National Assembly, the Council of Ministers, and other state organs.

The Constitution 2007 was designed to link loyalty to the King with support for the constitution, with the slogan "Love the King, Care about the King." The Constitution 2007's draft was accepted by 59.3% voters in the August 2007, referendum.

The 2007 Constitution has been criticised, particularly on the citizenship for the small group in north Thailand. The government has accepted registration arrangements aimed at highland minorities, but statelessness have restricted access for a significant number to education, land, employment, and health care; and renders them vulnerable to exploitation. Registration arrangements have reduced the number of ethnic minorities not been able to obtain citizenship, but the requirements, such as literacy in the Thai language, have created an unreasonable barrier for many, especially amongst the highland minorities of the north.

Other problems are that women and girls from subgroups are vulnerable to trafficking. Over two million Burmese have illegally sneaked across the border

[54] See also James Klein, *A The Constitution of the Kingdom of Thailand 1997: A Blueprint for Participatory Democracy* (The Asia Foundation San Francisco March, Working Paper Series , 1998) 5-19.

[55] The Kingdom of the Thailand, 'Judiciary and Legal System' accessed 21 October 2013. <http://thailand.prd.go.th/ebook/inbrief/page.php?cid=6>; The Constitution of the Kingdom of the Thailand, Chapter X, Part 2, The Constitutional Court .

into Thailand,[56] seeking a better living standard, without any migrant's documents. Illegal migration continues to restrict access for many to education, land, employment, and health care; and renders them defenceless to mistreatment.[57]

3.2.3.3. Philippines

Being a former Spanish colony, the Spanish legal system strongly influenced Philippine law and judiciary system. The Spanish built the first Philippine civic organisations to strengthen its nationality, one of which was called the Conferencia de San Vicente de Paul, established in 1886 by Spanish priests; with Margarita Roxas de Ayala—founder of the Casa Ayala, and scion of the Zobel de Ayala family—its first President.[58]

Three previous constitutions governed the Philippines, namely, the 1935 Commonwealth Constitution, the 1973 Constitution, and the 1986 Freedom Constitution. Two further constitutions were drafted and adopted during short-lived war-time governments – by the revolutionary forces during the Philippine Revolution, with Emilio Aguinaldo as President; and by the occupation forces during the Japanese Occupation of the Philippines during World War II, with José P. Laurel as President.

In 1986, following the People Power Revolution which ousted Ferdinand E. Marcos as President, and following on her own inauguration, Corazon C. Aquino issued Proclamation 3, declaring a national policy to implement the reforms mandated by the people – protecting their basic rights, adopting a provisional constitution, and preparing for an orderly transition to a government under a new constitution. President Aquino later issued Proclamation No.9, creating a Constitutional Commission in the Philippines—popularly abbreviated "ConCom"—to frame a new charter to supersed 1973 Constitution. Aquino appointed 50 members to the commission, drawn from varied backgrounds, which included several former congressmen, former Supreme Court Chief Justice

[56]Alexandra Seltzer, 'Human Trafficking: the Case of Burmese Refugees in Thailand,' (2013) 37 (4) International Journal of Comparative and Applied Criminal Justice 279-293.
[57]See also Jonathan Rigg, *Challenging Southeast Asian Development: The Shadows of Success*. (Routledge 2015)
[58]See also Prince Christian Cruz, 'The Spanish Origins of Extractive Institutions in the Philippines,' (2014) 54 (1) Australian Economic History Review 62-82.

Roberto Concepción, Roman Catholic Bishop Teodoro Bacani, and Film Director Lino Brocka.

The ConCom presented the draft constitution to President Aquino on 15 October 1986. On 11 February 1987, the new constitution was proclaimed, ratified and made effective; with Aquino, her government, and the Services pledging allegiance.[59]

Under the 1987 Constitution, the Supreme Court of Republic Philippine can review and validate acts, and other regulations. The jurisdictions are clearly stated in the constitution, such as when the constitutionality, or validity, of any of the following are in question: a treaty; international or executive agreement; law; presidential decree; proclamation; order; instruction; ordinance; or regulation.[60]

The 1987 Constitution has problems with marginal rights for groups like the Lumad, Igorot, Chinese, Moros, and other indigenous peoples. They face land loss due to development schemes, failing poverty, government neglect, and loss of culture. The Moros and the ethnic Chinese, have still to be distinguished by the majority population, with negative labels broadcast by majority media.[61]

Moro Muslims, for years, have also suffered loss of their traditional lands and educational system,[62] and discriminate against Muslim, or other beliefs, regarding language, religion, and culture. In spite of the recent conceding of a form of autonomy for the Moro in parts of Mindanao, limitations remain on education in their languages in communal schools; or in having their languages as co-official, or working languages of administration.[63]

It has happened because of the slow pace and difficulties in implementing the Indigenous Peoples Rights Act, established in 1997. Obstacles appear when some officials and companies disrespect the law's requirements and 'niceties', such as free and informed consent for development projects.[64]

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[59]Wikipedia, 'Constitution of the Philippines,' accessed 16 October 2013. <http://en.wikipedia.org/wiki/Constitution_of_the_Philippines>

[60]The 1987 Constitution of Republic of Philippine, Section 5.

[61]Minorityrights, 'Philippines Overview,' accessed 31 July 2015 <http://www.minorityrights.org/3462/philippines/philippines-overview.html>

[62] In educational system government imposes Christian curriculum for other beliefs, using English and Tagalog for language instruction.

[63]Robert Schreiter, 'Peacebuilding in the Philippines: The Challenge of Mindanao,' (2015) 27 (2) New Theology Review 47-55.

[64]Rodolfo Stavenhagen, *Peasants, Culture and Indigenous Peoples* (Springer 2013) 95-111.

3.2.3.4. Myanmar

On 4 January, 1948, Myanmar (also called Burma) achieved independence from Britain, and became a democracy based on the parliamentary system. Unlike most other former British colonies, it did not become a member of the Commonwealth. A bicameral parliament was formed, comprising a Chamber of Deputies, and a Chamber of Nationalities. The geographical area Burma today encompasses, can be traced to the Panglong Agreement, which combined Burma proper (consisting of Lower Burma and Upper Burma), and the Frontier Areas (administered separately by the British).

In 2008, Myanmar amended its constitution. On 10 May, in the first phase of a two-stage referendum amid Cyclone Nargis, the Myanmar's army-drafted constitution was overwhelmingly approved by 92.4% of the 22 million voters, with an alleged voter turnout of 99%. It was the first national vote since the 1990 election. Multi-party elections in 2010 would end five decades of military rule, as the new charter gave the military an automatic 25% of seats in parliament.[65]

Under the 2008 Constitution, the legislative power of the Union is shared among the Pyidaungsu Hluttaw, the State and Region Hluttaws. The Pyidaungsu Hluttaw consists of the People's Assembly (Pyithu Hluttaw), who are elected based on township as well as population; and the House of Nationalities (Amyotha Hluttaw), with on an equal number of representatives elected from Regions and States.

The People's Assembly consists of 440 representatives, with 110 being military personnel nominated by the Commander-in-Chief of the Defence Services. The House of Nationalities consists of 224 representatives, with 56 being military personnel nominated by the Commander-in-Chief of the Defence Services.

In terms of the judicial review Myanmar has Constitutional Tribunal instead of constitutional court. The Constitutional Tribunal of the Union is formed with nine members - three members chosen by the President, three members chosen by the Speaker of the Pyithu Hluttaw, three members chosen by the

[65]Susanne Prager Nyein, 'Expanding military, shrinking citizenry and the new constitution in Burma' (2009) 39 (4) Journal of Contemporary Asia 634-648.

Speaker of the Amyotha Hluttaw, with one member from amongst the nine members to be assigned as the Chairperson.[66]

The Constitutional Tribunal interprets the provisions under the constitution, decides constitutional disputes in the Union, and reviews whether the laws promulgated are in conformity with the constitution.[67] As the country is ruled by the military, the government has closed the public chance for judicial review, and people have tended to keep silent for the sake of their security.

The constitution has yet to safeguard ethnicity issues. The Rohingya ethnic group have encountered a serious unfair treatment from the government.[68] They have declined to distinguish the Rohingya as a legitimate ethnic group, negating their equal citizenship rights. Their freedom of movement has been tightly constrained, access to medical treatment, suspensions on marriage permits, educational services, and other public services.[69] Any have been forced to become refugees to other countries, across the border to Aceh Province, Indonesia, Malaysia, and other neighbour countries.[70]

3.2.3.5. Cambodia

The governmental system of Cambodia is a Kingdom where the King fulfils his functions according to the constitution and the principles of liberal multi-party democracy. The Kingdom of Cambodia is an independent, sovereign, peaceful, permanently neutral and non-aligned state.[71] The King is the unitary symbol. The government is led by Prime Minister elected by the King.

Cambodia is committed to accelerating the Legal and Judicial Reform process. The Council for Legal and Judicial Reform, established in June 2002, has the mission to initiate and encourage the process, and to implement legal and judicial reform policy, and programmes, in accordance with the objectives of the Supreme Council of State Reforms. Since the middle of 2005, the Council

[66]The Myanmar Constitution 2008, sections 320, 321.
[67] The Myanmar Constitution 2008, sections 322.
[68]Benjamin Zawacki. 'Defining Myanmar's" Rohingya Problem"' (2013) 20(3) Human Rights Brief 18-23.
[69]Syeda Naushin Parnini, Mohammad Redzuan Othman and Amer Saifude Ghazali. 'The Rohingya Refugee Crisis and Bangladesh-Myanmar Relations' (2013) 22(1) Asian and Pacific Migration Journal 133.
[70]Eliane Coates, *Rohingya Boat People: A Challenge for Southeast Asia* (RSIS 2013) 1-3.
[71]The Constitution of Laos, Article 1.

has carried out its comprehensive action plan to implement the Cambodia Legal and Judicial Reform Strategy.[72]

After the amendment to its constitution in 1993, Cambodia established a new organ of the state, called the Constitutional Council.[73] It is a supreme institution, stipulated in the 1993 Constitution, to guarantee the respect of the constitution; to interpret the constitution and the laws adopted by the National Assembly, and completely reviewed by the Senate; and to examine and decide on litigations related to the elections of the Members of the National Assembly, and to the elections of the Senators.

When requested by the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one-fourth of the senators, one-tenth of the National Assembly members, or by the court (for promulgated laws only) - the Constitutional Council interprets the constitution and the laws in the framework of the examination of the constitutionality. The Constitutional Council is similar to a constitutional court, but does not have court function, because it is only an additional state organ, attached after the amendment.

The constitution of 1993 has had little positive impact for the small religious communities, such as the Cham-Muslim, Khmer Loeu (also known as hill tribes), the Chinese ethnic community, the Vietnamese ethnic community, and the Kampuchea Krom as the fifth Cambodian minority group.[74] Because of contention and indecision over who is—or can become—a citizen of Cambodia, the Cambodian government has yet to approve even basic legislation on the Cambodian citizenship matter.

3.3. Conclusion

The ASEAN region is geographically located in the mainland of the long rivers which begin in highlands separating Southeast Asia from China and northwest India. The ASEAN Charter is the milestone in the regional organization's improvement. The Charter has established the practices of

[72]Royal Government of Cambodia, *National Strategic Development Plan Update 2009-2013 for Growth, Employment, Equity And Efficiency To Reach Cambodia Millennium Development Goals*, (Royal Government of Cambodia 2010) 12-13.
[73]Constitutional Council Of Cambodia. 'What is the Constitutional Council?' accessed 11 October 2013. <http://www.ccc.gov.kh/english/>
[74]Ramses Amer, 'Domestic Political Change and Ethnic Minorities–A Case Study of the Ethnic Vietnamese in Cambodia' (2013) 13(2) Asia-Pacific Social Science Review 87-101.

regional framework, creating a normative structure for the area, and stipulates major targets in an envisaged process of enhanced regional integration.

However, the Charter character has no a binding power. With these consequences, the ASEAN countries have option whether obeying or rejecting the Charter norms within their constitutions. Some ASEAN members have faced serious criticism on crucial issues, including human rights, migrants, and discriminations.

The constitutional practice in the ASEAN countries can be divided in three major models, the Westminster Model, the Socialist Model, and the Mixed Model. The models have been inherited by the former colonial period, but those countries have tried to generate their own adjustments over their constitution. Most ASEAN countries are now undertaking regular renewal, stimulated and greatly energised by the need to review, and re-examine existing rules. Those countries have been made relevant to common and home-grown models and value systems.

The Westminster Model is indicated from the role of parliament, and head of state in law making. The legal constructions are therefore based on the British common law system. The laws come from statute and case law, as implemented in Malaysia, Singapore, and Brunei Darussalam. In certain points, they have arranged some significant changes, such as placing the President as the head of state in Singapore, and Sultan in Brunei Darussalam. Countries with this model, have received criticisms, chiefly in the way of implementing the constitutional system for their citizens. The common issues are related to discrimination and racism, coming from the interpretation of general norms in their constitutions.

The second model is the Socialist Model, the domination of single-party and military force in governmental system. In Socialist countries, private property in the form of capital can be reduced and changed by mutual possession of the means of production. Thus, it permits a large measure of equality and fraternity in social relations. Once it agrees a specific procedure, it conveys its plans to all of its essential organs; and this policy will be approved by its legislative, executive and judicial agencies. The ASEAN members adopting this model are, namely, Vietnam, and Laos. The supremacy of military power in the government and political system occupies parliament jurisdiction.

Lastly is the Mixed Model, adopted in Indonesia, Thailand, the Philippines, Myanmar, and Cambodia. In this model, a country has tried to adopt other country's experiences and resettle it into their own country. The adoption, at some levels, can run well - although, sometimes, not as planned. This can be seen in the formation of constitutional court. It has success story in Austria, but there are no guarantee that the success will be the same for other countries.

Although most of countries in the Mixed Model have made crucial changes in their constitution, the practice of being fully democratic is still questioned. In order to be constitutionally solved, issues such as human rights, corruption, and law enforcement are still in need of serious work to fulfil.

CHAPTER 4 - CREATION AND OPERATION OF INDONESIAN CONSTITUTIONAL COURT

4.1. Introduction

On 21 May 1998, the authoritarian regime of Soeharto who had ruled Indonesian for 32 years fell. The transitional process from the authoritarian regime to the democratic era had to be fulfilled, as soon as possible, including the amendment of the 1945 Constitution.

The amendment aimed to elevate the Indonesian constitutional system to democratic state, for various reasons for the amendment. *Firstly,* are the demands of reformation, such as - eliminating military politic interventions, law enforcement, human rights, eradicating corruptions, provincial autonomy, independent press, and sustaining democratic life.[1] Military interference in several social conflicts has means human rights violation in some provinces in Indonesia, as happened in Aceh. It had a devastating impact on the civilian population, chiefly between 1989 and 2004 - when military actions were conducted by the Indonesian authorities to conquer claims for autonomy movement by Free Aceh Movement. Between 10,000 and 30,000 people were killed during the conflict.[2]

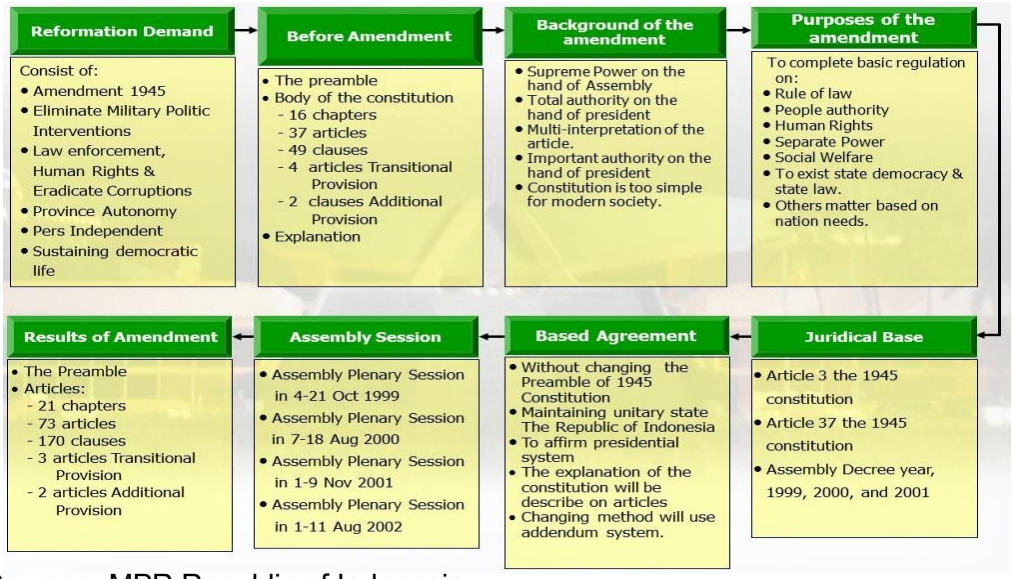
Secondly is the imbalance of power distribution.[3] During the authoritarian era, the power was supremely held by the parliament, imposing whether or not the president can continue to carry out his duty, or impeach the president in tenure. The parliament held authority to legislate law, and there was no space for judicial review at that time. The president had almost absolute power, able to create law on behalf of the state, even without the legitimation of parliament.[4]

The 1945 Constitution was too short to answer the needs of modern society, consisting of only 37 Articles in total and created multi-interpretations in several articles, including the unlimited presidency period. The winning party at

[1]MPR, 'Training of Trainer (TOT) UUD 1945 [Training of Trainer the 1945 Constitution],' accessed 16 September 2015, <www.mpr.go.id>
[2]Amnesty, 'Justice, Truth and Reparations for Victims of the Aceh Conflict, Ten Years on,' accessed 16 September 2015, <https://www.amnesty.org/download/Documents/ASA2122672015ENGLISH.pdf>
[3] MPR (n1)
[4]Tamir Moustafa, 'Law and Courts in Authoritarian Regimes,' (2014) 10 Annual Review of Law and Social Science 281-299.

that time, could not have their own chosen president. In 1999, the elected parliament members began to gradually amend the 1945 Constitution, year by year and finished in 2002. The constitutional system of Indonesia has changed from distribution of power, to create checks and balances mechanism.[5]

Table 8: The Process of Amendment of the 1945 Constitution



Sources: MPR Republic of Indonesia

Table 9: The changes summary of the 1945 Constitution

YEARS	CHANGES SUMMARY
First Amendment 1999	In this year amended 9 articles; namely, • 7 articles rearranged the president's powers and the mechanisms of presidential election; • 2 articles rearranged the sharing power between president and parliament in processing a bill to be an act.
Second Amendment 2000	In this year amended 5 chapters including its 25 articles; namely, • Chapter IXA on State Territory; • Chapter X on Citizens and Residents; • Chapter XA on Human Rights; • Chapter XII on State Defence and Security; • Chapter XV on National Flag, Language, Coat of Arms and Anthem;

[5]Abdul Rasyid Thalib, *Wewenang Mahkamah Konstitusi dan Implementasinya Dalam Sistem Ketata Negaraan Republik Indonesia* [The Constitutional Court Jurisdictions and its Implementation in State Administration of Republic of Indonesia] (Citra Aditya Bakti 2006) 34.

Third Amendment 2001	In this year amended 3 chapters including its 22 articles; namely, • Chapter VIIA on Regional Representative Council; • Chapter VIIB on General Elections; • Chapter VIIIA on Supreme Audit Board. In this time also added the specific court later known as the Indonesian Constitutional Court.
Fourth Amendment 2002	In this year amended 2 chapters including its 13 articles; namely, • Chapter XIII Education • Chapter XIV The National Economy And Social Welfare

The newly established state institution with legislative power is the DPD (Regional Representative Council). Other state institutions having judicial power, beside the Supreme Court, are the Indonesian Constitutional Court (ICC), and the Judicial Commission.[6] Various state agencies that have been created have their own mission and functions in accordance with the 1945 Constitution, such as the ICC, and the Judicial Commission, with authority to supervise judiciary power.

The existence of the ICC is clearly stated in Article 24C of the 1945 Constitution,[7] to ensure that the constitution, as the supreme law, can be enforced as it should be. The ICC also 'guides and guards' the 1945 Constitution. In carrying out this judicial function, the ICC is legally allowed to freely interpret the 1945 Constitution.[8] In order to ensure legal certainty, resolution to a dispute must be submitted to an independent judiciary institution, and is carried out by the ICC.[9]

Jimly states that the constitutional courts in many countries resolve conflict amongst state institutions – as, in the process of change towards democratic state, state institutional conflicts are unavoidable.[10] Jimly further

[6]Sri Soemantri, *Prosedur Dan Sistem Perubahan Konstitusi* [Procedures and Systems of Constitutional Amendment] (Alumni 2006) 305.
[7]The position of the ICC has clearly regulated in the Chapter IX on the Judicial Power, in the Article 24C, which is only consisted of 1 Article and 6 clauses. This number is too little if compared with the significant role of the ICC in the law reform. In another country such as Austrian Constitutional Court has 6 Article and 18 Clauses. This number have excluded the number of letter in the clause. See also The Austria Federal Constitution.
[8]See also Bagir Manan and Susi Dwi Harijanti, *Memahami Konstitusi: Makna dan Aktualisasi* [Understanding the Constitution: Meaning and Actualisation] (Rajawali Pers 2014) 173.
[9]Bambang Sutiyoso and Sri Hastuti Puspitasari, *Aspek-Aspek Perkembangan Kekuasaan Kehakiman Di Indonesia* [Aspects of Judicial Power Development in Indonesia] (UII Press 2005) 23.
[10]Jimly Asshiddiqie, *Hukum Tata Negara* [The Constitutional Law] (FHUII Press 2002) 127.

confirms that in relation to the idea of checks and balances mechanism, dispute settlement between equivalent state institutions should be regulated in a mechanism. Before amendment the MPR was positioned as the highest state organ, incarnation of people power with authorities to resolve state organ dispute, but after amendment, these powers transferred to ICC.[11]

The ICC's jurisdiction is not only set forth in Article 24C of the 1945 Constitution, but in the Act No. 24 of 2003 on the ICC; amended by the Act No. 4 Year 2014, and in the Second Amendment Act No. 24, 2003. The ICC's jurisdiction include, a) testing a law against the 1945 Constitution of Indonesia; b) deciding disputes of the state institutions authorities granted by the Constitution of the Republic of Indonesia Year 1945; c) dissolution of political parties; and d) deciding disputes over the election results. The ICC examines alleged violations of law committed by the President and/or Vice President, known as impeachment, and regulated in the 1945 Constitution.[12]

4.2. Constitutional Authority of the ICC

The ICC is the guardian and the final interpreter of the constitution, which since 1945 has regulated the state based on the principles of democracy,[13] and protected the human rights guaranteed in the constitution. Therefore, the ICC has a similar role as the protector of the citizen constitutional rights, as well as human rights.[14] The authority of the ICC embodies the principle of checks and balances,[15] and its existence is a progressive step towards correcting the performance of inter-state institutions, and allowing political maturation of state and nation.[16]

In carrying out duties and functions, the ICC is in harmony with the inherent authorities in the 1945 Constitution. The authorities of the ICC are

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[11]Jimly Asshiddiqie, *Merambah Jalan Pembentukan Mahkamah Konstitusi* [Clearing-away of the Formation Road of Constitutional Court] (KRHN 2002) 5.
[12]See the 1945 Constitution, Article 7A and 7B.
[13]Moh. Mahfud, *Demokrasi dan Konstitusi di Indonesia* [Democracy and Constitution in Indonesia] (Rineka Cipta 2003) 136-139.
[14]Mahkamah Konstitusi, *Mengawal Demokrasi Menegakkan Keadilan Substantif Refleksi Kinerja Mk 2009 Proyeksi 2010* [Uphold Democracy Democracy escort Escorting Substantive Justice Reflection MK Performance 2009 Projections 2010] (Mahkamah Konstitusi 2009) 1-2.
[15]Moh. Mahfud, *Perdebatan Hukum Tata Negara: Pasca Amandemen Konstitusi* [The Constitutional Law Debate: Post the Constitutional Amendment] (Rajawali Pers 2011) 67-69.
[16]Ni'matul Huda, *Hukum Tata Negara Indonesia* [Indonesian Constitutional Law] (Rajagrafindo Persada 2012) 212.

regulated under Article 24C of the 1945 Constitution, in conjunction with Article 10 of the Act No. 24 of 2003 on the ICC, in conjunction with Article 29 of the Act No. 48 of 2009 on Judicial Power, as follow:

4.2.1. The Authority of Reviewing Law against the 1945 Constitution

These provisions are set forth in Article 24C Paragraph (1) of the 1945 Constitution; namely,

> The Constitutional Court has authority to hear at the first and last with final decision to test the laws against the 1945 Constitution.[17]

The judicial review of an act against the 1945 Constitution, is the most frequently registered by ICC clerkships. The terminology of "judicial review*"* is debated amongst Indonesian legal scholars, and "judicial review*"* in the Netherlands, is called *toetsingsrecht*.[18] Fatmawati, states that *toetsingsrecht* means "the right to test", whilst the judicial review means "a review by the judiciary institution". Thus, basically, these two words are similar in meaning, which is: the authority to test or review.[19] In judicial review system,[20] the authority of executing the court is held by the judge, making the two terms different. In the case of authority of the judiciary institution, the Indonesian legal scholars are accustomed to naming it "judicial review".

The former ICC judge, Jimly stated that judicial review is an attempt at testing laws conducted by the judicial institution, to test the laws established by the legislative branch, executive, or judicative.[21] The rights test can be formal review or material review.[22] He also claimed that the right of formal review is the

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[17]See also the 1945 Constitution, Article 24C Paragraph (1).

[18]Indonesia was a part of Dutch colonial that has influenced the legal terminology. *Toetsingsrecht* in Netherlands can be defined as right to examine whether a given system does not conflict with any higher. Accessed 4 March 2015 < http://www.encyclo.nl/begrip/toetsingsrecht>

[19]Fatmawati, *Hak Menguji (toetsingsrecht) Yang Dimiliki Hakim Dalam Sistem Hukum Indonesia* [Rights to Review Owned by Judge in Indonesian Legal System] (Grafindo 2005) 5.

[20]The idea of judicial review has been developed befor the independent, notwithstanding, at that time there has no a specific institution to handle it. So, the judicial review mechanism has spread in those three state power including legislative, judicative, and excecutive. See also Benny K.Harman, *Mempertimbangkan Mahkamah Konstitusi: Sejarah Pemikiran Pengujian Undang-Undang Terhadap UUD* [Considering the Constitutional Court: History of Thought in Reviewing an Act against the Constitution] (Kepustakaan Populer Gramedia 2013) 145-237.

[21]Fatkhurahman, Dian Aminudin, and Sirajudin, *Memahami Keberadaan Mahkamah Konstitusi Di Indonesia* [Understanding the Existence of Constitutional Court in Indonesia] (Citra Aditya Bakti 2004) 25.

[22]Jimly Asshiddiqie, *Perihal Undang-Undang di Indonesia* [Concerning the Act in Indonesia] (Mahkamah Konstitusi RI 2006) 149-158.

authority to assess a legislative product, such as an act, whether it is incarnated as it should be, or not.[23]

Sri furthermore insisted that formal review is concern procedural issues relating to legality and institutional competence. He added that the right of judicial review is an authority to investigate, and then judge, whether a legislation content fits the rules or goes against the highest rules, and whether a particular rule is entitled to issue a particular regulation.[24] Saldi asserted that after the Amendment, the legislation function radically shifted from parliament to the judiciary and the ICC has played a significant role in legislation.[25]

In a different view, Maruar asserted that the formal review is a judicial review against the 1945 Constitution, including discussion, approval, promulgation, and implementation. Basically this test means an evaluation on the basis of Article 20, Article 20A, Article 21, and Article 22A of the 1945 Constitution.[26] Harun argued that judicial review is about the rights of law-making authority, and whether or not the contents contradict with the highest laws.[27] It is further regulated in Article 4 Paragraph (2) of the ICC Regulation No. 6 of 2005 that

> The charge material in the paragraph, and/ or parts of an act considered to be contrary to the 1945 Constitution.[28]

4.2.2. Determining Disputes over the Authorities of State Institutions

Under Section 24C Paragraph (1) of the 1945 Constitution, one authority of the ICC is determining disputes over the authorities of state institutions whose powers are given by the 1945 Constitution. The meaning of "state institutions" does not have a fixed meaning, because the constitution does not clearly explain the issues in state institutions. It was before the amendment of the 1945

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[23]Jimly Asshiddiqie (n10) 5.
[24]Sri Soemantri (n6) 11.
[25]Saldi Isra, *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia* [Shifting the Legislation Function: A Legislation Model Strengthening Parliamentary In Indonesia Presidential System] (RajaGrafindo Persada 2010) 9-10.
[26]Maruar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* [The Procedural Law of Indonesian Constitutional Court], (Konpress 2005) 20.
[27]Fatmawati (n19) 6
[28]See also the ICC Regulation No.6 of 2005 on The Procedural Guidance in Judicial Review. Article 4 Paragraph (2)

Constitution, chiefly in 1978, the type of state institution was defined and classified by the MPR.[29]

The state institution before amendment means a state institution receiving direct authority from the 1945 Constitution. As the 1945 Constitution also regulated state institutions and their authorities.[30] The ICC in its regulation has defined the meaning of state institutions:

> The DPR (House of Representatives), the DPD (Regional Representative Council), the President and/ or Vice President, The MPR (People Consultative Assembly), The BPK (Supreme Audit Board), the Regional Government, or other state institutions in which their authority is granted by the 1945 Constitution.[31]

State institutions cannot be separated from one another as parts to achieve their goals.[32] A function can be held by a single entity and foremost among these roles. There must be cooperation, putting forward the spirit of brotherhood in serving the common good.[33]

4.2.3. Deciding over the Dissolution of a Political Party

Before the amendment of the 1945 Constitution, the ruling party was able to dissolve a political party.[34] Before independence, the dissolution of a political party had frequently happened in Indonesian political history as dissolution of the *Indische Partij* (IP) in 1913. This situation continued until the reformation era in 2001.[35] There was no mechanism arranging the dissolution of a political party through the judicial process, making the existence of the ICC necessary. In the

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[29]See also The MPR Decree No. III of 1978 on the Status and Relationships of Work Procedures of the highest state institution with / or Inter State Agency

[30]Fatkhurahman, (n21) 35.

[31]Article 2 Paragraph (1) of the ICC Regulation No. 8 of 2006 on Guidelines for the Proceedings in the constitutional State Institutions Dispute.

[32]C.S.T. Kansil, *Hukum Tata Negara Republik Indonesia* [The Constitutional Law of the Republic of Indonesia], (Rineka Cipta 2000) 166.

[33]*Ibid*, 167.

[34]In the time of Soekarno and Soeharto with their absolute power the dissolution political party was easily happened with political system instead of judiciary process. This was occurred chiefly on the party having Islamic background. Solichin Salam, *Sedjarah Partai Muslimin Indonesia* [The History of Indonesian Moslem Party] (Lembaga Penjelidikan Islam, 1970)1-10. See also Lembaga Analisis Informasi, *Kontroversi Supersemar dalam Transisi Kekuasaan Soekarno-Soeharto* [The Controversies of the Supersemar in the Power Transition of Soekarno-Soeharto] (Gramedia Pustaka Utama 2007).

[35]Jimly Asshiddiqie, *Kemerdekaan Berserikat, Pembubaran Partai Politik dan Mahkamah Konstitusi* [ndependence Association, Dissolution of Political Parties and Constitutional Court], (Konstitusi Press 2005) 159-204.

Indonesian political system, a political party can be defined as an organized group with similar orientation, goals, and values. The purpose of this group is to gain political power, and constitutionally seize political position in order to execute their policies.[36] The ICC power to dissolve a political party is governed by Article 24C of the 1945 Constitution Section (1).[37]

The 1945 Constitution does not clearly formulate the requirement or prohibition for a political party to be dissolved. Now, the problem is, whether the dissolution of political parties conflicts with human rights issues,[38] because a political party is related to the definition of assembly, association, and giving opinion. In this situation, it can be argued that the 1945 Constitution itself may have a conflict of norm.[39]

The ICC has several reasons to decide the necessity to dissolve a political party, or not. *Firstly* is an ideological reason. In the Indonesia political system, political parties are prohibited to embrace, to develop, and to disseminate the teachings of communism/Marxism-Leninism,[40] argues communism aims to create a communist society through revolution all tools, including the state are used and devoted for the sake of achieving communism.[41]

Secondly, Act No. 2 of 2008 on Political Parties, amended by Act No. 2 of 2011, states that the principle of political parties should not contradict Pancasila, and the 1945 Constitution.[42] Mahfud argues that the Pancasila as the philosophical base ideology has a stronger power because since a long debate in 1959, it has been accepted as the national ideology.[43]

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[36]Miriam Budiarjo, *Dasar-Dasar Ilmu Politik* [Basics of Political Science], (Gramedia Pustaka Utama 2004) 160. See also Bintan Regen Saragih, *Politik Hukum* [Legal Politic]. (Utomo 2006) 13-16.
[37]See also the 1945 Constitution, the Article 24C.
[38]See also the 1945 Constitution, the Article 28E. It stated that *everyone owns the right of freedom of association, assembly, giving opinion and expression.*
[39]See the topic of conflict of norm by Kelsen. The misplaced of the highest norm can produce the conflict of norm that lead to legal uncertainty. See also Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1961)157.
[40]See the MPRS Decree No. XXV of 1966 on Dissolution of the Communist Party of Indonesia, Statement For the Forbidden Organizations Around the Territory of the Republic of Indonesia for the Indonesian Communist Party and banning for each activity to Develop or to Spread Ideology or teachings of Communism / Marxism-Leninism.
[41]Miriam Budiarjo (n36) 77.
[42]The ideology of the Pancasila is one of the most important principal in creating political party as well as other organisation. Regarding the Pancasila as the ideology can also be found in the Act No.2 of 2008 on the Political Parties, Article 1, and also in the Act No.2 of 2011 on the Amendment of the Act No.2 of 2008.
[43]Moh. Mahfud, *Konstitusi dan Hukum dalam Kontroversi Isu* [Constitution and Law in the Controversial Issues] (Rajawali Pers 2009) 5-9.

Thirdly is the purposes reason. Article 10 of the Act No. 2 of 2008 on Political Parties, states that the purposes of political parties are

1) to fulfil the ideals of the nation as mentioned in the 1945 Constitution;
2) to sustain and maintain the Unity of the Republic of Indonesia;
3) to develop the democracy of life based on Pancasila, by upholding the sovereignty of the People of Indonesia; and
4) to fulfil prosperity for all society.[44]

Fourthly is activity reason. Under Article 40 of the Act No. 2 of 2008 on Political Parties, political parties are prohibited from

1) performing activities against the 1945 Constitution;
2) performing harmful activities which are endangering to the unity of the state; and
3) performing activities which are against the state policy in maintaining friendship with other countries, as the effort to keep peace of the world.[45]

The reason for the dissolution of political parties is to stop stewardship and activities of a political party, together with a reason to dissolve it.[46] Before the dissolution is decided by the Supreme Court authority, that political party must be heard through the judicial process in the Supreme Court.[47] In practice, the Supreme Court has never received an appeal for dissolution from the opposition of the political party nor from the government, because it is referred to in the law of the ICC.

The government in the dissolution of political parties has to find evidence[48] of activities seeking opposed to the 1945 Constitution. When the evidence is considered sufficient, then the government may apply to the ICC to dissolve the political party, and the ICC judgment is implemented by the government, by cancelling the registration.[49] The ICC's judgement is announced by the Government in the Official Gazette of the Republic of Indonesia at least 14 (fourteen) days after the judgement is received.[50]

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[44]The Act No. 2 of 2008 on Political Parties, Article 10.
[45]Fatkhurahman (n21) 46.
[46]*Ibid.*
[47]See also The ICC Regulation No. 12 of 2008 on Political Parties Proceedings Procedure.
[48]Included in the evidence categories are namely; documents or writing, witness statement, expert statement, statement by the parties, indication; and other means of evidence in the form of information uttered, received, or stored electronically by way of optical instruments or similar device. See also the Act No.24 of 2003 on the ICC, Article 36.
[49]Fatkhurahman, (n21) 48.
[50]Refly Harun, Zainal AM Husein, Bisariyadi, ed., *Menjaga Denyut Konstitusi* (Konstitusi Press 2004) 366.

