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Ultra Petita and the Threat to Constitutional Justice: The Indonesian Experience

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

Keywords: Ultra Petita, Constitutional Justice, Indonesian Constitutional Court

Abstrak: Doktrin tentang Ultra Petita telah menjadi subjek kritik dan telah mengancam keadilan perlembagaan. Tulisan dalam artikel ini mengkritik dan menguji beberapa doktrin yang terjadi dalam perlembagaan Indonesia. Dalam hal ini, Mahkamah Perlembagaan Indonesia terlihat telah melebarkan kekuasaannya untuk melakukan pengujian dan bahkan membatalkan beberapa akta yang berlaku di Indonesia. Dalam hal ini, penulis menegaskan bahwa Mahkamah Perlembagaan Indonesia tidak perlu mempertahankan doktrin *Ultra Petita*, karena terlalu banyak menimbulkan ketidakpastian hukum. Sebagai gantinya Mahkamah Perlembagaan Indonesia perlu kembali kepada pendekatan *black letter* law, untuk mencapai kepastian hukum secara menyeluruh.

Kata Kunci: Ultra Petita, Keadilan Perlembagaan, Mahkamah Perlembagaan Indonesia

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Introduction

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

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

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

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

Ultra Petita and its Future challenges

Ultra Petita judgments have been widely criticized in Indonesia by academics, newspapers, and social media. The future challenge faced by the ICC regarding Ultra Petita is the judges' unlimited power potentially violating a value of democratic justice. ICC can easily choose a specific act which can be annulled easily. Ni'matulhuda stated that the Ultra Petita judgment has appeared because the ICC had an improvisation sense in the tribunal process. Ultra Petita judgments may happen again in coming years (Ni'matulhuda 2010).

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

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

In some cases, the justices try to send a message to the legislature or other state bodies through statement in passing (called *obiter dicta*).[1] An example is the Classroom Crucifix case. The GCC decided that putting the crucifix symbol was unconstitutional by the panel majority. The mere presence of a cross in the classroom does not compel the pupils

to particular modes of conduct, nor make the school into a missionary organization. Nor does the cross change the nature of the Christian nondenominational school; instead it is, as a symbol common to the Christian confessions, particularly suitable for acting as a symbol for the constitutionally admissible educational content of that form of school. The affixation of a cross in a classroom does not exclude consideration of other philosophical and religious contents and values in education. The form of teaching is, additionally, subject to the precept of Art. 136(1) BV, according to which, at all schools, the religious feelings of others are to be respected (FCCG 2014). The Federal Constitutional Court, furthermore, stated in connection with the precept of neutrality, that the school may influence children's decisions as to beliefs and conscience, while only containing the minimal amount of elements of compulsion. It may not be a missionary school nor claim binding validity for Christian beliefs, and must be open to other philosophical and religious contents and values. In this case, GCC did not annul the regulation and closed the case by just giving some note for the regulation. Thus, it accords with the judicial review concepts of Kelsen, not to annul the entire statute. Kelsen's concept is clear that constitutional court has a function of reviewing a mistake in a regulation, and not making a new regulation through the court's judgment (Hans Kelsen 1942).

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

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

The Article above states that the SKCC can only magnify access to constitutional justice and can apply their authorities to cover ordinary

court decisions. In 1995 the court confirmed a tax law as partly illegitimate, and said that it might only be applied on a particularly narrow interpretation by ordinary courts (Tom Ginsburg 2003).

This comparison shows two models of expanded jurisdictions in the constitutional court. From the German case, the court is not too bold of expanding its jurisdiction out of the regulation, whilst South Korea is brave enough to expand its jurisdiction, because its regulation has allowed for that. In the context of Indonesia, ICC does not have authority to expand its jurisdictions, but in practice has done so through Ultra Petita. The Ultra Petita might be the enabling principle if in a constitution has clearly stated about the mechanism of Ultra Petita, but if not stated in a constitution, the Ultra Petita mechanism must be avoided.

Analysis of Ultra Petita cases

Intervening parliament's jurisdiction

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

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

Consider the Case of Children Outside of Marriage, Machica Vs the Act No.1 of 1974 on Marriage (ICC 2010). On 20 December, 1993, Machica married with Moerdiono in Jakarta, and had a son one year later. The marriage was held in the 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.[3] Their marriage was held legitimate fifteen years later, receiving a Religious Court judgment in 2008 (IRCJ 2008).

