CONSTITUTIONAL COURTS AND JUDICIAL REVIEW: LESSON LEARNED FOR INDONESIA

MAHKAMAH KONSTITUSI DAN PENGUJIAN UNDANG-UNDANG: PEMBELAJARAN BAGI INDONESIA

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Abstrak

Posisi peradilan memainkan peranan penting dalam proses uji materi undang-undang. Mahkamah konstitusi dan pengujian undang-undang merupakan dua kata yang saling berkaitan memiliki keterikatan. Ide dasar pengujian peraturan perundang-undangan melalui lembaga peradilan berkembang luas di dunia hingga sampai ke Indonesia. Sistem pengujian undang-undang dengan melibatkan hakim sudah sering digunakan dan dipraktekkan di berbagai negara. Terdapat dua organ kenegaraan yang mempunyai peran vital dalam memaikan peran ini yaitu mahkamah konstitusi dan mahkamah agung. Model seperti ini lebih dikenal dengan model terpusat di suatu lembaga negara sebagaimana yang di Amerika Serikat. Sedangkan negara yang mempunyai mahkamah konstitusi akan melimpahkan kewenangan pengujian undang-undang kepada mahkamah konstitusi, model ini dikenal dengan model Kelsen. Pada model ini mahkamah konstitusi hanya berfokus pada konstitutionalitas peraturan peraturan perundang-undangan serta memastikannya agar tidak bertentangan dengan norma dalam konstitusi. Mahkamah agung pada model ini hanya berfokus untuk menangani kasus sehari-hari saja, bukan untuk menguji peraturan perundang-undangan. Dua model ini pengujian undang-undang ini (melalui mahkamah konstitusi dan mahkamah agung) sering diterapkan dalam sistem ketatanegaraan dunia, termasuk juga di Indonesia. Pada zaman rezim otoriter, Indonesia menerapkan sistem pengujian undang-undang terpusat, dengan memposisikan Mahkamah Agung sebagai organ tunggal negara yang menangani perkara sehari-hari dan pengujian undang-undang. Menemukan hambatan dengan model terpusat ini, akhirnya Indonesia membentuk Mahkamah Konstitusi. Mahkamah Konstitusi Indonesia hanya menguji undang-undang terhadap Undang-Undang Dasar 1945. Sedangkan peraturan perundang-undangan di bawah undang-undang tetap menjadi kewenangan Mahkamah Agung. Modifikasi seperti ini berakibat rentannya terjadi pertentangan putusan antara Mahkamah Konstitusi dan Mahkamah Agung.

Kata kunci: *studi perbandingan, mahkamah konstitusi, pengujian undang-undang.*

Abstract

In the context of reviewing law through judiciary organ, the court plays significant role to review several regulation. This article specifically will discuss regarding the role of court on judicial review. This idea spreads out worldwide including in Indonesia. The Constitutional court and judicial review are two words which having inextricably meaning that attached to each other. On worldwide, the system of reviewing law by involving judges commonly has been practiced by several countries. There are two most significant state organs that plays role in the system, they are constitutional court and supreme court. Most countries do not have constitutional court and will deliver the authority of judicial review through supreme court. It has added more tasks, not only to adjudicate the common case, but also regarding constitutionality matter of an act against constitution. This model is commonly known as a centralized model, as practiced in the United State of America. In the Countries that owned a constitutional court, will certainly deliver the authority of judicial review through constitutional court.

This model is commonly known as *Kelsenian's* model. In this model, the constitutional court will merely focus on the constitutionality of regulations, and ensuring those regulations not in contradicting with the constitution. The Supreme Court in this model merely focus on handling common cases instead of regulations. Those two model of judicial review (through the constitutional court and the supreme court) has widely been implemented in the world legal systems, including in Indonesia. In the authoritarian regime, Indonesia implemented the centralized model, which positioned the Supreme Court as the single state organ to handle the common case and also judicial review. Having difficulties with the centralized model, after the constitution amendment in 2003, Indonesia has officially formed the constitutional court as the guardian of constitution. However, the Indonesian Constitutional Court (ICC) merely examine and/or review the statute that against the Indonesian's Constitution year 1945, and related to the legislations products lower than the statute will remains the portion of the Supreme Court jurisdiction. Such modification is vulnerable resulting a judgement conflict between the ICC and the Supreme Court.

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

I. INTRODUCTION

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

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

First is the American model judicial review. The American model significantly is the first time judiciary that conducting a judicial review from parliament work. In this model, the Supreme Court is holds the supremacy of the constitution. The Supreme Court has been dispersed as well as decentralized judicial review mechanism among courts in the states and the Federal Supreme Court. The system has been applied in practice since over two hundred years ago in the United States. The Supreme Court as the part of judicial power holds the supremacy of Constitution has been firmly regulatedin the American's Constitution, specifically in the Section 2 Article III, stated that;

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.[1]

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

The above mentioned Section has shown that the Constitution has widely given the authorities for the Supreme Court to resolve all the cases occur inside or outside the United States. This model, has resulting the success story in America, has made significant influence for the world wide, including Indonesia. Indonesia has been over 58 years,[2] practiced the American model under the authoritarian regime,[3] positioning the Supreme Court as the central of judicial review power. However, the American model in Indonesia has been slightly modified. The judicial review authority has centralized in the Supreme Court instead of distributed to the provincial court. Since the existence of the ICC in 2003, the Supreme Court power to review all of the regulations, has been limited, which only have authority to review the regulations under the statute.

Second is the Austrian model judicial review. This model known as the Kelsenian Court, as asserted by Stone as a prototype model of judicial review in Europe.[4] This model has been very centralized and concentrated merely on one institution known as the constitutional court. It can be claimed as the pioneer of judicial review mechanism in Europe.

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

From the Austrian model has been developed several important variants, one of them is developed in Germany commonly known as *Bundes-Verfassungsgerichtshof* (Federal Constitutional Court), which relatively has a strong position. Other variants can be seen in the South African Constitutional Court, which is positioned as the highest court.[5] In general the judicial review practiced in Europe has a significant modification to which is commonly practiced in the United States of America.

The development of Austrian model around the world has taken place very quickly, as happened in the Asian countries.[6] Most of them amending their constitution have transplanted the idea of constitutional court in their constitution with some modifications.