4.2.4. Deciding Disputes on the Result of General Election

The general election part of the ICC jurisdiction consists of members of the DPR, the DPD, the President and/or Vice President, and the DPRD.[51] However, the ICC has expanded the meaning of election. The Governor, the Mayor, and also the district representative election have become included in the meaning of the election. The critical discussion on the authority of handling elections will be in sub-chapter 4.7 and in Chapters 5, 6 and 8.

Under principles of transparency, each action or policies performed by the state should be known by its citizens. The general election is a political means for citizens to select their representatives entrusted to manage the country, an important instrument in the development of political order in a democratic country.[52] The general election has to be fair, free, direct, and confidential. Most important, is the transparency of the government as the organizer of the general elections.[53]

The 2004 election not only elected the members of the DPR, the DPD, but also the President and/ or Vice President, and the DPRD. After long decades of authoritarian regime, this was a new experience for Indonesians, and the Election Commission.[54]

At least, two electoral systems have been used during these general elections. *Firstly* is the proportional system,[55] with open lists for the electing members of the DPR, the DPRD, and Council at district/city level. *Secondly* is the district system.[56] This system has been used for electing members of the DPD. The election of the governor/mayor has resulted in disputed elections of regional heads, under the jurisdiction of the ICC to resolve the dispute.[57]

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[51]See also the 1945 Constitution, the Article 22E, the Clause 1-6.
[52]Fatkhurahman (n21) 49.
[53]See also the 1945 Constitution, the Article 22E, the Clause 1-6.
[54]*Ibid*.
[55]With the proportional representation system several members of parliament are to be elected per constituency. Basically every political party presents a list of candidates and voters can select a list that is they vote for a political party. Parties are assigned parliamentary seats proportionally to the number of votes they get. Democracy-Building, 'Election', accessed 4 March 2015. <http://www.democracy-building.info/voting-systems.html>
[56]An electoral district system is a distinct territorial subdivision for holding a separate election for one or more seats in a legislative body. Generally, only voters who reside within the geographical bounds of an electoral district (constituents) are permitted to vote in an election held there. Wikipedia, 'Electoral District', accessed 4 March 2015, < http://en.wikipedia.org/wiki/Electoral_district>
[57]See the Act No. 12 of 2008 on the Second Amendment of the Act No. 32 of 2004 on Regional Government, the Article 236C stated that *the handling of dispute counting on the local elections and*

Thus the ICC's jurisdiction covers all elections held in Indonesia. Application is filed within 72 hours from the date of the Election Commission announcing the final result. The ICC will decide an election dispute within fourteen days, and judgment is binding.[58]

4.2.5. The Power to Impeach the President and the Vice President

The ICC has jurisdiction over a petition concerning alleged violations by the President and/or the Vice-President. Before impeachment by the MPR, the ICC must examine, whether or not the President and/or the Vice-President has performed an unlawful form of treason, corruption, bribery, other felonies, or misconduct, and/or no longer qualifies as President or Vice President.[59]

The impeachment process through the judiciary mechanism is intended to prevent impeachment by the political system, as previously happened.[60] With the judiciary mechanism, the opposition groups cannot easily build a motion of no confidence for the president, but need clear evidence to prove that the president has committed such crime as provided in the 1945 Constitution. [61]

The inspection process for impeachment begins from the opinion of the DPR, asking the ICC to examine prosecutes the President and/or Vice President who is allegedly guilty. After the judiciary process, if the President and/ or Vice President have been found guilty, the ICC will return the judgment to the MPR.[62]

Impeachment process can also begin with the proposal to the ICC from the House of Representatives against the President and/or Vice President, who is considered to no longer qualify as a President and/or Vice President. This indicates that the process of impeachment of the President and/or Vice President is legal. Prior to the reform era revoking the President mandate was conducted by the General Assembly, as the highest state body.

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deputy head of the region by the Supreme Court transferred to the Constitutional Court not later than 18 (eighteen) months from the promulgation of this Act.

[58]See also the Act No.24 of 2003 on the ICC, Article 68 and 85.

[59]See also the 1945 Constitution, Article 24C.

[60]Eko Noer Kristiyanto, 'Pemakzulan Presiden Republik Indonesia Pasca Amandemen UUD 1945 [Impeachment of the President of the Republic of Indonesia after Amendment of the 1945 Constitution],' *Jurnal RechtsVinding* 2, No. 3 (2013). P.331. See also Hamdan Zoelva, *Pemakzulan Presiden di Indonesia* [Impeachment of the President in Indonesia]. (Sinar Grafika 2011) 9.

[61]The crimes, which can be a reason for the impeachment, are unlawful form of treason, corruption, bribery, other felonies, or misconduct. See Article 24C of 1945 Constitution. Article 10 Paragraph (2) and also the ICC's Act.

[62]Regarding the inspection mechanism can be seen in the 1945 Constitution, Article 7B.

Law enforcement efforts mandated by the 1945 Constitution are less influential in the impeachment process. After the ICC's adjudication of the DPR's proposal, its judgment is put to the General Assembly, an institutional mechanism in charge of appointing and dismissing the President and/or Vice President.[63]

Impeachment has to meet the support of 2/3 of the floor members of Parliament attending the plenary session, attended by at least 2/3 of the Parliament. In 2014, the MPR members consisted of 692 persons,[64] meaning that to impeach the President and/or Vice President, 461 MPR members are required. After the reformation era and the amendment of the 1945 Constitution, therefore, it is now more difficult to impeach the President and Vice President.[65]

4.3. Constitutional Court Process

The daily operation of the ICC is presently run by three important processes. *First,* is the role of Secretary General (SG),[66] playing a significant role in the smooth operation of the ICC's daily duties, whether internally to the ICC, or externally. Internally, the ICC has to make sure that a case process, from case registering to the final judgment, will be well organised. Externally, it cooperates with other state institutions. For instance, the ICC has had a joint research agreement with several universities in Indonesia, been signed by the SG, who represents the ICC President.

During June to October 2013, the researcher personally visited the ICC in the capital city of Jakarta. The aim was to see how the ICC is operated on a daily basis. It is interesting to know the circle of the judgement making process, from registering cases, attending session, and final judgement. The ICC's judgement is the final arbiter, with no further appeal thereafter. The researcher was also involved in several academic discussions, focus groups, and seminars - such as attending a seminar about the specific watchdog organ for the ICC.

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[63]See alsot the 1945 Constitution, Article 7B.
[64]Majelis Permusyawaratan Rakyat, 'Anggota MPR' [MPR Members], accessed 2 March 2015. < https://www.mpr.go.id/profil/anggota/?periode=3&N=30>
[65]Maruar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* [The Procedural Law of Indonesian Constitutional Court] (KONPress 2005) 50.
[66]*Ibid*

The SG has designed the ICC to be accessible to researchers or public. The ICC website can be accessed easily for judgements, trial schedules, and video conferences. With Indonesia consisting of thousands of islands, the teleconference facilities in each province are helpful, but may not operate correctly because of poor weather.

The ICC building has a modern design and has good free access for the public to attend the session, and also in the distribution of recent and previous judgements. Typically, the judgements can be downloaded easily through the website, and the ICC has a library of contemporary design, containing collections both physical and electronic of the judgements, journals, books, and so forth. The public are welcome to access the facility, as long as they are registered. Usually visitors increase during the election session, but the ICC limits public access - forbidding electronic devices, distracting the session, threatening the judges, bringing a weapon, and so forth.

Second, is the Registrar, with duty to ensure administrative procedure are well-prepared.[67] The Registrar has duties only for the internal ICC, such as recording during the session, note taking, organising files, numbering judgements, double-checking evidences, inviting parties, minutes of trial, and so forth. The Registrars are highly experienced officers, having background in judicial archive. Their expertise in quickly finding a previous case and judgments is an advantage to the judges.

Registrars and the SG have been criticised mainly regarding the minutes of the trial. Sometimes, the minutes are a blurred document which is difficult to read. Usually, this situation has been found in the election cases. Another complaint is about the trial schedule, which is not regularly updated on their website, making it difficult for the media, or the applicant, to know the exact date for the trial.

At this time, the person holding the SG position has not been replaced for more than 12 years, although Indonesian administrative law only allows a person to hold public position for no more than 5 years.[68] There are no specific

[67] Ibid.
[68] See also Government Decree Number 13 of 2002 on the Appointment of Civil Servants on the Structural Positions.

requirements on how the SG must be selected. The SG and Registrar administer the ICC namely,

a. planning; analysis and evaluation; general administration and supervision of the administration of justice; as well as organizational management and governance;
b. financial management and human resource development;
c. household management; archival and expeditions; as well as state property;
d. implementation of public relations and cooperation; leadership and administration protocols; as well as secretarial court reporting;
e. research and case studies; library management; management of information and communication technology; and
f. the Pancasila and the 1945 Constitution.[69]

Thirdly is the proceedings process. The hearings in the ICC are conducted open to the public. The ICC's act states that

(1) The Constitutional Court examines, hears, and decides in a plenary session of the Constitutional Court with nine (9) constitutional judges, except in exceptional circumstances with seven (7) constitutional judges, headed by the Chairman of the Constitutional Court.
(2) In the case of the Chairman of the Constitutional Court is unable to lead the plenary session as described in paragraph (1), the trial is to be led by the Vice Chairman of the Constitutional Court.
(3) In the case of the Chairman and Vice Chairman of the Constitutional Court are absent at the same time, a plenary session is chaired by a temporary chairman, elected from and by the members of the Constitutional Court.
(4) Prior to the plenary session as described in paragraph (1), the Constitutional Court may establish a panel whose members consist of at least three (3) constitutional judges examining the results discussed in the plenary session for a decision to be taken.
(5) The decision of the Constitutional Court is pronounced in public session.
(6) When the provisions referred to in paragraph (5) are not met, it results in the invalid decision of the Constitutional Court and has no legal force.[70]

The ICC has nine judges. If the ICC's hearing is not held open to the public, the ICC's judgment regarding that case would not have legal power as well as a final binding.[71] ICC judgments have public impact, so that the public presence in the ICC judiciary process is a must. As stated by Mohammad the ICC must refer to several court principles in general; namely,

a) Ius Curia Novit (the court knows the law)

[69]Mahkamah Konstitusi, 'Tugas Pokok dan Fungsi' [Main Duties and Fuctions], accessed 3 March 2015. <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=5>
[70]See also the Act No.24 of 2003 on the ICC, Article 28.
[71]Ibid

b) Hearings open to public
c) Independent and impartial
d) Fast, simple and inexpensive judiciary
e) The right to be heard in equal
f) The principle of presumption of validity[72]

The plaintiff applying claim in the ICC must be an Indonesian citizen. They have certain legal entities considered to have their constitutional rights harmed caused by the enactment of act passed by the government. The applicant may fill his proposal to the ICC in writing, using a good and clear Indonesian language.[73]

A plaintiff in his petition has to describe the identity, position, and claim reasons against the defendant. A plaintiff is considered to have impaired his constitutional rights, and must prove the injustice which is required to be judged by the ICC.[74] The procedures are regulated in the ICC regulations, used as a reference in conducting the trial.[75]

ICC judges should demonstrate good ethical code and conduct to the parties present at hearings. Ethical behaviour is the attitude and behaviour based on a maturity which is aligned with prevailing norms in society. The implementation of a code of ethics, and a code of conduct, specifically for the ICC judges themselves, can lead to a trust or distrust over the court judgment. The judges are required to always behave with noble character,[76] because the act as law enforcement officers; owning ethical code as a set of moral standards or principal of formal law. The facts reveal that the legal profession has not always fully implemented the ethical code, and code of professional conduct. Thus, the profession in general is considered negative in public vision.[77]

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[72]Mohammad Saleh, *Prinsip-Prinsip Umum Hukum Acara Mahkamah Konstitusi* [General Principles of ICC Procedural La], (Fakultas Hukum Universitas Narotama Surabaya 2013) 2.
[73]See also the Act No.24 of 2004 on the ICC, Article. 29.
[74]See also the Act No.24 of 2004 on the ICC, Article. 31.
[75]Those the ICC's Regulation can be accessed through ICC website. Mahkamah Konstitusi, 'Peraturan' [The Regulations], accessed 3 March 2015. < http://www.mahkamahkonstitusi.go.id/index.php?page=web.Peraturan&id=6>
[76]See also The Joint Decision of the Supreme Court Chairman and the Judicial Commission Chairman of the the Republic of Indonesia No.047/KMA/SKB/IV/2009 & No.02/SKB/P.KY/IV/2009 on the Ethical Code and the Guidance of Judge Behaviour.
[77]Wasingatu Zakiyah, ed., *Menyingkap Tabir Mafia Peradilan* [Revealing the Scene of Judicial Mafia], (ICW 2002) 9.

4.4. The ICC as the Final Arbiter

The ICC has a key role in the Indonesian legal system, resolving cases linked with the implementation of state mechanism, as well as the political system. Thus, a conflict, which might have happened between state and political system, is to be managed legally through the judiciary process, one of the key combinations of the existence of the ICC.

The ICC, which is commonly known in the European system, adheres to the tradition of civil law in Austria, Germany and Italy. In America, it is integrated into the authority of the Supreme Court, so that the Supreme Court is the one called the Guardian of American Constitution.[78]

The ICC judgment creates legal norms that can negate the state's law and create a new legal situation.[79] In making its decision, the ICC shall not include content that is set. The ICC can only declare an act, or some of its contents void, as contrary to certain parts of the 1945 Constitution. The ICC has shared a good idea with regards to the regulations, as an alternative to a law or semi-cancelled law. ICC judgments are not always implemented promptly, but can be postponed.[80] The judgment is issued for a specified period of time, in order to meet a requirement in which the binding force of this decision will apply. Another form of this decision is made by stating that one of the articles in the acts is not binding, which is tested before there is a requirement to be met.

In another judgment, the ICC has made an important innovation with creating a new norm, in the judicial review of the Act No. 32 of 2004 on the Election. In this case the ICC declared that the words, phrases, and clauses in the Act, or the entire contents of the Act do not have binding legal force. If there are state officials or citizens who still use the article or act, their actions have no legal basis.

Since the ICC's judgment is a binding and final decision, then it must be based on philosophical values, and has a legal binding value certainty. The ICC

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[78]Achmad Ali, *Menguak Tabir Hukum Suatu Kajian Filosofis & Sosiologis* [Revealing the Legal Scene, A Study on Philosophy and Sociology], (Toko Buku Gunung Agung 2002) 87.
[79]Fista Prilia Sambuari, 'Eksistensi Putusan Judicial Review Oleh Mahkamah Konstitusi [The Existence Judicial Review Judgment by the ICC],' (2013) 1(1) Lex Administratum 20.
[80]See the ICC Judgment No. No. 016 / PUU-IV / 2006 on the the Corruption Eradication Commission.

has always upheld the values of justice, leading to justice and legal certainty, and this is the main substance that ideally determines the decision of the ICC.[81]

4.5. The Discussion on the Need of Supervision for Constitutional Court

In the principle of checks and balances, every state organ has a checking mechanism amongst them. The ICC has abolished the checking and balancing mechanism with its judgment, cancelling the jurisdiction of the Judicial Commission to watchdog ICC's judges.[82] The purpose of the Judicial Commission (KY) is to support the judicial power. During the amendment of the constitution in the MPR, Judicial Commission was to supervise the judges in the Supreme Court.[83] The development of constitutional law also implies the need to watchdog the ICC's judges, their role in protecting rights of citizen as the single interpreter of the constitution. In terms of the need for supervising the ICC's judges, there are two points of view that can be strong reasons.

Firstly, on one hand, the constitution does not give a detailed explanation of the judges which are referred to in the meaning of Article 24b Clause (1) stated ... '*to maintain and ensure the honour, dignity and behaviour of judges'*.[84] On the other hand, in the Constitution Article 24 Clause (2) it is stated that '*The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court*'. In this context, the word 'judges' mentioned in the constitution also means the ICC's judges.

Secondly, referring to the Transitional Provisions of the Constitution it is stated that "*The Constitutional Court shall be established at latest by 17 August 2003, and the Supreme Court shall undertake its functions before it is established."*[85] Thus, because the Supreme Court's judges have taken on the role as the ICC's judges, or in other words the Supreme Court's judges have acted as

[81]Mariyadi Faqih, '*Nilai-Nilai Filosofi Putusan Mahkamah Konstitusi yang Final dan Mengikat* [The Philosophical Values in the ICC Judgment, Final and Binding],' (2010) 7 (3) Jurnal Konstitusi 114.
[82]ICC's Judgment No.005/PUU-IV/2006 on the Judicial Commission.
[83]Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negarta Republik Indonesia tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002 [The Comprehensive Text of the Amendment of 1945 Constitution]* (Mahkamah konstitusi 2008) 413-467.
[84]Indonesian Constitution, Article 24 Clause (1).
[85]Indonesian Constitution, Transitional Provisions Clause III.

the ICC's judges, therefore the ICC's judges have also been included in the meaning of 'judges' who need to be supervised.

The recent supervising mechanism for ICC's judges is the Honorary Council of Constitutional Court, which has two supervising bodies, namely, an internal monitoring supervisor, and external monitoring supervisor. But this arrangement has a crucial weakness, because it cannot supervise judges' behaviour. The need of an independent agency supervising judges' behaviour, free from interference is necessary in order to uphold the honour, dignity and behaviour of judges, in the interest of good and clean governance.

4.6. The Election Authority and its Potential of Abuse of Power

Under Act No.15 of 2011 on the General Election, the election of provincial, district, governor, and mayoral election have been included in the election regime. As stated in Article 1 Clause (4) that: *'Governor and Vice-Governor Election is the election to vote directly head of the province and also his/her vice*.[86] The Act has been explicitly contradicted with the Article 22E Clause (2) stating 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.*[87]

The implication is the delegation of authority regarding election disputes from Supreme Court to the ICC, which has forced the ICC to share its focus amongst jurisdictions given by the constitution, and judging in limited time for solving provincial election disputes - that is no more than 14 days since the first registration.

The elections task seemed a serious problem, with frequency of elections Presidential, Governor, Mayor, DPD, DPR, DPRD/ DPRA, and DPRK. Indonesia now consists of 34 provinces, 403 districts, and 98 cities.[88] What would happen if those provinces, districts, and cities make elections in same year, having disputes that needed to be resolved quickly by the ICC? Off course, this too implies overload for the ICC, and also brings the credibility of ICC judgment into question.

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[86]The Act No.15 of 2011 on the General Election, Article 1 (2).
[87]Indonesian Constitution, Article 22E.
[88]Kementerian Dalam Negeri, 'Profil Daerah' [Region Profile], accessed 6 December 2014, <http://www.kemendagri.go.id/pages/profil-daerah>

In 2013, there were 178 provincial elections in Indonesia, of which more than 90% were brought to the ICC. This means there were more than 160 provincial election disputes brought to ICC.[89] If a year is 360 days, and excluding holidays and weekend is roughly 300 days, we can say that every 2 days the ICC has to judge 1 case of provincial election disputes. Arguing this fact, one of the ICC's judges stated that the delegation has made ICC looked like the election litter.[90] The ICC only has nine judges who have to handle a lot of provincial election.

With these statistics, and this logic, quality judgement and judicial fairness are almost impossible to achieve, creating vulnerability to the abusing of power. The election cases had a short period of time to examine and decide the cases. Consequently, the examination process, and the delivery of evidence, has seemed hasty, with a short time in making legal considerations, and judges in a hurry. Therefore, people are not satisfied with the legal reasoning and judgments in the Provincial Election dispute.

Table 10: Provincial Election Case from 2013-2014

YEAR	PROCESSING	ACCEPTED	TOTAL	JUDGMENTS		TOTAL JUDGMENTS	PROCESSING THIS YEAR
2013	8	192	200	Accepted:	14	196	4
				Rejected:	132		
				Not Accepted:	42		
				Withdrawn:	6		
				Cancelled:	2		
2014	4	9	13	Accepted:	0	13	0
				Rejected:	9		
				Not Accepted:	4		
				Withdrawn:	0		
				Cancelled:	0		
TOTAL	12	201	213	Accepted:	14	209	4
				Rejected:	141		
				Not Accepted:	46		
				Withdrawn:	6		
				Cancelled:	2		

Source:www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPUD

[89]Mahkamah Konstitusi, 'Rekapitulasi Perkara Pengujian Perselisihan Hasil Pemilihan Umum [The Recapitulation of the Election Disputes Cases]', accessed 6 December 2014. <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPU>. See also Harus Husein, *Pemilu Indonesia, Fakta, Angka, Analisis, dan Studi Banding* [Indonesian's Election, Fact, Figure, Analysis, and Comparative Studies], (Perludem 2013) 654.

[90]Arief Hidayat, 'MK Keranjang Sampah' [the ICC is the Election Litter] accessed 9 September 2014, <http://www.rumahpemilu.org/in/read/5990/Arief-Hidayat-MK-Keranjang-Sampah>

Besides other problems as a result of this delegation of authority, another is that the ICC's judgment is final and binding (first and last attempt). The situation can be exploited by certain elements to take more advantages in the ICC. In this circumstance, the ICC's judges are vulnerable to abusing their power. The President of the ICC judges was caught red-handed accepting bribes in an election dispute cases in October 2013 (Akil's case).[91] This case can be caused by lack of supervising body that monitoring judges behaviour.

After the Akil case, the ICC's jurisdiction to handle provincial election disputes was finally invalidated, and re-delegated to the Supreme Court. The ICC returned to its previous jurisdiction mentioned in the Constitution Article 22E Clause 2, to handle general election, chiefly the election of the members of the House of Representatives; the Regional Representative Council; the President and the Vice President; and the Regional House of Representatives.

The re-delegation has not solved the election problem. Responding to the concern over Akil, the ICC President stated that the ICC judgement was valid and legitimate, made by nine judges. The ICC President led a session in decision-making and pronunciation of judgment. The voice of ICC judges including president and vice-president in decision-making forum is equal.[92]

From my point of view, the ICC should review all its judgements during Akil's task as the ICC's judge, to give back the rights of justice to the real winner of the election dispute at that time. With this process, the injustice during Akil could be revealed clearly to the public, and go far in healing public trust.

4.7. Conclusion

The ICC was established after the amendment of 1945 Constitution, done for eliminating military interventions, law enforcement, human rights, eradicating corruptions, provincial autonomy, independent press, sustaining democratic life, and so forth. The changes have had great impact on the Indonesian constitutional system.

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[91] Corruption Eradication Commission (KPK), 'KPK Sita Tiga Mobil Mewah Akil,' accessed 10 September 2014 <http://www.kpk.go.id/id/berita/berita-sub/1433-kpk-sita-tiga-mobil-mewah-akil>

[92] Hamdan Zoelva, 'MK Kecewa Tak Diundang Presiden', accessed 10 September 2014 <http://www.antaranews.com/berita/399119/mk-kecewa-tak-diundang-presiden>

As the state organ established after the amendment, the ICC has duties and authorities to ensure the rights of Indonesian citizens before the constitution, as the guardian and interpreter of the 1945 Constitution.

The ICC has several written powers stated in the constitution, such as reviewing acts; determining disputes among institutions; deciding over the dissolution of a political party; deciding over disputes on the result of general election; and the power to impeach the president and the vice president. The ICC has also unwritten powers which are not clearly mentioned, or not mentioned at all in the constitution. The unwritten powers have been created by judges' interpretation in specific circumstances.

Some powers have caused significant debate, such as with regards to the dissolution of a political party. This power has been almost impossible to implement after the amendment, because the rule of law system has been well applied so far. Instead, the ICC is supposed to have a mechanism for solving conflict inside the political party - happening quite frequently.

Another power is the handling of election disputes. This authority has a short time limit in handling cases and numbers of justices' are not sufficient. In this situation, the ICC should choose a specific election, such as Presidential or Parliamentary election, to produce a quality judgment. Lastly is the power to impeach the President or his vice. This authority can be said to be a sleeping power, to be very rare. This power seems to prevent the previous experience in which the President was easily impeached through political process, instead of judiciary process.

In its daily process, the ICC has two key role positions; the SG and Registrar. The criticism is that the person holding the SG job has not been changed for more than 12 years, since 2003 to 2015. The 'unchangeble SG' is against the administrative law imposed in Indonesia. Also, there are no firm rule on how the SG has to be nominated.

Cooperation with other institutions can be easily cancelled by the SG on behalf ICC, without any consequences - as happened with several universities in Indonesia. The teleconference facilities for the remote areas of Indonesia have rarely functioned because there is no routine maintenance to face severe weather conditions.

The Registrars, who note-take during the session, have also received public concern regarding their work. The minutes produced by the Registrars are sometimes a blurred document which is hard to read, as frequently happened in the election cases. Similarly, the website has late updates, making it difficult for the media or an applicant to know the exact date for the session.

In supervision, the ICC has faced serious critics, since the ICC invalidate the KY's power to supervise ICC's judges. This implies that the ICC's judges are untouchable, violating the basic principle of checks and balances in the 1945 Constitution. Every state institutions must have checks and balances, implies which the need for a watchdog for the ICC including the judges. This is simply because the ICC has a significant role in protecting rights of citizen as the single interpreter.

Although ICC has final and binding judgment, some ICC judgments need a serious concern and careful investigation, chiefly, the Akil's cases. After being found guilty on the bribery case, during handling a provincial election case, the public have been questioning the previous Akil's cases. There are assumptions that during his role as the ICC judge, Akil gave victory for the wrong persons. In contrast, the ICC so far seems reluctant to investigate the Akil's cases.

Responding to this fact, the ICC should be appraising the ICC judgments involving Akil. The review is important to inspect whether at a certain period of time Akil made a verdict with the indication of bribery, or not. Therefore, it will bring back public trust for the ICC in future. Also, this review also will give back the rights of justice to the real winners of the election disputes, at that time, who were unjustly taken by Akil. By this process, the injustice during Akil's period can be clearly discovered by the public, whilst finding new corruptors in the time of Akil's period. Also, this opinion would give many advantages for the ICC in the process of healing public trust.

CHAPTER 5 - INDONESIAN CONSTITUTIONAL COURT ROLE IN THE LAW REFORM

5.1. Introduction

Indonesia has become the 78th country in the world to establish constitutional courts. The 13th August, 2003, was the day on which the Act number 24 of 2003 was validated, and pronounced the birth of the Constitutional Court of Indonesia. Following the validation of the Act, proposing institutions the House of Representatives, the President, and the Supreme Court, recruited their constitutional judge candidates. After going through the selection phases as regulated by the mechanism that applies in their respective institutions, the House of Representatives, the President, and the Supreme Court nominate nine constitution judge candidates to be proposed to the President, and then inaugurated as the constitution judges.

The philosophical reason for establishing the ICC is for supervising a law process. Act making is principally a parliamentary process, related closely to political bargaining or the majority domination, which potentially bring legal inconsistency to the 1945 Constitution. For this reason, most Indonesian scholars are fully aware, that judges have to be involved throughout the process of democracy and law reform - chiefly to protect the constitution in general.

Therefore, the ICC has developed as one of main tools of democratic reforms agents. It has sheltered the state of the country's other key political and judicial institutions. Whilst the ICC has pushed the democratic reform agenda headlong, the government, parliament, and other organs of the legal system have hindered further political transformation.[1] In observation of this fact, Horowitz has noted that in law, as in life, what is mundane is often more essential than what is

[1]Stephen Sherlock, 'The Parliament in Indonesia's Decade of Democracy: People's Forum or Chamber of Cronies,' (2010) Problems of Democratisation in Indonesia: Elections, Institutions and Society 160-178.

exceptional.[2] In other words, the emphasis on constitutional judgement should not be confused from the task of associating a country's routine political and legal organ practices.

Thus, one of the key actors in law reform through the judiciary process is the judges. Constitutional judges possess broad powers to govern, in conjunction with other state officials, by virtue of an explicit act of delegation. In the terminology of delegation theory, constitutional courts are the agents. 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.[3]

5.2. The Procedures of Selecting Judges

As one of the holders of judicial power, the ICC is required to be an independent institution, free from the influence of other powers, as it has been stated in Article 24 of the 1945 Constitution. Therefore, the ICC judges are required to be selected from the group of constitutional law experts, who are outstanding persons in the field of state administration and politics in Indonesia, as well as being independent from the political practices, and its influences. It is commonly known, between the law and politics it is difficult to draw a clear line, especially in the Indonesian legal system.[4] Therefore, in the context of being ICC judges, they have to personally free themselves from any political interest.

The procedures for the election of ICC judges have been clearly regulated in Article 24C Paragraph (3) of the 1945 Constitution; namely,

> "The Constitutional Court comprises of nine members of constitutional judges assigned by the President, each three of them are represented by the Supreme Court, the House of Representatives, and by the President."

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[2]Donald L. Horowitz, 'Constitutional Courts: A Primer for Decision Makers,' (2006) 17 (4) Journal of Democracy 135.
[3]Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy,' (2002) 25 (1) West European Politics 1.
[4]Moh.Mahfud, *Politik Hukum di Indonesia* [The Politics of Law in Indonesia] (LP3S 1998). 7-14.

It is further confirmed in the same chapter (4) of the constitution stating that

(1) The Chairman and the Vice Chairman of the Constitutional Court judges are elected from and by the Constitutional Court.
(2) The constitutional judges must own un-despicable integrities and personalities, being righteous statesmen who can control the constitution and the statehood, and do not concurrently hold the position of government officers.
(3) Matters pertaining the appointment and dismissal of constitutional judges, procedural law and other provisions of the Constitutional Court shall be regulated by law.

The legal basis for the appointment of ICC judges is further stipulated in the act, namely Article 4 Paragraph (5) of the Act No. 24 of 2003 on the ICC, as amended by the Act No. 4 of 2014 as Article 4 of the Act No. 24 of 2003 on the ICC, which stated that

(1) The Constitutional Court consists of nine (9) members of the constitutional judges set by the Presidential Decree.
(2) The composition of the Constitutional Court shall consist of a Chairman and member, a Vice Chairman and member, and seven (7) members of the constitutional judges.
(3) The Chairman and the Vice Chairman are elected from and by the constitutional judges for a term of three (3) years.
(4) Prior to the election of the Chairman and Vice Chairman of the Constitutional Court as referred to in paragraph (3), the election meeting is led by the oldest judges.
(5) The procedure of election of the Chairman and Vice Chairman as referred to in paragraph (3) shall be regulated further by the Constitutional Court.

Historically, it can be observed that the changing of the Act No. 24 of 2003 conducted twice and lastly with the passage of the Act No. 4 of 2014, cannot be separated from the internal problems. It has occurred within the ICC, whereas there are some ICC judges violating the ethical code of the judges, snagging into criminal cases.[5] Therefore, the government, in this case the President and the House of Representative, has agreed to amend the ICC's act by focusing on strengthening the requirements procedures of ICC judges. This is confirmed in the preamble considering; namely,

[5]Zihan Syahayani, "Pembaharuan Hukum Dalam Sistem Seleksi Dan Pengawasan Hakim Konstitusi [Legal Reform in the System Selection and Supervision Constitutional Justice], (2014) 1 (1) Jurnal Mahasiswa Fakultas Hukum 4-5.

> To preserved the democracy and the laws of Indonesia and to restore public confidence and trust toward the Constitutional Court as a state institution performing the function of enforcing the Constitution, the President has set the Government Regulation in Law No. 1 of 2013 on the Second Amendment Act number 24 of 2003 on the Constitutional Court, particularly the provisions regarding the requirements and procedures of selection, election, and proposing of candidate of constitutional judges and the establishment of the chamber of honour of constitutional judges.[6]

Article 15 Paragraph (1) of Act No. 4 of 2014 states the requirements of the ICC judges are

a. owning un-despicable integrities and personalities
b. be righteous; and
c. statesmen who master constitution and statesmanship.[7]

The concept of the statesman was developed concurrently since the development of state discussion, one of them was Plato's view. He said that to govern requires special abilities possessed only by the statesman; who has the ability to organize the fair and good and the interests of citizens.[8]

A statesman grammatically can be defined as a person having knowledge and expertise of state administration, considerable field experience, and a commitment to implement and oversee the state of life in accordance with the constitution corridor. A statesman can also be interpreted as a highly visionary person, long-term oriented, prioritizing the welfare of society, able to apply egalitarian fairness and protection for all components of the nation.[9]

In the context of the ICC, a statesman has a meaning as someone who has been separated from the interests of individuals and political

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[6]Letter b of the Act No. 4 of 2014 on the Second Amendment of the Act No. 24 of 2003 on the ICC.
[7]Ibid, see also the Article 15.
[8]Hamid Behzadi, 'State and Ruler in Plato and Machiavelli,' (1977) Pakistan Horizon 5-22.
[9]Janedjri M Gaffar, *Hakim Konstitusi dan Negarawan* [The Constitutional Judge and the Statemen], accessed 4 March 2015, <http://www.unisosdem.org/article_detail.php?aid=10544&coid=3&caid=21&gid=2>

groups. The interests of the nation and the state are the main orientation.[10]

The ICC judges consist of nine persons representing the three branches of state power, namely, the President, the Parliament and the Supreme Court. The three branches of power can choose three candidates before the ICC judges are officially assigned by the President. Those judges must pass through a due diligence review in the trial panel of experts. Meanwhile, the expert panel is formed by the Judicial Commission.[11]

At the time when the candidates of the ICC judges have declared that they have passed the fit and proper test of the expert panel, they can be declared as the ICC judges by the President as the head of state. The nine ICC judges, who have been determined by the President, can further define and specify the Chairman and the Vice Chairman of the ICC.

The determination of the Chairman and the Vice Chairman of the ICC is done as has been stipulated in the ICC Regulation No. 3 of 2013 on Procedures and Election of Chairman and Vice-Chairman of the ICC. The Election of Chairman and Vice Chairman of the ICC is organized through plenary meeting of the judges'.[12] Each of the representatives of judges in the meeting has the right to elect and to being elected the Chairman and Vice-chairman of the ICC.[13]

The decision making in the election of Chairman and Vice-Chairman can be organized through a closed meeting.[14] If a conclusion cannot be reached, balloting is allowed, and the vote is from the judges themselves.[15]

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[10]Janejri M.Gaffar, 'Demokrasi dan Kepatutahan' [Democracy and The Compliance],' (2014) 91 Majalah Mahkamah Konstitusi 75.
[11]The ICC judges must go through a fit and proper test conducted by the expert panel, before legally appointed by the President. See also the Article 18A and 18B of the Act No.4 of 2014 on the Amendment of ICC.
[12]See also the Article 1 (5) The ICC Regulation Regulation No. 3 of 2013 on Guidelines for Proceedings in Dispute of Election Results Members of the Board of Parliament, Regional Representatives Council, and the Regional Parliament Council.
[13]Ibid, see Article 2 (3).
[14]Ibid, see Article 5 (1).
[15]Ibid, see Article 5 (2).

In the future, the selection process of the ICC judges must have a fixed standard in the procedures and process. The recruitment of the ICC judges has to look at the roles, functions, and duties of the judges, who are the most influential persons to the nation in terms of constitution.

5.3. The ICC under Five Presidents

The composition of the ICC that consists of nine judges is likely to affect the kind of discourse that the court generates. The court will construct a jurisprudence that mediates between different spheres of knowledge. Its discourse will be relatively autonomous and different from, what Comella mentioned the more legalistic kind of reasoning which one could expect from ordinary judges, especially in civil-law countries, as well as from purely political discourse.[16]

To put it in a rather simplified manner, the professors on the court will tend to be more philosophical, governmental officials will be more sensitive to policy considerations, former politicians will have insights into what is feasible for the court to do given the existing political climate, and judges will bring their expertise in more technical ordinary law.