On 7 October 2011, her husband passed away, and Machica claimed the inheritance for his son, but the Religious Court denied her inheritance claim, arguing that his son was not legitimate[4] because the marriage was not held in the Marriage Office, and had not been officially registered.[5] 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 Act No.1 of 1974 that the Marriage has violated her constitutional rights as a mother and also her son. Thus, she cannot receive legal endorsement of her marriage, and also cannot legalize the status of her son. Even though her marriage is guaranteed by Article 28B paragraph (1) and paragraph (2) and Article 28D (1) of the 1945 Constitution stating that: *(1) Every person shall have the rights to establish a family and to procreate based upon lawful marriage. (2) Every child shall have the rights to live, to grow and to develop, and as well as of protection from violence and discrimination.* To strengthen the Article 28B, the 1945 Constitution also regulates the recognition rights in Article 28D of Clause (1) stating that *Every person shall have the rights of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.*

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

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

After the judgement, it was stated:

> "Children born outside of marriage only have a civil relationship with their mother and their mother's family as well as with men as her father, who can be proved based on science and technology and/or other evidences under the law

> to have a blood relationship, including civil relationship with his family (ICC 2010)."

The judgement shows the ICC expanding its jurisdictions. Editing and changing the article in an act that is in DPR's jurisdiction. The ICC should simply state that the act is invalid and have no legal power to enforce, and allow the DPR to fix it.

Judging itself

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

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

The reason for forming the Judicial Commission was to build the checks and balances mechanism among state organs, mainly in the judiciary power. The 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 been caught red-handed by the Corruption Eradication Commission accepting bribery from the election case that he was handling. After this case, all judgments' involving the bribed judge have been questioned, whether to be validated

or re-examined. Thus, the idea of establishing a watchdog body for the ICC is back on the reform agenda.

Reviewing president decree

The constitution states that the ICC can only review an act. In fact, the ICC also has reviewed several president's decrees, such as president emergency decree (known as *Peraturan Pemerintah Pengganti Undang-Undang* - Perppu).[6] The presidential decree has had a lower level in Indonesia's legal system, which means that it is not the jurisdiction of ICC to review, but the Supreme Court's jurisdiction. Nevertheless, Perppu is not equal to an act and does not have a same hierarchical power in the Indonesian legal system. There is no clause in the constitution or other acts, that states a Perppu can be reviewed by the ICC. Constitutionally, Perppu is legislated by the president in an emergency situation. Perppu can only be implemented for two years, unless the DPR upgrades Perppu status to be an act. If, in two years, Perppu has not been upgraded, a Perppu cannot be enforced as Indonesian law. The mechanism of reviewing Perppu belongs to the DPR, whether it will be accepted or be rejected. If the ICC really wanted to review a Perppu, the ICC has to wait until the Perppu becomes an act (Siddiq 2014).

Inconsistencies in the judgment format

The formats of ICC's judgments' have been regulated within constitution and in Act Number 24 of 2003 on the Constitutional Court (ICC 2003). However, ICC has not fully obeyed to those imposed judgement-formats, and has created new judgement-formats which are not coming from Act of ICC. The official judgement-formats of ICC consist of;

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

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

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

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

5) *Justifying the DPR's petition*:[7] The *justifying the DPR's petition* judgment is when the ICC decides that the President and/or the Vice President is proven to violate the law through an act of a treason, corruption, bribery, serious criminal offence, or through moral turpitude; and/or no longer qualifies as President and/or Vice President.

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

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

1) The conditionally constitutional judgment states that an act provision is not contradicted by the constitution, with giving a condition to a state organ implementing an act provision, for considering the ICC's interpretation, on the constitutionality of an act provision, which has been reviewed. In contrast, *2) a conditionally unconstitutional* judgment states that an act provision is not fulfilling the requirement stated in the ICC's judgment.

An example of ICC's own-format-judgment is in the case of the Presidential Election 2009 (ICC 2009). The Act of Presidential Election stated that voters must be registered in the election list to get their right to vote. Unfortunately, the plaintiff, because of administration failure by the Election Commission, was not registered as a voter, asked the ICC for his voter rights, and won. The ICC made its own-format-judgment that the plaintiff could vote by showing his ID, such as Passport, ID card, or other valid ID documents—ID types not stated in the act, or

the Constitution. Was his right to vote constitutional? These judgments' take the ICC into the jurisdiction of the DPR, as legislative. The ICC has bravely abolished the clause stated in an act, and made its own version, acting as a positive legislator (rule maker) rather than a negative legislator (rule canceller).