This phenomenon also has occurred in Indonesia. After the amendment of the 1945's Constitution, Indonesia includes the constitutional court in their constitution, known as the Indonesian Constitutional Court (ICC). Practically, the constitutional court which has transplanted in Indonesia seems similar to the Germany model. However, the ICC is not a single court that having authority to review all regulations under the constitution. This due to it has to share its power with the Supreme Court to review the regulations. The ICC is merely has jurisdiction for reviewing a statutes that against the constitution; and on the other hand the Supreme Court has juridiction for

2 During 1945 until 2003 Indonesian's judicial review system purely adopted American model judicial review, centralizing Supreme Court as the single one. Zainal AM Husein, *Judicial Review di Mahkamah Agung RI: Tiga Dekade Pengujian Peraturan Perundang-Undangan*, Jakarta: Rajawali Pers, 2009, hal. 21-27.

3 See also Sharon Poczter and Thomas B. Pepinsky, "Authoritarian Legacies in Post–New Order Indonesia: Evidence from a New Dataset," *Bulletin of Indonesian Economic Studies*, Vol. 52, No.1, April 2016, hal. 77-100.

4 Alec Stone have asserted that the Austrian practice is reflected important for Western Europe, and the Kelsen idea on constitutional court is broadly recognized recently as the design of the European model constitutional review, in opposition to the American model. Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective,* Oxford: Oxford University Press, 1992, hal. 228. See also Frances E. Lee, "How Party Polarization Affects Governance," *Annual Review of Political Science,* Vol.18, No.1, February 2015, hal. 261-282.

5 C. G. Van der Merwe and J. E. Du Plessis, *Introduction to the Law of South Africa*, New York: Kluwer Law International, 2004, hal. 71-72.

6 Tom Ginsburg, *Judicial Review in New Democracies Constitutional Court in Asian Cases*, Cambridge: Cambridge University Press, 2003, hal. 247.

the regulations under the statute. This dualism system of judicial review has seemed easy in idea but has obstacles in the practice. In this dualism system of judicial review, Indonesia has widely modified the system existing in Austria as well as in Germany.

And the last is the France model with its Constitutional Council, which was formatted in 1958. It also have played an essential role in Europe, as the court conferred with several authorities, particularly, in reviewing the constitutionality of legislation. The Constitutional Council is not likely as a Supreme Court or constitutional court in Austrian model nor American model. The general role of this council is to ensuring the executive branch, such as president will follow its policy in order not against the constitution.[7] Therefore, this Council can be categorized as an advisory body for thepresident instead of judicial institution for reviewing a statute.

This council furthermore has been developed in some countries including Indonesia. Before the constitution amendment, Indonesia also had this kind of institution which is known as the *DPA*.[8] The DPA main task is giving the input and consideration for the President to act in according to the constitution. After the long debate on its effectiveness among the state organs, after the amendment of the 1945's Constitution, the DPA erased. However, the president remains has simple state institution that giving input as well as consideration, which is known as the *Watimpres*.[9] The Watimpres's institution is consisting of nine members, which has very small amount of members compared with the previous DPA which having 45 members. Consequently, both the *DPA* and the *Watimpres* are almost similar with the role of the Constitutional Council in France. They have significant role to ensuring the president will run his government in track with constitution, particularly, reviewing the regulations made by the president.

It is also interesting to take into account the fascinating matter which can be compared among the other models are the institutionalization of the function of constitutionality review have been clearly regulated in the Kelsenian's element. The institutionalization of constitutional justice system has been developed according to the Austrian-Germany models, in term of the recruitment of the judges. Moreover, the European's judges have a special position; because they are not derived from the career judge, meanwhile, in the United States of America all the judges handling the cases including the constitutional review are the career judges.

However, the development of the judicial review institutions, such as the Constitutional Court or the Constitutional Council, also has received criticism among the legal experts. The critics are mostly regarding the legitimacy or lawfulness of the institutions; which have been developed according to the European tradition. Some of legal scholars claimed that those judges have worked sometimes more political than legal; and frequently they tend to get caught as a legislator instead of as an interpreter of the constitution.[10] Even Harlow claims that judicial review is in threat of flattering a political method, and it need a modification from the current method in view of the possibility of judicial review becoming free for all.[11]

Another model which also important to consider is the United Kingdom model. This model perceived that the judicial review is not required that up to the present the country does not adopt such review procedures into in its

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7 Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective,* Oxford: Oxford University Press, 1992, hal. 119-224.

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

9 Watimpres = Dewan Pertimbangan President (The Presidential Advisory Council). http://www.wantimpres.go.id/Beranda/tabid/36/Default.aspx, diakses 30 Juni 2015.

10 Susana Galera, ed., *Judicial Review: A Comparative Analysis inside the European Legal System*, Strasbourg: Council of Europe, 2010, hal. 171.

11 C. Harlow, "Public Law and Popular Justice," *Modern Law Review*, Vol. 65, No.1, January 2002, hal. 1-18.

national judicial system. Even if the idea of the judicial review is applied, such constitutionality review is only confined the review area into the governance administration law or so-called administrative actions review.

According to Hilaire Barnett, A.V. Dicey perceive that the judicial review as the right way to preserved the parliament's sovereignty doctrine simultaneously in order to enforce the law supremacy. This means that the judicial review in terms of the administrative law context is acceptable, however the idea of law constitutionality review in United Kingdom is absolutely denied. Through the administrative actions review, all the government's actions are controlled in order to assure that they are walking in the corse of the corridor of law. Such review system has become commonly accepted since the beginning of the 20th century. A.V. Dicey developed this idea through his analysis in the case of Board of Education versus Rice in 1911 and the case of Local Government Board versus Arlidge in 1915.[12]

Furthermore, in reality, the United Kingdom does not have an explicitly codified constitution draft like one that recognized in the countries that adopt the constitutional democracy principle. Therefore, this country is widely known as the unwritten constitution's country. However, Pilkington does not fully agree that British do not have an unwritten constitution. British really do have a written constitution that have spread across a hundred different documents, decrees, statute, acts, reference works, and so forth.[13] This argument has been strengthened by MacCormick whom stated that the Act of Parliament has been explicitly positioned as a constitution.[14] In other words it can be said that that British does not have a codified constitution, instead of does not have an unwritten constitution.