The Constitution 1945 lays down the very high qualifications for a person to be a judge for the ICC, in which he or she should have a noble and dignified personality, be fair and be a statesman with a great mastery of the constitution and the governance administration. The position is open to personalities with academic and politics backgrounds provided they are wise, and not partisan. The qualifications required by the constitution should be carefully considered by the House of Representatives, the President, and the Supreme Court in nominating their delegated candidates for the Constitution Judges.[17]

Since 2003 to October 2015, the ICC has been headed by five ICC's presidents with a variety of educational and political backgrounds. The president, having a political background has normally faced more critics in terms of impartiality. In contrast, the academicians, in some

[16]Victor Ferreres Comella, *Constitutional Courts & Democratic Values A European Perspective* (Yale University 2009) 45-46.
[17]The Act Number 24 of 2003 on the Constitutional Court of the Republic of Indonesia.

situations, have received minor criticisms. The academicians have been criticised because of using more philosophical approach rather than the clear text of the constitution.

The glory periods of the ICC were about 2008 – 2013. In that time the ICC made significant breakthrough in Indonesian law reform, such as in 2009 by allowing unregistered-voters to vote based on their identity cards as replacing the Election Commission's card. The gloomy eras were in 2013 – 2014. This was because the ICC president was caught-red-handed in a bribery case. In that period, the ICC's dignity reached its nadir. Even the ICC session was interrupted easily, and riot within the session happened frequently. Nowadays, the ICC has been in the process of building public trust to regain its previous glory. Below, will be briefly explained the characteristics of the ICC judges under five leaders.

Table 11: The ICC President from 2003 to 2017

NO	PRESIDENTS	VICE	PERIOD	PRESIDENTS BACKGROUNDS
1	Jimly Asshiddiqie	Mohammad Laica Marzuki	19 Aug 2003 - 19 Jan 2008	Academician & Politician
2	Moh. Mahfud MD	Achmad Sodiki	19 Aug 2008 - 3 Apr 2013	Academician & Politician
3	Akil Mochtar	Hamdan Zoelva	3 Apr 2013 - 5 Oct 2013	Politician
4	Hamdan Zoelva	Arif Hidayat	1 Nov 2013 - 6 Jan 2015	Politician
5	Arif Hidayat	Anwar Usman	7 Jan 2015 - 6 Jan 2017	Academician

Source: http://www.mahkamahkonstitusi.go.id

5.3.1. Jimly Asshiddiqie

He is the constitutional law professor from the University of Indonesia who is known for his strong academic background, calm and can control his emotion. Similarly, he is recognized as one of the key persons underpinning the foundation of the ICC, and led from 19 August, 2003 until 19 August, 2008, accompanied by his vice Mohammad Laica Marzuki.[18] Jimly was known as the person longest holding the position of ICC president.

Under his leadership the ICC became a respected court. The ICC's judgements could be easily downloaded directly through the ICC

[18]Mahkamah Konstitusi, 'Mantan Hakim Konstitusi,' accessed 23 December 2014, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.HakimLain&id=>

website shortly after the judgement had been read. In terms of bureaucracy and finance, the Audit Board also expresses the honourable award for the financial statements of the Court.[19] The debate on constitutional law in this period was very exciting, especially when the ICC made controversial judgements, such as the case Ultra Petita on the Act of Truth and Reconciliation Commission, and Electrical Power.

At that time, although there were some issues about the possibility of deviant practice, most people still saw the ICC as one of the most transparent and authoritative court in Indonesia, with an established record of independent rulings, such as the landmark 2007 decision to inversion denouncement related articles of the penal code.[20] Other state organs which are still publicly trusted are the Anticorruption Court and the Corruption Eradication Commission.

At the beginning of his leadership period, the ICC was much closer to the basic idea of constitutional courts as the negative legislator introduced by Kelsen. In this time the ICC only invalidated the basic norm in the provisions, which indicated against the 1945 Constitution, and then sent to the parliament to make some changes. However, this basic idea was changed, when the ICC judged several controversial judgements. One of the crucial judgements was the judgement about the invalidation of the Judicial Commission's role in supervising the ICC's judges.[21]

Another debatable judgement in the time of Jimly, was about the former communist party member. As is publicly known, Indonesia had a miserable experience regarding the communist party. A lot of innocent people, mostly Muslim, were brutally killed by members of the communist party.[22] From that experience, Indonesia has banned permanently all communist activity, and all of their members from involvement in political

[19]BPK (The Audit Board), 'BPK Menyerahkan Laporan Hasil Pemeriksaan atas Laporan Keuangan Tahun 2013 Kepada 37 Kementerian/Lembaga, ' accessed 14 November 2014. <http://www.bpk.go.id/news/bpk-menyerahkan-laporan-hasil-pemeriksaan-atas-laporan-keuangan-tahun-2013-kepada-37-kementerianlembaga>

[20]Arch Puddington, and Aili Piano. *Freedom in the World 2009: The Annual Survey of Political Rights & Civil Liberties* (Freedom House 2009) 337.

[21]ICC's Judgment No.005/PUU-IV/2006 on the Judicial Commission.

[22]Robert Cribb,'Genocide in Indonesia 1965-1966,' (2001) 3 (2) Journal of Genocide Research 219-239.

activity. The ICC, under Jimly, conversely, restored the political rights of those former communist party members, to become a political contestant, and giving a voting right in elections.

The restriction of communist party to involve in any political activities had clearly been mentioned in the Act of Election, Article 60 (g) which stated that former member of the banned Communist Party of Indonesia, including its mass organizations, or not a person who is directly or indirectly involved in the G30S / PKI or other banned organizations. The ICC's judges have given their opinion on the Article, saying that the article was not relevant to the purposes of national reconciliation for the nation of Indonesia. However the majority of the Indonesian population stressed that the involvement of the Communist Party, and their mass organisations, in the tragedy of the G30S/PKI in 1965 was a crimes against humanity.[23]

5.3.2. Moh. Mahfud MD

Moh. Mahfud MD is the professor of constitutional law and politics at the Indonesian Islamic University, Yogyakarta, Indonesia. He has a strong academic background, combining law and politics. His previous experience as parliament member and ministry give him credit point to become the ICC judge. Mahfud led the ICC from 19 August 2008 until 3 April 2013, accompanied by his vice Achmad Sodiki.[24] In this period, Mahfud was only following and strengthening the success story of the ICC which had already been designed in the time of Jimly.

Influenced by his previous experience as a politician, who tended to speak to media, he easily commented on the cases judged by the ICC. Sometime he was commenting on matters which did not related to the ICC, such as the Suprem Court's judgement on death penalty and drug dealers.[25] In contrast, the ICC judge is restricted ethically to comment only

[23]ICC's Judgment No. 011/PUU-I/2003 on the Act of Election.
[24]Mahkamah Konstitusi, 'Mantan Hakim Konstitusi, accessed 23 December 2014, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.HakimLain&id=>
[25] Waspada, Mafia Narkoba Dibalik Dinding Istana [Drug Mafia Behind the Palace Wall], accessed 17 November 2014,

upon his own judgement when speaking to the public. Also, in the time of Mahfud, the ICC undertook several controversy judgements. Even, at times, the ICC bravely decided a breakthrough in a few crucial judgements, even must invalidate some articles in an act.

An example is the judicial review of the Employment Act. According to ICC, the rules for outsourced workers (providers of employment services) in the act, namely Article 65 paragraph (7) and Article 66 paragraph (2), b is considered unconstitutional, if it does not guarantee the rights of workers, thus violating the constitution. On this case the ICC stated that the Act does not have a binding force, if the employment agreement is not required the transfer of rights protection for workers or labourers.[26]

Another controversial judgement was the judicial review of the Act Number 49 of the State Receivables Affairs Committee, Article 4, 8, and 12. In this judgement, Mahfud and the judges annulled the terminology of 'state agencies' stated in the Act. The ICC stated that the state's bills receivable is simply an amount of money that must be paid to the central government and/ or local governments; whilst receivables owned by state-owned enterprises are not included in the state accounts.[27]

Therefore, it is not compulsory for the state to pay the debt of the national company. With this judgement, the completion of state bank accounts is no longer borne by the state, because the settlement mechanisms have been submitted to the respective state banks. Receivables state-owned banks can be resolved solely by the management of each state-owned bank, based on the principles of fairness.[28]

In the Mahfud era, the ICC had not specifically annulled or invalidated all over an act. But he intervened the parliament jurisdictions by fixing and editing text of in act. Even he made his own judgement

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<http://www.waspada.co.id/index.php?option=com_content&view=article&id=267637:mafia-narkoba-di-balik-dinding-istana&catid=59:kriminal-a-hukum&Itemid=91>
[26]ICC's Judgment No. 100/PUU-X/2012, on the Employment Act.
[27]ICC's Judgment No. 77/PUU-IX/2011, on the State Receivables Affairs Committee.
[28]ICC's Judgment No. 77/PUU-IX/2011, on the State Receivables Affairs Committee

format, which did not exist before in the ICC's judgement, or before other acts.

Those judgement formats are: firstly is *the conditionally constitutional.* This judgement states that an act provision is not contradicted to the constitution. But the ICC makes a condition to state institution to implement act provision based on the ICC's interpretation, especially on the constitutionality of an act provision. Secondly is *the conditionally unconstitutional.* This judgement states that an act provision is contradicted with the ICC, if it does not fulfil the requirement stated in the ICC's judgement. [29]

5.3.3. Akil Mochtar

Akil Mochtar is widely known as a member of a political party. In contrast, his background is very different from the previous leaders as academician. His extended process for next period of the ICC judge has created a serius controversy.[30] He was recognized as the election case specialist, because of his concern over the election disputes, chiefly provincial and district elections. Because of the bribery case, Akil led the ICC for the shortest period - only six months, between 3 April, 2013, and 5 October, 2013. His vice-president in that time was Hamdan Zoelva.[31]

The corruption indication by Akil was detected since 2010. The Mayor of Simalungun District admitted to having asked the cost of winning the case to be giving for the ICC's judge in April 2010. Knowing the extortion, the Mayor's solicitor rejected giving the cost of winning for the ICC judge, and he then published the awkwardness to a broadsheet newspaper.[32] Responding to the article and ensuring public trust, the ICC

[29]ICC's Judgment No.072-073/ PUU-II/ 2004, ICC's Judgment No. 5/PUU-V/2007, ICC's Judgment No. 102/PUU-VII/2009. ICC's Judgment No.01/PUU-VIII/2010, ICC's Judgment No.65/PUU-VIII/ 2010.

[30]Martin Hutabarat, 'Memang Ada Kejanggalan dalam Perpanjangan Masa Jabatan Akil Mochtar' [Indeed There is irregularity in the Extension Term Akil Mochtar], accessed 13 October 2014
<http://nasional.kompas.com/read/2013/10/14/1426485/.Memang.Ada.Kejanggalan.dalam.Perpanjangan.Masa.Jabatan.Akil.Mochtar>

[31]Mahkamah Konstitusi, 'Mantan Hakim Konstitusi, accessed 23 December 2014, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.HakimLain&id=>

[32]Refly Harun, 'MK Masih Bersih' [Is MK still Clean?], accessed 19 November 2014

had an independent investigation unit seek the indication of bribery. After a few months' work, unfortunately, the ICC could not find strong evidence of Akil involvement in several cases.

During 2010 and 2013, the Corruption Eradication Commission found several occasions of awkwardness in provincial and district elections, specifically, the session under Akil - such as making lots of jokes in the session; wasting time in examining witnesses; not being concerned about checking a voted letter, even tending to ignore it; controlling the election cases under his authority; and so forth.[33] Unfortunately, Akil was not clever enough to hide his actions from the Corruption Eradication Commission. On 2 October, 2013, he was caught red-handed whilst accepting a bribe from the case of a district election dispute.[34]

The Honorary Council of the ICC officially dismissed Akil Mochtar with no respect for his position as a constitutional judge. Akil was considered deviant in deciding local election disputes during his period. He was also proven on deciding a case with a bias to one party only.[35] From this case, it seemed that Akil decided a case only partially, and was also proven to have received funding from litigants. In fact, according to the code of ethics, the ICC's judges and their families are prohibited from asking for gifts or loans from the parties litigate.[36]

After Akil's case, most people who ever had a case under Akil have been asking about the validity of Akil's judgement, and whether the judgement needs to be reviewed or annulled. Answering their anxiety, Harjono, one of the ICC judges, stated that all of the ICC judgements are

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<http://nasional.kompas.com/read/2013/10/03/0837290/Melihat.Lagi.Catatan.Refly.Harun.MK.Masih.Bersih>

[33]KPK, 'Akil Mochtar Terjerat Dua Sengketa Pilkada' [Akil Moctar Entangled Two Election Disputes], accessed 19 November 2014, <http://www.kpk.go.id/id/berita/berita-sub/1422-akil-mochtar-terjerat-suap-dua-sengketa-pilkada>

[34]Ibid.

[35]Harjono, 'Semua Putusan MK Dinilai Bermasalah' [All of ICC's Judgments Accessed Troubled] , accessed 19 November 2014, '<http://www.tempo.co/read/news/2013/11/02/063526682/Semua-Putusan-Akil-Mochtar-Dinilai-Bermasalah>

[36]The ICC Regulation Number 02/PMK/2003 on the Code of Conduct and Ethics of ICC Judges, Article 3.

valid, and will not be annulled or reviewed. Harjono also insisted that the Akil's case is in police domain that not affecting the ICC judgements.[37]

Regarding Akil's judgements, the researcher personally has a contrasting point of view. The ICC must recheck the judgements made under Akil. The rechecking process is needed for several purposes: specifically, to foster public trust; to identify the indication of corruption in other cases and catching other suspect; to give election justice to the right persons; and most importantly restores the dignity of the ICC, which is known as the trusted court in Indonesia post reformation era. Unveiling Akil's judgements are same like covering a time bomb which can be explode at any time.

5.3.4. Hamdan Zoelva

Hamdan Zoelva is broadly recognized as a member of a political party, who led the ICC from 1 November, 2013, until 2015, accompanied by his vice Arief Hidayat. Personally, Hamdan was known as a calm person who was also straight to the point in session process, chiefly, in checking the witnesses.

He replaced Akil Mochtar, who left the position due to the bribery case. The Zoelva's period was known as the decline of ICC. The public, generally, no longer trusted the institution. Zoelva was in a difficult position at that time, because he faced the daunting task of restoring public trust in the ICC after the Akil's case. [38]

In the time of Jimly, the ICC departed from zero. In contrast, in the time of Zoelva, who currently leads, the ICC set out below zero. The ICC is in the most difficult position to restore public trust. The riot, which can be identified as a contempt of court, frequently happened in the ICC

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[37]Harjono, 'Semua Putusan MK Dinilai Bermasalah' [All of ICC's Judgments Accessed Troubled] , accessed 19 November 2014,
'<http://www.tempo.co/read/news/2013/11/02/063526682/Semua-Putusan-Akil-Mochtar-Dinilai-Bermasalah>

[38]Mahkamah Konstitusi, 'Profil Dr. Hamdan Zoelva, S.H., M.H', accessed 23 December 2014, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilHakim&id=659>

session room after the reading of judgements.[39] Previously, this had never happened – either before, during, or at the time of Jimly and Mahfud; because during those times the ICC was very authoritative and also respected.

Currently, the ICC has gradually begun to restore public trust. It has started with the success record in resolving election disputes in 2014. The election was a crucial test for the ICC. Fortunately, the ICC has able passed the test with fair and trusted tribunal system.

In improving public trust, Hamdan has made a significant upgrading to the ICC. Every case and its judgement in the ICC can be accessed easily on the ICC's website after the judges read it; this is one of the applications of public transparency on the court. The public can always access the information and monitor the performance of ICC's judges. In the form of public scrutiny of the ICC, universities can also play a significant role in supporting the daily work of the ICC. Also, a number of models of justice in the ICC have been derived from the contributions of academicians.

For the eleven years of the ICC establishment, several universities have played an important role for the ICC. At the beginning of the establishment of the ICC, Jimly successfully led the ICC as a respected institution, and throughout the leadership period of Mahfud, the ICC was increasingly powerful and respected. The position of the ICC was in a stronger place because the ICC had managed to fulfil the mandate to be one of the trusted institutions at that time.

Hamdan's term of office finished in January 2015, moreover, many critics asked him to resign from the post of judge. As mentioned by Erwin, under Hamdan the ICC was considered to lack transparency, and provided inconsistent court decisions. For instance, the ICC's judgement

[39]Patrialis Akbar, 'MK: Kerusuhan Sidang MK Bentuk *Contempt of Court'*, accessed 20 November 2014, < http://www.hukumonline.com/berita/baca/lt5284f162198a3/mk--kerusuhan-sidang-mk-bentuk-icontempt-of-court-i>

has limited the Judicial Commission's authorities to probe the ICC's judges who violating the code of ethics of the ICC.[40]

5.3.5. Arief Hidayat

Arief Hidayat is publicly known as the environmental law professor in the University of Diponegoro. So far, he is recognised as the only ICC president who does not have a previous political background, or associated with any political party. He was elected by nine ICC judges on 7 January, 2015, as the ICC President until 6 January, 2017.[41] Current elected president has future hard work. His presidency period has significat task to heal and rapidly restore the public trust and honour, which were tarnished by the Akil's bribery case.

One of the popular cases in his first year presidency was the circle process of the parliament members, who allegedly were suspected of breaking the law. The ICC made the judgement that the green light of investigating the parliament members must be given by the Honorary Council Board, instead of the President who can delegate his authorities for chief of police. This implies that the suspect might be innocent with the political approach. Thus, the Honorary Council Board is dominantly ruled by the number of political members that do not want their members will be found guilty.[42]

Moreover, ICC judges are expected to come from backgrounds of constitutional law, public law, or administration law. In contrast, Arief academic background is in environmental law. Thus people have asked an essential question on his capability. Only a few of his publications have indirectly related to the matter of constitutional law. Similarly, his sense of

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[40]Erwin Natosmal Oemar, 'Hamdan Zoelva Tak Layak Dipilih Kembali Jadi Ketua MK [Hamdan Zoelva Not Eligible To Be Re-selected as the Chief Justice],' accessed 20 November 2014, <http://m.jurnas.com/news/157591/Hamdan-Zoelva-Tak-Layak-Dipilih-Kembali-Jadi-Ketua-MK--2014/1/News/Hukum/>

[41]Mahkamah Konstitusi, 'Profil Arief Hidayat [The Profile of Arief Hidayat],' accessed 7 October 2015. <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilHakim&id=669>

[42]See also the ICC' Judgment No.76/PUU-XII/2014 on the Parliament Members.

humour is sometimes publicly misplaced. He apologized for his mistakes of satirizing the GP profession.[43]

5.4. The ICC Role in Law Reform in Indonesia

The establishment of the ICC has also projected to provide law reform to overcome problems relating to the outcome of general elections - which has been recognized as the main pillar in a modern democratic system. In other words, judges must be involved in political dispute, or rather, unleashing the political without the dispute mechanism.

Regarding law reform in election disputes, if there are differences of opinion regarding the count of votes amongst the electorate with the organizer of a general election, the ICC will act as the first and final court in order to provide a final binding judgement. Through a justice mechanism of this style, the deviation of view concerning the product of an election will not turn into a political conflict, rather, it is managed objectively and rationally as a law related dispute, which must also be established legitimately.

5.4.1. Reforming the Legacy of Dutch Colonial

In reforming the legacy of Dutch colonial, the ICC has made several significant points, including amending the Criminal Act. It was inherited by the Dutch since 1 January 1918.[44] The Act previously impressed as the sacred act which was forbidden from review. Generally, the clauses and articles in the act have been easily interpreted by the

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[43]In the seminar held by University of Diponegoro on 29 November 2013, with the title Dekonstruksi dan Gerakan Pemikiran Hukum Progresif [Deconstruction and the movement of progressive legal thought], he made a joke statement that *the mechanic is more difficult than the GP, if a mechanic fails, he will be unpaid. However if a GP fails to remedy or even a patient pass away, he will still pay with huge amount of money. Because the GP can say this is the God's destiny, We have done our best!* This joke statement received critics from GP association stated that the ICC judges have supposed to be a polite person not making a degraded joke. See also Widodo Judarwanto, ,'Pantas MK Terpuruk, Hakimnya Tidak Beretika dan Tidak Bijaksana [The ICC deserve slumped, the Judges Have Not Ethical and Unwise],' accessed 7 October 2015, <http://www.kompasiana.com/sandiazyudhasmara/pantas-mk-terpuruk-hakimnya-tidak-beretika-dan-tidak-bijaksana_55290157f17e6126268b4670>

[44]Ahmad Bahiej, 'Sejarah Pembentukan KUHP, Sistematika KUHP, dan Usaha Untuk Pembaharuan Hukum Pidana Indonesia' [History of the Formation of the Criminal Code, the Criminal Code Systematics, and Effort To Reform Criminal Law Indonesia]

government for general purposes, such as, activist detention and holding other political prisoners.

Indeed, in terms of the Criminal Act, the ICC has decided some crucial judgements, which have also caused controversy amongst criminal law experts. Those judgements are: *firstly,* the reviewing article on insulting the President or Vice-President. The ICC has clearly found that the articles were the colonial's articles, used to convict people of colonies in a very easy way, including charging for insulting the power holder during that time. Therefore, the people could be intimidated and humiliated; and arranged their lives so as to not go against the power holder.[45]

The ICC's judges also stated that those articles may create legal uncertainty because of susceptibility to the interpretation of whether a protest, statement, or opinions are an insult or criticism of the President and/or Vice President. Similarly, the articles hampered the rights of thoughts expressed either orally or written such as demonstration on the public space.[46]

Secondly, was reviewing the article regarding criminal offense expressed feelings of hostility, hatred, or humiliation in public against the Government of the Republic of Indonesia. The ICC has the opinion that the offense norms in the articles were the formal offense, giving rise to a tendency of abuse of power, as they could easily be interpreted according to the will of the power holder. Also, those articles can be said to be irrational; because a citizen of an independent and sovereign state, could not be hostile to the state and his own government - which is independent and sovereign. In the same way, a citizen intending to express criticism or opinions of the government, which is a constitutional right guaranteed by the Constitution 1945, could be easily qualified by the authorities as statements of feelings of hostility, hatred, or contempt.[47]

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[45]ICC's Judgment No. 013-022/PUU-IV/2006 on The Insulting President and Vice-President, Article 134, 136, and 137.
[46]Ibid.
[47]ICC's Judgment No. 6/PUU-V/2007 on The Criminal Offense Expressed Feelings of Hostility, Hatred, or Humiliation in Public Against the Government of the Republic of Indonesia, Article 154 and 155.

Thirdly was the review of Article 160 on the crime of incitement. The judges stated that the legal value protected in the article is to provide legal protection to the public from acts that incite another person to commit a criminal act, incite people to commit violence against public authorities, and protect from those who disobey the law or positions of command. Therefore it must be the consequences arising from such incitement, and then the criminal offense can be implemented.[48]

5.4.2. Reforming Natural Resource Acts

In reforming natural resource acts, the ICC has also played a substantial part. Several acts were reviewed because of contradiction with the constitutional spirit, those acts are; namely,

Firstly, the Act Number 4 of 2009 on the Mineral Mining and Coal was reviewed four times. It could be understood that this act has a significant impact on the economic perspective. The mining issue is not only an energy issue, but could also be a business issue. The national and multinational corporations have their own interest in minerals and coal energy. Therefore, the state has to have a protective mechanism, in handling energy security, such as the Act on Mineral Mining and Coal.

The four-time reviews have different concerns. On the first review, applied by WALHI, the ICC annulled the Article 10 (b), because the norms in the article cannot protect people living within the mining area. In the decision, the court asserted that the act should protect, respect, and fulfil the interests of people whose area and land ownership will be occupied in the mining area, and the people affected by the impact of mining.[49]

On the second review, the court annulled the Article 22 (e/f), 55 (1) & 61 (1), which asserts about the area of exploration. The court also annulled the Article 51, 60, and Article 75 (4), which asserted about the bidding process.[50] Lastly, the court annulled and revised the Article 6 (1e),

[48]ICC's Judgment No. 7/PUU-VII/2009 on the Crime of Incitement.
[49]ICC's Judgment No. 32/PUU-VIII/2010.
[50]ICC's Judgment No.30/PUU-VIII/2010. The Court stated that those article is unconstitutional, because the mechanism process in the bidding and the exploration do

Article 9 (2), Article 14 (1), and Article 17. Those articles had unclear meaning about the authority of giving permission for exploration, whether it is the regional authority or belongs to central government. So, in this decision, the court stated that provincial level does not have authority to issue the permission for the exploration.[51]

Secondly, is the judicial review of the Act Number 22 of 2001 on the Oil and Earth Gas. The ICC has significantly 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. One of the court's reasons in the act is that the function of the Executive Organ (*Badan Pelaksana*) in the act is against the constitution. Consequently, the function of the Executive Organ reduced stated role, in ensuring and controlling the distribution of the oil and gas, which could have a deep impact on providing energy security in Indonesia.[52]

On its judgement, the ICC explained that the act was unconstitutional and did not have a binding power. The court asserted that the act had openly liberated the oil and gas management, due to influence by foreign parties. The unbundling[53] method, separating upper course and lower course, indicated that foreign parties want to split national industry on oil and gas, so it is could easily occupy the oil and gas industry in Indonesia.

Lastly, is the judicial review of the Act Number 20 of 2002 on the Electrical Power. The ICC annulled entire act, and asserted that the act is unconstitutional. The act mentioned that electrical power was a commodity which can be competitively increased in price. With this concept, the ICC's judges asserted, that the state does not have full control to enhance the benefit of electricity for the people's needs,

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not guarantee the rights of citizen. See also Indonesia, ICC's Judgment No.25/PUU-VIII/2010.

[51]ICC's Judgment No.10/PUU-X/2012.

[52]ICC's Judgment No. *36/PUU-X/2012*. See also ICC's Judgment No.002/PUU-I/2003.

[53]Unbundling is to sell related products and services separately, rather than as one unit. See also MacMilllan Education, *MacMillan English Dictionary for Advanced Learners* (Macmillan Publishers 2007) 1622.

because the price might be controlled by the market and private sector.[54] The act is very dangerous on protecting energy security, because the natural resources will not fully not belong to the state. Likewise, the 1945 Constitution of the Republic of Indonesia, in the Article 33 (2) implies that sectors of production, which are important for the country and affect the life of people, shall be under the powers of the state.

The annulment of the Act Number 20 of 2002 on the Electrical Power, consequently, influenced on law certainty. Owing to this situation, the government had to refer to the previous act, the Act Number 15 of 1985 on the Electrical Power, whilst the House of Representatives had been reviewing the new act.

5.5. Questioning in the ICC Judgements

As mentioned in the constitution, the ICC's judgement is final and binding.[55] This means that the ICC judgement has a permanent legal force whilst read at the ICC trial. The court judgement having a final binding also has a legal force and legal binding - to be implemented as soon as possible. However, in practice, the main problem for ICC judgements is the power to execute the judgement.

In contrast to ordinary court ruling, which is only binding on the parties, the ICC judgements are binding all components of the nation including state institutions and also citizens. The judicial review case tests abstract norms (having multi interpretation) existed in an act. To have legal interpretation and final binding, abstract norms must be tested through judicial review process in the ICC. Although the basis of a petition is because the presence of the applicant's constitutional rights has been harmed, the real action is to represent the legal interests of the nation or community as a whole by the enforcement of the constitution.

The ICC's judgement is binding entire state elements. The parties relate with the implementation of act, must implement the

[54]ICC's Judgment No.001-021-022/PUU-I/2003. See also, Ida Bagus Radendra Suastama, 'Asas Hukum Putusan Mahkamah Konstitusi Tentang Undang-Undang Migas dan Ketenaga Listrikan [Principles of Law Constitutional Court Judgment on Oil and Gas Law and electricity power],' (2012) 24 (2) Mimbar Hukum 187- 375.
[55]Indonesian Constitution, Article 24C (1).

judgement. The norms in act have integrated system in the judgement implementation. It has to pass through certain stages, depending on a substance of judgement. Some of them can be implemented immediately without making new rules or changes. But other judgements require further adjustment in advance such as needing any supported decrees. Thus, the immediate implementation is impossible. Based on these kinds of judgements, the ICC judgements can be separated into two categories; namely, (1) Hard Judgements; and (2) Soft Judgements. These categories will be elucidated briefly below.

5.5.1. Hard Judgements

The hard judgement can be defined as a judgement annulling certain norms which are not disturbing the existing norm system, and also do not require further adjustment. This judgement can be immediately implemented after being declared by the judges. This kind of judgement can be examined in several ICC judgements. In reviewing the Election Act, the ICC annulled the Article 60 in letter g.[56] This article stated the disallowance of the persons in realtion to elections who was directly or indirectly involved in the communist party—which existed in Indonesia during 1965—or any other organizations banned in Indonesia.

In this regard, the ICC has the point of view that the article denied the rights of citizens, and discriminated on the basis of political beliefs. The 1945 Constitution did not justify discrimination based on differences of religion, race, ethnic group, class social status, economic status, gender, language, and also political beliefs.

In the same way, the hard judgement has also been found in the case of reviewing the Criminal Act, which was the legacy of the Dutch colonial.[57] The act was reviewed several times, producing the annulment of some articles, such as Article 134, 136bis, and 137. Since the judgement declared by ICC, no one can be convicted based on those articles. Even police cannot use the articles as a basic inquiry of

[56]ICC's Judgment Number. 011-017/PUU-I/2003 on the Former Member Communist Party.
[57]ICC's Judgment No. 013-022/PUU-IV/2006 on the Insulting President and Vice-President, Article 134, 136, and 137.

investigation, and the prosecution by the prosecutor. The judgement has to be applied immediately, even though the Criminal Code has not yet been amended.

5.5.2. Soft Judgements

The soft judgement can be defined as the judgements requiring other supported regulations, such as decrees. Without any supported regulations the judgements cannot be implemented. The soft judgements erase the norms of act, affecting other norms, rules, or regulations. To implement this judgement, necessitates an operational regulation. The judgement technically has not been allowed to be instantly implemented after the judgement has been declared by the judges.

However, the lack of supported regulations following the judgement does not reduce the binding force attached at the time the judgement is declared. Each party should be implementing the judgement. If it happened someday that there were some regulations against the ICC's judgement, then the legal basis is the ICC's judgement, not the other regulations.

Examples of soft judgements have commonly occurred in election cases, whether general elections or provincial elections. One of the negative impacts of soft judgements can be analysed in the case of a non-party candidate in Aceh's Governor Election. The ICC's judgement, reviewing the Article 256 of Act Number 11 of 2006 on the Governing of Aceh, has given a chance for the non-party candidate in the election.[58] In spite of giving an assuring judgement, the ICC created legal uncertainty in Aceh at that time, because of the lack of supporting regulations after the judgement.

After the judgement was released, Saleh, the Head of the DPRA[59] strongly refused the judgement because of contradicting with the

[58]ICC's Judgements No. 35/PUU-VIII/2010 on the Non-Party Candidate for The Governor/Mayor Election. See also the previous judgement in same cases ICC's Judgements No. 5/PUU-V/2007.
[59]DPRA = Dewan Perwakilan Rakyat Aceh (Aceh House of Representatives). It is the provincial parliament located in the Aceh Province that has the special autonomy stated by the Act of Aceh.

Act.[60] The DPRA argued that the refusal of the judgement was due to the ICC not asking for a consideration from the DPRA as stated in the Act.[61] Therefore, in an administration state law, this opinion seemed weird. It is commonly known that in the Indonesian legal system, the position of the ICC is higher than the DPRA. The ICC's judgement has the final binding without the need for any parties' consideration, which means that the DPRA has to obey and must fully accept the ICC's judgement.

As a consequence of this dispute, the Aceh's Election Commission[62] was affected from the judgement. As part of a state organ, the Commission assumed that Aceh's Provincial Election would be established as soon as possible, by using the Qanun Number 7 of 2006 on the Aceh Provincial Election.[63] On the other hand, the DPRA stayed with their point of view - that Aceh's Provincial Election must have a new bylaw, regulating the Aceh Provincial election. The DPRA strongly suggested that the Commission implement the Election with a new bylaw, which would be made by the DPRA, otherwise the Election would be invalid because it did not have a strong legal foundation.

In the same way, the Governor of Aceh holding executive power, agreed with the Aceh Election Commission, who stated that the Aceh Provincial Election must be immediately implemented. It had to refer to the Qanun Number 7 of 2006 on the Aceh Provincial Election. Implicitly, the Governor's statement was highly understandable, because he wanted to add more periods for his position. Thus, he could take more advantages from his position as a governor. Conversely, if the election was postponed, his position's period would end, and he could not take any advantages at all. The regulation dispute consequently affected

[60]Abdullah Saleh, 'PA: Jangan Utak-atik UUPA' [Do Not Modify The Aceh Governing Act], accessed 16 March 2012, <http://aceh.tribunnews.com/2011/10/10/pa-jangan-utak-atik-uupa>

[61]In the Article 269 Clause 3 state that: 'Any planned amendment to this act must first undergo consultation by and receive considerations from the DPRA. The term 'considerations' in this article has no compulsory binding, normally the words consideration in Indonesian legal terminology is not a must. See also Act Number 11 of 2006 on The Governing of Aceh.

[62]In Aceh, the Election Independence Commission is called Komisi Independen Pemilihan Aceh (KIP Aceh).

[63]Qanun is terminology for bylaw in Aceh Province. See also The Qanun Number 7 of 2006 on the Governor and Mayor Election in Aceh Province.

elections at the district level. Some district parliaments postponed allocating budget for election at the district level, such as in Pidie and Aceh Jaya.[64]

From the Aceh's case election dispute can be learned that the conflict in local election could be prevented, if the regulation dispute did not happen. Indonesia's election mechanism has to learn quickly from influential cases. A regional election frequently happens because of personal competitions, struggling for political power at the provincial level. If intense scrutiny is not provided, this competition will potentially produce violence.

Although religion and indigenous issues have commonly occurred in elective competitions, fortunately, they have not trigger any serious conflict on cultural values and religion issues. Local political competition is not only a matter at provincial level, which can be ignored, but is a national issue as well. A central government has to take serious concern in preventing provincial election disputes.[65]

5.6. The ICC from Negative Legislator to Positive Legislator

The idea of constitutional court has not only happened in Europe, but has also spread broadly around the world. The doctrine as negative legislator imposed by Kelsen has intensely changed during last few decades.

The role of the constitutional court, as asserted by Hans Kelsen, is as a negative legislator, because the decision is almost the same as parliamentary process.[66] The decision in the court might be revised; annulled some of the article or clause; and even annulled all over of the act.

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[64]Nyak Arief Fadhillah Sya, 'Dana Distop, Tahapan Pilkada Terganggu [Budget stoped, the Election Disturbed]', accessed 19 December 2014. <http://aceh.tribunnews.com/2011/11/10/dana-distop-tahapan-pilkada-terganggu>

[65]International Crisis Group, *Indonesia: Mencegah Kekerasan Dalam Pemilu Kepala Daerah Asia Report N°197 – 8 Desember 2010 [Indonesia: Preventing Violence in the Provincial Election],* (International Crisis Group 2010) 3.

[66]Victor Ferreres Comella, *Constitutional Courts & Democratic Values A European Perspective* (Yale University Press 2009) 6-25.