Invaliding all over act

The ICC can annul or invalidate an act, although not asked to do so. Two cases illustrate this fact: firstly, is the invalidation of Act number 27 of 2004 on the Truth and Reconciliation Commission. The human rights organization called Elsam, which asked the ICC to judicially review Act 27 of 2004 on the Truth and Reconciliation Commission. Elsam found unfairness within Articles 1, 27, and 44, about restitution, compensation, and rehabilitation for victims affected by gross human rights violation during Indonesia's authoritarian era. After the reviewing process, on the contrary, ICC abolished and annulled all over the act in its judgment, making the act unfit for enforcement. This judgment made the plaintiff, Elsam, feel hopelessly confused because they never asked for the abolishment and annulment, only for review. This Ultra Petita judgment has produced long debate on the authority of the ICC, whether having authority to annul an act or only reviewing the specific article submitted by plaintiff.

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

The ICC judges argued that the state does not fully have control to enhance the benefit of electricity for the people's needs, because the price might be controlled by the market and private sector (ICC 2003). Subsequently, the ICC interpreted that the act was dangerous on protecting energy security, because it did not belong to the state. The judges also stated that the act has contradicted with Article 33 (Clause 2) of Indonesian's Constitution. The Article 33 (Clause 2) states that *production sectors that are vital to the state and that affect the*

livelihood of a considerable part of the population are to be controlled by the state.[8] This implies that the annulment of the Act Number 20 of 2002 on the Electrical Power influenced on the law of certainty. In to this situation, the government has to refer to the previous act, the Act Number 15 of 1985 on Electrical Power, although it was old the House of Representative had been considering the new act.

Incorrect judgment code

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

Intervening Supreme Court authority

Clash with other state organs has often occurred, including the Supreme Court. A plaintiff who failed in the ICC could win in the Supreme Court, and vice versa. A parliament candidate could be judged by the ICC as unable to contest because they do not 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 (Akil Mochtar 2013).

Ultra Petita has usually happened in election dispute cases. The ICC has frequently decided to hold re-election in some places, instead of examining carefully each of the cases. In the election cases, most of the plaintiffs have filed a lawsuit to the ICC, seeking an election justice rather than hold re-election. Now elections have cost a lot of time and energy. Election dispute cases are the most prominent cases in the ICC. The election in Indonesia has consisted of presidential election, parliaments, governor, until district level. In 2010, the ICC made more

than 230 judgments on election cases (ICC 2014). The number of judgments can increase in election seasons.

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

Judging based on another country's experiences

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

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

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

Lastly, each case has constitutional views, opinions, and positions, which are different in other parts of the world. There are no agreements

amongst the judges to use one methodology in making a judgment, which can lead to reasoning that can support the personal views of each judge. If the ICC really wanted to adopt foreign law, the constitution itself should give a license for picking other sources. In this issue the constitution must have a license to use comparative foreign law for the court as part of the constitutional authority (Mark 2000), such as in South Africa.

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

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

Judging based on scholarly theory

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

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

Adding jurisdiction in handling provincial and district election

As regulated in the Constitution, the ICC's jurisdiction only consists of reviewing laws, determining disputes over the authorities of state institutions, deciding over the dissolution of a political party, deciding

over disputes on the result of general election, and to issue a judgment over a petition concerning alleged violations by the President and/or the Vice-President as provided by the constitution (ICC 2007).

Regarding "general election", Article 22E Clause (2), states that: *General elections shall be conducted to elect the members of the House of Representatives, the Regional Representative Council, the President and the Vice President, and the Regional House of Representatives* (ICC 2007). In fact, ICC has extended its jurisdiction to adjudicate provincial and district election disputes, even though that jurisdiction was not stipulated within the constitution, which has excluded the provincial and district election disputes, including the governor and mayor elections, as part of the meaning of "general election". In the beginning, the disputes of those elections were handled by the Supreme Court. At that time, the ICC still focused on its jurisdiction in reviewing the act against the constitution.