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

However, in practice, it happened there is preventive measure which was centrally performed by the Supreme Court through its consultative function upon the request of the parliament or concerned parties. The Supreme Court judgment over such case is absolute as an e*rga omnes* (towards all or towards everyone).[15]

The rational or justified reasoning for a judicial review has been widely opposed by the British academicians. Forsyth emphasised the urgency of preserving the ultra vires doctrine that has been acknowledged since long time ago.[16] On the contrary, Craig bases his argument on the justice principle and public power-control concerns, accepting the parliament supremacy doctrine. His idea of judicial review has nothing to do with either the parliamentary intent or the *ultra vires* rules doctrines. [17]

On other sides, Jowell comes up with a compromising idea or the third proposition, placing the judges as the final decision maker of the law regarding how to administer the power according to a democratic system. [18] Meanwhile, Oliver added that the judges are well suited to adjudicate on procedural matters but are not constitutionally qualified to make broad decisions on social and economic policy. The courts do not and should not unilaterally and arbitrarily impose substantive constraints on administrative action.[19]

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12 Judicial review signifies the means by which the sovereignty of parliament is supported and the rule of law implemented. Hilaire Barnett, *Constitutional and Administrative Law*, United Kingdom: Cavendish Publishing, 2004, hal.88.

13 Colin Pilkington, *The Politics Today Companion to the British Constitution*, Manchester: Manchester University Press, 1999, hal. 2-4.

14 Neil MacCormick, *Questioning Sovereignty,* Oxford: Oxford University Press, 2001, hal. 99-101.

15 Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge: Cambridge University Press, 2005, hal. 17-18.

16 Christopher Forsyth, Ed., *Judicial Review and the Constitution*, Oxford: Hart publishing, 2000, hal. 50-58.

17 Paul Craig, "Ultra Vires and the Foundations of Judicial Review," *The Cambridge Law Journal*, Vol. 57, No. 01, March 1998, hal. 63-90.

18 Jeffrey Jowell, "The Rule of Law and its Underlying Values," in *The Changing Constitution*, Oxford: Oxford University Press, 2007, hal. 11-23.

19 Dawn Oliver, *Constitutional Reform in the UK,* Oxford: Oxford University Press, 2003, hal.95.

Based on above mentioned background, there are several key points which will be discussed in this article, first on how constitutional courts plays its central role in judicial review, second how American model judicial review influence the world system, and last how South African model judicial review combine the two system, American and European judicial review models. Those research questions will be explored briefly in conceptual framework and analysis.

The research purppose in this article is to give explanation and explore on Constitutional Courts as Central Organ of Judicial Review in European countries, discussing American model judicial review, and exploring South African model judicial review. This research also gives complete analysis on the role of American model and European model judicial review, particulary on how those both model influencing the judicial review system in world order. In this article also will explain the South African model judicial review that have successfully combine the American model judicial review and European judicial review, by using its extra-systemic approach which also used in Indonesian Constitutional Court in the death penalty case.

II. CONSTITUTIONAL COURT AS CENTRAL ORGAN OF JUDICIAL REVIEW

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

As the extend to that, it is required to establish a special organ in terms of justice area called the Constitution Court *(constitutional court)*. This special legal controlling organ is authorized to completely eliminate a law found to be unconstitutional to enable its implementation by any other organs.[20] The thought of Kelsen has encouraged the establishment of an institution called "Verfassungsgerichtshoft" or Constitutional Court that is independent from the Supreme Court. Therefore, this model is often known as The Kelsenian Model.[21]

The development of the Constitution Court power implementation has encouraged developing the theoretical studies of governance administrative law. Some required field of legal theories that currently has started to develop are, for example, the theories of legal norms, theories of legal interpretation, theories of governmental institutions, theories of democracy, theories of commerce politics, and theories of human rights.

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

More further, the theories that receive more attention and growing are the interpretation theories. In terms of legal study, the law interpretation have a central position because all the legal activities are conduct all around the norms and provisions of the law and constitution that will be applied into a real event (*imputation*). Interpretation becomes more crucial when the reflection or understanding of a constitution norm is adopted to determine other norms, the ones out of the former. Both norms should be fully comprehend starting from the background, objective, and the future interpretation for their implementation. Therefore, by using the linguistic interpretation

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20 Hans Kelsen, *General Theory of Law and State*, New York: Russell & Russell, 1961, hal. 157.

21 It is also called the centralized system of judicial review. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries*, New Haven: Yale University Press, 2012, hal. 225.

study, the study of law has developed so much. Simultaneously, with that, other theories also developed very significantly.

In the European Union (EU) countries, there are sixteen countries that having constitutional courts; as follow; 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. Other countries, have the court that similarly having the same function with the constitutional court as the guardian of constitution. Vice versa, they have slightly different terminology. It is known as the Constitutional Tribunal in Spain and Poland, and the Constitutional Council in France.

This article will focus on the member of EU countries that having constitutional courts. They are frequently influenced by the existence of the European Court of Justice (ECJ) as well as the European Court of Human Rights, over the sovereignty of constitutional court in EU countries.[22]

It is not an easy tasks for the constitutional courts in EU countries to adapting with the existence of EU laws. Hence, the jurisdiction of the constitutional court in Europe has changed after the establishment Europe Union. The constitutional court decision is no longer binding as usual, due to it can be reviewed by the European Court of Justice, which has to be respected unconditionally.[23]

On one hand, the country has the sovereignty to hold their constitution through the constitutional court, and on the other hand they have to fully obey on the EU laws. In order to maintain the harmony among the EU countries, particularly with the constitutional court, the EU judiciary system has made some doctrines to create better understanding and legal certainty for the EU members. Due to that fact, the EU judges has created several doctrines to maintain the supremacy of the EU laws. Furthermore, the doctrines will be briefly discussed and explored below.

The First is Italian constitutional doctrine. To avoid the contradiction between the EU laws and Italian's regulations,[24] the Italian Constitutional Court has inferred a doctrine from the 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.[25]

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

Furthermore the next article is being one of the important doctrine in the EU community recognised as Italian constitutional doctrine.[26] The doctrine is very authentic to the Kelsenian's essence that stirring the centralized model. Consequently, a national statute which is in contradicting with the EC laws is not only directly opposing to the EC laws but also indirectly opposing to the Italian Constitution,

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

23 Matej Avbelj and Jan KomÃirek, ed., *Constitutional Pluralism in the European Union and Beyond,* Oxford: Hart Publishing 2012, hal. 1-37.