Additionally, Kelsen's distinction between the positive and the negative legislator relies almost entirely on the absence, within the constitutional law, of enforceable human rights. Although this fact is ignored by his modern-day followers, Kelsen explicitly warned of the 'dangers' of bestowing constitutional status to human rights, which he equated with natural law, because a rights jurisprudence would inevitably lead to the obliteration of the distinction between the negative and the positive legislator.[67]

In some egalitarian countries, constitutional courts, which are conventionally permitted to annul or to cancel unconstitutional statues, furthermore have the role of interpreting and applying the constitution to preserve its supremacy and to ensure the prevalence of fundamental rights. The view of constitutional courts as veto players are expanded in political space, allowing for consideration of a variety of actions by the court. Though courts can never directly initiate nor enforce policies, they can, nonetheless, influence policy change in several ways.[68]

In this sense, they were traditionally considered 'negative legislators,' unable to substitute for the legislators or to enact legislative provisions that could not be deduced from the constitution. During the past decade, the role of constitutional courts has dramatically changed. Their role is no longer limited to declare the unconstitutionality of statutes or to annul them.[69] Consequently, the constitutional courts condition with their decisions on the presumption of the constitutionality of statutes, opting to interpret them according to or in harmony with the constitution to preserve them, instead of deciding their annulment or declaring them unconstitutional, have made long debate on their existing.

More often, constitutional courts, instead of dealing with existing legislation, have assumed the role of assistants or auxiliaries to the legislator. The court has also created provisions deduced from the

[67]Alec Stone Sweet (n1) 83.
[68]Mary L. Volcansek, 'Constitutional Courts as Veto Players: Divorce and Decrees in Italy,' (2001) 39 European Journal of Political Research 367.
[69]Allan-Randolph Brewer Carías (ed), *Constitutional Courts as Positive Legislators A Comparative Study* (Cambridge University Press 2011) I

constitution when controlling the absence of legislation or legislative omissions.

In some cases, the court acts as the positive legislators, issuing temporary analyses. This is a new role of the constitutional courts, conditioned by the principles of progressiveness and of prevalence of human rights, particularly regarding the important rediscovery of the right to equality and non-discrimination.[70]

In terms of the court's role as the law-interpreter, MacCormick stated that the self-interpretations of legal acts are error-prone and susceptible to self-obfuscation.[71] This is the case, in particular, when the law is in the hands of courts. Courts need to decide. Owing to the permanent embarrassment that arises from carrying a burden of justification, courts are likely to ascribe to their reasoning on more solid foundations than they actually can possess. This is unavoidable. Indeed, in the case of courts, it is particularly obvious that the raising of legal claims involves self-validation in spite of insufficient reasons. As a result, the reality of legal systems, aside from over-determination by money and power, is marked by the incessant production of ideology.[72]

In balancing the power of interpretation within the constitutional court, Marmor insisted the need for moral values. Perhaps it is true the constitutional courts have too much political power in the interpretation of the constitution. But since they do have power, they must exercise it properly. If the best way to exercise their power is by relying on sound moral arguments, then moral considerations are the ones which ought to determine, as far as possible, the concrete results of constitutional cases. Sometimes moral consideration may dictate caution and self-restraint and at other times they may not. But what the appropriate moral decision ought to be is rarely affected by the question of who makes it.[73]

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[70]Ibid.

[71]This overlooked by theorists who mistake such self-reference for a simple social fact and not as an indication of a contestable claim to validity. Neil MacCormick, *Questioning Sovereignty* (Oxford University Press 2001) 118.

[72]Alexander Somek, 'Monism: A Tale of the Undead' in Matej Avbelj and Jan KomÃirek (ed), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 343-379.

[73]Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing 2005) 168.

Marmor's argument is confined to the nature of the moral considerations which ought to determine constitutional decisions. If the decision is of such a nature that it depends on relative institutional competence, then morality itself dictates that those who are more likely to have the better judgement should be left to make the relevant decision. Either way, the courts should rely on sound moral judgement.

From the above explanation, and comparing with the Indonesian legal system, it is always hard to draw a clear line, whether the ICC is the negative legislator or positive. In theory the ICC has been defined as the negative legislator, notwithstanding, in practice it has sometimes positioned itself as the positive legislator. In the first period of establishment of ICC, the judgements were not too far from the idea of negative legislator. Along with the times, and the number of ICC's judgements which were not immediately revised by the DPR, the ICC began to take their own initiatives - being the positive legislator. Here we can see that the ICC wanted to immediately fill the legal vacuum in that time with judicial review procedure.

For this reason, the ICC has played a significant role as the shadow of parliament. Although the constitutional court is the judiciary institution, their decisions sometimes reflect the parliament's role. Indeed, on the doctrine of the parliament's sovereignty, parliament has the authority to annul and to revise the act.[74] Conversely, the constitutional court, as a judiciary institution, has seriously played the parliament role, such as revising, editing, annulling an act in the name of the guardian of the constitution.

Based on the basic norms set out in the constitution, the negative legislator authorities have been possessed by two institutions in the judicial authorities, namely the ICC and the Supreme Court. For the ICC, as negative legislator, reviews the acts as opposed to the constitution; whereas, for the Supreme Court, as negative legislator, reviews the regulations under the acts, which are against the acts opposed to the

[74]Mark Elliott, *The Constitutional Foundations of Judicial Review,* (Hart Publishing 2001) 87-96. See also Tom Ginsburg (n 2) 3-20.

1945 Constitution. It delivers the role of positive legislator only for DPR and the President not for the ICC.[75]

Most of the cases for ICC as the positive legislator have occurred in cases relating to elections including general elections, provincial elections, electing the senator, and so forth. Commenting on the ICC role as positive legislator, Martitah specified that the judge's consideration here is to secure the constitutional rights of citizen, and also the consideration of argumentation. The judges may have insistence to fulfil legal certainty at that time.[76] Explained below are some cases where the ICC is ruling itself as the positive legislator, rather the negative legislator.

5.6.1. The Election Supervisory Committee Case

Referring to the Election Supervisory Committee case, it seemed clear that the ICC has switched its domain from negative legislator to positive legislator. This happened in the Election Supervisory Committee case. The ICC has not only declared that the Article 93, 94, and 95 does not have legal binding, but also drafting and creating new norms. The ICC then declared that those articles were invalid, unless obeying the new norms and the draft provided by the ICC.[77] The ICC invalidated the word '*Calon'* (candidate) stated in those articles. As the negative legislator, the ICC should only be stating that the article does not have binding legal force.

The ICC's point of view in this judgement saw an urgency to avoid a legal vacuum, due to the implementation of urgent elections. However, the reason was unacceptable because of its unconstitutionality. The situation of emergency has been clearly stated in the constitution, in that it belongs to the jurisdiction of President to release the law regarding emergency.[78]

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[75]See also Indonesian Constitution, Article 5 Clause (1) and Article 20.
[76]Martitah, *Mahkamah Konstitusi dari Negative Legislature ke Positive Legislature [Constitutional Court from Negative Legislature to Positive Legislature],* (Konpress 2013)163.
[77]ICC's judgement No.11/PUU-VIII/2010 on the Election Supervisory Committee
[78]Indonesian Constitution, Article 22.

5.6.2. The Domicile Requirement Case

ICC as positive legislator can also be analysed in the ICC's judgement on Domicile Requirement for Candidates of DPD on the Act No. 10 of 2008 on Election.[79] In this judgement, the ICC decided that the Article 12 in the Act No.10 of 2008 on Election still had legal binding force, but the candidates must have domicile in the province where they want to be represented. In other words, the candidates having domicile in province A cannot represent the province B. The debate on this judgement is not only about the ICC as positive legislator, but is further expanded, in that the ICC has been asked whether it needs to handle this case, or to unaccepting the case, because there was no indication of loss of constitutional rights.

The substance regulated in Article 12 and 67 of the Act of Election was the requirement for individuals to nominate themselves, or be nominated as a member of the DPD (Senator). Thus, is concerned with the constitutional right to be a candidate. Those articles have no part that can be said to hinder, impede, or eliminate the rights of Indonesian citizen. The absence of a condition "domicile in the relevant province" and the terms "not a member and/ or political party officials" in the requirements to become a member of DPD in Article 12 and 67, does not impede, obstruct, or remove the right to be a candidate. For this reason, it can be argued that there is no loss of rights and/or authority of the applicant as a result of the enactment of Article 12 and Article 67 of the Act of Law, so that, the ICC should be declared unacceptable not partly accepting the case.

5.6.3. Provincial Election Case

In this case, the ICC reviewed and also legislated Articles 57, 66, 67, and 82 (2) that existed in Act Number 32 of Local Government.[80] Those articles which were edited are; namely,

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[79]ICC's judgement No.10/PUU-VI/2008 on the Domicile Requirement for Candidates of DPD.

[80] ICC's judgement No. 072- 073/PUU-II/2004 on the Act of Local Government.

- in Article 57 clause (1) the words … *'yang bertanggung jawab kepada DPRD*' (who is responsible to the Parliament);
- in Article 66 clause (3) letter e "*meminta pertanggungjawaban pelaksanaan tugas KPUD*" (asking responsibility of the task execution of Election Commission);
- in the Article 67 clause (1) letter e, along the clause *"… kepada DPRD*" (to the Parliament); and
- in the Article 82 clause (2) along the clause "… *oleh DPRD*" (by the Parliament).

These articles, judged by the ICC, do not have legal binding force, and are also against the Constitution. In contrast, not all ICC judges agreed with the judgement, some of them had the dissenting opinion. Fadjar stated that, as the guardian of constitution, the ICC must give enlightenment to build a significant sustainability for the 1945 Constitution, and also creating a system of democracy for the whole aspects. Therefore, all modern democracies do indeed carry elections, but not all elections are democratic. In Indonesian's experience during three decades of the New Order there have always been election activities, including general and provincial, but they cannot be qualified as democratic elections.[81]

Though, the constitutional mandate, contained in Article 18 paragraph (4) of the constitution, requires the head of the region should be elected democratically. The basic democracy must have certain eligibility criteria, such as, the recognition and protection of human rights; the existence of public confidence in the direct elections, which could produce a legitimate local government; and fair competition between the participants involved in the direct elections. These measures should be reflected in the electoral laws, such as basic principles, electoral system, suffrage, organizers, and so forth. Equally important are in the electoral process, particularly participants, voter registration, campaigning, voting, determining the results and dispute settlement, and so forth.

[81]Mukthie Fadjar, *Disseting Opinion in ICC's judgement No. 072- 073/PUU-II/2004 on the Act of Local Government.*

For the ICC, however, being a positive legislator is not something forbidden, but firstly the MPR must amend the 1945 Constitution, most importantly, in the jurisdictions of the ICC. This experience was created by the Austrian Constitutional Court which amended its constitution to make the constitutional court into a positive legislator.[82]

5.7. Conclusion

The basic idea of establishing the ICC in Indonesia after the reformation era is that the justices must be involved in the development of democracy, and similarly in law reform. This court, it is believed, can protect the constitution.

During 2003 to October 2015, the ICC was led by five ICC presidents with a variety of educational backgrounds and political affiliations. Judges coming from academician will tend to be more philosophical; governmental officials will be more sensitive to policy considerations; former politicians will have insights into what is feasible for the court, to do for the existed political circumstance; and judges will bring their expertise in more technical ordinary law.

In combination with other state officials, constitutional judges own wide powers to rule, by quality of an obvious act of assignment. In the lexis of delegation concept, constitutional courts are the mediators. These courts, when measured as functional solutions to the varied problems of narrowing and pledge, seem to adapt, paradigmatically, as it were, to the delegation concept's preferred logic of institutional design.

The composition of nine judges has affecting the kind of discourse generated by the ICC. The numbers of cases were not in accordance with the capacity of the existing judges, most importantly in election season. In this case the ICC impressed that the judges were too hurried, making judgement without deep consideration.

In reforming legal matters, it seems the ICC has made a significant leap in the annulment of the old-fashioned Criminal Act inherited from

[82]Since 1925, Article 138, paragraph 2, of Austrian Constitution has enabled the Austrian Constitutional Court to act as a positive legislator. See also Allan-Randolph Brewer Carías (n 71) 251.

Dutch Colonials, such as, the articles about publicly insulting the President or Vice-President, expressing hostility, incitement, hatred, or humiliation in public against government. In protecting natural resources, furthermore, the ICC has made crucial improvements with reviewing the Act of Mineral Mining and Coal, and the Act of Electrical Power.

However, the ICC has also faced a serious problem regarding its final-binding judgement. Some of judgements can be implemented immediately without making new rules or changes, called hard judgements. On the other hand, there are judgements requiring further adjustment in advance, which are impossible to immediately implement, called soft judgements, which have often been disobeyed by other state organs.

Chiefly in terms of resolving election disputes, reviewing act against the constitution, and resolving disputes among state agencies, the future of the ICC's jurisdictions have been questioned, asking whether they need to be expanded further, or be reduced. These problems became amplified when at times the ICC positioned itself as positive legislator, rather than its basic idea as negative legislator. For this intention, the ICC has occupied another role as the shadow of parliament. Although the constitutional courts are a judiciary institution, their decision and their role, sometimes reflect the role of parliament.

The constitution has possessed the role of negative legislator authorities for the two judicial institutions, namely the Indonesian Constitutional Court (ICC), and the Supreme Court. For the ICC, its role as negative legislator is for annulling any acts contradicting with the constitution. The Supreme Court as negative legislator is required to examine, invalidate, or annul regulations under the acts. The Supreme Court will identify regulations contradicting with acts. Moreover, the roles of positive legislators belong to parliament and president as stated in the 1945 Constitution.

But in some cases the ICC has positioned itself as the positive legislator. It can be seen in several cases that have occurred relating to elections, including general elections, provincial elections, electing the senator, and so forth. The ICC as positive legislator happened because of

judge's reflections on securing the constitutional rights of citizen, and legal necessities, at the time.

To be a positive legislator is not essentially prohibited. The ICC can arrange that, however, firstly, the parliament should amend the constitution, chiefly, in the part of the ICC's jurisdictions. This experience practiced in the Austrian Constitutional Court by amending its constitution to make the court able, in some cases, to be a positive legislator.

An embarrassing moment happened for the ICC when the ICC's president was caught red-handed accepting bribery from a provincial election case. After the case, the ICC seemed at its nadir point. It is hard for the ICC to heal public trust of the institution. Other problems arose. People who ever had a case under Akil have questioned the validity of Akil's judgement - whether the judgements need to be reviewed or annulled. Answering this worry, the ICC judges quickly responded to the situation. They strongly stated that all of the ICC judgements are valid; and will not be annulled, or be reviewed.

This ICC statement was made regarding the judgement during Akil's time as the ICC judge. However, the ICC must double-check Akil's judgements. The double-check process is desirable for significant purposes, such as fostering public trust; identifying the indication of corruption in other cases, and catching other suspects; giving election justice to the correct persons; and most importantly, is returning the dignity of ICC as one of trusted judiciary institution in Indonesia post reformation. Veiling Akil's case and his judgements are also same with keeping the future problem that can happen again.

CHAPTER 6 - ULTRA PETITA AND FUTURE CHALLENGES OF THE ICC

6.1. Introduction

The Ultra Petita cases in the ICC are particular challenges for Indonesian law reform. This chapter will explore several judgements 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 researcher uses basic theory from Kelsen on the constitutional courts as the negative legislator, and other methodologies, particularly comparative constitutional law[1] and black-letter law.[2]

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.[3]

In the Indonesian legal system, Ultra Petita is known in the context of private law, derived from the Dutch law called HIR[4] and RBg.[5] A judge is prohibited to give a judgement 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.[6]

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[1]Ran Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies,' (2013) 11 (1) International Journal of Constitutional Law 1-12.
[2]Michael Salter, *Writing Law Dissertations: An Introduction And Guide To The Conduct Of Legal Resarch* (Longman 2007)56.
[3]USLegal, 'Ultra Petita Law & Legal Definition', accessed 4 August 2014, <http://definitions.uslegal.com/u/ultra-petita/>
[4]Herzien Indonesis Reglement (HIR) is the private law resource produced by Netherland; it is also called the Rule for New Indonesia. See also R. Tresna, *Komentar Atlas Reglemen Hukum Atjara Didalam Pemeriksaan Dimuka Pengadilan Negeri Atau HIR: Dihubungkan Dengan Ketentuan-Ketentuan Dari Undang-Undang Darurat No. 1, Tahun 1951 Diubah Dengan Undang-Undang No. 11, Tahun 1955* [The Comment on the Procedural Law in the Front of the Provincial Court] (W. Versluys 1956).
[5]Rechtsreglement Buitengewesten (RBg) is the private law resource produced by Netherland specifically for the outside of Java and Madura. Muhammad Syaifuddin, 'Perspektif Global Penyelesaian Sengketa Investasi di Indonesia [Global Perpective Resolving Investment Dispute In Indonesia],' (2011) 3 (1) De Jure 58-70.
[6]Herzien Indonesis Reglement (HIR), Clause 178 (3). See also Rechtsreglement Buitengewesten RBg, Clause 189 (3).

In the ICC, Ultra Petita has been widely defined beyond the definition given in HIR and RBg. Based on several judgements produced by ICC, the judges have expanded their jurisdictions regulated by several acts, including prosecuting themselves, 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 as the supreme law source. Ultra Petita has happened when an applicant asks the ICC to review a clause or an article in the act, but the ICC may go further, by not only annulling a clause or an article, but also invalidating the whole act.

6.2. Ultra Petita and Its Future Challenges

Ultra Petita judgments have been widely criticised in Indonesia by academics, newspapers, social media, and so forth. The future challenge faced by the ICC regarding Ultra Petita is the judges' unlimited power potentially violating a value of democratic justice. They can easily choose the target act to be annulled with a serious threat in law certainty. The Ultra Petita judgment, as asserted by Huda, has appeared because the ICC had an improvisation sense in the tribunal process. Ultra Petita judgements may happen again in coming years.[7]

Mahfud MD, a university professor, has stated that the ICC has claimed itself as a superior state institution, sheltering its final judgements under the constitution. For this reason, the ICC has sometimes made judgments beyond its jurisdiction and based on the judges own argument, rather than the acts on constitution.[8]

The experienced solicitor Nasution had also given a hard criticism of Ultra Petita, claiming that the extra-controversial judgement shows the judges' arrogance. Nasution 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.[9] The expanded jurisdiction by the ICC has

[7]Ni'matul Huda, 'Pengujian Perppu oleh Mahkamah Konstitusi [The Judicial Review of Perppu by the Constitutional Court],' (2010) 7 (5) Jurnal Konstitusi 10.
[8]Moh. Mahfud MD, 'Rambu Pembatas Dan Perluasan Kewenangan Mahkamah Konstitusi [Barrier Signs And Expansion Authority of the Constitutional Court],' (2009) 4(16) Jurnal Hukum 441-462.
[9]Adnan Buyung Nasution,'Putusan MK Tentang UU KKR Dianggapi Ultra Petita [ICC Judgment on the Truth and Reconciliation Act is Ultra Petita],' accessed 30 July 2014,

also occurred in other countries, often making it hard to draw the line between legal and political questions.

Ultra Petita cases in ICC invalidating an entire act are not found in Germany. Pursuant to the Basic Law and the Federal Constitutional Court Act, which govern the FCC's jurisdiction, the Court decides on the basis of constitutional law and enumerated cases (constitutional complaints, judicial review proceedings, and so forth.) Moreover, the Court does not act /ex officio/ but only on the request of others. Whilst the justices are thus required to base their decisions on the constitution and to only answer the questions of the case at hand, there is always a possibility that somebody believes that they went too far.[10]

In some cases, the justices might also try to send a message to the legislature or other state bodies through obiter dicta.[11] An example is the Classroom Crucifix case. The Federal Constitutional Court of Germany decided that the Provision of 13(1), third sentence, of the Bavarian School Regulations for Elementary Schools, 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 others are

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<http://www.hukumonline.com/berita/baca/hol15882/putusan-mk-tentang-uu-kkr-dianggap-iultra-petitai>

[10] Statement by Margret Böckel, (Personal email correspondence on 23 October 2014).

[11] 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. Translegal, 'Obiter-Dicta,' accessed 29 October 2014 <http://www.translegal.com/legal-latin/obiter-dicta>

to be respected.[12] 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.

From the above case can be seen that the German Constitutional Court has not expanded its jurisdiction, only invalidating the provision in the Bavarian School Regulations for Elementary Schools, not all of the regulation. It thus accords with the judicial review concepts of Kelsen, to not annul the entire statute.[13]

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 Constitutional Court 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.[14]

This article shows that the court can magnify access to constitutional justice, and has applied its authority 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.[15] This case shows that a system of constitutional review can assist the interests of all parties,

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[12]Federal Constitutional Court of Germany, 'Case BVerfGE 93, 1 1 BvR 1087/91 Kruzifix-decision Crucifix Case (Classroom Crucifix Case)', accessed 28 October 2014, <http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=615>

[13]Hans Kelsen, 'Judicial Review of legislation: A Comparative study of the Austrian and the American Constitution,' (1942) 4 (2) Journal of Politics 186.

[14]South Korea Constitutional Court Act, Article 45 (Decision of Unconstitutionality).

[15]Tom Ginsburg, *Judicial Review in New Democracies Constitutional Court in Asian Cases* (Cambridge University Press 2003) 232.

and the design of the court, providing it with institutional power with which to broaden its power.

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, its ICC does not have authority to expand its jurisdiction, but in practice has done so through Ultra Petita.

In the United Kingdom, the issue of Ultra Petita is usually known as Ultra Vires, a Latin term which literally means beyond the powers.[16] In practice, a court might sometimes expand its authority, whilst respecting parliamentary sovereignty without invalidating or annulling an act. Ultra Vires has been subjected to criticism over recent years, and its justification for judicial review of power questioned.[17] Elliot has asserted that the courts are not competent to deny the power of the other branches, because the court's powers are themselves derived from and regulated by the constitution. The constitutional legitimacy of such review is vouchsafed by the Ultra Vires doctrine which provided that, when a court reviews an exercise of statutory power, this entails nothing more than judicial enforcement of the express and implied limits which parliament attaches to grants of such power.[18]

Craig has asserted that the Ultra Vires principle is based upon the assumption that judicial review is legitimated where the courts are applying the intent of the legislature. The Ultra Vires principles have been used as the vehicle to impose constraints on the way in which the power given through the agency has been exercised: it must comply with rules of fair procedure; it must exercise its discretion to attain proper and not improper purposes; it must not act unreasonably, and so forth.[19] If the courts fail to exercise their law-making function with caution, the courts can create a totalitarian state, where the courts can possibly strike down any chosen acts.[20]

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[16]Mark Elliot, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001) 3.
[17]Ibid. 3-16.
[18]Ibid.
[19]Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 (1) Cambridge Law Journal 64-65.
[20]Lord Devlin, 'Judges and Law makers' (1976) 39 Modern Law Review1-16.

6.3. Analysis of Ultra Petita Cases

6.3.1. Intervening Parliament's Jurisdiction

Regarding reviewing an act against the constitution, the ICC has only been permitted to interpret the constitution, based on the constitution itself. 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 to amend an act, or to revise it.

The jurisdiction border between ICC and parliament are clear, that the parliament has a role as the positive legislator (known as norm maker), whereas the ICC has an essential role as negative legislator (known as the norm canceller). Constitutionally, the ICC is prohibited to cross the border of parliament jurisdiction.[21] 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.[22] On 20 December, 1993, Machica married with Moerdiono in Jakarta, and had a son one year later. The marriage was held in the 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.[23] Their marriage was held legitimate fifteen years later, receiving a Religious Court judgment in 2008.[24]

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[25] because the marriage was not held in the Marriage Office, and had not been officially registered.[26] 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

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[21]Allan-Randolph Brewer Carías (ed), *Constitutional Courts as Positive Legislators A Comparative Study* (Cambridge University Press 2011) 29.
[22]ICC Judgement Number 46/PUU-VIII/2010 on the Case of Children Outside of Marriage
[23]Marriage Office is called Kantor Urusan Agama (KU).
[24]Indonesian Religion Court Judgement, Number. 46/Pdt.P/2008/PA.Tgrs.
[25]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.
[26]Clause 2 Article 2 the Act No.1 of 1974 on the Marriage stated that each marriage has to register according to the act.

violated her constitutional rights as a mother and also her son. Thus, she cannot receive legal endorsement of her marriage, and also cannot legalise 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. 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."[27]

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 binding, and allow the DPR to fix it.

6.3.2. Judging Itself.

The ICC has infrequently judged the act, ruling itself. 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.[28] 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 judgement has violated the Act of Judicial Power,[29] 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. Those breaking the act will receive administrative sanctions, or will be sentenced based

[27] ICC Judgement (n22).
[28] ICC's Judgment No.005/PUU-IV/2006 on the Judicial Commission.
[29] The Act Number 4 of 2004 on the Judicial Power.

on the regulations. The ICC still continued the case, and the judgement has had a valid binding.

The reason for forming the Judicial Commission was to build the checks and balances mechanism among state organs, mainly in the judiciary power. The 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 judgements 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.

6.3.3. 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 the Perppu.[30] 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, the Perppu is not equal to the act. 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, the automatically a Perppu cannot be applicable. 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.[31]

[30] *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.

[31] Muhammad Siddiq, 'Kegentingan Memaksa Atau Kepentingan Penguasa (Analisis Terhadap Pembentukan Peraturan Pemerintah Pengganti Undang-Undang (PERPPU)) [Crunch Forcing Or Interests Ruler: Analysis of Formation PERPPU],' (2014) 48 (1) Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum 261-292.

6.3.4. Inconsistent on Judgement Format

The formats of ICC's judgements have been regulated, whether in the constitution, or in the act. Act number 24 of 2003 on the Constitutional Court,[32] specifies six formats of judgment; namely, 1) denying; 2) granting; 3) rejecting; 4) not-legally-binding; 5) justify the DPR's petition; and 6) rejecting DPR's petition. These formats of judgements will be explained below:

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

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

3) Rejecting: The rejecting judgement 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 judgement 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:*[33] The *justifying the DPR's petition* judgement 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* judgement 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.

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[32]The Act Number 24 of 2003 on the Constitutional Court, Clause 56 (1) (2) (5), 57 (1) (2), 64, 70, 77, and 83.

[33] DPR (Dewan Perwakilan Rakyat) is House of Representative of Indonesian. See also < http://www.dpr.go.id/>

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.[34]

1) The conditionally constitutional judgement 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* judgement states that an act provision is not fulfilling the requirement stated in the ICC's judgment.

An example of ICC own-format-judgement is the case of the Presidential Election 2009.[35] 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-judgement 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 judgements 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).

6.3.5. Invaliding All Over Act

The ICC can annul or invalidate an act, although not asked to do so. In this case, the Ultra Petita is more extreme than Ultra Vires, which still respects parliament sovereignty. Two cases illustrate the fact: firstly, is the invalidation of Act number 27 of 2004 on the Truth and Reconciliation Commission. The human rights organisation called Elsam, which asked the ICC to judicially review Act 27 of 2004 on the Truth and Reconciliation 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

[34] ICC's Judgment No.072-073/ PUU-II/ 2004, ICC's Judgment No. 5/PUU-V/2007, ICC's Judgment No. 102/PUU-VII/2009. ICC's Judgment No.01/PUU-VIII/2010, ICC's Judgment No.65/PUU-VIII/ 2010.
[35] ICC's Judgment No.102/PUU-VII/2009 on the Election Voter Rights.

authoritarian era. After the reviewing process, on the contrary, ICC abolished and also annulled all over the act in its judgement. This judgement made the plaintiff, Elsam, feel hopelessly confused because they never asked for the abolishment and annulment, only for review. This Ultra Petita judgement 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.[36] 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 was clearly against the 1945 Constitution, which is stated in Article 33.[37] 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 one and the House of Representative had been considering the new act.

6.3.6. Incorrect Judgement Code

This judgement followed the Aceh Election of 2012, to elect a governor and vice governor, and head of regency and vice. This election was unique in

[36]ICC's Judgments Number 001-021-022/PUU-I/2003 on the Electrical Power.See also, Ida Bagus Radendra Suastama, 'Asas Hukum Putusan Mahkamah Konstitusi Tentang Undang-Undang Migas dan Ketenaga Listrikan [The Basics Priciples of ICC's Judgments on the Natural Resources and Electrical Power] (2012) 24 (2) Mimbar Hukum 187- 375.

[37]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.

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 judgement, but unfortunately put the code judgement 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. [38]

6.3.7. *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 fulfil 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.[39]

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, governor, until district level. In 2010 the ICC made more than 230 judgements on election cases.[40] The number of judgements can increase in election seasons.

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[38]ICC's Judgment Number 108/PHPU.D-IX/2011 on the Aceh Governor Election.

[39]Akil Mochtar, 'Putusan Kasus Pilkada Saling Bertrubrukan, MA MK Gelar Pertemuan Tertutup [ICC and SC Judgments Collide with Each Other, ICC and SC Hold a Closed Meeting],' accesed 26 June 2013 <http://news.detik.com/read/2013/06/25/164914/2283856/10/putusan-kasus-pilkada-saling-bertubrukan-ma-mk-gelar-pertemuan-tertutup >

[40]Mahkamah Konstitusi, 'Putusan Mahkamah Konstitusi [ICC Judgments],' accessed 31 July 2014 <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Putusan&id=1&kat=1>. See also Muhidi, 'Sengketa Pilkada Paling Banyak Diperkarakan [Provincial Elections Are the Most Sued Cases] accessed 31 July 2014.
<http://www.antaranews.com/berita/239861/sengketa-pilkada-paling-banyak-diperkarakan>

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.[41] 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.

6.3.8. 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.[42] 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 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.

[41]ICC's Judgment Number 039/PHPU.C1-II/2009 on the General Elections.
[42]Diane Zhang, 'The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A study of Constitutional Court Decisions 2003-2008,' (Masters Coursework Thesis, Melbourne Law School, The University of Melbourne 2010) 1-10.

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, Tushnet stated that the constitution must have a license to use comparative foreign law for the court as part of the constitutional authority, such as in South Africa.[43]

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).[44]

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.

6.3.9. 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,[45] regarding ICC's judgment on the death penalty for the drug dealer.[46]

Also ICC's judgments 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

[43]Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000) 200.
[44] ICC's Judgement Number 2-3/PUU-V/2007 on the Narcotics.
[45] See also Richard Quinney, *The Social Reality of Crime* (Transaction Publishers 1970) 3-6.
[46] ICC's Judgement (n44).

other.[47] Therefore, it should be the content of the constitution which will be the basis, and all of its original intent of ICC resources.

6.3.10. 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 judgement over a petition concerning alleged violations by the President and/or the Vice-President as provided by the constitution.[48]

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.*[49] 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.

6.4. The Causes of Ultra Petita

Ultra Petita in the ICC has so far been caused by several factors; namely, the judges, the approach of judicial interpretation, the undisclosed recruitment process, and political interference, as discussed below.

6.4.1. The Judges

The ICC judges' decisions have received praise and criticism for their judgements. 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

[47] Mohd. Mahfud MD (n8).
[48] Indonesian Constitution, Article 24C.
[49] Indonesian Constitution, Article 22E.

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, solicitor or barrister, and so forth.[50]

In the ICC's Act it is not clearly stated 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.[51] 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 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.[52]

6.4.2. The Approach of Judicial Interpretation

The judicial interpretation in the ICC is supposed to be based on the constitution. Whereas, in fact, occasionally the ICC's judges have used other resources, instead of the constitution, particularly international conventions and other countries experiences as the main resource of the interpretation.[53] 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.[54]

From those cases, it seems the ICC has used unleashed interpretation in making a judgement. It means that the interpretation has come purely from the

[50]Mahkamah Konstitusi, 'Profil Hakim [Judges Profile],' accessed 31 July 2015, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilHakim&id=670>
[51]See also the Act Number 24 of 2003 on the Constitutional Court, Article 20 (1).
[52]One of ICC judges, Patrialis Akbar, after several tests in Parliament resigned, then approached the President to be elected for ICC judge. Hukumonline, 'Tiga Calon Hakim Konstitusti Mengundurkan Diri' [Three Candidates Constitutional Court Resigned], accessed 10 October 2014, <http://www.hukumonline.com/berita/baca/lt512dd0d76012b/tiga-calon-hakim-mk-mundur>
[53]ICC's Judgement (n44)
[54]ICC's Judgement (n28)

judges understanding and interpretation, without considering acts, regulations, and even the constitution itself. This interpretation has made a diversity of meaning, and is also vulnerable to misuse for personal interest, such as happened in the Akil's case.

6.4.3. The Undisclosed Recruitment Process

The undisclosed recruitment process has commonly occurred. It can be seen from the elected judges, Patrialis Akbar 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.[55] The judges have continued their job pending on appeal to the Supreme Court. Morally, they should be suspended, 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.[56]

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

[55]Pengadilan Tata Usaha Negara (PTUN) DKI Jakarta (Administration Court of Jakarta), Case Number 139/G/2013/PTUN-JKT, *Lembaga Bantuan Hukum Indonesia (YLBHI) and Indonesia Corruption Watch (ICW) Vs Susilo Bambang Yudhoyono, on the President Decree Letter Number 87/P Year 2013 on the Constitutional Court Judges Appointments for Patrialis Akbar and Maria Farida Indrati.*

[56]Martin Hutabarat, 'Memang Ada Kejanggalan dalam Perpanjangan Masa Jabatan Akil Mochtar' [Indeed There is irregularity in the Extension Term Akil Mochtar], accessed 13 October 2014 <http://nasional.kompas.com/read/2013/10/14/1426485/.Memang.Ada.Kejanggalan.dalam.Perpanjangan.Masa.Jabatan.Akil.Mochtar>

being extended. He was caught-red handed by the Corruption Eradication Commission accepting bribery in an election dispute case.

6.4.4. The Political Interference

Political interference in the ICC was shown in the Akil's case, that, abusing his power to win his previous party in the Ratu Atut's case, both Akil and Ratu Atut were active members of the Golkar Party. As reported by the head of Corruption Eradication Commission, Akil abused his power in several provincial election cases.[57] 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. The ICC's judges vulnerable to interference are the judges selected by the DPR and the President, because those organs are state organs. For future ICC judges, special arrangement is needed to select them, including their relationship with political party.

6.5. The Impact of Ultra Petita Judgements

The main tool of constitutional courts is the power to interpret the constitution and to ensure its application.[58] The ICC has had positive and impacts, generating a long debate over the interpretation over the 1945 Constitution.

Ultra Petita judgements have no legal background. The constitution only explains ICC jurisdictions, and the ICC's Act and its procedural law do not elucidate the role of Ultra Petita. There are no articles in the ICC's regulations justifying Ultra Petita. After the first Ultra Petita judgement, the ICC made it legally based, positioning the judgement as doctrine and also jurisprudence. The Ultra Petita doctrine has threatened public trust. The interpretation by the judges has indicated that the position of the ICC is equal in the supremacy of the 1945 Constitution. Alternatively, the rule of interpretation asserted by Bennion states

[57] Abraham Samad, 'Ini Kronologi Dua Kasus Yang Menjerat Akil' [This chronology of the two cases that led Akil],' accessed 24 October 2014 <http://nasional.sindonews.com/read/790580/13/ini-kronologi-dua-kasus-yang-menjerat-akil>

[58] Allan-Randolph Brewer Carías (n21) 29,

that the process of interpretation has to look at the main problems connected with drafting, interpreting, and applying legislation, though there are many lesser problems.[59]

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.[60]

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. Somek 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.[61]

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.

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.[62] Similarly, the mere existence of a constitutional court establishing legislative breaches of duty and abuse of powers for constitutional reasons is not sufficient to ground an objection of the unconstitutional transfer of

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[59]Francis Bennion, *Understanding Common Law Legislation Drafting and Interpretation* (Oxford University Press 2009) 79.

[60]Miguel Schor, 'An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia' (2009) 16 (1) Indiana Journal of Global Legal Studies 177

[61]Alexander Somek, 'Monism: A Tale of the Undead' in Matej Avbelj and Jan KomÃirek (ed), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 343-379.