The causes of Ultra Petita

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

The judges

The ICC judges' decisions have received praise and criticism for their judgments'. The ICC has nine judges: three derived from representatives of the DPR, three from the President, and three from the Supreme Court. The three judges coming from Supreme Court have more experiences from their judiciary record. In contrast, the six judges representing the DPR and President have a lack of judiciary experiences, some of them none at all. This is because most of them come from different backgrounds, such as academician, politician, and solicitor or barrister. For educational qualification, a candidate holding a master's degree can register to be an ICC judge although lacking the experience in judicial mechanism. This policy has the potential chance of creating Ultra Petita, because of the lack understanding on constitutional court (ICC 2015).

The ICC's Act has not clearly stated on what mechanism can be used for selecting the judges, making it hard to select a judge with integrity. Moreover, the three states organs representing the ICC's judge do not have a specific regulation regarding the recruitment mechanism (ICC 2003). The judges from DPR and the President have lack of experience in the 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 they are not elected as parliament members. Some cases have happened in the selection process of ICC judges, where the judge candidate who was unelected in the DPR selection, will often be switched to the President selection, because the President selection process is very simple, only needing a political and personal approach compared with the DPR, who have cognitive and interview tests (Patrialis Akbar 2014).

The approach of judicial interpretation

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

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

The undisclosed recruitment processes

The undisclosed recruitment process has commonly occurred. This secret process can select a judge who can collaborate with political

party that selecting a judge. Thus, this kind of judge has the chance to produce Ultra Petita judgment if required by someone who selected him previously. It can be seen from the elected judges, Patrialis Akbar (Patrialis Akbar 2017) and Maria Farida, who have been elected by President without any proper tests, leading to public protest and a lawsuit in the Administration Court, which decided that the recruitment process invalidated.

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

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

The political interference

Akil's case has indicated that political interference has contaminated ICC's judgment. Akil has made a confession that he designed to make Ratu Atut as the winner of governor election in Banten. Akil and Ratu Atut were later found out to be colleagues in the Golkar Party. As reported by the head of Corruption Eradication Commission, Akil abused his power in several provincial election cases (Abraham 2014). The warning of abuse power by Akil had been indicated since 2010, until in October 2013, his was caught red-handed receiving an amount of money from provincial election cases, namely the provincial elections of Lebak and Gunung Mas.

Thus, interference of a political party does occur, and the ICC has no mechanism to prevent interferences. Six judges of ICC have potential to be interfered by political interest. Those six judges have been selected through a political process by a political party and president. Thus, the selected judges have been indebted to political party and president. This causes several judgments vulnerable to be dictated by political attention. For future ICC judges, special arrangement is needed to select them, including their relationship with the political party.

The impact of Ultra Petita judgments'

The main tool of constitutional courts is the power to interpret the constitution and to ensure its application (Carías 2011). The establishment of ICC has created a debate on the unlimited interpretation of Indonesian's Constitution. The Constitution gives open space for making unlimited interpretation.

Ultra Petita judgment does not have a supporting norm in the Indonesian constitution. The Indonesian constitution only explains the ICC's jurisdictions. In the Act of ICC it has not elucidated about Ultra Petita, and no norm in the Act justify Ultra Petita. First judgement of Ultra Petita has been made as the reference, and positioning the judgment as doctrine and also jurisprudence. The Ultra Petita doctrine has threatened public trust. The wide range of interpretation has indicated that the authority of ICC is equal with the Indonesian constitution. Alternatively, the rule of interpretation asserted by Bennion states 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 (Bennion 2009).

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

Above all, the decisions handed down by courts are self-validating in the sense that they situate themselves within a context representing the source of their authority. Authentication is a co-operative social process in which legal theory generates an evolving structure of reasoning. Responding to this fact, Alexander insisted what remains from

pluralism and cosmo-pluralism, unless they are to recast as a version of monism, is the mutually assured trust in capacities of problem solving. This self-confidence is shared among networks of international actors whose free-floating and self-ascribed authority lacks an impeccable legal pedigree. (Alexander 2012). Thus, the basic philosophy behind the establishment of a constitutional court is to protect the constitutional rights of the citizen. The constitutions are often seen as creating a closed and hierarchically organized system of law. Constitutional systems are taken as closed to claims of legality from outside the system, setting forth a hierarchy of norms and institutions within the system. This consolidation of authority is predominantly associated with a radical political reestablishment of the state.