24 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*, Cambridge: Intersentia, 2012, hal. 101-124.

25 See also Italian Constitution Article 117 (1)

26 Victor Ferreres Comella, *Constitutional Courts & Democratic Values: A European Perspective*, New Haven: Yale University Press, 2009, hal. 125.

which is connecting the Italian country to international environment.

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

Furthermore, the Italian Constitutional Court has seemed agreeable to those requests. Even recently it has encouraged on scholarly discussion that has taken the judicial discussion earnestly and astounded its separation. This contributee to a much more open place, the Constitutional Court likewise has seemed to endorse the method, which from both a European and national angle that may seem quite unfamiliar. By way of Europe, the present state of judicial interactions having for many explanations is distant from the comfortable image of discourse.[27]

Several national constitutional and supreme courts have, not only, been appeared hesitatee to refuse the clash when it facing to the EU matters,[28] but also the ECJ does not look totally persuaded by the view of leaving its autonomous style of adjudication, and creating genuine and open relationships with its national debaters.[29] In this framework, the primary exchange towards negotiation clearly articulated by the Italian Constitutional Court as an approach as touchable evidence of EU faithfulness, which could not easily be taken for contracted.

The new method of the Italian Constitutional Court is even more outstanding when associated to its past judgements. Certainly, the effects of current constitutional settlement are distant from radical insofar. Because they ensure slight more than review some of the most uncertain structures recognized in the previous judgements. However, the Italian Constitutional Court could also be catagorized as one of the critical speakers of the ECJ, since some of the most essential constitutive doctrines of the Community legal structure were enclosed exactly in reply to the locations developing from Italian constitutional adjudication.[30]

Particularly, before attainment the assumption that the Constitutional Court has included Article 234 EC[31] and 35 EU[32] as an advantages channels for judicial collaboration

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27 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, hal. 35-38, http://www.jeanmonnetprogram.org/papers/07/071201.html, diakses 26 Februari 2015.

28 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," *European Law Journal,* Vol. 14. No.1, January 2008, hal. 1-35.

29 The necessity to turn to a more broad, analytic and familiar style has been claimed by Weiler. See also Joseph. H. H. Weiler, 'Epilogue: The Judicial Après Nice', in G. de Burca and J. H. H. Weiler, Ed., *The European Court of Justice,* Oxford: Oxford University Press, 2001, hal. 225.

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

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

32 Article 35 EU stated that 1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them. Please visit the complete article at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12002M035, diakses 10 Juni 2017.

with the ECJ, an investigation of its recent statements in bright of present EU judicial construction may be beneficial. Likewise, it was highly pointed out that in deteriorating, referring under the preliminary decision procedures, the Constitutional Court rather than controlling the EU national agreement, was misplacing an important chance to establish a serious discussion with the ECJ.

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

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

The Second is Simmenthal doctrine which born in the case of the *Simmenthal company* vs *Italian Minister of Finance* in 1978. The point of this doctrine is that the precedence of the Community law applies even with regard to a subsequent national law.[33] The doctrine can be said as the opposition of the Italian constitutional doctrine. Although some country such Italia has adopted the EU law in their constitution, in some cases, if the contradiction occured, the national court have to review their decision based on EU laws. This doctrine has widely been adopted by EU member in preventing the clash among regulations.

The European Court of Justice (ECJ) has arranged the basics for a devolved system of judicial review. It stated that the national court is entitled upon implementation of the provisions of the Community law, which is under a responsibility to provide full influence to those provisions. If it is compulsory refusing of its own indication to implement any conflicting provision of national statute. Thus, it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.[34]

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

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

This simply implies that the constitutional court has lost their previous control. In other words, the constitutional court will still have held

[33] Please visit sources at: www.cvce.eu/obj/judgment_of_the_court_of_justice_simmenthal_case_106_77_9_march_1978-en-82c8d76f-b272-4e8f-99e1-7940acbbc090.html, diakses 10 Juni 2017.

[34] The national legal systems have numerous techniques to coexist with the European Convention on Human Rights. See also Tanja A.Börzel and Ulrich Sedelmeier, "Larger And More Law Abiding? The Impact Of Enlargement On Compliance In The European Union," *Journal of European Public Policy*, Vol. 24, No.2, February 2017, hal. 197-215. See also Denise Carolin Hübner, "The 'National Decisions' Database (Dec. Nat): Introducing A Database On National Courts' Interactions With European Law," European Union Politics, Vol. 17, No.2, June 2016, hal. 324-339. See also Agustín J. Menéndez, "The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-) technocratic Governance," *Journal of Law and Society*, Vol.44, No.1, February 2017, hal. 56-78.

their control over the willpower of the authority of laws under the national constitution, but they have lost their wide-range of control over the statutes; because a regular court now also can check them under the EC laws.

In its daily operation, the European supranational court has the American model in practicing of the judicial review of legislation, including the varied follower states of the European Union such as Netherlands. It used to be has more confident character, when they reflect the constitutionality of the statue. Even if they cannot establish aside the statute on constitutional grounds, they do express the legal censure of it. This change have not easily recognized in all jurisdictions, however. It has occupied some time for the doctrine to yield democratic basis.[35]

The diverse countries in Europe, additionally, have originally interpreted the *Simmenthal* doctrine into national constitutional texts in the different ways; such as French's Constitution in Article 55 clearly honours international treaties a higher rank to statutes. [36] Though, the principle is now quite well established. It should request into the validation, explore as well as supporting the Kelsenian system.

Principally, there are two essential points of views on why the ECJ depend on to defend its holding in Simmenthal.[37] *First* is for the effectiveness of handling cases. The effective enforcement of the EC laws would be weakened, if the ordinary courts in charge of handling specific disputes were not authorized to immediately set apart the national statutes that in contradicted with the EC laws.

Should the courts continue the proceedings and request the national constitutional court to intervene, there would be an interval in solving the cases. This interval would decrease to a weakness to the full effectiveness of the EC laws. Thus, the courts have to direct and immediate in the establishment of the EC laws.[38] This point of view can sound like an undoubted argument, notwithstanding, the countries establishing constitutional court should not be mesmerized by it.