[62]Daniel Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance' in Matej Avbelj and Jan KomÃirek (ed), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 85.

competence from the legislature to the ICC. If the constitution grants to the individual rights against the legislature and intends there to be a 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; it is also required.[63]

In the same way, Comella insisted that constitutional courts cannot be passive when they review legislation: they cannot easily abstain from ruling on constitutional matters they might otherwise wish to avoid; nor can they be extremely deferential toward the governmental majority. Despite some dangers, this tendency toward activism is not a trait we should condemn.[64]

6.5.1. 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 feeling really hit from ICC judgment. As the representative of the people's voice, the DPR has frequently felt a weak state organ instead of sovereignty.

The act making is principally 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.

Constitutional judges possess broad powers to govern, in conjunction with other state officials, by virtue of an explicit act of delegation. In the terminology of delegation theory, constitutional courts are the agents. 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.[65]

In contrast, the National Legislation Program designed yearly has seemed that the DPR has tended to avoid an act affected by the ICC judgment.

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[63]Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 367-368.
[64]Victor Ferreres Comella, *Constitutional Courts & Democratic Values A European Perspective* (Yale University 2009) xvi.
[65]Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy,' (2002) 25 (1) West European Politics 1.

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.[66] This can be understood, although the DPR has redrafted and made a new one, the ICC still has power to annul or invalidate it again in the future.

This is because the main tool of ICC courts is the power of interpreting the constitution and to ensure its application, enforceability, and supremacy by adapting the constitution when changes and time require such a task, but without assuming the role of a constituent power or of the legislator, they cannot on a discretionary political basis create legal norms or provision that cannot be deducted from the constitution itself.[67]

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.

6.5.2. 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.[68]

For the President, the ICC judgments moreover are hard judgments. This means that the President must implement what the ICC judgments order to do, especially concerning the determining of 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 judgement over a

[66]In the National Legislation Program. Dewan Perwakilan Rakyat, 'Badan Legislasi', accessed 27 September 2014, <http://www.dpr.go.id/id/baleg/prolegnas>
[67]Allan-Randolph Brewer Carías (n21) 29.
[68]Regarding relationship between the President and Parliament is regulated in the Indonesian Constitution Article 20 Clause (5).

petition concerning alleged violations by the President and/or the Vice-President as provided by the constitution.

One of the cases can be seen in the case of judicial review of the Act Number 22 of 2001 on the Oil and Earth Gas against the 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. One of the ICC reasons given is 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 of energy security in Indonesia.[69]

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.

6.5.3. The Impact for the Supreme Court

Like other judgements, the Supreme Court has also been affected by the ICC judgment. Constitutionally, the Supreme Court has to fully obey all of the ICC judgements. However, the Supreme Court has sometime seemed reluctant to fully obey ICC judgments, in some cases even ignoring a judgement. 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.[70] Dr. Bambang

[69]ICC Judgment Number 36/PUU-X/2012 on the BP Migas. See also Kompas, 'Alasan Pembubaran BP Migas,' accessed 21 February 2013, <http://bisniskeuangan.kompas.com/read/2012/11/14/15130050/Alasan.Pembubaran.BP.Migas>.

[70]ICC's Judgement Number 4/PUU-V/2007 on the *General Practitioner*. In this judgement ICC stated that the Articles 29 Clause (1); Article 36, Article 37 (2), Article 73 (1), (2), (3), Article 75 (1), Article 76, Article 77, Article 78, and Article 79 (a) the Act Number 29 of 2004 on General Practitioner is invalid and against the Constitution.

was sentenced to 18 months in prison.[71] 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 judgements has not widely impacted to the Supreme Court. Because the ICC does not have power to force its judgement to be implemented by other state institutions. On this it seemed that the ICC's judgements 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 judgement.

6.6. 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 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.[72]

The legal uncertainty in ICC procedural law creates difficulty for the ICC jugdes. 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

[71] Imam Anshori Saleh, 'MA Penjarakan Dokter Bambang dengan Pasal yang Dihapus MK, Ini Kata KY [SC Prisoning General Practioner with the Invalid Act] 'accessed 12 September 2014, <http://news.detik.com/read/2014/09/11/161501/2687799/10/ma-penjarakan-dokter-bambang-dengan-pasal-yang-dihapus-mk-ini-kata-ky?nd771104bcj>

[72] ICC Ordinance Number 06/ PMK/2005, Article 5 (1)b. Act of Constitutional Court, Article 51 (3).

expand their jurisdiction to protect public interest.[73] 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.[74]

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 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.

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

The Ultra Petita judgements can be classified into several categories; namely, 1. intervening parliament's jurisdictions; 2. judging itself; 3. reviewing president decree; 4. inconsistent on judgement formats; 5. invalidate all over act; 6. incorrect judgement code; 7. intervening supreme court authorities; 8. judging

[73]Haposan Siallagan, 'Masalah Ultra Petita dalam Pengujian Undang-Undang [The Problem of Ultra Petita in Judicial Review],' (2010) (22) 1 Mimbar Hukum 80.
[74]Mohd. Mahfud MD, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi [The Debate on the Constitutional Law Post Amendment of Constitution]* (LP3S 2007) 73.

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 proces 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 judgements have not strongly impacted. The Supreme Court has seemingly classified the ICC's judgement as soft judgement, which is allowed to not be implemented immediately after the judgment is declared by the judges, even displaying a tendency to ignore the judgement. The ICC does not have power to force its judgement to be implemented by other state institutions. On this, it seemed that ICC judgements 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 organisational structure). In order 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 dispute 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 judgement. With these statistics and logic, quality judgements 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 judgement 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 has 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 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.

CHAPTER 7 - JUDICIAL REVIEW IN THE AMENDED 1945 CONSTITUTION

7.1. Introduction

This chapter will explore judicial review in the Indonesian legal system, particularly after the amendment of the constitution, which was a milestone of transformational law review, from the authoritarian to the democratic era (see Table 12). Before there is almost no space and mechanism for ordinary persons to express legally their reluctance on the acts, decrees, regulations, and so forth. The mechanism of judicial review can demolish the impression of the 'sacred constitution,' from the time of the authoritarian era.

Pursuant to the 1945 Constitution, the authority regarding legislation lies with the DPR.[1] The provisions issued by legislative institutions are different to those issued by executive ones, including those such as the PP, the Perpres, and the Keppres.[2] Definitions of juridical legislation, legislative act, and executive legislations are often differentiated, because those provisions have been made by different state institutions, follows criticism in the MPR Decree,[3] which grants authority for the MPR to review acts against the 1945 Constitution, including the MPR Decree. Judicial review of an act, as well as the MPR Decree, will empower a political institution instead of a judiciary process. Therefore, several authorities of the MPR, after the third amendment of the 1945 Constitution,[4] have been transferred to the ICC.[5]

The third amendment of the 1945 Constitution, giving the ICC power to review an act, is a result of a prolonged process since 1945. Muhammad Yamin proposed the need for a judiciary institution to review laws against the 1945 Constitution. Indicating a change of thinking of all people in Indonesia, especially

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[1]The 1945 Constitution, Article 20.
[2]PP= *Peraturan Pemerintah* (Government Decree), Perpres= *Peraturan Presiden* (President Decree), Keppres= *Keputusan Presiden* (President Decision). Those provisions are positioned below an act. See also the Act No. 12 of 2011 on the Forming of the Legislation, Article 7 which is arranging the types and hierarchy of legal sources in Indonesia.
[3]See also the MPR Decree Number III of 2000 on the Sources Law Hierarchy, Article 5 paragraph (1).
[4]See also the 1945 Constitution, the Article 24C.
[5]Marwan Mas, 'Mengurai Putusan Pembatalan UU Nomor 45 Tahun 1999' [Analyzing of the Judgment Regarding Invalidation of the Act No.45 on 1990] (2004) 1(2) Jurnal Konstitusi 19.

those Indonesian figures regarding acts, constitution, and government administration.[6]

Reviewing law by the ICC is new in the development of judicial review.[7] Since its establishment, the ICC has been open for reports from people whose rights and authority are violated by a certain act. The Indonesian people have become aware of this new function of the ICC. Many cases were proposed in 2004, and investigated by the ICC with judgment on some.[8] The establishment of the ICC marked a new era in the power of the judiciary system in Indonesia. Some untouchable areas, such as judicial review issues on the 1945 Constitution, can now be addressed by the ICC, including other authorities regulated in the 1945 Constitution after the amendment.[9]

Jimly claims that an act is a product of democracy, which is the will of the people, but the substance of an act does not always comply with justice and truth according to the constitution.[10] An act contradicting directly with the 1945 Constitution will, in whole or part, be considered not binding. It is an implication of duties given to the ICC as the countervailing power as well as the guardian of democracy.

The implications of judgment made by the ICC reviewing an act against the 1945 Constitution need to be re-examined in terms of judiciary administration, along with the level of consistency from those judgments.[11]

The implementation of juridical review according to the 1945 Constitution is not only conducted by the ICC, but also by the Supreme Court.[12] The judicial

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[6]Benny K.Harman, *Mempertimbangkan Mahkamah Konstitusi: Sejarah Pemikiran Pengujian Undang-Undang Terhadap UUD* [Considering the Constitutional Court: History of Thought in Reviewing an Act against the Constitution] (Kepustakaan Populer Gramedia 2013) 145-237.

[7]Muchamad Ali Syafa'at, 'Pengujian Ketentuan Penghapusan Norma dalam Undang-Undang' [Reviewing the Elimination Provision of a Norm in the Act], (2010) 7(1) Jurnal Konstitusi 2.

[8]Bambang Sutiyoso, 'Pembentukan Mahkamah Konstitusi Sebagai Pelaku Kekuasaan Kehakiman di Indonesia' [The forming of the Constitutional Court as the Actor of Judicial Power in Indonesia], (2010) 7(6) Jurnal Konstitusi 26.

[9]Ibid.

[10]Jimly Asshiddiqie, *Pengantar Hukum Tata Negara [Introduction on the Constitutional Law]* (Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi RI 2006) 335.

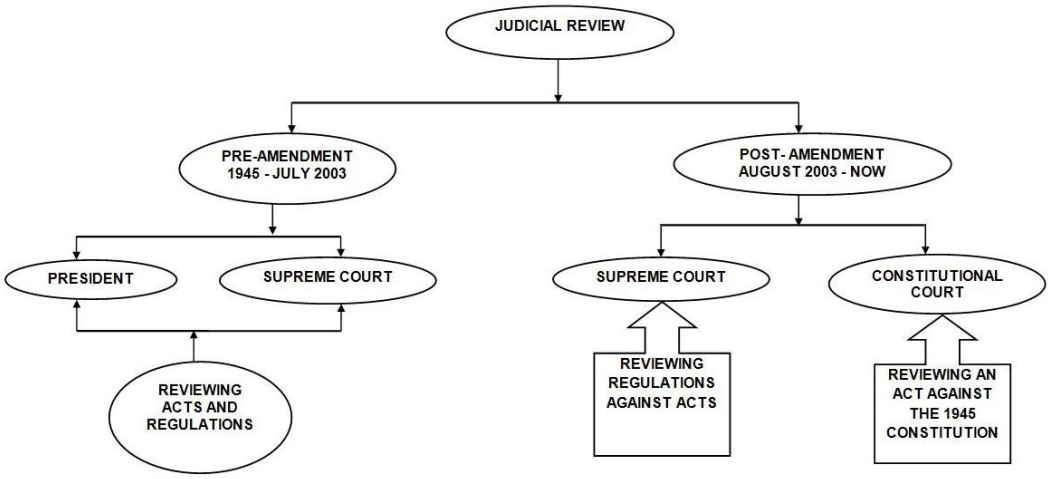
[11]Aan Eko Widiarto, *Penyelenggaraan Kekuasaan Kehakiman Dan Putusan Mahkamah Konstitusi [Implementation of the Judiciary and the Constitutional Court Judgment]* (University of Brawijaya 2012) 1.

[12]The Supreme Court is authorized to hear at the level of cassation, review legislations under laws, and bear other authorities granted by laws. See also the 1945 Constitution, Article 24A paragraph (1) of the 1945 Constitution.

review conducted by the Supreme Court is a balancing manifestation in order that the authority to review laws is not merely restricted to the ICC.

The ICC has an equal position to the Supreme Court. The 1945 Constitution also established a commission, which is authorized to keep the purity, honour, and dignity of a judge, known as the Judicial Commission. It has a significant role in upgrading the judiciary system in Indonesia, because the 1945 Constitution amendment has emphasized goals of reform in reinforcing legal supremacy, and making institutions more clean, free, and authoritative.

Table12: Diagram of Judicial Review Pre and Post Amendment



7.2. Judicial Review pre the Amendment of the 1945 Constitution

The idea of authority to review a regulation was proposed by the founding fathers of Indonesia since the earlier stage of independence during 1945, part of the idea a state based on the rule of law, later known as the state-law. In one of the meetings of the BPUPKI[13] an Indonesian founding father, Mohammad Yamin, proposed an institution authorized to resolve disputes regarding the implementation of the constitution, and a supreme court given an authority to compare laws.[14]

[13]BPUPKI = *Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, is the Investigative Committee for the Preparation of Independence Indonesia. See also Ananda B. Kusuma, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI): Panitia Persiapan Kemerdekaan Indonesia (PPKI): 29 Mei 1945-19 Agustus 1945 [Minute of Sessions the Investigative Committee for the Preparation of Independence Indonesia]* (Sekretariat Negara Republik Indonesia 1992).

[14] Moh. Mahfud MD, *Membangun Politik Hukum Menegakkan Konstitusi [Building Political of Law and Upholding the Constitution]* (LP3ES 2006) 31

Mohammad Yamin's view was not widely accepted. One of his colleagues, Soepomo, disapproved of the idea, for four reasons. Firstly, was the basic concept of the constitution being established at that time, which did not emphasize on separation of power, but on distribution of power. Secondly, was that a judge was to implement the law instead of reviewing it. Next, was that the authority given to a judge to review the law contradicted with the concept of the MPR supremacy. Lastly, was because the Republic of Indonesia was a new state, which just gained independent, and did not have experienced experts on judicial review. For those reasons, the idea was not adopted by the 1945 Constitution at that time.[15]

Additionally, Soepomo also claimed that the term of "judicial review" was a characteristic of the law of the United States. It investigated every government action violating the constitution. He similarly added that the concept was unknown in the Netherlands, in which, in this regard, authority to review was the only concept known.[16]

Soepomo's argument can be understood, because at that period most Indonesian legal scholars made the Netherlands as the prime destination for studying law.[17] However, if Soepomo had shifted slightly to German or Austria at that time, instead of concentrating only in Netherlands, he would have found that the judicial review mechanism, through judicial process, was implemented in those countries.

7.2.1. The Domination of Supreme Court

The establishment of the Supreme Court of the Republic of Indonesia dates back to the time of colonialization, and its history. It was evident from the fact that Indonesia was colonialized by Dutch, England, and Japan at different periods of time. However, the development of justice in Indonesia was influenced by these eras.

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[15]Laica Marzuki, *Merambah Pembentukan Mahkamah Konstitusi di Indonesia* [*Clearing-away on the Establishment of Indonesian Constitutional Court],* (Konsorsium Reformasi Hukum Nasional 2003) 79.

[16] Moh. Mahfud MD, (n16) 8.

[17]Soepomo did his PhD in Leiden Netherland. He was involved directly in the legislation of the 1945 Constitution. See also Adriaan W. Bedner, Sulistyowati Irianto, Jan Michiel Otto, and Theresia Dyah Wirastri, ed, *Kajian Sosio-Legal [Socio-Legal Studies]* (Universitas Indonesia, Universitas Leiden, Universitas Groningen, 2012) 35-45.

In 1807, Mr. Herman Willem Deandels was appointed Governor General by Lodewijk Napoleon to defend Dutch colonialization in Indonesia from attacks by England. Deandels made many changes in the area of judiciary established earlier by the Dutch, amongst others was changing *Raad van Justitie* into *Hooge Raad* in 1798.[18]

When the 1945 Constitution was passed, there was not any Supreme Court in Indonesia. The only regulation referring to the Supreme Court institution was in the 1945 Constitution.[19] Later, the PP was issued to determine the City of Jakarta Raya as the city where the Supreme Court was located.[20] Then, the Act on the Supreme Court gave staff positions in the Supreme Court and Attorney General,[21] This Act was amended in 1948 and assigned the Supreme Court as the highest federal court.[22]

The Supreme Court was established on 18 August, 1945, one day after the Indonesia's Independence Day, by a committee dominated by the Judicial Commission, with approval from the House of Representatives which later appointed the President. The Supreme Court is the highest court in the state.[23] It hosts 4 judiciary institutions, the General Court, the Military Court, the Religious Court, and the State Administrative Court. The Supreme Court Act in 1985[24] stated that the Supreme Court is one of the executors for the judiciary power as the highest institution, independent from the Government or others' influence in performing its functions.

Three norms can be reviewed: regulatory decision, administrative decision, and judicial decision.[25] The three norms can be reviewed in court or by other mechanisms. The Supreme Court has the following jurisdictions:

(1) to conduct judicial review towards legislations under laws

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[18]RM. A.B. Kusuma, *Lahirnya Undang-Undang Dasar 1945 [The Birth of the 1945 Constitution]* (Badan Penerbit Fakultas Hukum Universitas Indonesia 2004) 3.
[19]The Supreme Court is the only state institution owning the judicial power. See also the Article 24 paragraph (1) of the 1945 Constitution before amendment.
[20] See alsot the Government Decree No. 9 of 1946 on Giving Military Rank to the Members of the Supreme Court of the Army.
[21]See also for the comparison the old version of the Act No. 7 of 1947 on the Supreme Court, which was enacted on 3 March 1947.
[22] RM. A.B. Kusuma (n20) 4-5.
[23]See also the Decree of the People's Consultative Assembly of the Republic of Indonesia No. III/MPR/1978 on the Position and Working Relationship Governance Institutions with Highest State/ or from High State Institutions.
[24]See also the Act No.14 of 1985 on the Supreme Court.
[25]Jimly Asshiddiqie (n11) 1.

(2) to declare invalid all legislations under laws if it violates the higher legislations
(3) decision on the invalidity of a regulation is made and based on a review at the level of cassation[26]

After the establishment of the ICC, the authority of the Supreme Court on law review has been amended:

(1) The Supreme Court is authorized to review legislations under laws towards the 1945 Constitution.
(2) The Supreme Court declares invalid legislation under the 1945 Constitution if it violates higher level legislations, or if it is not established in accordance with prevailing laws and regulations.
(3) The judgement on the invalidity of a legislation as intended in paragraph (2) is based on a review at the level of cassation, or based on direct request from the Supreme Court.
(4) The legislation which has been declared invalid as intended in paragraph (3) does not have any binding legal force.
(5) The judgment as intended in paragraph (3) should be included in the State Gazette of the Republic of Indonesia within the maximum period of 30 (thirty) days since the judgment is declared.[27]

The Supreme Court plays an important role in determining the validity of a legislation result, while the ICC's authority is restricted to only review legislations under the 1945 Constitution.

7.2.2. The Limitlessness of Presidential Power in Law Review

The authorities for reviewing such provisions are not restricted to judicial authority only. The executive institutions, chiefly the President, are also authorized to review regulations, known as executive review.[28] The objects for executive review can be divided into legislative products, and regulative ones. The legislative products are products of regulation involving parliament as

[26]See also the Act No.14 of 1985 on the Supreme Court. Article 31 stated that the Supreme Court has the authority to test materially only against regulations under the Supreme Court Act.
[27]Gede Pantja Astawa and Suprin Na'a, *Dinamika Hukum Dan Ilmu Perundang-Undangan Di Indonesia [Law Dynamics and Legislation Science in Indonesia]*, (Alumni 2008) 124. See also the Act No. 5 of 2004 on the amendment for the Act No. 14 of 1985 on the Supreme Court, Article 31.
[28]Muhammad Siddiq, *Studi Epistemologi Perundang-undangan* [Epistemology Studies on Legislation], (Teratai Publisher 2011) 97.

legislators or co-legislators. The DPR acts as the legislator, whilst the government as co-legislator because any bills which will be made into acts, need discussion as well as approval by the DPR and the President.[29]

The president has authority to carry out executive review, limited only to bylaws, a result of control by the central government over regulations in autonomous provinces. Local regulations by the DPRD with the Governor shall be submitted to the government within 7 days after enacted.[30]

For executive review, there are two types of control: preventive and repressive controlling. Preventive controlling reviews local-regulations regarding the Local Government Budget, Local Government Tax and Retribution, and City/Municipality Spatial Planning that is the responsibility of a governor.[31] Furthermore, preventive controlling is purposed to any draft of local regulation regarding Provincial Government Budget, Provincial Government Tax and Retribution, and Province Spatial Planning that is the responsibility of central government. Repressive control applies all regulation passed by a local government, including local regulation to which preventive controlling has been conducted. Therefore, it is possible that one local regulation undergoes both types of controls.[32] The cancellation of local regulation is imposed by President through presidential decree, no more than 60 (sixty) days since submission to central government. However, the evaluation process conducted by the regional government usually takes longer, which delays legal certainty.[33]

The standard of executive review by the government is different with the Supreme Court. The Supreme Court reviews a bylaw to find out whether violates higher regulations, and whether the procedure of making this regulation is in accordance with the existing acts and regulations. The government reviews a bylaw against a wider standard, higher level regulation, but public interest as well.

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[29] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang [The Procedural Law on the Judicial Review]* (Konstitusi Press 2006) 30.
[30] See also the Act No. 32 of 2004 on the Local Government, Article 136, 145.
[31] Muhammad Siddiq, 'Retribusi Daerah di Provinsi Otonomi Khusus: Kajian Terhadap Eksekutif Review Peraturan Daerah [Provincial Retribution in the Special Province: A Study on Executive Review Bylaw],' (2010) 12 (24) Media Syari'ah: Jurnal Hukum Islam dan Pranata Sosial 1-19.
[32] Imam Soebechi, *Judicial Review Perda Pajak Dan Retribusi Daerah* [The Judicial Review of the Tax Bylaw and Livies] (Sinar Grafika 2012) 196-217.
[33] See also the Act No. 32 of 2004 on the Local Government.

Public interest review depends on a variety of social laws and norms such as lives of society, public services, public orders, and so forth.[34]

Cancellation of a bylaw is by presidential regulation,[35] by Decree of the Ministry of Home Affairs acting on behalf the President. Cancellation of bylaws by Decree of the Ministry of Home Affairs should be confirmed by the Presidential Regulation, without which the regulation is still valid.

7.3. Judicial Review Post the Amendment of the Constitution

7.3.1. The Role of Supreme Court

The 1945 Constitution as amended makes role of judicial authority has been independent from other authority in line with the ambition of a state based on the rule of law. The Supreme Court has been authorized to conduct judicial review, in addition to performing court in the level of cassation, and other authorities based on the prevailed acts and regulations.[36] The Supreme Court moreover may invalidate provisions of the PP, Perpres, Keppres, Ministry Decrees, Perda and other regulations.[37] In performing its function, the Supreme Court has acted passively, waiting for any objections submitted by local governments. However, the authorities of the Supreme Court in conducting judicial review of legislations under acts have been restricted by the ICC. The provisions being reviewed by the Supreme Court must be postponed, if the provision relates to act which is being reviewed by the ICC until ICC decides final judgement.[38] The restriction is made because the ICC has the authority to conduct judicial review as well.

To implement its authority to review legislations, the Supreme Court has authority to review only the substance of the provisions, not how the provisions have been made. The mechanisms contrast with the ICC, which can also be reviewing a process of making an act assumed against the constitution. The

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[34]A *Perda* is prohibited contrary to the public interest and/ or the provisions and higher regulations. See also the Act No.32 of 2004 on the Local Government. The Article 136 Paragraph (4).
[35]See also the Act No.32 of 2004 on the Local Government. The Article 145 Paragraph (4).
[36]Zainal AM. Husein, *Judicial Review di Mahkamah Agung RI: Tiga Dekade Pengujian Peraturan Perundang-Undangan [The Judicial Review in the Supreme Court; Three Decades of Judicial Review of the Regulations]* (Rajawali Pers 2009) 2-10. See also Harun Al-Rasid, 'Hak Menguji Dalam Teori dan Praktek [The Rights to Review in Theory and Practice],' (2011) 1 Jurnal Konstitusi.
[37]See also the Act No. 12 of 2011 on the Forming of the Legislation, Article 7 which is arranging the types and hierarchy of legal sources in Indonesia.
[38]See also the Act No. 24 of 2003 on the ICC, Article 55.

standard used by the Supreme Court in conducting judicial review is whether the following statement is true about the local regulation:

1) The local regulation contradicts higher level legislations; and/or
2) The local regulation is not made by complying with the prevailed acts and regulations.

If a local regulation contradicts the higher level regulations and/or it was not established in accordance with the prevailed acts, laws, and regulations, the Supreme Court approves the proposal and instructs the local government along with the DPRD, to cancel the local regulation in no more than 90 days from the time of the decision.

7.3.2. The ICC Position

The ICC has the authority to examine the law against the constitution, the Supreme Court to examine the existing regulations under the law so as not to conflict with the law. The problem faced by the ICC is that the DPR often ignored even for years, particularly acts which needed amending. The Supreme Court still uses invalidated acts, which have been cancelled by the ICC.[39]

The future challenges faced by the ICC are the problem of the credibility and dignity of the judiciary. To overcome this situation, firstly, are forceful measures to enforce ICC's judgments. Another effort is the dissemination of information acts cancelled by the ICC to all state institutions, especially the ordinary court under the auspices of the Supreme Court. For the moment, the ICC judgments are only published on the website without a thorough dissemination. The ICC needs additional authority to consolidate the supremacy and safeguarding of the constitution.

Jenedri stated that safeguarding the constitution means to reinforce the constitution, suggesting reinforcing laws and justice. The ICC is given the position, authority, and constitutional obligation to guard and guarantee the implementation of the constitution.[40] Thus, an act is a political product which the

[39]It can be analysed in the dr. Bambang's case that the Supreme Court made judgment based on the annulled Article on 12 June 2007. See also ICC Judgement No. 4/PUU-V/2007, *General Practitioner*. In this judgement ICC stated that the Articles 29 Clause (1); Article 36, Article 37 (2), Article 73 (1), (2), (3), Article 75 (1), Article 76, Article 77, Article 78, and Article 79 (a) the Act Number 29 of 2004 on General Practitioner is invalid and against the Constitution.

[40]Janedjri M. Gaffar*, Kedudukan, Fungsi Dan Peran Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Republik Indonesia*, [Status, function and Role of the Constitutional Court in the

political interest of law makers are crystalized in the act. As a political product, the substance of an act might contradict with the constitution.

Additional authority is doing the testing on all legislation, so that there is consistency of all legislation from the constitution to the local regulations. Therefore, the Supreme Court, who had been holding the authority of judicial review of legislation under the law, can only concentrate with ordinary cases which are not reviewing regulations.

Sri Soemantri proposes that the judicial review is an authority to investigate and assess whether the substance of legislation is inline or contrary to the higher level laws, and whether a certain power is authorized to establish certain legislation.[41] Therefore, the objects of judicial review are divided into two categories. There are namely, the substance of a provision, and procedure in establishing legislation. If a request is submitted to review a provision for both objects, what the judge has to review first is the procedure, because if a provision is established not based on the procedure regulated by the prevailed acts and regulations, the legislation shall be declared invalid, including its substance.

A judge defines a provision is by using two interpretations, chiefly: the original intent or non-original intent—commonly known as textual meaning and contextual meaning. The two interpretations have created endless argument between legal positivism[42] and progressive law. Another known theory in constitutional law is the living constitution theory,[43] considered as a principle for progressive law.[44]

According to the law hierarchy, the substance of a lower-level law shall not violate or refer to that of higher-level law (see Table 13). To test whether an

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Constitutional System of the Republic of Indonesia] (Mahkamah Konstitusi Republik Indonesia 2009) 11.

[41]Sri Soemantri, *Hak Menguji Material di Indonesia [The Rights to Review in Indonesia]* (Alumni 1986) 8

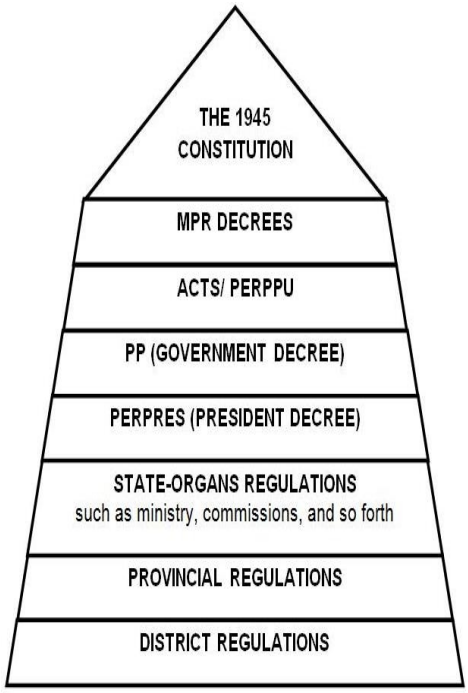
[42]Hans Petter Graver, *Judges against Justice on Judge when the Rule of Law is Under Attack* (Springer 2015) 205-224. See also Wilfrid J. Waluchow, *Inclusive Legal Positivism* (Clarendon Press 1994).

[43]See also Michael E. Parrish, 'The Evangelical Origins of the Living Constitution by John W. Compton (review),' (2015) 45 (4) Journal of Interdisciplinary History 593-594.

[44]Sekretaris Jenderal Mahkamah Konstitusi, *Perkembangan Pengujian Peraturan Perundang-undangan di Mahkamah Konstitusi-Dari Berpikir Hukum Tekstual ke Hukum Progresif*, [The Development of Judicial Review in ICC- from the Textual Legal Thought to the Progresive La] (Sekretaris Jenderal Mahkamah Konstitusi 2010) 11.

act contradicts with the constitution, the mechanism used is judicial review.[45] If an act, or any part in it, is declared to violate the constitution, then the act shall be cancelled by the ICC. Through a judicial review authority, the ICC becomes a state institution ensuring that there are no such acts or any provisions violating the constitution.

Table 13: The obelisk of law hierarchy in Indonesian legal system



Source: The Act Number 12 of 2011 on the Forming of the Legislation

Above all, in the future it is expected that the ICC will be the only state organ owning authority to carry out the judicial review for all regulations not sharing with government as executive. Thus, the government will no longer be justified to use its power to review legislative product in the provincial level.[46] Because the government is in the domain of executive, notwithstanding, the DPRD/DPRA is in the domain of legislative, even in provincial or district level.

At the moment, in practice, the revocation of regulation by the government is in the form of ministry, because the government has delegated the

[45]Ibid.,14.
[46]In the Article 136 Clause 4 the Act Number 32 of 2004 on the Local Government, stating that 'Bylaw prohibited contrary to the public interest and / or legislation higher'.

power to the Minister of Home Affairs. There are two tools which are commonly used by the ministry to test the bylaw regulation; namely, preventive and repressive. The preventive process uses for regulation relating to financial regulations such as taxes, levies, layout, and budget. The repressive process uses for regulation which is indicated as a contradicting regulation during the legislation process. If the regulation has contradiction, it will not be passed to be a bylaw, and will be removed in earlier. The tested regulation by government is a means of control, in order to avoid future problems in society.

Table 14: The differences of the SC and ICC after the 1945 Constitution amendment

Differences	The Supreme Court	The ICC
Authority according to the 1945 Constitution	1. hearing at the level of cassation; 2. reviewing provisions under the acts; 3. other authorities granted by acts. (Article 24A paragraph [1] of the 1945 Constitution)	1. hearing at the first and last process which results in final decision to review laws toward the 1945 Constitution; 2. deciding disputes between the authority of state institutions whose authorities are granted by the 1945 Constitution; 3. deciding dismissal of a political party; 4. deciding disputes regarding general election; 5. impeachment the President and/or Vice President. (Article 24C paragraph [1] of the 1945 Constitution)
Duties and Authorities	The Supreme Court is given duties and authority to review and decide (Article 28 paragraph [1] of Supreme Court Act): 1. request for cassation; 2. disputes on authority to adjudicate. The Supreme Court has a jurisdiction in the first process and latest for all disputes: a. between court in a certain judiciary institution and that in another; b. between courts under different high courts in the level of appeal under the same judiciary institution;	The ICC has a jurisdiction in the first process and latest which its decision will be considered as a final decision to (Article 10 paragraph [1] of ICC Act): 1. review laws towards the 1945 Constitution; 2. deciding disputes between the authority of state institutions whose authorities are granted by the 1945 Constitution; 3. deciding dismissal of a political party; 4. deciding disputes regarding general election.

	c. between two high court appeals under the same or different judiciary institutions. (Article 22 of the Supreme Court Law) 3. request for appealing of judgement with permanent legal power. This is an extraordinary legal remedy. In this case, the Supreme Court conducts the latest correction towards a judgment containing injustice due to errors and mistakes of a judge; 4. Judicial review for the provision under the acts (Article 31 of the Act No. 5 of 2004)	
Candidacy of a judge	The judges' candidate proposed by the KY to the DPR for approval. (Article 24A paragraph [1] of the 1945 Constitution)	The ICC has nine members of constitutional judges appointed by the President. The candidates are proposed by the Supreme Court (three candidates), the House of Representatives (3 candidates), and The President (3 candidates). (Article 24C paragraph [3] of the 1945 Constitution)
Number of judges	The maximum number of Supreme Court judges is 60. (Article 4 of Act No. 5 of 2004)	The ICCs has 9 judges. A chief justice concurrently serving as member, a deputy chief justice concurrently serving as member, and 7 members of constitutional judges. (Article 4 paragraph [2] of Act No. 8 of 2011)
Branches of judiciary authority	The Supreme Court has branches of judiciary authority, consisted of judiciary institutions under the Supreme Court in general high court, religious high court, and military high court, and administrative high court. (Article 24 paragraph [2] of the 1945 Constitution and Article 65 of Act No. 14 of 1985)	In exercising its power, the ICC does not have any branches of judiciary authority. There is only one ICC located in the capital city of Indonesia. (Article 3 of the Act of ICC)
The nature of judgment	The judgment of the Supreme Court is considered a final judgment, but a legal remedy is possible by reviewing the judgment with permanent legal power and clemency.	The judgment of the ICC has a final binding and no legal remedy is possible. (Elucidation of Article 10 paragraph [1] of the Act No 8 of 2011)

	- the legal remedy to review is regulated in Article 66 – 76 of Law No 14 of 1985) - For judgment with permanent legal force, a convict may request clemency to the President. (Article 2 paragraph [1] of the Act No. 22 of 2002 on Clemency). After that, the Supreme Court provides legal advice to the President in order that the President is able to grant or reject the clemency. (Article 35 of the Act No. 14 of 1985)	

7.3.3. The Boundary of Presidential Authority in Law Review

There are several parties as well as states institutions which have the rights to review the local regulations. The rights to review are not only owned by the Supreme Court, but are also owned by the President and his ministries.[47] These authorities have purposed to fully control the local governments, whether they have a special autonomy, or only ordinary autonomy.

The controlling of implementation of a local government is a process aimed for ensuring that the local government is running based on the prevailed acts and regulations. According to the relation between central and local government, controlling is a mechanism to maintain the unity of the country, in order that autonomy does not threaten the unity. Controlling a local regulation is a part of local government implementation in Indonesia.

The local regulations are consisted of 1. *Perda* for the provincial level, 2. *Perda* for the district level, 3. Governor Decree, and 4. Mayor Decree.[48] In controlling those local regulations, the government has used a mechanism

[47]Riawan Tjandra, W. and Kresno Budi Darsono*, Legislative Drafting Teori dan Teknik Pembuatan Peraturan Daerah [Legislative Drafting, Theory and Technic on Making Bylaws]* (Universitas Atma Jaya 2009) 21.

