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The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia

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THE RISE AND FALL OF HISTORIC CHIEF JUSTICES: CONSTITUTIONAL POLITICS AND JUDICIAL LEADERSHIP IN INDONESIA

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Abstract: In the decade following its inception, the Indonesian Constitutional Court has marked a new chapter in Indonesian legal history, one in which a judicial institution can challenge the executive and legislative branches. This article argues that judicial leadership is the main contributing factor explaining the emergence of judicial power in Indonesia. This article posits that the newly established Indonesian Constitutional Court needed a strong and skilled Chief Justice to build the institution because it had insufficient support from political actors. As the Court lacked a well-established tradition of judicial review, it needed a visionary leader who could maximize the structural advantage of the Court. Finally, the Court needed a heroic leader able to deal with the challenges and pressures from the government. This article examines the role of the four Chief Justices of the Indonesian Constitutional Court: Jimly Asshiddiqie (2003–2008), Mohammad Mahfud (2008–2013), Akil Mochtar (2013), and Hamdan Zoelva (2013–2015). Chief Justice Jimly Asshiddiqie and Muhmmad Mahfud set a high bar by playing the role of heroic Chief Justices. The departure of Asshiddiqie and Mahfud, however, marked the end an era of heroic Chief Justices. Both Chief Justices Akil Mochtar and Hamdan Zoelva could not maintain the role of heroic Chief Justice.

I. INTRODUCTION

When the former Chief Justice of the Indonesian Constitutional Court, Akil Mochtar was arrested in October 2013 for alleged bribery, his story immediately made international headlines.[1] It may come as a surprise to many that by the time of his arrest, Mochtar had held the position of Chief Justice for just six months. It is clear that international communities—

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[1] Joe Chochrane, *Top Indonesian Judge Held in Corruption Case*, N.Y. TIMES, Oct. 3, 2013 at A1; I Made Sentana & Joko Hariyanto, *Indonesia Detains a Top Judge Over Alleged Corruption*, WALL ST. J. (Oct. 3, 2013), http://www.wsj.com/articles/SB10001424052702303492504579113253416780; *You're nicked, your honour: An anti-corruption investigation touches the constitutional court*, THE ECONOMIST (Oct. 12, 2013), http://www.economist.com/news/asia/21587849-anti-corruption-investigation-touches-constitutional-court-youre-nicked-your-honour; *Indonesia arrests top judge on corruption charges*, BBC NEWS (Oct. 3, 2013), http://www.bbc.com/news/world-asia-24344995.

especially those composed of lawyers, legal scholars and law students—must be provided with a better narrative of the Indonesian Constitutional history. Before this disgraced Chief Justice, there were two great Chief Justices: Jimly Asshiddiqie and Mohammad Mahfud. These two Chief Justices never made international headlines like their successor, but they contributed extensively to the struggle for the rule of law during post-authoritarian Indonesia, particularly in solidifying the Court as an institution.

This article examines the role of the four Chief Justices of the Indonesian Constitutional Court: Jimly Asshiddiqie (2003–2008), Mohammad Mahfud (2008–2013), Akil Mochtar (2013), and Hamdan Zoelva (2013–2015). Before exploring the roles played by each of these four Chief Justices, clarifications are necessary. First, this article is a study of judicial empowerment rather than a study of each Chief Justice's personality. By judicial empowerment, this article refers to the process of how the Court balances power between the judicial, executive, and legislative branches of government.[2] In the decade following its inception, the Indonesian Constitutional Court has marked a new chapter in Indonesian legal history. It is one in which a judicial institution can challenge the executive and legislative branches. This article argues that the architects behind this success story were the first two Chief Justices: Jimly Asshiddiqie and Mohammad Mahfud. Armed with a strong leadership style, both Asshiddiqie and Mahfud led the Court to issue several decisions that challenged governmental policies and pushed the government to abide by the Constitution.

Second, by analyzing the role of judicial leadership, this article addresses the question that constitutional law scholars and political scientists have asked: how is a Court with no army or coercive power able to constrain the other branches of government?[3] Stated otherwise, why would the

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[2] Legal scholars and political scientists have come up with many different theories that explain judicial empowerment. *See, e.g.*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) [hereinafter GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES]; RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, *in* CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 21 (Wojciech Sadurski ed., 2003); ALEXI TROCHEV, JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS, 1990–2006 (2008).