Secondly is the integrated model of judicial review is grounded on the presumption that the procrastination is a value that worth paying-provided. In order to ensure that the procrastination is not irrationally long. The matter that has been raised by an act can be ultimately established by the constitutional court from the verybeginning.

There is no necessity to postpone a case to get judged by the highest courts after several appeals. A judgment by the constitutional court calling off the statute, likewise, has the supremacy to bind immidiately all justices. These benefits of centralism appear flawlessly appropriate, most importantly when the national legislation is to be revised for the congeniality with the E.C. law.[39]

It is important to acknowledge that the EC laws in general are very dissimilar from national constitutions. The constitutions specifically contained the text articulating comprehensive and morally emotional values. Thus, the

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35 Tim Koopmans, *Courts and Political Institutions*, Cambridge: Cambridge University Press, 2003, hal. 83-84.

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

37 Victor Ferreres Comella, *Constitutional Courts & Democratic Values: A European Perspective*, New Haven: Yale University Press, 2009, hal. 125.

38 See also Denise Carolin Hübner, "The 'National Decisions' Database (Dec. Nat): Introducing A Database On National Courts' Interactions With European Law," *European Union Politics*, Vol.17, No.2, 2016, hal.324-339.

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

interpretation is deeply controversial when tested by judiciary process. The clash between a statute and the constitutions are frequently the clash between a comprehensive legal provision and a somewhat intangible and fundamental norm.

In contrast, the EC laws are ultimately legislated by a usual legislation expressing in slightly exact terms. The clash between a national provision and the EC laws, between two pieces of usual legislation. Thus, the disputes over the national statutes conform to the EC laws will not be as deep as the constitutional disputes. Thus, the Dispersed systems in the EC laws are more allowable. Although, this dissimilarity cannot be reserved too far. Some parts of the EC laws do look like the constitutional models. For an example, the market freedoms safeguarded by the EC law can be constrained by the participant states in the name of a convincing community interest. Justices have to implement the norm of proportionality and select whether the restriction is eventually justified.[40]

The EC laws, in the same way, are also sheltering the essential rights as fragment of the secondary legislation. Member states are assured by such rights when they perform in a part governed by the EC laws.[41] National justices may disagree among themselves when they must double-check national legislation to ensure the consistency with the EC laws in some cases. In order to prevent this case happened; the ECJ fortunately has made the mechanism ensuring the uniformity that is called the preliminary-reference procedure.[42] With the mechanism, the national justices have jurisdiction to openly examine whenever they are requiring the guidance from the ECJ; most importantly if an interpretive difficult appears under the EC laws.

The ECJ involvement has significantly needed, because its judgements are broadly supposed to be officially binding. The solutions providing in the procedure of preliminary rulings are to be obeyed. It is not only by the justices raising the appropriate questions, but by all other justices in all member states as well. The ECJ has clearly attracted this power, and the majority of scholars have recognized it.[43]

And last is the clear act doctrine. In this doctrine ECJ has announced a concession to the responsibility of national courts of last option to ask a preliminary question. The national courts do not need to request for a preliminary ruling when there is no sensible doubt about the meaning of the important EC laws.[44] If the question that being inspected by the national court is the same to a question already judged by the ECJ, there is no necessity to send a reference, if the answer can be resulted from ECJ precedents. [45]

The ECJ collaborates diligently with all the courts of the EU state's members. There are regular courts in substances of EU law. The regular courts have a vital function to guarantee the effectiveness and uniformity, including the application of the European Union legislation; and also to narrowly prevent deviating elucidations of EU laws.

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40 Richard Bellamy, "The Liberty Of The Moderns: Market Freedom And Democracy Within The EU," *Global Constitutionalism,* Vol. 1, No. 01, March 2012, hal. 141-172.

41 The instrument arranged by ECHR would permit the constitutional courts or the courts of last case to demand a recommended opinion from ECHR. Please visit https://wcd.coe.int/ViewDoc.jsp?id=1063779, diakses 25 Februari 2015.

42 Josephine Shaw and Marise Cremona, *Law of the European Union*, United Kingdom: Macmillan, 1996, hal. 400.

43 Although it is hard for the Justices to speak in a same voice, they have to agree in final decision as final binding. Michael Malecki, "Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers," *Journal of European Public Policy,* Vol. 19, No. 1, December 2011, hal. 59-75.

44 In this context, the courts has to respect international treaties, or if they disagree, can make reservation. This reservation procedure is only for non EU countries unwilling to ratify international law. See also Benedetto Conforti, *International Law And The Role Of Domestic Legal Systems,* Leiden: Martinus Nijhoff Publishers, 1993, hal. 255. See also Victor Ferreres Comella, *Constitutional Courts & Democratic Values: A European Perspective*, New Haven: Yale University Press, 2009, hal. 125.

45 The precedents, which may come from preliminary preference or judgements, in EU countries is importance as the legal sources. See also Andreja Pegan, "The Role Of Personal Parliamentary Assistants In The European Parliament," *West European Politics,* Vol.40, No.2, June 2016, hal. 295-315.

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

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

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

Indeed, the reference can be prepared simply by the national court, the Member States and the European Union's institutions, which may take part in the proceedings before the ECJ. In that approach, the vital principles of the European Union law have been definitely established, in particular, on the source of questions stated for preliminary rulings.

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

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

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

Nowadays, when the assignment control are rightly supposed as the major concerns for controlling the EU laws, regionalization through clear act doctrine or sector entrustment to national courts are mostly recognized strategies,[46] even though their backside is likely to result in a lower or less well-versed application of the Community law.

The application of clear act doctrine, therefore, has exposed surprising mistakes, because the way of the Constitutional Court carrying out its review on justification. Most importantly, its implementation of the principles of review usually engaged in domestic issues have seemed unreliable with the objection of the ECJ, placing the EC laws in its detailed context and interpreting it in light of its purposes.[47]

III. AMERICAN MODEL JUDICIAL REVIEW

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

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[46] Hjalte Rasmussen, "Remedying the Crumbling EC Judicial System," *Common Market Law Review,* Vol. 37, No. 5, June 2000, hal. 1107-1110.

[47] G. Federico Mancini and David T. Keeling, "From CILFIT to ERT: The Constitutional Challenge Facing the European Court," *Yearbook of European Law*, Vol. 11, No. 1, November 1991, hal. 1-13.