[48]In various autonomy province of Indonesia, the term of Perda have been called in various name. In Aceh is called Qanun, in Papua and West Papua is called Perdasi and Perdasus. See also the the Act No. 12 of 2011 on the Forming of the Legislation, in the explanation of Article 7. See also Jum Anggriani, 'Kedudukan Qanun dalam Sistem Pemerintahan Daerah dan Mekanisme Pengawasannya [The Position of Qanun within Local Government System and Its Supervising Mechanism],' (2011) 18 (3) Jurnal Hukum, 333-334.

regulated by the prevailed acts and regulations.[49] The mechanism for controlling the local regulation is regulated in the Act of the Local Government stating that

> Any local regulation must be submitted to the Government in no more than 7 (seven) days after being endorsed. Seven days is given to allow it to be delivered from the Central Government to the Local Government. The local regulation which contradicts the public interests and/or the higher regulations shall be cancelled by the Local Government…,[50]

The decision of the cancellation of the local regulation is laid down in the Perpres, in no more than 60 (sixty) days after the local regulation has been received. If the province/district/municipality cannot accept the decision on the cancellation of the local regulation on reason justified by the acts, the governors/mayors may file an objection to the Supreme Court.[51]

Supervision and controlling for the implementation of the local government are conducted by the President. It includes the supervision and controlling for the implementation of local government, local regulation, and governor regulation. The purposes of this supervision and controlling are to clearly implement the goal of local autonomy implementation, and to ensure that the local government is running as planned and in accordance with the highest norm. For those purposes, a number of regulations have been regularly established, including the government regulations as well as the ministry regulations.

The President, as the holder executive power, commonly, will not review the local regulations by his own hand. He functions his executive review power through the Ministry of Home Affairs, who will review those regulations within two months.[52] The delegation of authority in this context is very reasonable,

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[49]Meri Yarni and Latifah Amir, 'Penguatan Tata Kelola Pemerintahan Yang Baik Dalam Pembentukan Peraturan Perundang-Undangan Sebagai Pilar Penegakan Hak Asasi Manusia Di Indonesia [Strengthening Good Governance In Formation Laws and Regulations for the Pillar Enforcement of Human Rights in Indonesia],' (2015) 5(2) Jurnal Ilmu Hukum, 133. See also the Decree of Ministry of Home Affairs No.1 of 2014 on the Forming of Local Regulations.
[50]See the Act No. 32 of 2004 on the Local Government. Article 145.
[51]See the Government Regulation No. 79 of 2005 on Guideline for Supervision and Control of Local Government. See Article 37.
[52]See the Act No. 32 of 2004 on the Local Government. Article 145.

considering the number of provinces and districts in Indonesia are too many.[53] Thus, the President can concentrate on other important tasks.

If a local regulation is contrary to the related acts and regulations, it can be declaring invalid by the Ministry. However, if the Governor/Mayor and/or the DPRD/DPRK are reluctant to accept the ministry decision regarding the invalidity of the regulations, they may legally file an objection to the Supreme Court. The second institution to review the local regulation is the Supreme Court through a judicial review.[54]

The executive review which may result in the cancellation of a local regulation through a Presidential Regulation, which finally becomes a Regulation of the Ministry of Home Affairs, has been debated by politicians, lawyers, and academicians. It is considered contrary to the interpretation of doctrine *argumentum a contrario.*[55] Thus, the interpretation or elucidation of a law has been regulated in several acts. It is based on opposite definitions between a concrete event happening at the time, and a concrete event happening in the past. In *argumentum a contrario* doctrine interpreting the cancellation of a decision can only be done by the institution issuing the decision.

The former ICC judge, Jimly has not fully agreed with those mechanisms. He asserted that local regulations cannot be cancelled unilaterally by the central government through the executive review mechanisms. The central government is supposed not be given power to invalid the regulations by the Act of Local Government.[56] His opinion can be understood. As a Kelsenian, he wants to protect the local norms existing in the local regulations from being invalidated by the political process, but must be through the judicial process in the Supreme Court.

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[53]The Republic of Indonesia are consisted of 34 Provinces, 403 Districts, and 98 Cities. Kemendagri, *Profil Daerah [District Profile]*, accessed 14 March 2015 <http://www.kemendagri.go.id/pages/profil-daerah>

[54] See the Act No. 32 of 2004 on the Local Government. Article 145.

[55]*Argumentum a contrario* (Latin) or argument from the contrary is an argument for different treatment made by negative reasoning from another argument. Accessed 14 March 2015. <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-243>.

[56]Jimly Asshiddiqie (n11) 1.

Furthermore, to control the regulations under the act, the Ministry on behalf of the President have conducted two methods of controlling. [57] *Firstly,* is through repressive controlling. Succeeding the beginning of the democratic and dispersed era in Indonesia, both political and socio-economic environments have tended to be more dynamic on the common level. The amendment, in the most projecting term originates in local politics, covering four fundamental sides including political, constitutional law, public administration, as well as repressive controlling onto local regulations. The repressive controlling is conducted when a local regulation has been made. In repressive controlling, the controlling process may result in the cancellation of a local regulation, decided by the Presidential Regulation.[58]

In reality, the cancellation of a local regulation is not conducted through a Presidential Regulation but by the Regulation of the Ministry of Home Affairs who is acting on behalf of the President.

Repressive supervision shall similarly happen if the result of the review made by the governor is not followed up by the regent/mayor;[59] who instead insists on enacting the drafts as its regional regulation and regent/mayor regulation. In this regard, the governor shall cancel both the regional regulation draft and regent/mayor regulation draft and simultaneously declare the enactment of the APBD of the previous year. Similarly, the stages of review over regional regulation draft on spatial plan follows the same mechanisms as those for the regional regulation draft on APBD. However, repressive controlling will not easily be implemented in the years to come. The Act on the Formulation of Regulation has limited the mechanism of cancelation regarding the local regulations. It stated that

1) In the case that a statutory regulation is allegedly against the 1945 Constitution of the Republic of Indonesia, the Constitutional Court shall test (review) it; and

[57]See the Government Regulation No. 79 of 2005 on Guideline for Supervision and Control of Local Government. See Article 37.
[58]See the Act No. 32 of 2004 on the Local Government. Article 145.
[59]Tri Widodo W Utomo, 'Beberapa Issu Strategis Jangka Pendek Di Daerah Dan Langkah Antisipasinya [Some Short Term Strategic Issues in the Region and Anticipation Step],' (2014) 1(1) Jurnal Borneo Administrator 11.

2) In the case that a statutory regulation inferior to the acts allegedly contradicts to the acts, the Supreme Court shall carry out a judicial review over it.[60]

In terms of hierarchy a regional regulation is a legislative product below an act and President Regulations. It is understood that the ICC signifies the only institution that can undertake to review an act against the 1945 Constitution. Therefore, the test over a regional regulation that allegedly contradicts public interests or its superior law, both formally and materially, can only be conducted by the Supreme Court.

Thus, it can be said that the central government has no longer what is called a repressive surveillance, because it does not distinguish the estimator subject. Referring to the doctrine *lex posteriori derogate lex priore*,[61] several legal norms consisted in the Regional Government Act have automatically been deleted and removed, most importantly their legal forces.[62] Consequently, the central government absolutely loses its authority to review a repressive supervision over a regional regulation; rather, it can only be done through the Supreme Court.

With this consequence, all parties are supposed to be aware that the executive review is a repressive control that is legally no longer applicable. The President and his ministry should have no power to cancel and/or to invalidate a regional regulation. If the central or provincial government need to review a regional regulation, they must submit an appeal to the Supreme Court. To enable the implementation of this need, a statutory regulation regarding the procedures of regional regulation review appeal by the central and provincial government to the Supreme Court should be immediately formulated.

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[60]The enactment of the Act of the Forming of the Legislation has provided a space to question the executive review, especially in regards with the revocation mechanism of a regional regulation by the President. See the Act No. 12 of 2011 on the Forming of the Legislation, Article 9 point (2) and (3).

[61]*Lex posteriori derogate lex priore* (Latin) is a principle of treaty interpretation, as a supplementary means of interpretation under Art. 32 of the Vienna Convention. Accessed 14 March 2015. <http://www.oxfordreference.com/view/10.1093/acref/9780195389777.001.0001/acref-9780195389777-e-1330>.

[62]The Act No. 12 of 2011 on the Forming of the Legislation, Article 9 point (20] has removed the legal force entitled to Article 145 and article 185 point (5) of the Act No. 32 of 2004 on the Local Government.

The principle of local autonomy used by the Government is the broadest possible autonomy. The local government has consequently given power to manage all affairs. The local government should be given authority to make its own policies, providing services, improve its participation, community empowerment for the welfare and improvement of the people.

Lastly, is through preventive controlling. Preventive controlling is commonly done before the activity started, and is basically made to avoid misconduct in an activity.[63] Preventive controlling is specified for a bill or legislation that is in the drafting process.[64] Preventive controlling is also conducted through an evaluation by the Ministry of Home Affairs towards the draft of provincial regulations, which are related to several matters; namely,

a. Local Tax
b. Local Retribution
c. Local Budget
d. General Plan for Spatial Planning

Evaluation for the draft of local regulations on local tax and retribution is clearly regulated by the Act of Local Tax. Those regulation drafts must technically be submitted to the Ministry of Home Affairs, and the Ministry of Finance in no more than 3 (three) days since its approval date, before it is passed to the further mechanisms. In addition, the draft coming from district level has to pass the Governor's review, before being submitted to the Ministry, in no more than 3 (three) days since its approval date. [65]

The time limit for the Governor in making decision is no more 15 days after receiving the application. Furthermore, the Home Affairs Minister and the Governor—according to their respective authority—review the drafts to test their compatibility on the public interests and/or other acts and regulations superior to them. The review is conducted in coordination with the Ministry of Finance, resulting in either approval or rejection.

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[63] Revrisond Baswir, Tony Prasetyantono, and R. Maryatmo, *Politik Ekonomi Indonesia Baru [Polical Economy in the New Indoesia]* (Forum LSM 2000) 123.
[64]Endang Purwaningsih, 'Bentuk Pelanggaran Hukum Notaris Di Wilayah Provinsi Banten Dan Penegakan Hukumnya,' [The Shape of the Notary Law Violations in Banten Province area and Enforcement Legal], (2015) 27(1) Mimbar Hukum 14-28.
[65]See the Act No.28 of 2009 on the Provincial Regulation on Tax and Retribution, Article 157-159.

If the review leads to rejection, the passing of the result should be accompanied with the reasons of rejection. Whilst, once a regional regulation draft is approved, it can be immediately decided to be enacted. The rejected regional regulation draft, however, still has the chance of revision by the governors or the mayors, together with their respective parliaments. Subsequently, the revised versions can be passed back to the ministries through the governor or mayors.

In case of a regional regulation draft goes against the public interests and/or contradicts any acts superior to it, and then the Ministry of Finance shall recommend the President to cancel that regional regulation draft. The cancellation recommendation shall be passed through the Home Affairs Minister no later than twenty working days, since the date of the regional regulation draft is received. Based on the cancellation recommendation, the Home Affairs Minister proposes to the President the proposal for the regional regulation draft cancellation.[66]

To these extents, to assure that a regional legislative product is within the national legal system framework, preventive supervision should be optimized. Therefore, the amendment of the Act of Local Government should be observed and implemented immediately.[67] So that, the preventive supervision over the drafts of regional legislation is not confined solely to the matters on taxes, levies, regional revenue and spending budget, and spatial planning, but also to all other materials.

7.4. Dissenting Opinions Amongst the Judges

One of the result from legal reform in Indonesia, post the amendment of 1945 Constitution, is the freedom of expression by judges, when deciding a case. Judges can disagree with the majority of the members of the assembly, and the opinion is included as an integral part of the court judgment. A different opinion is now commonly called a dissenting opinion.

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[66] See also Mailinda Eka Yuniza and Adrianto Dwi Nugroho, 'Mekanisme Pertanggungjawaban Anggaran Pendapatan dan Belanja Daerah (Studi Kasus Di Yogyakarta) [Accountability mechanisms Budget and Expenditure-Case Study in Yogyakarta],' (2014) 25(2) Mimbar Hukum 231-243.

[67] Johan Kaloh, *Mencari Bentuk Otonomi Daerah: Suatu Solusi Dalam Menjawab Kebutuhan Lokal Dan Tantangan Global* [Finding the Form of Regional Autonomy: A Solution In Answering the Needs of Local and Global Challenges] (Rineka Cipta 2007) 72-75.

In defining the term of *dissenting opinion*, Hussain mention that the dissenting opinion is the opinion of a judge who disagrees with the decision or recommended opinion, whilst a distinct opinion is one in which a judge supports the view of the majority. It can also be said that the dissenting is when the judge finds it hard to agree with the effective part of the judgment or opinion; whereas in separate view the judge agrees with operative part, but disagrees with the majority on the grounds of decision.[68]

In differentiating between dissenting opinion and concurring opinion, which commonly happens in Indonesian justice system, Sarwoko (a former Supreme Court judge), stated that the dissenting opinion, since the beginning of consideration, has been different; starting from the legal fact, legal considerations, until the judgment, are different. In contrast, the concurring opinion is that the legal fact and legal consideration are the same, but the verdicts are relatively different. The base statement, chiefly in the Indonesian criminal justice system, is indictment. If indictment has been different, it means a difference since the beginning. Although the guilty in a case is fairly clear, in responding an indictment could be different. It entered a dissenting opinion because of different indictment.[69]

Although there are three dissenting opinions, the panel still can take a decision. The court cannot let the dissenting opinion hinder decision making. For instance, in the existing mechanisms established in the Supreme Court, justices can be added if the case cannot be disconnected because there was a dissenting opinion.[70]

An overview of the tradition of a dissenting opinion, Germany became the first European country to legislatively recognize dissenting opinion within its positive law during the drafting of the Judicature Act *(Gerichtsverfassungsgesetz)* in 1877. The example of Germany was followed by Spain and Portugal, which permitted the use of dissenting opinions in their constitutional courts from the

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[68]Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (Martinus Nijhoff Publishers 1984) 8.
[69]Djoko Sarwoko, 'Dissenting Opinion di Mata Hakim Agung [Dissenting Opinion on the Eye of Supreme Court Judge], accessed 23 December 2014, <http://www.hukumonline.com/berita/baca/lt51f1005f68a4c/idissenting-opinion-i-di-mata-mantan-hakim-agung>
[70]Ibid.

time of their establishment. Actually, dissenting opinions were considered to be part of the German model at that time (the end of the 1970s).[71]

Indonesia is relatively new in the application of a dissenting opinion. This idea was first introduced in 1998,[72] furthermore, in the Act of Judicial Power and in the Act of The ICC.

A judgment taken by a judge would not necessarily be the same. The factors of interpretation in the trial, the legal knowledge of the judge, and their beliefs will also influence the attitude of the judge whilst making decisions. The judgment of the judges' assembly are taken during the deliberations.

The discussions and debates during the consultative meeting can influence a judge's decision. A junior judge for example may have a reluctant sense to oppose the opinion of senior judges. They are still reluctant and not brave enough to dissent with others, not only because of the seniority, but also from concern over other judges excluding them from other parties.[73] Before reaching a final judgment, a judge should be questioning to his heart, whether a judgment will be giving a fairness judgment, or not. The judge must consider, assess, and choose the final judgment—which influences people's lives.

Dissenting opinion in some cases is essential. It is a realization of the democratization of justice, judicial transparency, and independent opinion requiring free speech. It also prevents collusion; corruption and nepotism; as well as preventing the judicial mafia.

The main debate concerning dissenting opinion, however, is whether the judgment should be attached within a judgment, or in the separate note, because it does not show a tangible benefit, most importantly for those who were defeated in court.[74] In term of dissenting opinion in the ICC, there is not a strict correlation between constitutional justice and the publication of dissenting opinions. It can be

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[71]Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts,' (2013) 14 German Law Journal 1347.

[72]The Dissenting Opinion was firstly introduced in the Act Number 4 of 1998 on the Bankruptcy. See also Sunarmi, 'Dissenting Opinion Sebagai Wujud Transparansi Dalam Putusan Peradilan [Dissenting Opinion As Being Transparency In Court Ruling],' (2007) 12 (2) Jurnal Equality 146-150.

[73]Tata Wijayanta and Hery Firmansyah, *Perbedaan Pendapat dalam Putusan Pengadilan [Dissenting Opinion in the Court Judgment]*, (Pustaka Yustisia 2011)90.

[74]Soedarsono, *Putusan Mahkamah Konstitusi Tanpa Mufakat Bulat: Catatan Hakim Konstitusi Soedarsono [Constitutional Court Judgment Without Consensus Round; A Note of Judge Soedarsono],* (Sekretariat Jenderal Kepaniteraan Mahkamah Konstitusi 2008) 27.

said that permitting ICC judges to publish their disagreements has become a strong development in Indonesia, which might be following the success story in Europe. This has happened because of increasing the judicial transparency in Indonesia after law reform, and is also due to the limitless discussions over the democratic legitimacy of constitutional courts.

However, looking to European experiences, even if today the majority of European constitutional courts are permitted to publish dissenting opinions, there is much heterogeneity as to how they make use of the possibility. The non-ICC-judges are still not tolerated in stating their dissent publicly. The ICC's judges, who attach a higher value to institutional loyalty than common law judges, are still quite reluctant to dissent. In this respect, even in constitutional justice, the classic division between civil law and common law carries some weight, as the mentality of the jurist tends to differ.[75]

The repetition of dissenting opinions discloses that there is still much difference in the mind-set of judges between common law and civil law systems. Therefore, an examination of dissenting opinions in constitutional courts can offer a very instructive and opened-eyed picture on continental European constitutional adjudication.

7.5. Conclusion

The concept of judicial review over statutory legislation has already existed since the convening of the BPUPKI, in meeting prior to the independence of Indonesia. The judicial review concept was initiated by the founding fathers, granting the authority to the judicial power institution. The Supreme Court, as the highest court after independence, had authorities to review laws. But it could not run up because of lack of legal scholar.

During the old order, and the new order period, the dominance of the Supreme Court was very strong. The Supreme Court was granted the authority to conduct a judicial review, but its authority was restricted to examining regulations under inferior to the 1945 Constitution.

[75]Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts,' (2013) 14 German Law Journal 1371.

The concept of review is recognized not only in the judicial domain, but also in other innermost power domains, such as the legislative and the executive. In this instance, the implementation of executive review was restricted to the regulations inferior to the acts, namely, the regional regulations in specific province. This was due to the nature of heavy executive influence in the governance system of Indonesia during the New Order era. The executive review preceding the amendment of the 1945 Constitution was performed by the central government, to preserve its control over the regulations issued by regional government, as a result of regional autonomy implementation within the centralised system.

Upon the amendment of the 1945 Constitution, however, the central government still maintains its executive review under the legal force as provided in the Act No. 32 of 2004 on the Regional Government. Furthermore, the authority of the central government to cancel or annul a legislative product inferior to the act is restricted to regional regulation and the governor or regent/mayor regulation. The legislation cancellation authority made through executive review, serves as a repressive supervision over regional legislative products, to ensure they are in line with their superior laws.

The role of the ICC as the guardian of the constitution also contributes to carry out judicial review over statutory regulations, but focusing only to review an act against the 1945 Constitution. This is highlighted in article 24C of the 1945 Constitution, as well its statutory derivatives.

The authority of the ICC in reviewing an act against the 1945 Constitution also confines the Supreme Court jurisdiction to review the regulations below an act. The Supreme Court is not permitted to review regulations whilst the ICC has been reviewing the act related to those regulations. Consequently, these mechanisms have occurred because the Indonesia legal system has not centralised the judicial review system in the one state institution, such as in Austria and Germany. This mechanism has frequently postponed the legal certainty for the parties feeling their rights have been corrupted by the existence of such local regulations.

The divided mechanisms of judicial review into the separated institutions, instead of concentrating in one state institution have frequently made the law vacuum. Sometimes, these state institutions, such as the ICC and the Supreme

Court, disobey each other. Kelsen has anticipated this problem when designing the Austrian Constitutional Court. He centralised the jurisdictions to carry out judicial review only in the constitutional court, and shared the ordinary case—which was not closely related to judicial review—to be solved by the ordinary court, and placed the Supreme Court as the appeal level.

The President's authority in executive review mechanisms of repressive controlling, as well as preventive controlling, will also create a snow ball effect. The President, with his authority, could easily cherry-pick local regulations, which he does not like to be effortlessly annulled. Thus, the review of local regulation, produced by the local parliament, is supposed to be reviewed through judiciary process, instead of political process done by the President. He is supposed to be given the authority only to review the product of the state government officer under his domain, particularly ministries and governors/mayors. If the President objects to fully accepting the local parliament product, he can be given a chance to carry out judicial review through judicial process, instead of political process.

Above all, one of result from post amendment of the 1945 Constitution is the freedom of expression by judges when deciding a case. Judges can disagree with the majority of the members of the assembly, and the opinion is included as an integral part of the court judgment. A different opinion is now commonly called a dissenting opinion. The debate on this matter is whether the dissent needs to be combined within a judgment, or be better elsewhere.

CHAPTER 8 - SPECIAL AUTONOMY IN INDONESIA: A CASE STUDY OF ACEH PROVINCE

8.1. Introduction

The approach in this chapter uses the case study that occurred in Aceh province, and considers some ICC judgments (as black-letter law) that influence the autonomous regulations. With interpretation power, the ICC makes a significant role in preventing clash of regulations - discussed in sub-chapter "The ICC Involvement in Aceh Province". Another important sub-chapter is "Potential Conflict Between Central Government and Provincial Level" – which identifies clash of regulations during special autonomy in Aceh.

The special autonomy implemented in Aceh has a long historical background. It is a compensation of ending 30 years' conflict which happened during 1975-2005. The conflict has emerged serious concern from human rights activist regarding the civil victims indirectly involved in the conflict.[1] As an Aceh resident, the researcher has personal experience of the conflict. A person could be easily tortured; even murdered for accusation of involvement in the Free Aceh Movement; or jailed for many years with extrajudicial process.[2]

The conflict was mainly triggered by the injustice of central government in the sharing of revenue from the exploitation of natural resource. The natural liquid gas was found and explored on 24 October, 1971 by Exxon Mobil.[3] Despite the exploration increasing Aceh revenue and prosperity, it made Aceh the poorest province in Indonesia. This fact created a significant social prosperity, and then emerged the conflict, led by the Free Aceh Movement.

The Tsunami disaster of 26 December, 2004, that killed 126,741 people,[4] finally ended the conflict. The Free Aceh Movement and the Indonesian

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[1] Ian Bannon, and Paul Collier, eds., *Natural Resources and Violent Conflict: Options and Actions* (World Bank publications 2003) 28-30.

[2] Based on the Act No. 11/PNPS of 1963 on the Eradication of Subversive Activities, everyone can be jailed with extrajudicial process, if someone, base on the assumtion, can threat national security. This act was later abolished after the reformation era in 1998. Benedict Richard O'Gorman Anderson, *Violence and the State in Suharto's Indonesia* (SEAP Publications 2001) 215.

[3] Exxonmobil, 'ExxonMobil Indonesia at a Glance Aceh Production Operations Fact Sheet,' accessed 12 October 2015, <http://www.exxonmobil.com/Indonesia-English/PA/Files/pub_fs_APO_052015.pdf>

[4] Reuters, 'Asia Remembers Devastating 2004 Tsunami with Tears and Prayers,' accessed 12 October 2015,
< http://uk.reuters.com/article/2014/12/26/us-tsunami-anniversary-idUKKBN0K30PR20141226>

Government signed the memorandum to end the conflict, later known as the MoU Helsinki 2005.[5] To be constitutionally applicable in the Indonesian legal system, some of the MoU articles have been incorporated in Act Number 11 of 2006 on the Governing of Aceh. The act has been recognized as the fundamental regulation for implementing special autonomy in Aceh the 1945 Constitution, and allows the ICC authority for judicial review on the Act of Governing Aceh, instead of the MoU Helsinki.

Special autonomy in Aceh province is identified as part regional autonomy in Indonesia, giving right, authority, and responsibility of the local government to organize and manage its own region in accordance with the legislation in force. Local government is granted by the central government the rights to set up and take care of their own affairs and interests, as provided in the 1945 Constitution.[6] Article 1 point (1) of the 1945 Constitution stipulates that *Indonesia is a Unitary State in the form of Republic*. The unitary state emphasized is an archipelagic nation, considering the geography of Indonesia, which consists of a wide range of waters and myriads of islands.[7]

Republic denotes a governing system based upon democracy. The regions that make up Indonesia are therefore called provinces instead of states.[8] A local governing system is based upon the principles of autonomy and assistance (co-administration)[9] for the governing of the provinces.[10] Decentralization comprises three (3) terms; namely,

1) Decentralization in the sense of de-concentration;
2) Decentralization in the sense of authority delegation;

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[5]See also Edward Aspinall, *The Helsinki Agreement: A More Promising Basis for Peace in Aceh?* (East-West Center Washington2005) 42.

[6]Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia [Constitution and Constitutionalism of Indonesia]* (Konpress 2006) 257-286.

[7]A unitary state is a state governed as one single unit in which the central government is supreme and any administrative divisions (subnational units) exercise only powers that their central government chooses to delegate. Accessed 21 March 205, < http://encyclopedia.thefreedictionary.com/Unitary+States>.

[8]The Republic of Indonesia is divided into provinces and the provinces are composed of districts (kabupaten) and municipalities each of which has its own local government which is regulated by law. See the 1945 Constitution, Article 18 point (1).

[9]See the 1945 Constitution, Article 18 point (2)

[10]The implementation of autonomy and co-administration is further regulated by law namely the Act No. 23 of 2014 on the Local Government. The implementation of the Act No. 23 of 2014 has purposed to amend the Act No.32 of 2004 as well as the Act No.12 of 2008 on the Local Government.

3) Decentralization in the sense of devolution of functions and authority delegation.

De-concentration is the delegation of tasks or workload by the central government to the representatives of the central government in the regions with the absence of authority delegation, to make decisions. Authority delegation (transfer of authority by the central government) means the handover of decision making authority to the regions or local governing units that lie beyond the reach of the central government's control. Devolution is the delegation of governing function and authority by the central government to Local Government, which becomes autonomous and out of the control of the central government.[11] Decentralization has the following characteristics:

1) Territorial decentralization: the delivery of government affairs, or the delegation of authority to administer the government affairs from the higher level government to a lower level government unit, based on territory;
2) Functional decentralization: handover of the government affairs, or the delegation of authority from a higher-level government to a lower-level government unit, to organize the government affairs on the basis of purposive aspects (such as to Subak in Bali);
3) Political decentralization: the delegation of authority that comes along with the right to take care of their own domestic affairs through the political body in the region, that is elected by the people. This also has a correlation to territorial decentralization;
4) Cultural decentralization: the grant of rights to certain groups to organize their own cultural activities, such as the educational activities for the foreign embassies, and *nagari* (village) autonomy to organize its own cultural activities. Such grants apparently do not include local government affairs, whilst economic decentralization means the delegation of authority in the administration of economic activities;
5) Administrative decentralization: delegation of parts of the authority to self-governing tools or units in the region.

Article 18B point (1) of the 1945 Constitution states that *the Nation recognizes and respects the local government units that have special or specific*

[11] Jimly Asshiddiqie, *Pengantar Hukum Tata Negara [Introduction on the Constitutional Law],* (Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi RI 2006) 28.

characteristics as regulated by law. There are many views saying that the provisions of the article are contrary to the concept of the unitary state adopted by Indonesia.[12]

Edie states that the Article 18B (1), and the Act No. 32 of 2004 as amended by the Act No. 23 of 2014 stipulates that the nation recognizes the privilege and the specificity, as long as there is compatibility to the diversity concept within the system of the Republic of Indonesia. This is analogous to the concept of diversity in unity (unity in diversity) within the federal system,[13] and goes against the unitary state concept adopted by Indonesia, as highlighted in Article 1 point (1) of the 1945 Constitution.[14] Philipus argues that four principles are implied by the provisions of the Article 18 of the 1945 Constitution. They are

1. the principle of territorial division is hierarchical as in point (1);
2. the principle of autonomy and co-administration as in point (2);
3. the principle of democracy as in point (3) and point (4); and
4. the principle of great autonomy as in point (5);[15]

8.2. The Types of Autonomy in Indonesia

The enactment of local government is viewed according to the principles of autonomy as regulated by the act. In general, the principles of autonomy involve the notions of centralization, decentralization,[16] de-concentration,[17] and co-administration.[18] Regional autonomy serves as one of the mechanisms bringing government closer to the people, so they are enabled for the participation of democratization in a wider space. With a smaller political and

[12]Rusdianto, 'Status Daerah Otonomi Khusus Dan Istimewa Dalam Sistem Ketatanegaraan Republik Indonesia [Special autonomy and Specialties In the constitutional system of the Republic of Indonesia],' (Conference in Fakultas Hukum Universitas Narotama, Surabaya) 1.
[13]Edie Toet Hendratno, *Negara Kesatuan, Desentralisasi, dan Federalisme* [Unitary, Decentralization, and Federalism] (Graha Ilmu dan Universitas Pancasila Press, 2009) 238.
[14]Ni'matul Huda, *Hukum Tata Negara Indonesia [The Constitutional Law of Indonesia]* (RajaGrafindo Persada 2005) 95.
[15]Philipus M. Hadjon, 'Kedudukan Undang-Undang Pemerintahan Daerah Dalam Sistem Pemerintahan [The Position of the Act of Local Government in Government System],' (The Conference of Indonesian Government System Post Amendment of The 1945 Constitution, East Java, 9-10 June 2004) 4.
[16]See the Act No. 23 of 2014 on the Local Government, Article 1.
[17]See the Act No. 23 of 2014 on the Local Government, Article 1 (9).
[18]See the Act No. 23 of 2014 on the Local Government, Article 1 (11).

geographical gap between the people and the policy makers, the control over the policies issued by local governments should be greater.[19]

At the level of the superstructure of state and restructuring government management, decentralization policy has been commonly developed in line with an agenda of de-concentration. The decentralization policies also have a concept of vertical distribution authorities. The de-concentration policy means a policy division of government authority. In the context of bureaucracy is called a horizontal distribution. Both decentralization and de-concentration have a restrictive power. They have played an important role in order to create a climate that is more democratic, and rule of law.[20]

An autonomy is considered far more democratic than a centralized system, and it even better ensures plurality (instead of the uniformity approach as applied during the New Order regime), in order to avoid the domination of power by culture, religion, belief, or ideology. With autonomy, the regions are given wider opportunity to develop their own policies in accordance with their needs. In general, the autonomy imposed in Indonesia comprises two types; namely: ordinary autonomy, and special autonomy. Those types will be discussed below.

8.2.1. Ordinary Autonomy

An ordinary autonomy can be interpreted as an obligation given to the autonomous region to self-administer, and manage its own government affairs and local people's concerns according to the aspirations of its people, to improve the efficiency and effectiveness of governance in the context of public service delivery, and development execution in compliance with the acts.[21]

Ordinary autonomy in the context of hierarchical relationships associated with the vertical division of power can be defined as submission to free any local government until the lower level, to control and manage fully the affairs of its own area. It is either about the principles or how to run it, specifically the authority to regulate and administer it. [22]

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[19]Eko Sabar Prihatin, *Laporan Hasil Penelitian Otonomi Daerah Dan Pengelolaan Sumber Daya Alam [Research Report on Regional Autonomy and Management of Natural Resources]* (Fakultas Hukum Universitas Diponegoro 2009) 1.
[20]Jimly Asshiddiqie (n7) 280.
[21]See the Act No. 23 of 2014 on the Local Government, Article 1.
[22]Bagir Manan, *Menyongsong Fajar Otonomi Daerah [Toward Dawn Regional Autonomy*] (Universitas Islam Indonesia 2001) 16.

The division of local government units in ordinary autonomy is a logical consequence of a unitary state. On the other hands, it led to drastic consequences with the relationship of authority through coordination and supervision, in addition to coaching and collaboration. The consequences of vertical power distribution to local government is included the distribution of region income. The amount of income or funds depend on the population in that area.

Autonomy is essentially derived from the element of freedom, although it is not completely a freedom. The autonomy is a subsystem, or a part of unitary state. The definition of ordinary autonomy is not explicitly expressed in the Act of the Local Government. However, the local government is not authorized to self-govern any specific areas such as foreign policy, defence, security, justice, national monetary and fiscal, and religion. Those areas are categorized into the absolute authority of the central government.[23]

8.2.2. Special Autonomy

Furthermore, special autonomy is a special authority granted to a certain region, to administer and manage its people's concerns on its own initiative, as long as conforming to the rights and aspirations of the people in the region.[24] The main point of difference between ordinary autonomy and special autonomy is in the allocation of the specific budget each year. The special autonomy province receives the budget annually. In other words, the special autonomy province will receive more money than ordinary autonomy province.[25]

The Unitary State of the Republic of Indonesia is composed of provinces. The nation recognizes and respects the local government units that assume special or specific characteristics as regulated by law. The term "local government units" refers to the special provinces of Aceh and Yogyakarta. According to the Act on Local Government the provinces owning special status are granted with special autonomy.[26]

[23]See the Act No. 23 of 2014 on the Local Government, Article 10.
[24]See the Act No. 23 of 2014 on the Local Government, Article 1.
[25]The special autonomy fund have clearly arranged in several regulations. See the Act No. 23 of 2014 on the Local Government, Article 281, 285, and 294.
[26]Rusdianto (n14) 3.

The regions have acted as legal community units. They are granted with autonomy and have the authority to rule and administer the regions according to the aspirations and interests of their people, as long as not contradicting the nation's legal order and the public interest. In order to provide a broader space for the regions to organize and take care of their people's concerns, the central government should consider the local wisdoms in its policy making.

Similarly, the regions should also pay high regards to the national interest in its issuance of the Perda, bylaws, or other types of legislation. Thus they will be creating a harmony and synergy between the regions and the central government. In other words, the central government should respect the special conditions, local wisdom, local smartness, and distinctiveness of the regions in running the government as a whole.[27]

In essence, this autonomy is granted by the central government to a legal community unit with the authority to self-administer and manage its government affairs. The implementation of which is carried out by the head of the legal community unit, with the assistance of its executive functionaries, and the parliament.

The government affairs delivered to the regions actually derive from the governing power at the hands of the President. The implication of a unitary state concept is that the ultimate responsibility of government lies at the hands of the President. In order that the implementation of government affairs in the regions is run in accordance with national policy, the President is obliged to provide guidance and supervision to the regional administration.[28]

In sight of the provinces with special autonomy status, there arise so many problems faced by the local government. Such problems derive not only from the delegated authority implication, but also from the legislation in force. For instance, the regions that have received special autonomy status are Aceh and Papua. Both provinces are granted with the special autonomy as a result of political conflict between the provinces and the central government.

[27]See the Act No. 23 of 2014 on the Local Government, Paragraph 5 on the explanation.
[28]See the Act No. 23 of 2014 on the Local Government, Paragraph 6 on the explanation.

8.3. Special Autonomy in Aceh Province

The Aceh conflict lasted for nearly half a century, and this conflict denotes a long history of injustice accumulation committed by the central government over Aceh. From the history of Aceh, it can be learned that the conflict in Aceh is the longest armed conflict that occurred in the history of the Republic of Indonesia.[29]

Specifically, for Aceh, the conflict termination process was achieved through a negotiation mechanism with the signing of the Memorandum of Understanding in Helsinki-Finland in 2005, which is famously known as the MoU Helsinki. It was followed-up with the enactment of the Act No.11 of 2006 on the Governing of Aceh. The provision of the act is accommodating the agreement points in the MoU.

The act has accommodated the provisions inspired by the MoU Helsinki such as that Aceh has the right to use regional symbols including a flag, emblems and hymn.[30] Aceh will also have the authority over the living natural resources surrounding Aceh's sea territory.[31] Thus, the main purpose of the implementation of the act is prospering the Aceh people.