Furthermore, the constitutional rights have the character of individual rights against the DPR; they are positions which by definition form legislative duties and limit legislative powers (Daniel 2012). Similarly, the mere existence of a constitutional court has created legislative breaches of duty, and also has abused power for constitutional reasons. The establishment of constitutional court does not mean a jurisdiction transfer from parliament to constitutional court. If the constitution grants an individual right 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, but also required (Robert 2002). In this context Comella have insisted that constitutional courts cannot be a passive court when reviewing legislation. Constitutional court judges cannot easily abstain from ruling on constitutional matters that they might otherwise wish to avoid; nor can be extremely deferential toward the governmental majority. Despite some dangers, this tendency toward activism is not a trait we should condemn (Victor 2009).

The impact for the parliament

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

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

In contrast, the National Legislation Program designed yearly has seemed that the DPR has tended to avoid an act affected by the ICC judgment. For instance, the Electrical Power Act invalidated in 2004, and the Truth and Reconciliation Act invalidated in 2006, those acts had not been redrafted until 2014 by the DPR (National Legislation 2014). Even though, DPR has redrafted and has made a new one, the ICC still has power to annul or invalidate it again in the future. Because ICC has the power to interpret the Indonesian constitution independently, and ensuring the application constitution through ICC judgements (Carías 2011).

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

The impact for the president

As the holder of executive power, the president directly affects the ICC's judgments because he constitutionally has the role as the partner of the DPR. Although the legislator is constitutionally parliament, in the process of discussion with the DPR in matters such as mutual consent, the president plays a large role, and so is also involved in the process of the legislation of an act.[9] For the President, the ICC judgments moreover are hard judgments. This means that the President must implement what the ICC judgments order to do, including to solve dispute amongst state

institutions, dissolution political party, dispute on general election, and impeachment issues.

For instance, ICC has reviewed the Act Number 22 of 2001 on the Oil and Earth Gas, that have indicated to break the Article 33 in the Indonesian's constitution. The ICC, significantly, has made other breakthroughs in protecting energy security, most importantly, the annulment of some articles in the Act Number 22 of 2001 on the Oil and Earth Gas. In its judgement ICC stated that the function of the Executive Organ (*Badan Pelaksana*) in the act is against the constitution. Consequently, the function of the Executive Organ has reduced a stated role in ensuring and controlling the distribution of the oil and gas, which could have a deep impact on the providing of energy security in Indonesia (ICC 2012).

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

The impact for the Supreme Court

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

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

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 of an act (ICC 2005).

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

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

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

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

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 the act.

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

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

The ICC's Ultra Petita has slightly manufactured the positive impacts in the Indonesian judicial system, rather than creating negative impact. The clear impact is a legal uncertainty, because an annulled act as a result of Ultra Petita cannot be replaced in the near future. Therefore, the DPR has tended to avoid an act affected by the ICC judgment. For instance, the Electrical Power Act invalidated in 2004 and the Truth and Reconciliation Act invalidated in 2006 have still not been redrafted by the DPR until 2014. 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, the President has also been affected by the Ultra Petita, because of his role as the partner of parliament. In process of law making the legislator is the DPR but the President still plays a significant role and also is involved in the process of the legislation of an act.

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

In terms of a supervising mechanism, the recent mechanism has a crucial weakness. The judge monitoring mechanism basically involves two supervising bodies, namely, the internal monitoring supervisor, and external monitoring supervisor (which involves institutions outside the organizational structure). In order to 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 in too many critics. This jurisdiction has positioned the ICC as the 'election bin'. With a limited number of judges, the court needs to decide cases within a limited time. In 2013, there were 178 provincial elections in Indonesia, of which more than 90% were brought to the ICC. This means, more than 160 provincial election disputes were brought to the ICC. If a year is 365 days, 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 chances, and then hearing a judgment. With these statistics and logic, quality judgments' and judicial fairness are almost impossible to achieve. The situation is vulnerable to abuse of power.

The main change that must be made regarding the ICC is changing the constitution, because the main problem of ICC is strongly located

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

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

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

Endnotes

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

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

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

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

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

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

[7.] DPR (Dewan Perwakilan Rakyat) is House of Representative of Indonesian. See http://www.dpr.go.id/ (Detailing information about the role of DPR)

[8.] In the Article 33 (2) imply that sectors of production, which are important for the country and affect a life of people shall be under the powers of the state.

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

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