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

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

That mean, such review, non-institutional as a stand-alone case, but included in the other cases being examined by the judge in all levels of the court. Therefore, by the scholars, the American model is also commonly referred to as the decentralized model.

The constitutional review, which has been conducted in a spread constitutional system, can be categorized as a posteriori review. It means that the judgment has only a final binding on the parties involved in the case (between the parties). It has an exception in the framework of the principle of *stare decisis,*[48] however. This principle requires the court eventually bound to follow a similar judgment, which has been judged previously by another judge or in other cases. Meanwhile, the Supreme Court in the system provides a mechanism for the unity of the system as a whole (the uniformity of jurisdiction). In essence, a judgment regarding the unconstitutionality of an act is declaratory and retrospective.

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

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

The amount of legislation, moreover, in common law system is not as much if compared with the tradition of civil law in Europe Continental, that from time to time the parliamentary institutions have continuously produced a written rules, such as act, decree, provisions, and so forth.[49] Therefore, the application of the judicial review or constitutional review system does not require a new institution, but simply associated with the existing function of the Supreme Court. The Supreme Court, in this circumstance, will act as a guard or protector of the Constitution, commonly known as the Guardian or Protector of the Constitution.[50]

The American's judicial review has clearly shown that the democratic values could own a sharp effect on societies.[51] The democracy and constitutionalism could be at balance.

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48 Stare decisis is essentially the doctrine of precedent. Courts cite to stare decisis when an issue has been previously brought to the court and a ruling already issued. http: // www.law.cornell.edu/wex/stare_decisis, diakses 26 Februari 2015. See also Jack Knight and Lee Epstein, "The Norm Of Stare Decisis," *American Journal of Political Science,* Vol. 40, No.4, November 1996, hal. 1018-1035.

49 Joseph Dainow, "Civil Law and the Common Law: Some Points of Comparison," The *American Journal of Comparative Law,* Vol. 15, July 1966, hal. 419.

50 See also Robert A. Licht, ed. *Is the Supreme Court the guardian of the Constitution?* United State of America: American Enterprise Institute, 1993.

51 Miguel Schor, "Judicial Review and American Constitutional Exceptionalism," *Osgoode Hall Law Journal,* Vol. 46, No. 3, October 2008, hal. 553.

By reinforcement the proper instruments by which peoples grip courts responsible, polities can decline the informal instruments, by which attention groups pursue to shape constitutional sense.[52]

The courts, which are reviewing the laws, have the obligation to be appropriately free from the interest of the political groups to hold legitimacy; but it is not as free as to challenge the popular input into constitutional evolution. The courts have to play a positive long-standing part in preserving the constitution. The judicial freedom has to be optimized, not maximized.[53]

When the judicial review has widely spread around the world, the American system assisted as a model and anti-model. The modern constitution-makers have to draw from a relatively different from those animating the framers of the American Constitution. As a consequence, most other nations have accepted different and stronger rules in which to embrace the courts politically responsible. The courts overseas, as in the United States, are governmentally powerful and their judgements may irritate the citizens.[54] Any political reaction motivated by this development in judicial power, nevertheless, is possible to take a different form than it ensures in the United States. In particular, interest groups are less likely to compete over activities overseas than in the United States.

Some academicians have miscarried to correctly escalate the exceptionalism of the US Supreme Court, because they have principally overlooked on why judicial review was changed when it spread around the world. Because of this miscarriage, it has a lack of judicial responsibility. In fact the constitutional court could be responsible either *ex ante*[55] or *post facto*.[56] *Ex ante* controls stay appointment instruments; *post facto* controls contain amendments and a legislative dominate of judicial decisions.[57] Furthermore a political liability, whether *ex ante* or *post facto*, could be either weak or strong. [58]

The US Supreme Court, unfortunately, is not strongly accountable both *ex ante* and *post facto*. Validation of presidential appointment by the Senate only needs majority approval. It allows factions to have a real voice in the appointment. The unnecessary independence gave the US Supreme Court and the difficulty in amending the Constitution.[59] It will make the Supreme Court an alluring target for interest group seize.

The Parties which have concern totally about the sense of the Constitution have no options except struggling over their appointments. The Supreme court are fully

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52 Kenneth Einar Himma, "Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States," *Journal of Law in Society,* Vol. 4, No. 2, December 2003, hal. 149-218. For comparison see also Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York: W.W. Norton, 2003.

53 Owen M. Fiss, 'The Right Degree of Independence,' in Irwin P. Skotzky, ed., *Transition to Democracy in Latin America: The Role of the Judiciary,* Colorado: Westview Press, 1993, hal.55.

54 See also C. Neal Tate and Torbjörn Vallinder, ed., *The Global Expansion of Judicial Power,* New York: New York University Press, 1997.

55 The term *ex-ante* is a phrase meaning before the event. *Ex-ante* is used most commonly in the commercial world, where results of a particular action, or series of actions, are forecast in advance (or intended). http://en.wikipedia.org/wiki/Ex-ante, accessed 27 February 2015.

56 An *ex post facto* law is a law that retroactively changes the legal consequences (or status) of actions that were committed, or relationships that existed, before the enactment of the law. http://en.wikipedia.org/wiki/Ex_post_facto_law, accessed 27 February 2015.

57 Miguel Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," *Minnesota Journal of International Law,* Vol. 16, No.1, December 2007, hal. 61.

58 There are other procedures of general control, such as impeachment or parliamentary control over prerogative, however they have largely dropped into neglect both in the United States and overseas as they have weaken judicial freedom. John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, " *New York University Law Review*, Vol. 77, No.4, October 2002, hal. 962.

59 The United States has one of the most difficult constitutions in the world to change, as super majority agreement is required both in Congress and among the states. The difficulty of changing the Constitution is demonstrated by the fact that the Supreme Court has produced substantial public opposition but has been overruled only four times by amendment. See Donald S. Lutz, *Principles of Constitutional Design,* Cambridge: Cambridge University Press, 2006, hal. 171.

liable, otherwise, if their judgments can be more eagerly overruled, or if judicial actions replicate the wishes of a dominant one.