These indicators can be assessed through the natural resource revenue sharing arrangement in Aceh; where the revenue is optimally used for the prosperity of the Aceh people. The economy in Aceh is intended to improve productivity and competitiveness in order to achieve the prosperity and welfare of the people, as well as to uphold the values of Islam, justice, equity, people's participation, and efficiency within the framework of sustainable development.[32]

The economy related problems especially in an autonomous region are usually on matters of revenue sharing both in terms of the revenue sharing fund (RSF), and some other matters. The central government allocates the RSF on Natural Resources deriving from the oil and gas sectors, in accordance with the mandate of the Fiscal Act.[33]

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[29]Moh. Daud Yoesoef (eds), *Sejarah Lahirnya UUPA [The History of the Birth of the Act of Governing of Aceh]* (Fakultas Hukum Unsyiah 2009) 13.

[30]See also the Article 1.1.5 of the MoU Helsinki. The Article furthermore have been accommodated in the Act No.11 of 2006 on the Governing of Aceh, in article 246 – 248.

[31]See also the Article 1.3.3 of the MoU Helsinki. The Article furthermore have been accommodated in the Act No.11 of 2006 on the Governing of Aceh, in article 162 (5). See also Mirja Fauzul Hamdi, *Implementasi MoU Helsinki dalam Undang-Undang Pemerintahan Aceh [The Implementation of the MoU Helsinki in the Act of Governing Aceh]* (Master thesis in University of Syiah Kuala, 2014) 7.

[32]See the Act No.11 of 2006 on the Governing of Aceh, Article 155.

[33]See also the Act No.33 of 2004 on the Balance between the Central and Local Government.

It is stated that oil revenue is to be shared with the proportion of 84.5% for the Central Government and 15.5% for the Provincial Government. As for natural gas, the sharing proportion shall be 69.5% and 30.5% respectively, for the Central and Local Government. From this portion it seems the Central Government is still dominant.

However, the RSF distribution as provided for in the Fiscal Act is clearly considered to contradict with the provisions of the Aceh Governing Act, which instructs that the distribution of the revenue sharing is to optimally enhance the prosperity of the Aceh people.

This fact gives the impression that the special autonomy continues to hide a potential conflict of regulations. On one hand, the central government has implemented a special autonomy for the specific province; on the other hands, the central government has still been reluctant to make clear the profit sharing mechanism. Thus, the potential conflict regulation can easily happen in the future.

8.4. Potential Conflict Between Central Government and Provincial Level

8.4.1. Decree of Sharing Natural Resources

The regulatory conflict has frequently happened in regard to the distribution of natural resources. “Natural resources” means, all that exist in nature and what human beings use to fulfil their lives. Natural resources can be categorized into two types, namely, renewable and non-renewable natural resources.

Renewable natural resources can be exploited continuously and will not run out, such as soil and animals; whilst, non-renewable natural resources cannot be exploited continuously and are exhaustible, such as coal and petroleum.[34]

All the wealth that is existent in the Earth both biotic and non-biotic, which can contribute to the welfare of human beings, is defined as a natural resource. Plants, animals, humans, and microbes are all natural resources; whilst other non-biotic beings are non-biological natural resources. Exploitation of natural resources must be followed by the maintenance and preservation of the resource, due to its limited supply.

[34]Valentinus Darsono, *Pengantar Ilmu Lingkungan [Introduction to Environmental Science]* (Universitas Atma Jaya 1992) 21.

Environment is a spatial unit that encompasses all things, forces, states, living things (including human beings and their behaviour which affect nature), the sustaining livelihood, human being's wellbeing, and other living creatures.[35] Natural resources mean environmental elements consisting of biological and non-biological resources which shape the ecosystem unity as a whole.[36]

The implementation of fiscal balance policy is conducted through budget allocation, which includes equalization fund to the regions. To that extend, the equalization fund allocation is intended to help the regions fund all their government affairs, that come together with the governing authority which has been delegated to them. In addition to that, it is also aimed at reducing the gap of funding source between the central and provincial government, as well as that amongst other local governments. The fiscal balance constitutes the transfer of funds from the national budget to the regions, such as the RSF, the GAF (General Allocation Fund), and the SAF (Special Allocation Fund).[37]

The principles of the financial balance policy between central and local governments are provided as follows:

(1) Fiscal balance between the Central and Local government is of the Nation's financial subsystem as a result of the delegation of tasks between the Central and Local government.
(2) The distribution of financial resources by the Central to the Local Government occurs in the framework of Decentralization that follows the transfer of task from the Central to the Local government in light of the stability and fiscal balance.
(3) Fiscal balance between the Central and Local government is a comprehensive system with the intention to fund the implementation of decentralization, de-concentration, and co-administration principles.[38]

The financial relationship between the central and local government can be defined as a system that governs how an amount of fund is distributed amongst various levels of government, as well as how to seek the sources of funding to help the local government fund their public sector activities.[39]

[35]See the Act No.32 of 2009 on the Protection and Environmental Management, Article 1 (1).
[36]See the Act No.32 of 2009 on the Protection and Environmental Management, Article 1 (9).
[37]Isti'anah, 'Optimalisasi Peran Dana Bagi Hasil Dalam Pembangunan Daerah [Optimazing the Role of the Fund Sharing in the Local Development],' (2008) 3(1) Jurnal Informasi, Perpajakan, Akuntansi Dan Keuangan Publik, 45.
[38]See the Act No.33 of 2004 on the Financial Balance Central Government and Local Government, Article 2.
[39]W. Riawan Tjandra, *Hukum Keuangan Negara* [State Finance Law], (Grasindo 2009) 105.

Fiscal balance between the central and local government is a system of government funding within the framework of a unitary state. It includes the financial distribution between the central and local government. This policy is assuring an inter-region equity in a proportional, democratic, fair and transparent way. That is with regard to the potentials; conditions and needs of the regions in line with obligations; delegated authority, and procedures for the implementation of the authority; and most importantly financial management and supervision.

Budget allocation from the centre to the region, so called national-regional fiscal balance, is often referred to as government transfer.[40] Davey stated that such revenue sharing system, or fiscal balance, is due to the central government directly taking in the country's financial potentials and miscellaneous income sources. That is why the nation delegates the task of taxing to the regions.

He also explains that if the central government has to take care of most of the public spending, it should restraint from utilizing the tax income – in this case, the entire revenue of the country for the sake of regional revenues – and transfer most of the revenue to the local government.[41] For that reason, it is necessary to allocate a development fund to the local government, in the form of either the general and special allocation fund, or the revenue sharing system.

As provided in the Fiscal Balance Act, the RSF is the fund that derives from the APBN (national revenue and spending budget) and is allocated to the regions, based on the amount in percentage, to fund the needs of the regions for the implementation of decentralization.[42] Subsequently, the act is also mentioning the kinds of RS; including,[43]

(1) RSF that derives from taxing and natural resource.
(2) RSF that derives from taxing as mentioned in point (1) comprises,
    a. Land and Construction Tax (PBB);
    b. Levy for Land and Construction Right Acquisition (BPHTB); and
    c. Income Tax (PPh) as in Articles 25 and 29 Domestic Private Individual Tax Payer and PPh as in Article 21.

[40]Kenneth Jackson Davey, *Financing Regional Government: International Practices and Their Relevance to the Third World* (John Wiley & Sons 1983) 12.
[41]Ibid.
[42]See the Act No.33 of 2004 on the Financial Balance Central Government and Local Government, Article 1 (20).
[43]See the Act No.33 of 2004 on the Financial Balance Central Government and Local Government, Article 11.

(3) Revenue Sharing Fund that derives from natural resources as described in article (1) is gained from the exploitation the following sectors:
   a. forestry;
   b. general mining;
   c. fishing and fishery;
   d. oil mining;
   e. gas mining; and
   f. geothermal mining;

The RSF is the fund that derives from the APBN (National Revenues and Spending Budget). It is distributed to the regions in certain percentages to fund the needs of the regions to implement the decentralization. The RSF is distributed on the basis of the source of the fund. In the sense of the amount to be distributed to a region depends on the amount to be received by the producing region. Such principle applies to all elements of the RSF, except for one that derives from fishery sector, which is to be distributed equally to all districts and municipalities throughout the province.[44]

The RSF that derives from natural resources is extracted from the elements below:

a. RSF over forest exploitation derives from Forest Resource Provision (PSDH), Exploitation License Levy (IIUPH) and Reforestation Fund (DR);
b. RSF over General Mining derives from Land Rent (fixed contribution), Exploration and Exploitation Levies (Royalty) and the Work Agreement Contract for Coal Mining Work Business (PKP2B);
c. RSF over Fishery derives from Fishery Business Levy and Fishery Income Levy;
d. RSF over Oil Mining;
e. RSF over Natural Gas Mining; and
f. RSF over geothermal mining;[45]

Regarding the sources of funds obtained by Aceh as a region with special autonomy, these are determined based on its regional income. The regional income derives from

[44]Kenneth Jackson Davey (n 42) 46.
[45]Ibid,. 47.

a. Locally-Generated Revenue;
b. Fiscal Balance;
c. Special Autonomy Fund; and
d. Other legitimate incomes.[46]

Furthermore, the provision on the RSF over natural resources is regulated specifically in the Act of Aceh Governing. In it is mentioned several types of revenue sharing that can be obtained by Aceh as one of its regional incomes; namely,

1) from forestry sector amounting to 80% (eighty percent);
2) from fishery sector amounting to 80% (eighty percent);
3) from general mining amounting to 80% (eighty percent);
4) from geothermal mining amounting to 80% (eighty percent);
5) from petroleum mining amounting to 15% (fifteen percent); and
6) from natural gas mining amounting to 30% (thirty percent).[47]

The example of the distribution of natural resources allocation out of RSF is further stipulated in several ministry regulations. Those regulations have sometimes collided with each other because the act, as a main resource of those regulations, also has overlaps. For instance, the fiscal gap results from the unsynchronized regulation between the Act of Fiscal Balance and its PP.[48]

The Act of Fiscal Balance states that the RSF is distributed to the related regions, namely the producers (district/municipality) and other districts/municipalities throughout the province. They are not associated with the exploitation of oil and gas. In contrast, the PP asserts that regarding the exploitation of oil and gas, the region associated with the mining site is entitled to receiving a 10% of participating interest by the contractor. In this agreement, Blora, as the host region of the mining site containing the oil and natural gas resources, gets the participating interest.[49]

The fiscal balance issue between the central and local government, so far, has still been regarded as extortion by the central against the local government.

[46]See the Act No.11 of 2006 on the Governing of Aceh, Article 179 (2).
[47]See the Act No.11 of 2006 on the Governing of Aceh, Article 181 (1.b).
[48]See also the Act No. 33 of 2004 on the Central-Local Government Fiscal Balance. See also the Government Regulation No. 55 of 2005 on the Fiscal Balance.
[49]Titik Kurniawati, Wiwik Widayati, and Sulistyowati, 'Kesenjangan Fiskal Dana Bagi Hasil Minyak Dan Gas Bumi Atas Eksploitasi Blok Cepu [The Fiscal Gap on the Sharing Fund on the Oil and Gas Exploitation in Cepu Block],' (2013) Jurnal Ilmu Pemerintahan, 10-11.

The regions owning the natural resources have not been able to enjoy their natural resource wealth to the fullest.

This fact of this paradigm has to be changed as soon as possible. The significant changes have purposed to maintain the integrity of Indonesian as a nation, creating social justice for all the people (regions) of Indonesia, rather than the perceived justice by the ruling elites. The deceiving justice—prospering certain groups of people—as well as the pseudo welfare, is commonly promised by the irresponsible elites. This is attracting the people's loyalty to the Unitary State of the Republic of Indonesia. Meanwhile, the policy towards prospering the people in the regions is merely utopia and artificial promises.

The efforts to manifest justice for all Indonesian people should be a common goal of all elements of the nation. Feeling superior over other parties should be eliminated. Providing wider and equal opportunities to all regions in managing their own financial sources are an essential matter. The needs of each region, mostly having natural resources, must be brought to light. Only after all this, can a proper policy to create equal justice to all people be made.

The allocation of funds from the centre to the region should consider the need of the regions for the source of funding, resulting from the potential natural resources in the region. Thus, the central government no longer needs to deceive and exploit certain regions, because the regions with their abundant natural resources deserve the rewards in accordance with their respective revenues. In the meantime, the regions which do not have adequate natural resources, can be granted with subsidy allocated from the Revenue Sharing Fund that the central government receives.

8.4.2. Decree of Land Issue

Land issue is very sensitive and closely related to justice, because land supply is regarded rare, limited, and a basic need of every human being. It is not easy to design a land policy perceived fair by all parties. A policy providing greater ease to a small number of people may be justified, as long as it comes

together with similar policies intended for another larger group. Thus, there is always a policy that serves to correct or restore the balance.[50]

Essentially, a regional autonomy is granted to the people of a legal community unit that is authorized to regulate and manage its own government affairs. The grant is handed by the Central to the Local government. The autonomy implementation is carried out by the administration head of the region, with the assistance of the region's administration functionaries, and the Parliament. The government affairs delegated to the local government derives from the governing power laying at the hands of the President. According to the concept of a unitary state, the ultimate responsibility of the government is at the hands of the President. In order that the execution of government affairs transferred to the regions runs in line with the national policy, the President is obliged to provide guidance and supervision over the regional administration.[51]

In light of the dynamic policy making, the central government issued a number of implemented regulations[52] or operational guidelines that confused the local governments. The central government, apparently, is still trying to retain the BPN (National Land Agencies) and its offices both in the province and districts/municipalities as the vertical agencies.[53] The BPN is in charge of the implementation of the central government's duties in land matters across national, regional and sectorial spheres. It also regulates that the BPN has 21 functions. The functions include ruling and determining over the land rights; providing consultation; handling the general administrative services in land matters; working on agrarian reform; and management for the special regions.[54]

Thus, the local government, on one hand, practically acts as a mere spectator, because all authority in the administration of land belongs to the business of the BPN. It is a legal vertical institution executing the governmental

[50]Abdurrahman*, Pengadaan Tanah Bagi Pelaksanaan Pembangunan Untuk Kepentingan Umum [Land Acquisition for Implementation of Development for Public Interest]*, (Citra Aditya Bakti 1994) 11.
[51]See the Act No. 23 of 2014 on the Local Government, Paragraph 6 on the explanation.
[52]See also the President Decision No. 10 of 2001 on the Regional Autonomy on Land. These regulations in terms of hierarchy are even contrary to the Act No. 23 of 2014 on the Local Government.
[53]See also the President Decision No. 10 of 2001 on the Regional Autonomy on Land. Furthermore, the central government asserted its authority over the land sector by issuing the Presidential Regulation No. 10 of 2006 on the National Land Agency.
[54]See also the President Decision No. 10 of 2001 on the Regional Autonomy on Land, Article 2.

tasks over land (agrarian) matters both in the centre and peripheries.[55] On the other hand, in conjunction with the local government authority in the land sector, the central government has, moreover, issued the regulation arranging the authority of the central government and the provincial government as an autonomous region. However, these government regulations, particularly regulating to land matters, do not function properly as a result of overlapping rules and authority in the land sector.[56]

The land sector at this time is under the authority of the BPN, having a regional agency in each province, and an office in the district/municipality. The rights of control are owned by the central government, but must be working together with the autonomous province regarding land acquisition.[57] The land administration affair is a mandatory authority of the district/municipality that is regulated in several regulations.[58]

Therefore, the presence of authority transfer, from the central to district/municipality government over land affairs, has actually laid down the judicial argument, and logic, for the local government to have autonomy in the land sector. In addition to that, it is subsequently reinforced with the issuance of the PP, affirming the distribution of authority in land affairs between the centre and regions.[59]

The determination and arrangement have included land use planning. Furthermore, the control and legal acts over land and land registration has always been administered by the central government. It is possible to delegate authority to local government or autonomous regions, notwithstanding, the delegation is carried out in the framework of de-concentration to the central government officials in the regions.

The delegation of authority could also be given to local government as an autonomous region, but it is only in the context of co-administration, instead of

[55]This is referring to the Presidential Regulation No. 10 of 2006 on the National Land Agency.
[56]See also the Government Regulation No. 25 of 2000 on the Authority of the Central Government and the Provincial Government as an Autonomous Region. See also the Government Regulation No. 38 of 2007 on the Coordination between the Central, Provincial and District/Municipality Government.
[57]See also the Act No. 5 of 1960 on the Basic Regulations on the Agrarian, Article 2 (4).
[58]See also the Act No.32 of 2004 on the Local Government, Article 13 and 14 point (k). This act later was amended with the Act No. 23 of 2014.
[59]See also the Government Regulation No. 38 of 2007 on the Government Task Division among the Government, Provincial Government, and the Government of Regency / City.

decentralization or regional autonomy.[60] With this point, the local government does not fully control its own land.

The constraints faced by local government in the execution of its authority in the land sector are; namely - firstly, the dis-synchronization of horizontal norms amongst the Act of Agrarian, the Act of Local Government, as well as the Act of Governing of Aceh.[61]

The Act of Agrarian affirms that land affairs are under the central government administration that can only be co-administered to the region;[62] conversely, the Act of Local Government asserts that land affairs constitute an obligatory matter that has been decentralized to the regions.[63] Contradiction, unfortunately, have also happened in the vertical norms between the Act of Local Government and the PP of BPN, later stated by Dewa as the emergency situation in the context of implementation of Aceh's land policy.[64]

The polemic over a number of regulations as the derivations to the Act of Governing of Aceh remained unfinished, even until the end of the tenure of Susilo Bambang Yudhoyono (SBY) as the President of the Republic of Indonesia, on 20 October, 2014. In fact, he seemed to postpone some of the crucial derivatives regulations regarding Aceh's special autonomy.

The polemic re-emerged upon the inauguration of Joko Widodo to be the succeeding President of the Republic of Indonesia. Tjahjo Kumolo, as Home Affairs Minister in the cabinet of Joko Widodo, refocused his attention on a number of regulations pertaining to the Province of Aceh, whether a legal product in the form of local regulations (bylaw), which is called Qanun in Aceh; or specific law, concerning the derivatives regulations for the Act of Governing Aceh.[65]

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[60]Albert Morangki, 'Tinjauan Terhadap Kewenangan Pemerintah Daerah Dalam Penyelenggaraan Urusan Di Bidang Pertanahan [Overview Of Regional Authority in the Implementation of Land Affairs in the Field]' (2012) 10 (3) Jurnal Hukum Unsrat, 63. See also Musleh Herry, *Kewenangan Pemerintah Daerah Bidang Pertanahan Di Era Otonomi Daerah* [The Authority of Local Government in Land Aspect in the Local Autonomy Era], '(2011) 3(1) De Jure Jurnal Syariah & Hukum 53.

[61]See also the Act No. 5 of 1960 on the Basic Regulations on the Agrarian, Article 2 (4). See also the Act No.32 of 2004 on the Local Government.

[62]See also the Act No. 5 of 1960 on the Basic Regulations on the Agrarian, Article 2 (4).

[63]See also the Act No.32 of 2004 on the Local Government.

[64]Dewa Gumay, 'Darurat Penyelesaian Konflik Agraria [Emergency Agrarian Conflict Resolution],' accessed on 20 March 2015, <http://aceh.tribunnews.com/2015/03/11/darurat-penyelesaian-konflik-agraria>

[65]Ibid.

One of derivatives regulations, which is not yet drafted, is the President Decree on the BPN in Aceh. This issue on the authority delegation of land affairs should have been completed during the reign of Susilo Bambang Yudhoyono. Therefore, the basic problem of the people's livelihood that lies on land ownership, has not completely been handled. Besides, the land issue is the fundamental asset of the people's economy towards the fulfilment of their daily needs.

Recently, the conflict over land has increasingly been emerging issues either vertically or horizontally, both between the people and the government, between the people and companies, and even among individuals in the community itself. Such conflicts keep growing and escalating due to the slow response of the authority to overcome them.

The injustice control of the land ownership policies is compounded by numerous government rules. This appears to contradict the 1945 Constitution, stating explicitly that the earth, water, and the wealth contained therein are fully controlled by the state, and must be used for the optimum prosperity of the people.[66] The basic philosophy providing the guidance and directives mandate as stipulated in the 1945 Constitution has been elaborated into the Act of Agrarian.[67] It tolerates the qualities of nationalism, populism, and is based on the customary law of Indonesia.

The main factor leading to wide spread emergence of agrarian conflicts is the absence of systematic efforts made by the government to resolve these conflicts, especially towards the fulfilment of justice and human rights. The MPR Decree on the agrarian reform and natural resource management has assigned the government to immediately resolve the land-born conflicts as well as improve the structure of land ownership in Indonesia.[68]

After the tsunami and the Helsinki MoU signing, Aceh emerges like a newly opened gold mine and becomes prone to seizure by some countries with large capital to exploit the natural riches. The regions along the west, south, and east coasts of Aceh are becoming eye-turners to some investors. The identified

[66]See also the 1945 Constitution, Article 33.
[67]See also the Act No. 5 of 1960 on the Basic Regulations on the Agrarian
[68]See also the MPR Decree No. IX of 2001 on the Agrarian Reform and Natural Resource Management.

natural riches, such as iron ore, tin, gold, coal, and oil deposits, have been hot discussion topics in Aceh and even in foreign countries.

Aceh's position as an attractive object has become a target to entrepreneurs and investors from developed countries.[69] This poses a threat and challenge to the government and the people of Aceh in designing and bridging an investment proposal, which will directly affect the lives, the socio-cultural order, the political structure, the development policy direction in Aceh, as well as the land tenure issues. As stated in the Act of Governing of Aceh that

(1) Every citizen of Indonesia in Aceh has the right over the land in accordance with the laws and regulations.
(2) The Provincial and/or District/Municipality Government of Aceh has the authority to regulate and manage the allocation, utilization and legal relations with respect to land rights by recognizing, respecting and protecting the rights, including the indigenous rights, of the people in accordance with the norms, standards, and procedures that apply nationally.
(3) The right over land as referred to in point (2) includes the authority of the Aceh provincial and district/municipality government to provide the rights of building site use and business site use in accordance with the applying norms, standards, and procedures.
(4) The Aceh provincial and district/municipality government is obliged to provide legal protection over communally granted lands, religious treasures, and other property for sacred purposes.
(5) Further provisions regarding the procedure for granting the land rights as referred to in point (1), point (2), and point (3) shall be regulated through a bylaw that takes the legislation into account.[70]

The regulation concerning the right over land emphasized in the article above mandates the government of Aceh to administer the land rights as further stipulated in the regional regulation, so called Qanun, with regards to the existing superior judicial norms and legislation.[71] Furthermore, the Act of Governing of Aceh also states that

(1) The Government of Aceh has the authority to grant building site use rights and business site use rights for domestic and foreign investment in accordance with the applying norms, standards, and procedures.
(2) Further provisions concerning the procedure for granting such rights as referred to in paragraph (1) is regulated by the Aceh Qanun.[72]

[69]Nicholas A. Phelps, Tim Bunnell, and Michelle Ann Miller. 'Post-Disaster Economic Development in Aceh: Neoliberalization and other Economic-Geographical Imaginaries,' (2011) 42 (4) Geoforum, 418-426.
[70]See the Act No. 11 of 2006 on the Governing of Aceh, Article 213.
[71]The meaning of land rights is referred to all rights to land as provided in the Act No. 5 of 1960 on the Basic Regulations on the Agrarian, Article 2 (4).
[72]See the Act No. 11 of 2006 on the Governing of Aceh, Article 214.

In conjunction with the land rights, the Government of Aceh should be able to provide facilities to foreign investors by granting the business site use rights and building site use rights in accordance with the regulation, legislation, and the Aceh Qanun. For these consequences, the BPN has to be automatically a part of the Aceh government working unit.[73]

This indicates that the assignment of the BPN as part of the Aceh government working unit should be further regulated through the presidential regulation. For all that the insertion of the BPN into a part of Aceh government working unit should have happened by the beginning of 2008; conversely, the presidential decree has just approved on 13 February 2015. The regulation only changes the BPN to be the *Badan Pertanahan Aceh* (BPA), but the BPN does not delegate its authorities with the BPA so far.[74]

8.4.3. Establishment of the Flag Bylaw

In the MoU Helsinki between the Indonesian government and the GAM (Free Aceh Movement) that ended the Aceh conflict has provided for the privileges for Aceh province through special autonomy. Along with the MoU, the Government of Aceh has been legally allowed to have their own flag stood together with the Indonesia flag, as well as emblems, and hymn.[75] This allows the Government of Aceh to determine and legislate upon the Flag and the Coat of Aceh as the symbols of specificity and privilege of Aceh. The flag and coat of arms depict the struggle and unity of the Aceh people.[76]

These privileges are then provided for in the Aceh Bylaw on the flag and coat of arms. Those symbols are one of the symbols of the Aceh people's unity, that reflects the privilege and specificity of Aceh.[77] The consideration for the formulation of the bylaw is legally referred to in the Act of Governing of Aceh. It states that the government of Aceh can determine and decide on its regional flag and coat of arms as the symbols that reflect the specificity and peculiarity of Aceh.

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[73]See the Act No. 11 of 2006 on the Governing of Aceh, Article 253.

[74]See also the President Decree No.23 of 2015 on the Transfering Office Of National Land Agency To The Aceh Land Office Agency.

[75]The MoU Helsinki states that Aceh has the right to use the regional symbols, including its own flag, symbol, and hymn. See the MoU Helsinki, point 1.1.5

[76]Aguswandi and Judith Large, *Rekonfigurasi Politik: Proses Perdamaian Aceh* [Reconfiguring Politics: Aceh Peace Process] (Conciliation Resource 2008) 9.

[77]See also the Bylaw No. 3 of 2013 on the Aceh Local Flag and Coat of Arms, Article 1 (11)

The flag here is meant as a symbol of privilege, not a symbol of sovereignty, and shall not be treated as the flag of Aceh's sovereignty.[78] In other words, it can be stated that Aceh, by the rule of law, has a legal justification to determine and decide upon its regional flag and coat of arms.

The DPRA endorsed the Aceh flag and coat of arm on 22 March, 2013.[79] However, the flag of Aceh province was not approved by the central government because it resembles the flag of GAM. The same thing happened to its coat of arms. According to the central government, the Qanun on Aceh flag and coat of arms which have been put into the Aceh legislatorial gazette, as contradicted with the PP on the Local Symbols.[80] Despite obeying the central government, the Government of Aceh and its parliament keep insisting on preserving the flag and symbols.

Therefore, reactions have emerged both from the Ministry of Home Affairs and the Government of Aceh. *Firstly,* is the reaction of rejection from the central government. The issues on the flag and coat of arms subsequently received numerous protests, especially from central government officials. They have argued that the design of the flag and coat of arms exactly resemble those of the GAM, which were previously known as the rebellion symbols.

Ethically, however, the use of emblems such as a flag and a coat of arms, are not provided under the concept of the Unitary State of the Republic of Indonesia. The 1945 Constitution and the Act of State Symbols has stated that the flag of the Republic of Indonesia is the Red-and-White Flag, and the national coat of arms is the Garuda Pancasila.[81]

In preventing the bylaw from being applied, later, the government immediately issued the PP on the regional symbols. It states that the design of the regional flag and coat of arms should not resemble, in terms of principle and entirety, a banned organization or separatist-organization/ association/institution/movement in the Republic of Indonesia.[82]

The examples of the flag and logo design of a banned organization/association/institution/separatist-movement as provided in the

[78]See the Act No.11 of 2006 on the Governing Aceh, Article 246 point (2) and (3).
[79]Hasbi Abdullah, 'DPRA Sahkan Bendera Aceh [DPRA Authorize Aceh's Flag], accessed 20 March 2015, < http://aceh.tribunnews.com/2013/03/23/dpra-sahkan-bendera-aceh>
[80]See the Government Regulation No. 77 of 2007 on the Local Symbols, Article 6 (4), and Article 3.
[81]See the Act No.24 of 2009 on the Flag, language, and the State Emblem and Anthem, Article 35.
[82]See the Government Regulation No. 77 of 2007 on the Local Symbols, Article 6 (4), and Article 3.

government regulation are - the Crescent Flag used by the separatist movement in Aceh Province; the Buraq Bird logo and the Morning Star Flag, used by the separatist movement in Papua Province; and the King's Thread Flag, used by the separatist movement in Maluku Province. For this reason, Djoehermansyah stated that discussion regarding Aceh's flag must be cooling down for a while.[83]

The PP on the regional symbols is a tool for the central government to deal with local government, especially in the issues of regional symbols. They serve as the people's social bond within the framework of the nation of Indonesia. So, it has purposed to make them compatible with the values of Pancasila, especially for the provinces of Aceh and Papua that have been granted special autonomy status through the specific acts. This is in consideration to the historical aspects of both provinces. They were previously in conflict with the central government and had used identity such as flags and coats of arms in that time. It is believed that their flags and other emblems have been recognized by all the people in both regions.

Therefore, the legislation of the GAM's flag and coat of arms to Aceh's regional flag and coat of arms are strongly disallowed (a breach). Two facts arise here. Firstly, is the position of the bylaw being inferior to government regulation; and, secondly, is that those symbols were used by the banned organisation.

On the behalf of central government, furthermore, the Ministry of Home Affairs, Gamawan, stated that the bylaw directly violates the regulation superior to it, that disapproves of the use of any separatist movement symbols as regional symbols. Therefore, the central government seeks a resolution to this polemic, rather than making it protracted, to avoid the emergence of anxiety amongst the Aceh people.[84]

Moreover, he has insisted that the Government of the Republic of Indonesia remains at its original inception with the argument to carry the spirit of the MoU Helsinki as aspired in the peace agreement, the use of Flag and

[83]Djoehermansyah Djohan, 'Colling Down Bendera dan Lambang Aceh Sampai 14 Agustus [The Colling Down on the Flag and Aceh Symbol until 14 August],' accessed 20 March 2015, <http://www.kemendagri.go.id/news/2013/07/15/colling-down-bendera-dan-lambang-aceh-sampai-14-agustus>

[84]Gamawan Fauzi, 'Mendagri: Qanun Belum Sah Bendera Aceh Tetap Dilarang Berkibar [Ministry: Not Legitimate Aceh Qanun flag fluttering Remain Banned],' accessed 20 March 2015, <http://www.kemendagri.go.id/news/2013/07/29/mendagri-qanun-belum-sah-bendera-aceh-tetap-dilarang-berkibar>

Emblems which essentially resemble GAM's symbols should not be used.[85] With this consequence, the government of Aceh must follow the requirements of provincial emblem and flag imposed by central government.

The requirements as provided by law, according to the Minister of Internal Affairs, should not resemble those of a banned organization or separatist movement. Owing to this fact, the Ministry of Home Affair on the behalf of the President, has the authority to annul it. Therefore, the content of the bylaw concerning the Aceh flag and coat of arms would be reviewed to make it agree with the regulations product superior to it, because, as mentioned before, a bylaw should not contradict any nationally applied regulations.

Lastly, is the reaction of local government resistance. In this context, the Government of Aceh has not fully accepted the reasons argued by the Central Government. With the signing of the MoU, GAM no longer bore the status as separatist movement or a movement with a will to separate Aceh from the Republic of Indonesia. Therefore, the use of emblem, logo, and hymn that were used by GAM can no longer be legally regarded as part of the existence of a separatist movement.

Thus, there emerge two arguments for the Aceh Bylaw on the regional flag and coat of arms. The first argument is that the legislation of Aceh regional flag and coat of arms is constitutionally valid, because of fully referring to the Act of Governing of Aceh. This implies that Aceh government has the right to determine its regional flag and coat of arms regardless of its contradiction to the PP. In terms of the hierarchy of regulations, the Act of Governing of Aceh is superior to the PP.

The second argument is in the light of legitimacy. The arguments about the symbols used previously by GAM, are still a controversy. The flag and coat of arms not originally belong to GAM. They have previously been used even long before the existence of GAM. In the history documentation, the flag and the coat of arms was used since the time of the Sultanates of Aceh. They led the fight against the colonialism in Aceh.

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[85]Gamawan Fauzi, 'Kemendagri Perpanjang Masa 'Negosiasi' Bendera Aceh [Ministry: the Ministry Home Affair Renew 'Negotiation' Aceh's Flag],' accessed 20 March 2015, < http://www.kemendagri.go.id/news/2014/04/17/kemendagri-perpanjang-masa-negoisasi-bendera-aceh>

The delegations of Aceh Government lobbying the bylaw have explained that the attestation of the flag and coat of arms was to accommodate the aspiration of the Aceh people, owing to the flag and the coat of arms representing the symbols of struggle and unity of the Aceh people. Muzakkir asserted that the legislation of the bylaw is not intended to revive GAM in Aceh.[86] The bylaw providing the flag and the coat of arms has denoted the symbols of privilege and specificity of Aceh, not symbols of sovereignty or separatism.

The 1945 Constitution and its derivative acts have not provided for any banning of a region from having its regional flag and coat of arms reflecting specificity, peculiarity, and privilege as unifying symbols for the people in the region, as long as, of course, the symbols do not stand in contest to the symbols of the nation's sovereignty.

This unnecessary controversy would not have happened, if all parties recognized the special status entitled to Aceh since the signing of the MoU Helsinki. Automatically, after signing the MoU, GAM had explicitly recognized the status of Aceh as part of the Unitary State of the Republic of Indonesia. As a consequence, Aceh has the special characteristics distinguished from other regions. Since then on, GAM and all its elements can no longer be viewed as part of a separatist movements. Moreover, the Government of Indonesia has announced a variety of special programs including the amnesty for the political prisoners.

Likewise, the PP on the regional symbols will be understood differently, when Aceh still bears the status as an in-conflict region having a separatist movement, that carries weapons for the liberation of Aceh. To that end, the provisions prohibiting the use of any flag, emblem, and hymn have resembled the separatist group, which formerly organised a separatist movement. In fact, the context of the PP is certainly applicable for the regions with special status that still have unresolved armed and political conflict, such as Papua.

To defuse heated political conflict, the Central Government, through the Ministry of the Home Affairs, offered a solution by allowing Aceh to participate in the management and exploitation of oil and gas within the area of 200 miles

[86]Muzakkir Manaf, 'Bendera Bukan Untuk Memisahkan Diri [The flag is not for Self Separation],' accessed 21 March 2015,
< http://aceh.tribunnews.com/2013/08/02/bendera-bukan-untuk-memisahkan-diri>

offshore, on condition that Aceh would alter the characteristics and features of the Aceh regional flag and emblems.[87] Unlike the wish of the Indonesian Government, however, the Government of Aceh still stands firm, not willing to amend to its endorsed flag and emblems which resemble the GAM's.

8.5. The ICC Involvement in Aceh Province

8.5.1. Solving Election Disputes at National and Provincial Level

The intensity of elections in Indonesia is very often. Thus, the election dispute cases are the most favourite cases handled by ICC.[88] The process of adding provincial election into the ICC authority was shortly discussed in the Chapter 6. The provincial elections, during 2008 until 2014, the ICC received 732 cases that need to be judged,[89] included Aceh Province. The existences of local political parties have furthermore escalated the intensity of the political conflict in the election season. Thus, the roles of the ICC have been highly expected in these circumstances.

One of the significant roles played by the ICC was in the Aceh Governor Election in 2012. This election was won by Zaini, earning 55.75% voters; and in the second position was Irwandi, earning 29.18% voters.[90] However, the winner was not fully accepted by Irwandi. He indicated that the election had been carried out with fraud, violence, coercion, and terror against voters. Irwandi also claimed that the voters living in remote areas had voted forcibly, in a threatening situation.[91] Thus, he was reluctant to sign the election minutes provided by the

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[87]Djohermansyah Djohan, 'Pengelolaan Migas Hingga 200 Mil Laut Masih Nego [Oil and Gas Management Up to 200 Nautical Miles Still Negotiable],' accessed 20 March 2015, < http://www.kemendagri.go.id/news/2013/09/09/djohermansyah-djohan-pengelolaan-migas-hingga-200-mil-laut-masih-nego>

[88] In 2013 there were approximately 119 Provincial Elections that have mostly brought to the ICC. Mahkamah Konstitusi, 'Rekapitulasi Perkara Pengujian Perselisihan Hasil Pemilihan Umum [The Recapitulation of the Election Disputes Cases]', accessed 6 December 2014, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPU>. See also Harus Husein, *Pemilu Indonesia, Fakta, Angka, Analisis, dan Studi Banding* [Indonesian's Election, Fact, Figure, Analysis, and Comparative Studies], (Perludem 2013) 654.