[3] *See* Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009).

Executive branch ever comply with the Court's decisions? In particular, I explore the question of how the Court manages to bolster its judicial power in a new democracy like Indonesia. This article will answer the question by exploring the role that the first four Chief Justices played in securing judicial power for the new Indonesian Constitutional Court.

This article argues that judicial leadership is the main contributing factor explaining the emergence of judicial power in Indonesia because of the Court's inability to rely on the government to build the institution. In the case of a new democracy like Indonesia, the government often creates the Court for the purpose of safeguarding its own interests rather than to safeguard constitutional principles.[4] Moreover, the government may not want the Court to become an institution capable of exercising robust judicial review out of fear that it could threaten the government's authority. Under such circumstances, the responsibility to build the Court into a functioning institution lies largely in the hands of the Chief Justice. This article argues that until the Court has established a solid judicial tradition, it must be dependent on the creativity of the Chief Justices to define and shape its judicial power. The first members of the Constitutional Court began their term with no point of reference regarding judicial review. In the absence of the tradition of judicial review, the Chief Justice had an important role in leading the Court to define the scope of its judicial power.

Third, although this article focuses on the role of judicial leadership, it also implicates the study of institutional design. One of the important features of judicial design is the term limit. The term limit is a key component of judicial independence. Longer appointment terms encourage judges to exercise their authority with more independence.[5] Limiting the term length to two and a half years is a weakness in the Indonesian Constitutional Court design. With this limited amount of time, executives and lawmakers have the opportunity to dismiss any sitting judges who run against their specific interest and to appoint their favorite judges.

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[4] *See* GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES *supra* note 2; Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196 (2003); TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT (2007); JODI S. FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S (2008).

[5] Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRIES L. 49, 65 (2002) [hereinafter Ginsburg, *Economic Analysis*].

This article further contends that the Court needs not only a good structural design, but also a Chief Justice who has the vision and courage to lead the Court in playing an important role in constitutional politics. The structural design of the Constitutional Court is an important factor that can strengthen judicial power.[6] Similar to Constitutional Courts in other countries, the Indonesian Constitutional Court is armed with abstract review that enables it to rule on the conformity of a statute with the Indonesian Constitution.[7] In other words, the Constitutional Court may scrutinize policy decisions made by the government. Nevertheless, the initial members of the Court did not have any reference on how the Court could scrutinize policy decisions. The Court needs a visionary and courageous Chief Justice who can lead the Court in fulfilling this role and building precedent for future Constitutional Court justices. Thus, while the analysis on institutional design is not intended as the primary contribution of this article, the analysis on the role of Chief Justice has some implications for the study of institutional design.

The final point of clarification is that this article is not meant to suggest that in order to bolster its power, courts in a new democracy ought to have a "Super Chief Justice."[8] This article makes no claim that the experience of the Indonesian Constitutional Court can be a model for the development of judicial institutions in various countries. The purpose of this article is rather to explain how judicial empowerment can be achieved in the context of Indonesian Constitutional politics. Thus, the exploration of judicial empowerment through the lens of judicial leadership is meant to be descriptive rather than normative. This article merely seeks to understand how the judicial power might be formed in post-authoritarian Indonesia. As

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[6] For a full discussion of the historical origins of the constitutional courts, see generally ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992); Klaus von Boyme, *The Genesis of Constitutional Review in Parliamentary Systems*, *in* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 21 (Christine Landfried ed., 1988); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 3–29 (2d ed. 1997); Stanley L. Paulson, *Constitutional Review in the United States and Austria: Notes on the Beginnings*, 16 RATIO JURIS. 223 (2003).

[7] For detailed analysis of the concept of abstract review, see STONE, *supra* note 6; Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705 (2004); WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2005); Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT'L J. CONST. L. 69 (2007).