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

IV. THE SOUTH AFRICAN MODEL JUDICIAL REVIEW

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

This model is very different compared with European's model constitutional court. The South African's model Constitutional Court has not only able to review the act against the constitution, but also able to review the ordinary cases which appealed from the ordinary court as well. Furthermore, the structure of the Constitutional Court, is lead by the Chief Justice, the Deputy Chief Justice and nine other judges. A material carried before the Constitutional Court must be received by at least eight judges.[60]

The court hierarchy in South Africa is clearly stipulated in Section 166 of the Constitution of the Republic of South Africa, 1996 (the Constitution').[61] The courts are as follow (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Court of South Africa, and (d) the Magistrates' Court.

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

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

The first case handled by the Constitutional Court was about the constitutionality of the death sentence;[62] which being a sensitive debate in human rights discussion.[63] That was a debatable question, whereas the legislators should have decided during the provisional discussions, but opportunistically absent for the Court to decide. Under the conditions, the job of the Court was to approach constitutional value from political realism.[64]

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

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60 See the Section 167(1) of the South Africa Constitution, as amended by Act 34 of 2001, the Constitutional Court. Lynn Berat, "Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice," *The International Journal of Constitutional Law,* Vol. 3, No.1, January 2005, hal. 39.

61 South Africa Constitution Section 166. See also George E. Devenish, *A Commentary on the South African Constitution*, United Kingdom: Butterworth-Heinemann, 1998.

62 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,"* *Journal of Politics*, Vol.65, No. 1, February 2003, hal. 1-30.

63 See also the section of Bill of Rights. Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, London: Bloomsbury Publishing, 2010.

64 Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge: Cambridge University Press, 2000, hal. 18-23.

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

(a) decide disputes between organs of State in the national or provincial sphere concerning the constitutional status, 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.[65]

All matters concerning constitutional issues other than those listed above will initiate in a High Court, unless the Constitutional Court grants an application for direct access to it. No order of unconstitutionality given by the Supreme Court of Appeal, a High Court or a court with similar status is lawful until that order has been confirmed by the Constitutional Court. Thus, it takes the final decision on the constitutionality of an Act of Parliament, a provincial Act or the conduct of the President.[66]

If compared with the Indonesian Constitutional Court, which is easily invalidating an act, nevertheless, the South African Constitutional Court is obligatory to approve any order invalidity of an Act of Parliament,[67] 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.[68]

V. COMPARATIVE ANALYSIS OF EUROPEAN MODEL AND AMERICAN MODEL JUDICIAL REVIEW

The legal academicians in Europe have begun to think on the effects of American constitutionalism in the nineteenth century.[69] American constitutional concepts, including judicial review and constitutional review, have widely played an essential part in the debates of the German National Assembly in Frankfurt in 1848.[70] The Frankfurt Constitution has suffered political defeat, but it has become one of the most important texts for the upcoming of German democratic constitutional improvement.[71]

Whilst the optimism of American's model have dominated the debates on judicial review in Frankfurt, the pan-European debate have taken into account a diverse and more realistic. An effort adopting American's model have been ultimately conquered by scholars, who argued that conservative courts in the United States had derailed needed social legislation.[72]

One of the important person in the European made an argument on judicial review is Hans Kelsen.[73] He has clearly faced two substantial

65 South African Constitution, Section 167(4).

66 Willem Adolf Joubert and T. Johan Scott, *The Law of South Africa*, United Kingdom: Butterworths, 1981, hal. 130.

67 Jackie Dugard, "Court of First Instance?: Towards a Pro-poor Jurisdiction for the South African Constitutional Court," *South African Journal on Human Rights*, Vol. 22, No. 2, April 2006, hal. 261-263.

68 South African Constitution, Section 167(5).

69 Helmut Steinberger, "Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review," *Columbia Journal of Transnational Law,* Vol. 36, 1998, hal. 189-208.

70 *ibid*. at 194-201.

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

72 Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective,* Oxford: Oxford University Press, 1992, hal. 37-40.

73 Hans Kelsen played an important part in designing the Austrian Constitution of 1920 chiefly in the article on judicial review. Stanley L. Paulson, "Constitutional Review in the United States and Austria: Notes on the Beginnings," *Ratio Juris,* Vol. 16, No. 2, June 2003, hal. 223-239.

problems in theorizing on how judicial review might fit in mainland Europe's constitutional and political background. Firstly is that the civil law courts have had not eye-catching organs to provide with the authority of constitutional interpretation; because those courts have been operated daily by civil servants, who have been ideologically accustomed to being passive to legislatures.[74] It has have been required in that time was a specialized constitutional courts. It has been expected to voice independently, authoritative voice[75] and holding equal self-respect with the legislature.

Secondly was the impact of Second World War. The governments in Western Europe were not only controlled over constitutions, but also the political systems. The success of the judicial review in Europe centred, therefore, on filling both legislators of the judiciary and justice power, and a pan-European association of protruding legal intellectuals who preferred installing American judicial review on the region.[76]

Kelsen's visionary answer was to reject the American idea that the constitution was types of law and to hold its political nature.[77] He said that whilst the legislatures have strongly engaged in the positive law making, the authority to declare regulation unconstitutional was also a form of law making, although a purely negative one.[78]

The supremacy of constitutional courts would, therefore, be constrained by carefully drafting constitutions to eliminate from justice capability in the general principles, particularly, equality, justice, and liberty.[79] Kelsen claimed that in the field of constitutional justice, such principles can play an extremely dangerous role.[80] In brief, the judicial review was essential to influence horizontal and vertical, the idea of separation powers; however the courts would gain too much influence if they had a wide-range of authority to create rights.[81]

Kelsen's awareness to limit the power of courts to interpret rights was disallowed in post-war Europe. The aspiration to contract with the fears of the Second World War has managed Germany and other continental democracies to hold a comprehensive set of judicially enforceable rights.[82] His heritage is recognizable, however, in the three structures have illustrated the political court model of judicial review, that adopted by the democracies of Western Europe after the war. Those structures are; *firstly*, the judicial review mechanism has been focussed in the one constitutional court; rather than distribute dispersed throughout the judicial system as in the United States. *Secondly*, the judicial review has not required a case or controversy. As legislation can be revised conceptually before it drives into result; and thirdly is the appointment requiring a legislative super-majority.[83]

The legal scholars have dropped substantial ink arguing the comparative merits of concentrated versus diffuse review, and intangible versus tangible review, and

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74 John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, California: Stanford University Press, 2007, hal. 49-52.

75 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,' *Journal of Politics,* Vol. 4, No.2, May 1942, hal. 183-200.