[89]Mahkamah Konstitusi, 'Rekapitulasi Perkara Perselisihan Hasil Pemilihan Umum Kepala Daerah dan Wakil Kepala Daerah [The Cases Recapitulation on the Provincial Election],' accessed 5 August 2015 <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPUD>

[90]Komisi Independen Pemilihan, 'Inilah Hasil Rekapitulasi Pemilukada Gubernur Dan Wakil Gubernur Aceh 2012 [This is the Recapitulation of Governor & Mayor Election in Aceh 2012], accessed 17 August 2015, <http://kip-acehprov.go.id>

[91]Kemendagri, 'Selama Kampanye Kekerasan di Aceh Meningkat Tajam [During Campaign Period, Violence Increase Sharply in Aceh],' accessed 17 August 2015, <http://www.kemendagri.go.id/news/2012/04/04/selama-kampanye-kekerasan-di-aceh-meningkat-tajam>

Election Committee. Facing this uncertainty, the Election Committee suggested Irwandi bring election dispute to the ICC, which has authorities on election disputes.

Before the ICC's judges, Irwandi claimed, and also had evidence, that the 2012 election had intimidation, terror, fraud, violence, coercion, and so forth. Those violations came from the Aceh Party that supported Zaini as the governor candidate. Therefore, the intimidations and terrors, by those calling themselves a successful team and cadres or sympathizers of the Aceh Party, gave a bad colour for democracy implementation in Aceh Province. Irwandi insisted that the process of political transition cannot be achieved by means of physical violence and armed forces. It would consequently take people away from the experience of peaceful and tranquil democracy.[92]

Responding the Irwandi's claim, the ICC judges examined the case in detail. The ICC judges gave the representation from the Aceh Party a chance to defend themselves. Razi, furthermore, speaking on behalf of the Aceh Party stated that the Aceh Party institutionally never ordered violence and intimidation, both at the central level, and at the level of the village. He also insisted to party cadres for involvement democratically and smartly in the election, without using such violence or intimidation.[93]

Therefore, based on the facts, and judges' assessment during the session, the ICC had the opinion that Irwandi's arguments had no strong legal evidence, proved by a strong legal opinion. Even if only some of these violations could be proved by the applicant, it is only sporadic violations carried out, not through governmental structures or the structure of the Aceh Party. So, if the petition was proven, it unfortunately could not affect and change the ratings of Irwandi's voters.[94]

The ICC argued that violence, intimidation, terror and so forth are the authorities of the police officer, because they could be categorized as crimes, which are not part of the ICC's authorities. With these consequences, the ICC strongly rejected all of Irwandi's claims and decided Zaini as the winner of Aceh's

[92] ICC's Judgment Number 22/PHPU.D-X/2012 on the Aceh Election.
[93] Fachrul Razi, 'Meski kecewa, Irwandi Yusuf hormati putusan MK [Although Dissapointed, Irwandi Yusuf Respecting ICC Judgment], accessed 17 August 2015, <http://www.bbc.com/indonesia/berita_indonesia/2012/05/120504_pemilukadaaceh_putusanmk.shtml>
[94] ICC's Judgment (n 93)

Governor Election 2012.[95] With this judgment, the ICC also created the new doctrine, that the crimes during the election are not part of the ICC jurisdictions. Thus, the crimes happening in the time of election cannot be a strong legal opinion to nullify an election result.

8.5.2. Reviewing Acts

The ICC has also been involved in reviewing the Article 256[96] of the Act on the Governing of Aceh, relating to a personal candidate who wants to compete in the governor or mayor election. With its judgment the ICC has allowed a personal candidate to contest in the governor or mayor election – which was not permitted before.

In spite of receiving appreciation from the Government of Aceh, the judgment has created pre-election dispute between the central and provincial level. The DPRA[97] has strongly rejected the judgment, assuming it was invalid because of contrasting with the Act of Governing of Aceh;[98] as the ICC did not ask the consideration from the DPRA.

In this context, the DPRA has adhered to the Act of Governing of Aceh, that states: *any planned amendments to this act must first undergo consultation by and receive considerations from the DPRA*.[99] However, the term 'considerations' in the article, regarding Indonesian common legal term, does not have a binding or a compulsory meaning. In other words, the ICC has a strong constitutional power to decide its judgment although the DPRA has a different opinion with the ICC. With these consequences, the DPRA has to fully obey and implement the ICC judgment instead of arguing or even rejecting it.

Another controversial judgment made by the ICC that influences Aceh specialties is the annulment of the Act on the Truth and Reconciliation

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[95] Ibid.

[96] The Article 256 stated that 'Provision that regulates individual candidate in the election of Governor/vice governor, regent/vice regent, mayor/vice mayor as mentioned in Article 67 act (1) character d, is applied and implemented only for the first election since the establishment of this law.' The article finally has been annulled by the ICC.

[97] DPRA = Dewan Perwakilan Rakyat Aceh, is the Aceh Provincial Parliament that legislate bylaw regarding the autonomy status.

[98] Abdullah Saleh, 'PA: Jangan Utak-atik UUPA [Do Not Permutate the Act of Governing of Aceh],' accessed 16 March 2012, <http://aceh.tribunnews.com/2011/10/10/pa-jangan-utak-atik-uupa>,

[99] See also the Act Numberv11 of 2006 on the Governing of Aceh, the Article 269 Clause 3 on the implementing TRC in Aceh that must be based on the TRC Act instead of Aceh bylaw.

Commission (TRC).[100] On one hand, the TRC is a compulsory task that must be implemented according to the Act of the Governing of Aceh. On the other hand, the Act on the TRC, used as the legal backbone, has been invalidated by the ICC, reasoning the TRC Act cannot fulfil the victims' expectation, chiefly in the process of restitution, compensation and so forth.

The judgment was very shocking, because the ICC has judged beyond what the applicant asked for – they were asked only to review an article, instead of all over the Act. The consequences of the judgment have not only resulted to Aceh, but also affected Indonesia as a whole, chiefly, the healing process for those human rights victims affected by the past authoritarian regime.

8.5.3. Determining Disputes Over the Authorities of State Institutions

The ICC has similarly played a significant role whilst determining disputes between the Election Commission and the Ministry of Internal Affairs. Such a dispute happened in the Governor & Mayor Election in 2012. These state organs strongly claimed to have a jurisdiction postponement of the election date. The election had been postponed several times, mainly because of the differences in interpretation of the Election Act. At first, the Election Commission set a vote date on 14 November, 2011. Then, for reasons of unpreparedness, postponed again to 24 December, 2011.

The Ministry strongly imposed that the election must be held on schedule because the impact of postponement would significantly impact the governmental system in Aceh province, such as the period of governor or mayor ending at a specific date. For the election to be delayed again was unreasonable, simply because the winning party (Aceh Party) does not apply for the election. The postponement occurred and could no longer be tolerated. This violated the rights of other candidates, such as personal candidate, or party representatives.[101]

Regarding the postponement the Election Commission has had a strong opinion. The Commission stated that the election postponement had significant impacted on a fair election. Thus, all candidates must be accommodated in the

[100]See also the ICC's Judgment Number 006/PUU-IV/2006 on the Annulment TRC Act in Indonesia.
[101]In the Article 28D of the 1945 Constitution stated that 'Every person shall have the rights of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.'

election. Both the Ministry and the Election Commission had their own legal reasoning; thus, the role of the ICC, as the final and binding judgment, is highly required in such a circumstance. Therefore, considering the fact during the session process, the ICC made the judgment that the final postponement was in 9 April, 2012.[102] The judgment had finally ended the election disputes between the Ministry and the Election Commission.

8.6. Conclusion

The implementation of special autonomy in certain provinces is intended to allow the achievement of certain developmental aspects considered to be still lacking by comparison to other regions. In addition, the historical approach should be applied to these provinces. With the enactment of the Act of Governing of Aceh as the follow-up to the Helsinki MoU, Aceh Province has gained a legal basis with its specialties category for the implementation of its autonomy.

As for the privileges granted to Aceh resulting from the autonomy, there is the shared gained from the natural resource revenue. This has the consequences that Aceh is recognised as a region with rich natural resources. Through the Act of Governing of Aceh is granted the right to administer, manage, and exploit its natural resources intended for the optimum welfare, as well as prosperity, of the Aceh people. However, the right to exploit its natural resources is apparently not fully owned by Aceh, due to the presence of the natural resource revenue sharing mechanism between the central government and the provinces have to wait for other supported regulations.

Management of the land sector is also granted to Aceh as a region with special autonomy. Aceh has the right to take part in deciding upon land rights and to carry out explorations over land. In addition, the Act of Governing of Aceh has vividly assigned the BPA in Aceh as one of the provincial administration organs, instead of being a vertical institution as previously. The central government only change the land institution name from BPN to BPA. But the BPA authorities are still fully controlled by the central government.

[102]ICC's Judgement Number 1-SKLN-X-2012 on the Aceh Election For Governor and Mayor. See also ICC's Judgement Number 1-SKLN-2012 on the Interim Judgement of the Aceh Election For Governor and Mayor.

As one of the regions with special autonomy, Aceh is also granted specificity in terms of regional identity through regional emblems and a flag. This has been stipulated in the MoU Helsinki and further regulated in the Act of Governing of Aceh. Aceh has received opposition against the local emblems and flag since its publication of the flag design, because it is considered to bear similarity to the flag used during the time of conflict. This has caused strong rejection from the central government. Despite legislation in the form of the Flag Bylaw being endorsed and declared legal for enactment, there has been no instruction issued to the governmental institution in Aceh for the raising of the flag bearing the picture of the crescent and star. If the Aceh Government has not yet changed the flag and emblem, the central government remains committed to banning the Flag Bylaw .

The establishment of the Act No.23 of 2014 on the Local Government has automatically changed the legal norms regarding the local government. Unfortunately, the implementations of derivative regulations, coming from the Act of Local Government, have not been quickly responded to by the President. Consequently, the old overlapped regulations are still being used because of legal uncertainty.

It is the crucial point in the regulations clash between central and local government. This is likewise one of the consequences of a unitary state. The central government is dominantly supreme over any administrative division – including the special autonomy province. As long as the central government does not delegate some of its power, the local government has to be fully obedient to central government.

The clash of regulations could be prevented, if Indonesian legal systems adopted a single state judiciary organ focused on reviewing such regulations. However, until now, in reviewing the regulations below the acts, the political mechanism *by the hand of the President* remains in use. Reviewing regulations through political mechanisms could potentially create another problem by central government and local government having their own interpretation of a norm in a regulation.

The interpretation can generate a conflict of regulation. Unfortunately, the political mechanism does not have a tool to interpret a norm, only a tool to implement a norm. Thus, a mechanism for handling a conflict of regulation,

through a specific court such the Supreme Court or the Constitutional Court, is strongly recommended. Solving regulatory clash through judicial mechanism is better than through a political approach.

Another problem in implementing autonomy in Indonesia is the logic of local politics, which is not always the same as the logic of central government politics. The logic of the local authority is still influenced by the logic of empire and imperial power. It applies through political entities. Local politics have pluralistic norms that recognized from ethnicity, cultural institutions, and local wisdom based upon historical records. In Aceh the institution of the *Wali Nanggroe* is one such clear example.

CHAPTER 9 - CONCLUSION

9.1. Introduction

The constitution regulates the rights between the state and its citizen, and in any nation, constitutional rights are a significant part of the legal process. More and more countries adopt human rights legislation and international human rights agreements.[1] To protect those rights needs specific legal mechanisms, through judicial mechanism as well as the parliament. Some countries unified the mechanism to their supreme court or the parliament, whilst others separated it to a specific court such as constitutional court. One such mechanism for protecting constitutional rights is judicial review—the judicial authority to decide the constitutionality of activities taken by any organ of government. Judicial review can be defined as part of constitutional interpretation, concerned with reasoning standards and methods by which courts use the power of judicial review.

In Kelsen's view, the state branch doing judicial review is the constitutional court. It is the essential mechanism for protecting citizens' rights, verifying the constitutionality of acts and decrees coming from member states, and maintaining the equilibrium between the higher and the lower government system. The relations between the centre and the local, furthermore, need to be demarcated.

Impressed by the success of Austria and other European countries, after amending its constitution in 2003 Indonesia established its constitutional court. The ICC has placed the Constitution of 1945 as the supreme law to be implemented with high consistency. The ICC holds court in an open way by summoning parties for judicial hearing, and encouraging people and the community to be involved in following how a constitution provision should be interpreted. The parties involved in the ICC are also allowed to air their thoughts regarding law interpretation, although in the end the decision belongs to the ICC judges.

The positive reform of the ICC has encouraged the development of governance administrative law theories.[2] In the past, such law only focused on

[1]Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 5.
[2]Taufi Qurrohman Syahuri, 'Putusan Mahkamah Konstitusi Tentang Perselisihan Hasil Penghitungan Suara Pemilihan Umum Berdasarkan Undang-Undang No. 24 Tahun 2003

the political activities within the institutions of parliament and the Presidential administration, addressing issues of governmental institutions, the relationship between them and human rights. After the reform, the current issues of the constitution start to touch wider aspects, involving more parties not restricted to the legal experts.

The ICC does not always generate positive impacts, creating a long debate around the absolute authority to interpret the 1945 Constitution. The arbitrary interpretation of the constitution indicates that the ICC becomes equally supreme to the 1945 Constitution itself. In some cases, there has been little difference between the position of the constitution and that of the ICC, for both have come to unification. This indicates that the ICC is not fully the guardian of the 1945 Constitution, because the guardian and the guarded have become one unity. In the meantime, according to the principle of constitutional supremacy from Kelsen, the guardian is supposed to submit to, and is placed below the guarded because the highest norms are in the constitution.[3]

The ICC's judgments must represent legal considerations and arguments. The norms in the provisions of the constitution should be interpreted and executed in the form of law and in any other forms, according to authorities and obligation granted to the ICC.[4] It is necessary to view the role of constitutional courts against other countries' experiences and how they deal with some crucial points of interpretation of the constitution.

9.2. Lessons for Indonesia From Other Countries' Experiences of Reviewing Law

The instruments of reviewing law over court process have two major categorizations, namely, through the Supreme Court and Constitutional Court. Positioning the Supreme Court as the single highest court is the American model of judicial review, applied over two hundred years ago since the Madison vs Marbury case. The American model places the Supreme Court as safeguarding the supremacy of the constitution. It leads to a dispersed and decentralized

[Constitutional Court Judgment on the Dispute Election of the Counted Vote based on the Act Number 24 of 2003 on the Constitutional Court], (2009) 2 (1) Jurnal Konstitusi 14.

[3]Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange 1945) 123-129.

[4]See also Martin H. Redish, and Matthew B. Arnould, 'Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a Controlled Activism Alternative,' (2012) 64 Florida Law Review 1485.

mechanism amongst courts in the States and the Federal Supreme Court. This model has spread around the world, including Indonesia, improved to fit the Indonesian legal system. During the ICC era since 2003 the Supreme Court authorities have been reduced. It only has power to review the rules under the acts.

The second classification is establishing Constitutional Court, known as Kelsenian model. That model has developed in Indonesia, and also in South Africa. The South African Constitutional Court not only evaluates the act against the constitution, but also can review the regular cases appealed from ordinary court passed by the Supreme Court.

In Indonesia both the Supreme Court and Constitutional Court still function respectively in reviewing law, a dualism subjected to significant critics. This modification has moved away from the basic principle of the Kelsenian model, making the constitutional court the single court to review all kinds regulations. Another modification is using external sources (international covenant) in making judgment, derived from the South Africa Constitutional Court and is known as extra-systemic evidence.

9.3. Constitutional Practices in the ASEAN

As an important member of the Association of Southeast Asian Nations (ASEAN), Indonesia has significantly affected practices, most importantly after the amendment of the 1945 Constitution. The ASEAN has not had a legal binding effect, and so is vulnerable to breaking by members, being thus a voluntary charter.

The countries in the ASEAN region have energetic constitutional movements, respecting the spirit of democracy and constitutional practice, and have frequently amended their constitution. Considering the implementation of the constitution, three models of constitutional practice have emerged in the ASEAN: The Westminster Model, the Socialist Model, and the Mixed Model.

The Westminster Model constitutional practice is the model in former British colonies of Southeast Asia; namely, Malaysia, Singapore and Brunei Darussalam. Their legal constructions are therefore based on English common law, with law made up of acts and case law. Indeed, in implementing their

governmental systems, those countries have adopted the Westminster Model in the political arrangements, although some of them vary with their own values.

The ASEAN countries under the Socialist Model include Vietnam, and Laos, characterized by one-party rule within a military system. The Mixed Model draws upon different country experiences transferred to their own country. Such countries are Indonesia, Myanmar, Cambodia, Thailand, and The Philippines.

9.4. The ICC's *Ultra Petita*

The *Ultra Petita* cases occurring in the ICC create a challenge to Indonesian law reform. *Ultra Petita* involves the judges expanding their jurisdictions regulated by several acts, including – prosecuting themselves, granting more than what is claimed, interfering in others court's jurisdiction, and intervening in other state organ's jurisdiction. In other words, the ICC judgment is no longer based on the original intent of the constitution as the supreme law source. When an applicant asks the ICC to review a clause or an article in the act, the ICC frequently goes much further, not only invaliding a clause or an article but also invaliding the whole act.

Ultra Petita can be categorized into several categories; namely, 1. intervening in legislation jurisdiction; 2. judging itself; 3. reviewing President Decree; 4. inconsistency of the type of ICC's judgments; 5. invaliding all over act; 6. incorrect judgement code; 7. intervening in Supreme Court authority; 8. judging based on other countries experiences; 9. judging based on scholar theory; and 10. adding jurisdiction, particularly handling provincial and district elections, as well as governor/mayor elections.

As a consequence of *Ultra Petita*, the DPR has not redrafted the act affected after *Ultra Petita*. For instance, the Electrical Power Act invalidated in 2004 and the Truth and Reconciliation Act invalidated in 2006, have not yet been redrafted until May 2016 by the DPR. They have assured that if those acts are redrafted, the ICC has still power to annul or invalidate it again.

For the Supreme Court, ICC judgements have appeared on voluntarily judgments, which only have power to be obeyed voluntarily or can be ignored. In this case, the Supreme Court has seemingly classified the judgments as soft judgments, which are not able to be implemented as soon as possible after the judgment is declared by the judges.

The *Ultra Petita* has been triggered by the judges' approach to judicial interpretation, an undisclosed recruitment process, and political interference. There is no strong supervision over the ICC judges, as the role of supervision body was easily annulled by the ICC. The independence of the judges elected by parliament and president has been called into doubt. Because the judges are screened politically through the parliament and the president. Thus, the elected process are vulnerable to bargaining with political interest.

In spite of having qualified judges, the representing judge from parliament and the president may lack experience in the judiciary process, with some lacking any judicial experiences at all. Before entering the ICC, moreover, they have not been trained in handling cases. The background of these judges is mostly political, academic, and professional. The political interference in judge recruitment cannot be denied. Akil Mukhtar came from the Golkar Party, and was re-elected dominantly by his former party. Akil has betrayed people trust with his involvement in the bribery case of the local elections.

The Ultra Petita has arisen in other country's constitutional courts, but not as extremely as in Indonesia. In the Germany case, the court is not too bold in expanding its jurisdiction, whilst South Korea is brave enough to expand its jurisdiction, because regulation has allowed it. Indonesia's ICC does not have a tool, such as South Korea, to expand its jurisdiction, but in practice the ICC has regularly made its own means to expand its jurisdiction.

9.5. The Future Format for the ICC in Law Reform

The existence of the ICC has played a significant role in Indonesian law reform. After a decade of experience, the ICC should return to its basic role of guardian of the 1945 Constitution. Thus, the ICC should adhere closely to the principle of black-letter law (the law what is simply the law), based upon on what is stated in the constitution and supporting acts, rather than expanding or interpreting more widely. This could prevent *Ultra Petita* in the years to come, and also return to the constitutional court role as negative rather than positive legislator.

The ICC judgment is final and binding, which has permanent legal force. However, in some cases, the ICC judgment has sometimes evolved gradually

into a new form, which is neither clearly mentioned in the constitution nor in the ICC Act.

ICC judgments can be divided in two types, namely, soft judgments and hard judgments. Soft judgment can be defined as the judgment which may not be implemented as soon as possible after the judgment is declared by the judges. Such judgments have often occurred in the case of judicial review. For instance, the Act of Truth and Reconciliation Commission, the Act of Electrical Power, not replaced up until 2015. Hard judgment can be defined as a judgment which has to be implemented as soon as possible after being declared by the judges. In general, these judgments have often happened in the case of general election, presidential election, and dispute amongst state organs.

9.6. The Prevention of Regulation Clash in Local Government

The autonomy policy has created the possibility of regulation conflict between central and local government, if countries do not have a judiciary mechanism, instead a political approach. So, the central government is positioned supreme over any administrative division including the special autonomy province. As long as the central government does not transfer some of its power, the local government must be fully obedient to central government.

Such clash of regulations could be stopped if Indonesian legal systems implemented a judiciary organ for reviewing local regulations. Until now in reviewing the regulations, the political mechanism is followed by the ministry acting on behalf of the president. This mechanism can potentially produce another problem by both parties have their own interpretation.

An additional problem in implementing autonomy in Indonesia is the reasoning of local politics differing from that of central government. Local authority is still influenced by the previous empire and imperial supremacy, applied to the present through local entities.

Unfortunately, the political instrument does not have a device to interpret a norm only a tool to implement a norm. Enhancing a judicial mechanism, for resolution of conflict regulation, through a specific court such the Supreme Court or the Constitutional Court, is highly recommended.

9.7. Proposal for Next Fifth Amendment

The *first* and main change that must be made regarding the ICC is the amendment of the 1945 Constitution through the fifth amendment. The position of the ICC is regulated in Chapter IX on the Judicial Power, in the Article 24C, comparing one article and clauses. The articles are too little if compared with the significant role of the ICC in the law reform. The Austrian Constitutional Court has 6 articles and 18 clauses.

The position of the ICC and its jurisdictions in the Indonesian legal system is unshakeable after the fourth amendment of the Constitution. So, for future recommendation requires a fifth amendment of the 1945 Constitution that prohibiting *Ultra Petita*. This prohibition would strongly control the ICC, in order not to intervene in other state organs' jurisdictions, particularly legislative, judicative and executive.

In reviewing and judging cases, the ICC must return its judgement to the original intent of the constitution, because the constitution has been legislated with the specific purposes accepted by the DPR. As stated by Clinton, a constitution is based on the social, political, and economic situation at that time.[5] It means that there are specific agreements in every constitution, as guidance for the constitutional court's judges.

Secondly, centralizing the judicial review of regulations under the ICC jurisdictions, instead of spreading this throughout several states organ. As stated in the constitution, the ICC has jurisdiction to review an act against the constitution, whereas the Supreme Court can review a regulation against an act, such as president decree, ministry decree, local bylaw, and so forth.[6]

From those divisions the jurisdiction clash between ICC and Supreme Court has occurred, chiefly in handling the conflict of regulations. In avoiding future conflict of regulation and divergent constitutional interpretation, the jurisdiction of reviewing all acts and regulations should be transferred under the jurisdictions of the ICC, leaving the Supreme Court to concentrate on handling personal cases, particularly private cases, criminal cases, and so forth – instead of regulation cases.

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[5]Kenneth Clinton, *Modern Constitutions* (Oxford University Press 1951)
[6]See also Article 24 C (1) and Article 24 A (1), the Constitution of 1945.

Thirdly, creating the mechanism of asking for constitutional opinion. Citizens can ask for the ICC opinion regarding the rights of citizens, officially violated by regulations or government officers, which are not clearly covered in the regulations. This instrument can also serve minorities, equality before law, and other vulnerable groups in a state. Thus the citizen can seek justice with binding effect from the Supreme Court, and ask for the constitutionality of an act.

Fourthly, adding more judges. Nine judges are not enough to handle the load of cases registered in the ICC, when more years may be taken to decide a case. *Next*, a clear statement in the constitution regarding which elections are handled by the ICC. If all elections, such as district, provincial, mayor and governor election have to be judged by the ICC, it creates a serious problem. The ICC should only decide the national level elections, and share other elections with other state institutions such as administration court, or other related courts.

Finally, the supervising state organ. Currently the supervising state organ was abolished by ICC judgment, making the ICC's judges vulnerable to abuse of power. Accordingly, the MPR has to amend the Chapter of Judicial Power in the 1945 Constitution. The main points which should be stated clearly in the chapter are (1) stating clearly that judges including ICC judges and Supreme Court judges are subject to supervision by the Judicial Commission; (2) redesigning the relationship of checks and balances between the ICC, the Supreme Court, and the Judicial Commission.[7]

9.8. Concluding Remarks

The fundamental idea of forming the ICC in Indonesia is that the judges must be involved in the development of democracy as well as in law reform. The ICC has made significant achievements in the annulment of the old-fashioned Criminal Act inherited by Dutch Colonial regime, such as the articles about publicly insulting the President or Vice-President, expressing hostility, incitement, hatred, or humiliation in public against the government. In protecting natural resources, ICC has similarly made a crucial improvement by reviewing the Act of Mineral Mining and Coal, and the Act of Electrical Power.

[7] Titik Triwulan Tutik, Pengawasan Hakim Konstitusi Dalam Sistem Pengawasan Menurut Undang-Undang Dasar Negara RI 1945 [Supervising Constitutional Judges in the Supervising Mechanism According to the Constitution 1945],' (2012) 12 (2) Jurnal Dinamika Hukum 295-309.

For such tasks the judges must be well prepared. The judge coming from academia will tend to be more philosophical; governmental officials will be more sensitive to policy considerations; former politicians will have insights into what is feasible in the existing political climate; and judges will bring their expertise in more technical ordinary law.

The nine ICC judges have been stimulating the kind of discourse caused by the ICC. The caseloads have not accorded with the capacity of judges, most importantly at election time, with judges making hasty judgment without deep consideration. So, the judge can differ from the majority of the members of the assembly—which is commonly called a dissenting opinion—and debate remains whether the dissent needs to be attached within a judgment or elsewhere. The age limitation of 47-years-old has insufficient justification. The number of judges has extended the judgement process up to 7 until 12 months, a priority scale potentially abusing the citizen rights in receiving constitutional certainty. The ICC also has a serious problem regarding its final-binding judgment. Some judgments may call to be implemented immediately; others need further adjustment and subsequently may be disobeyed by other state organs.

The future ICC jurisdictions have been examined. Should they further expand or be reduced? Sometimes, the ICC has positioned itself as positive legislator rather than its basic idea as negative legislator, and occupied a role as the shadow of parliament. Although the constitutional court is the judiciary institution, its decision and its role may usurp the parliament role as the positive legislator, where the judges have assumed that they are securing the constitutional rights of citizens. Being a positive legislator is not essentially prohibited, as long as the 1945 Constitution has been amended. If not, the ICC has to return to his basic role as the negative legislator. The Austrian Constitutional Court amended its constitution to allow the court in some cases to be a positive legislator.

Another serious task concerns election disputes. Handling provincial and district elections has opened the ICC to many critics. With the limited number of judges, the ICC decides election cases in 14 days, a very short time. The session only has three chances, and then hearing a judgement. A quality judgement and judicial fairness are almost impossible to achieve, creating potential for the abuse of power.

The ICC should have a supervising instrument. The current instrument is self-supervising mechanism that has a crucial weakness, designed by an act which is vulnerable to be annulled by the ICC. Thus, locating the supervising instrument in the 1945 Constitution is essential.

The judge monitoring instrument should involve two supervising bodies, internal and external. An independent agency, supervising judges' behaviour and interference from other institutions, will be essential to uphold the honour, dignity and maintain the behaviour of judges. The Akil's case contains other lessons to learn for the ICC, to rebuild their honourable reputation in the years to come.

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Indonesian Constitutional Court Judgments Number 005/PUU-IV/2006 on the Judicial Commission

Indonesian Constitutional Court Judgments Number 01/PUU-VIII/2010 on the Juvenile Justice

Indonesian Constitutional Court Judgments Number 011/PUU-I/2003 on the Act of Election

Indonesian Constitutional Court Judgments Number 011-017/PUU-I/2003 on the Former Member Communist Party

Indonesian Constitutional Court Judgments Number 013-022/PUU-IV/2006 on the Insulting President and Vice-President

Indonesian Constitutional Court Judgments Number 013-022/PUU-IV/2006 on the Insulting President and Vice-President

Indonesian Constitutional Court Judgments Number 016 /PUU-IV /2006 on the Corruption Eradication Commission

Indonesian Constitutional Court Judgments Number 039/PHPU.C1-II/2009 on the Election Disputes

Indonesian Constitutional Court Judgments Number 05/PUU-IV/2006 on Judicial Commission

Indonesian Constitutional Court Judgments Number 072- 073/PUU-II/2004 on the Act of Local Government

Indonesian Constitutional Court Judgments Number 10/PUU-VI/2008 on the Domicile Requirement for Candidates of DPD

Indonesian Constitutional Court Judgments Number 100/PUU-X/2012 on the Employment Act

Indonesian Constitutional Court Judgments Number 102/PUU-VII/2009 on the Presidential Election

Indonesian Constitutional Court Judgments Number 65/PUU-VIII/2010 on the Criminal Procedure

Indonesian Constitutional Court Judgments Number 108/PHPU.D-IX/2011 on the Aceh Governor Election

Indonesian Constitutional Court Judgment Number 22/PHPU.D-X/2012 on the Aceh Governor Election

Indonesian Constitutional Court Judgments Number 2-3/PUU-V/2007 on the Narcotics

Indonesian Constitutional Court Judgments Number 30/PUU-VIII/2010 on the Mineral and Coal Mining

Indonesian Constitutional Court Judgments Number 32/PUU-VIII/2010 on the Mineral and Coal Mining

Indonesian Constitutional Court Judgments Number 35/PUU-VIII/2010 on the Non-Party Candidate for the Governor/Mayor Election.

Indonesian Constitutional Court Judgments Number 36/PUU-X/2012 on the Oil and Gas

Indonesian Constitutional Court Judgments Number 4/PUU-V/2007 on the General Practitioner

Indonesian Constitutional Court Judgments Number 46/PUU-VIII/2010 on the Case of Children Outside of Marriage

Indonesian Constitutional Court Judgments Number 5/PUU-V/2007 on the Individual Candidate in Local elections and Deputy Head of Region

Indonesian Constitutional Court Judgments Number 6/PUU-V/2007 on the Criminal Offense Expressed Feelings of Hostility, Hatred, or Humiliation in Public against the Government of the Republic of Indonesia

Indonesian Constitutional Court Judgments Number 7/PUU-VII/2009 on the Crime of Incitement.

Indonesian Constitutional Court Judgments Number 77/PUU-IX/2011, on the State Receivables Affairs Committee

Indonesian Constitutional Court Judgments Number 97/PUU-XI/2013 on the Provincial Election.

Indonesian Constitutional Court Judgments Number 005/PUU-IV/2006 on the Judicial Commission

Indonesian Constitutional Court Judgments Number 10/PUU-X/2012 on the Supervision Commission on Judicial Court Judge and Constitutional Court

Indonesian Constitutional Court Judgments Number 102/PUU-VII/2009 Election Voter Rights.

Indonesian Constitutional Court Judgments Number 11/PUU-VIII/2010 on the Election Supervisory Committee

Indonesian Constitutional Court Judgments Number 14/PUU-XI/2013 on the Simultaneously Election

Indonesian Constitutional Court Judgments Number 25/PUU-VIII/2010 on the Mineral and Coal Mining

2. Regulations

Indonesian Constitutional Court Regulation Number 02/PMK/2003 on the Code of Conduct and Ethics of Indonesian Constitutional Court Judges

Indonesian Constitutional Court Regulation Number 03/PMK /2003 on the Rules of the Constitutional Court trial

Indonesian Constitutional Court Regulation Number 04/PMK/2004 on Guidelines for the Proceedings in the Trial Results of Election

Indonesian Constitutional Court Regulation Number 05/PMK/2004 on Procedures of filing Objection to the determination of the General Election Results for President and Vice President in 2004

Indonesian Constitutional Court Regulation Number 06/PMK/2005 on Guidelines for Testing Proceedings in the Legal Case

Indonesian Constitutional Court Regulation Number 06/PMK/2005

Indonesian Constitutional Court Regulation Number 08/PMK/2006 on Guidelines Proceedings in Dispute of Authority of Constitutional State Institutions

Indonesian Constitutional Court Regulation Number 09/PMK/2006 on the Application of the Ethical Code and to Conduct Declaration of Constitutional Justice

Indonesian Constitutional Court Regulation Number 1 of 2014 on Guidelines for Proceedings in Dispute of Election Results of the Members of the Board of Parliament, Regional Representatives Council, and the Regional Parliament

Indonesian Constitutional Court Regulation Number 11/PMK/2006 on Guidelines for the Constitutional Court judicial Administration

Indonesian Constitutional Court Regulation Number 12 of 2008 on Political Parties Proceedings Procedure

Indonesian Constitutional Court Regulation Number 14 of 2008 on Guidelines for Proceedings in Dispute of the Election Results of the Members of the Board of Parliament, Regional Representatives Council, and the Regional Board of Parliament

Indonesian Constitutional Court Regulation Number 15 of 2008 Guidelines Proceedings in Dispute of the Election Results of Regional Head

Indonesian Constitutional Court Regulation Number 16 of 2009 on Guidelines for Proceedings in Dispute of Election Results of members of the Parliament, Regional Representatives Council, and the Regional Parliament

Indonesian Constitutional Court Regulation Number 17 of 2009 on Guidelines for Proceedings in Dispute of Election Results of the President and Vice President

Indonesian Constitutional Court Regulation Number 18 of 2009 on Guidelines for Electronic Application Submission (Electronic Filing) and Distance Court Hearing (Video Conference)

Indonesian Constitutional Court Regulation Number 19 of 2009 on the Rules of Trial

Indonesian Constitutional Court Regulation Number 2 of 2012 on the Constitutional Court Trial

Indonesian Constitutional Court Regulation Number 21 of 2009 on Guidelines for the hearing of the House of Representatives in deciding opinion regarding alleged violations by the President and / or Vice President
Indonesian Constitutional Court Regulation Number 3 of 2013 on Guidelines for Proceedings in Dispute of Election Results Members of the Board of Parliament, Regional Representatives Council, and the Regional Parliament Council

Indonesian Constitutional Court Regulation Number 3 of 2013 on Guidelines for Proceedings in Dispute of Election Results Members of the Board of Parliament, Regional Representatives Council, and the Regional Parliament Council

Indonesian Constitutional Court Regulation Number 3 of 2014 on the Amendment of Indonesian Constitutional Court Regulation Number 1 of 2014 on Guidelines for Proceedings in Dispute of Election Results Members of Parliament, the Regional Representative Council, and the Local Parliament

Indonesian Constitutional Court Regulation Number 4 of 2014 on Guidelines for Proceedings in Dispute Election of President and Vice President

Indonesian Constitutional Court Regulation Number 6 of 2005 on the Procedural Guidance in Judicial Review

Indonesian Constitutional Court Regulation Number 8 of 2006 on Guidelines for the Proceedings in the constitutional State Institutions Dispute

Constitutions of Various Countries

1987 Constitution of Republic of Philippine

Austrian Federal Constitution

Constitution of the *Italian* Republic

Constitution of the Kingdom of Cambodia

Constitution of the Kingdom of the Thailand

Constitution of the Lao People's Democratic Republic

Constitution of the Republic of Korea

Constitution of the Republic of Singapore

Constitution of the Republic of South Africa

Constitution of the Republic of the Union of Myanmar

Constitution of the Socialist Republic of Vietnam

Federal Constitution of Malaysia