[8] For the analysis on the role of judicial leadership in understanding the nature of judicial politics in Asia, see Haig Patapan, *Leadership, Law and Legitimacy: Reflections on the Changing Nature of Judicial Politics in Asia*, *in* THE JUDICIALIZATION OF POLITICS IN ASIA 219 (Björn Dressel ed., 2012).

a court in a new democracy, the Indonesian Constitutional Court faces the risk of a counter attack from the executive and legislative branches whenever they are dissatisfied with the Court's decision. The Court, however, has no army that can provide protection from a potential attack. Consequently, it needs a "heroic" Chief Justice who can lead the institution to deal with the challenges and pressures from the executive and legislative branches.

In sum, this article posits that the newly established Indonesian Constitutional Court needed a strong and skilled Chief Justice to build the institution, as it had insufficient support from political actors. Moreover, as it lacked a well-established tradition of judicial review, it needed a visionary leader who could maximize the structural advantage of the Court. It needed a heroic leader able to deal with the challenges and pressures from the government. Finally, the Court required a skilled Chief Justice who could navigate the Court through the stormy waters of constitutional politics.

This article proceeds in five parts. Following the Introduction, Part II provides the conceptual stage by presenting evidence of the role of Chief Justice in the judicial empowerment process in different countries. The importance of Chief Justices can be seen in the courts of new democracies. Judicial leadership assumes particular significance as the country continues in its democratic transition period. For example, the democratic transition process in Eastern Europe witnessed the rise of two towering figures, Chief Justice Lazlo Solyom of the Hungarian Constitutional Court and Chief Justice Valery Zorkin of the Russian Constitutional Court. In both cases, these Chief Justices emerged as political actors in fragmented political worlds. Both of them, however, ended their terms with a disastrous exit after elected political leaders attempted to silence their opposition. In a different context, Chief Justice Arthur Chaskalson of the Constitutional Court of South Africa proved to be a crucial figure in the democratic transition process. Unlike the two Chief Justices from Eastern Europe, Chief Justice Chaskalson was able to survive a decade of his tenure without triggering debilitating attacks on his Court.

Part IV explores the role that the first Indonesian Chief Justice, Jimly Asshiddiqie, played in securing judicial power for the new Indonesian Constitutional Court. Chief Justice Asshiddiqie was indeed strategic in his role as he sought to increase the Court's policy-making influence. He maintained the Court's institutional position vis-a-vis other branches of government. Asshiddiqie was conscientious when choosing to engage in

confrontation with the government and when to backtrack if the issue became too sensitive. Nonetheless, the Chief Justice's term limit made his position vulnerable. Asshiddiqie, along with the Executive, was ousted by the associate justices of his own Court.

Part V explains the direction adopted by Asshiddiqie's successor, Chief Justice Mohammad Mahfud. Chief Justice Mahfud came to the Court with a vision of strong judicial restraint and promised to employ a more modest leadership style than his predecessor. Nevertheless, after Mahfud began in his position, he did not remain faithful to his vow of judicial restraint. It is true that the Mahfud Court was keen to defer to the executive and legislative branches in the area of individual rights, but he also sought to maintain the Court's status as a key policymaker by reviewing many governmental policies. Moreover, Chief Justice Mahfud continued to strengthen the Chief Justice's power by expanding its extrajudicial activities through giving media interviews and public statements on social and political issues. As a strategic judge, Chief Justice Mahfud managed to avoid backlash from the other branches of government and his own associate justices. Nevertheless, his own political ambition led to his early departure from the Court, as he aimed to occupy the office of the President.

Part VI shows the damage that was caused by the dismissal of Chief Justice Akil Mochtar. Having only spent six months in office, Akil Mochtar was arrested by the Anti-Corruption Commission for alleged bribery. The arrest of Akil Mochtar unraveled the hard work of his predecessors to build the Court as a functioning and transparent institution. Mochtar's corruption immediately flipped public perception and insinuated that the Court was merely another corrupt legal institution in the country.

Part VII considers the performance of Chief Justice Hamdan Zoelva in his short tenure in the position. Chief Justice Zoelva only stayed in office for a little over a year. During his brief tenure, Chief Justice Zoelva continuously led the Court to advocate for judicial restraint. Under Zoelva's leadership, the Court did not show any interest in engaging in judicial review of strategic and politically sensitive cases. Zoelva's advocacy of judicial restraint, however, did not guarantee him a second term. Zoelva had to leave the Court as President Joko Widodo decided not to reappoint him for a second term.