76 Alec Stone Sweet, "Why Europe Rejected American Judicial Review: And Why It May Not Matter," *Michigan Law Review,* Vol.101, No.201, August 2003, hal. 2766.

77 Mark Tushnet, "Marbury v. Madison Around the World," *Tennessee Law Review*, Vol. 71, No.4, Summer 2003, hal. 251.

78 Alec Stone Sweet, "Why Europe Rejected American Judicial Review: And Why It May Not Matter," *Michigan Law Review,* 2003, hal. 2766.

79 Miguel Schor, "Judicial review and American Constitutional Exceptionalism," *Osgoode Hall Law Journal,* Vol. 46, 2008, hal. 555.

80 *Ibid.*

81 Stanley L. Paulson, "Constitutional Review in the United States and Austria: Notes on the Beginnings," *Ratio Juris,* Vol. 16, No. 2, 2003, hal.v223-239.

82 Mauro Cappelletti, "Repudiating Montesquieu-The Expansion and Legitimacy of Constitutional Justice," *The Catholic University Law Review,* Vol. 35, Vol.1, October 1985, hal. 5-6.

83 Alec Stone Sweet, *Governing With Judges: Constitutional Politics in Europe*, Oxford: Oxford University Press, 2000, hal. 46-49.

whether these transformations lead to an overly debated form of judicial review.[84] However, these differences finally might not substance as much as imagined by legal scholars; since both supreme court and constitutional court have really done a permitted job of effectuating rights and moving political criticisms.

The dissimilarity that does substance is the one that legal academician mostly overlook, which is that activities to a constitutional court need the endorsement of a legislative super-majority.[85] By accepting super-majority appointment dealings, the political court model of judicial review has abridged the power of parties to sway constitutional interpretation. As a result, the actions will turn on deals brokered between diverse political parties.[86] Whilst never perfect, super-majority selection processes have worked by delivering uneven balance between different parties and districts.[87]

A super-majoritarian position mechanism has respited on a diverse idea of democracy, than does a majoritarian instrument. Democracy can unpleasant either regulation by a bare majority or regulation by as many as possible.[88] Majoritarian democracies have inclined to be more discordant than those requiring a higher degree of agreement.[89] The worth of agreement is sufficiently explained by how super-majoritarian choosing procedures have prohibited the divisive political choosing battles, which have developed familiar in the United States.[90] However, in the Europe did not answer the problem modelled by *Lochner*—that peoples are sometimes intensely 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.

VI. USING AN EXTRA-SYSTEMIC EVIDENCE IN INTERPRETING CONSTITUTION

The Constitution established post-apartheid South Africa is the only one having an express provision, which have allowed the judges to usage an extra-systemic evidence for interpreting the constitution.[91] In the Section 39 of the 1996 Constitution clearly stipulate the position of the Constitutional Court. Specifically, when the Court interpreting the Bill of Rights have to maintain the principles that underlie an open and democratic society; and also must consider international public law and may take foreign law into consideration.[92]

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

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84 Michel Rosenfeld, "Constitutional Adjudication In Europe And The United States: Paradoxes And Contrasts," *International Journal of Constitutional Law,* Vol. 2, No. 2, August 2004, hal. 197-198.

85 John Ferejohn and Pasquale Pasquino, "Constitutional Adjudication: Lessons from Europe," *Texas Law Review,* Vol. 82, No.7, June 2003, hal. 1676-1680.

86 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*, Toronto: University of Toronto Press, 2006, hal. 196.

87 Lisa Hilbink, "Beyond Manicheanism: Assessing the New Constitutionalism," *The* Maryland *Law Review*, Vol. 65, No.1, February 2006, hal. 15.

88 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries,* New Haven: Yale University Press, 1999, hal. 1-2.

89 *Ibid.* at 300-08.

90 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: Cambridge University Press, 2006, hal. 171.

91 Hoyt Webb, "Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law," *The University of Pennsylvania Journal of Constitutional Law*, Vol. 1, No.2, October 1998, hal. 205-283.

92 South African Constitution, Section 39.

For this reason, South African constitutional judgement has become one of the most fascinating on a world-wide level; because the judges in Johannesburg had to challenge the problem of systematically setting up the criteria and bounds of this practice. [93]

Regarding the Section 39, Dugard state that there are three main reasons for adopting the provision into the constitution.[94] *Firstly* is the essential of international legality after decades of seclusion under the apartheid regime. The regime had intentionally disregarded international values on fundamental rights mankind.

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

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

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

VII. CLOSING

A. Conclusion

The constitutional court established in Indonesia seemed close to Germany model, but the ICC only possess the power to review all regulations under the constitution, because share its power with the Supreme Court to review the regulations under the statutes. Whereas, the ICC is reviewing the statutes that against the constitution, and the Supreme Court is reviewing the regulations under the statutes. These two ways of judicial review is vulnerable to overlapping and creating a serious homework for the existence of ICC.

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

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

The existence of the American model judicial review has raised a serious debate among legal scholars; whether it is suitable in Europe context or merely appropriate in America. Responding to this debate, Hans Kelsen has given two substantial reasons; first

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93 Andrea Lollini, "South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law," *The Utrecht Law Review,* Vol. 8, No.2, May 2012, hal. 55.

94 John Dugard, "International Law and the South African Constitution," *European Journal of International Law,* Vol. 8, No.1, February 1997, hal. 77.

of all, the civil law court, which is practicing the judicial review in America, does not have a specific mechanism in providing constitutional interpretation.

B. Recommendation

From above explanations, seems that Indonesia adopts almost all of world model judicial review. It will cause a difficulty in its daily system. For an instance, in the system of law review, delivering authorities for the constitutional court and Supreme Court. A statute can only be reviewed by the Constitutional Court and regulations below the statute can only be reviewed by the Supreme Court. This dualism model judicial review is vulnerable to conflicting each other between these two courts, particularly if not having system coordination and communication. One of recommendation to solve this problem is by strengthening the information technology (IT) system using specific designed software. With this system the regulations reviewing in the Supreme Court having connection with a staute reviewing in the Constitutional Court will be stopped automatically. Therefore, the regulation will not be proceed if still linked with a statute testing in the Constitutional Court. If this system not implemented, the clash of law review may be occurred, the Constitutional Court and Supreme Court able to review a regulation that having strong connection to each other.

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