This article concludes by suggesting that the leadership of the Chief Justice holds a crucial role in the Indonesian constitutional constellation.

Chief Justice Jimly Asshiddiqie set a high bar by playing the role of a heroic Chief Justice. While his successor, Mohammad Mahfud came with a vision of judicial restraint, he immediately followed the steps of his predecessor. The departure of both Asshiddiqie and Mahfud marked the end an era of heroic Chief Justices. Both Chief Justice Akil Mochtar and Hamdan Zoelva could not maintain the role of the heroic Chief Justice. The Court's structural design consistently requires the Court to deal with constitutional issues that have a powerful impact in the political realm. Consequently, the Court requires heroic leadership of a Chief Justice who can lead the institution in challenging areas involving politically sensitive issues.

II. THE ROLE OF CHIEF JUSTICE IN COMPARATIVE CONSTITUTIONAL PERSPECTIVES

While currently there are few legal scholars and political scientists attempting to explain the judicial empowerment from the perspective of the judicial leadership, we can find evidence on the role of Chief Justice as part of the larger theme of the study of judicial institutions. One major piece of scholarly work on the role of judicial leadership is the research from Jennifer Widner on the emerging constitutionalism in southern and eastern Africa.[9] In her study, Widner explores the question of how judges engaged in institution building. She particularly focuses on one man, Francis Nyalali, the former Chief Justice of Tanzania (1976–1999).

Widner explains the influence of Nyalali as an institutional builder and social engineer through his direct and strategic engagement with politicians and other public officials rather than through doctrinal activism. For example, Nyalali spent much time lobbying for judicial independence and democratic reform at every level. One of his major accomplishments was the adoption of a code of judicial conduct modeled after the American Bar Association (ABA) Code of Judicial Conduct.[10] As part of his extrajudicial activism, Nyalali attempted to educate members of the legal profession on matters of constitutional interpretation.[11] With the media, Nyalali built mutual collaboration, periodically contributing columns on legal issues for newspapers and participating in other law-related educational

[9] JENNIFER A. WIDNER, BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA (2001).

[10] *Id*. at 279.

[11] *Id.* at 314.

initiatives on the radio and television.[12] Moreover, Nyalali built close connections with international donors to increase material resources for the judiciary.[13]

Kim Lane Scheppele has conducted substantial research on the role of the Chief Justice in new democracies.[14] Scheppele focused her research on two of the first Chief Justices of Constitutional Courts in Eastern Europe: Laszlo Solyom of the Hungarian Constitutional Court and Valerii Zorkin of the Russian Constitutional Court.

Schepelle explained that both Solyom and Zorkin emerged as leaders who led the Courts to fight against the executive power. Neither was shy to challenge their governments for failures to follow the constitutional principles such as the right to life and the right to human dignity. In both countries, politicians were unhappy with Chief Justices' behavior and successfully pushed the outspoken Chief Justices out of their office. Nevertheless, both of them were resilient and came back triumphantly to the political arena after spending a few years in the political wilderness.[15]

It is worth briefly exploring Scheppelle's analysis on the role of Chief Justice Solyom in the early period of the Hungary Constitutional Court. Solyom was formally elected by his fellow justices as the Chief Justice of the Constitutional Court in the summer of 1990.[16] During his tenure as Chief Justice, Solyom made constitutional promulgations such as the notion of the "invisible constitution."[17] For instance, the right to life and to human dignity can be found in Article 54(1) of the 1990 Constitution. Nevertheless, under the notion of the "invisible constitution," Chief Justice Solyom explained that these rights are foundational principles of Hungarian constitutional law and therefore it would exist even without a reference in the constitutional text. In the *Capital Punishment Case*, Solyom described the decision's reliance on the right to human dignity as a utilization of the

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[12] *Id.* at 322.
[13] *Id.* at 394–95.
[14] *See* Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757 (2006).
[15] *Id.* at 1758.
[16] *Id.* at 1776.
[17] *Id.* at 1777.

"'invisible constitution'—[which is] beyond the [control of both the] Constitution, which is often amended . . . [, and] future constitution." [18]

Under Solyom's leadership, the Court also struck down many laws related to economic issues such as property rights, entrepreneurship, contracts, and social security benefits. A telling example is when the Hungarian government passed a severe austerity budget that aimed to cut social safety-net programs. The Court declared that the government's economic plan violated the principle of legal security in the Constitution because it did not give the citizens adequate time to adjust themselves to the welfare cuts.[19]

After the Court's decision on the social welfare package, the Government signaled that it could weaken the Court through its intervention in the selection process of the Constitutional Court justices. The Constitutional Court justices were elected to a nine-year term in office and the majority of them, including Chief Justice Solyom, had been elected in 1989 or 1990. With the end of their nine-year terms approaching, the question arose as to whether the activist justices' terms would be renewed. When Chief Justice Solyom's term ended in November 1998, the government and parliament decided not to renew his term. Consequently he left the Court and briefly disappeared from public life.[20]

Scheppele argues that there are at least two factors that could facilitate the rise of a maverick Chief Justice like Laszlo Solyom. The first factor involves the Constitutional Courts, as they have a particular function of judicial review that is to review the constitutionality of laws and

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[18] *See* Alkotmánybírósága (AB) [Constitutional Court] Oct. 31, 1990, 23/1990 (Hung.) (on capital punishment). For discussion of the development of the idea of "invisible constitution" in Hungarian case law, see Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights*, 1992 B.Y.U. L. REV. 41, 78–81 (1992).

[19] *See* Alkotmánybírósága (AB) [Constitutional Court] Jun. 30 1995, 43/1995, MK.56/1995 (Hung.) (on social security benefits). The government was angry with the Court's decisions and it threatened to slash the Court's authority. Justice Solyom, however, went to the media and explained that the Court had to guard the Constitution from political assaults, and the Court had to be aggressive because the constitutional rights of citizens had been threatened by the politicians. *See* Scheppelle, *supra* note 14, at 1783.

[20] Scheppelle, *supra* note 14, at 1785. Solyom took up a guest professorship at the University of Cologne but later returned to Budapest to teach at the new private Catholic law school, Peter Pazmany University. Nevertheless, Solyom remained popular in the public mind and when the term of the Hungarian President was up in the summer of 2005, Solyom ran for presidential election and was elected by the parliament as the Hungarian President. He took office on August 5, 2005 and finished his term as President in August 2010.

governmental decisions and actions.[21] Consequently, the Chief Justice of the Constitutional Court would always be in the midst of political controversy because the Court has to constantly review governmental policies and actions.[22] Second, unlike the Chief Justice of the U.S. Supreme Court who has a role as the top administrator of the U.S. federal court system, the Chief Justice of the Constitutional Court has no administrative relations to other courts. As a result, the Chief Justice of the Constitutional Court has enormous control over its own institution and the Chief Justice can be a public personification of the Constitutional Court.[23]

In her article, Schepple compares Chief Justice Loszlo Solyom to Chief Justice Valery Zorkin, the first Chief Justice of the Russian Constitutional Court. In his early tenure (1991–1993), Chief Justice Zorkin led the Court to become a powerful political actor by taking virtually every politically sensitive case concerning issues of jurisdiction and competencies both within and between branches of the federal government.[24] Overall, the Zorkin Court favored accepting political challenges filed by political actors over civil rights challenges filed by individual citizens.[25] This approach provided incentive to the Court to involve itself in policy disputes and to assert the Court's authority as the arbiter of political disputes.

Chief Justice Zorkin began his fall from power when he became involved in the major political dispute between the executive and the legislatures. Initially, Chief Justice Zorkin attempted to play the role as a broker of a political compromise between President Yeltsin and Supreme Soviet Chairman Khasbulatov.[26] Chief Justice Zorkin, however, went further to enter the political brawls when he sided with Khasbulatov against Yeltsin's proposed referendum on the constitution. Zorkin gave a speech to the Supreme Soviet and argued that the referendum should be postponed.[27] Zorkin suffered significant humiliation when other members of the Court

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[21] *Id.* at 1762–63.
[22] *Id.* at 1764.
[23] *Id.* at 1766.
[24] *See* CARLA THORSON, POLITICS, JUDICIAL REVIEW AND THE RUSSIAN CONSTITUTIONAL COURT 55 (2012).
[25] *Id.* at 57–58.
[26] *Id.* at 105–06.
[27] *Id.* at 106–08. After the legislatures rejected his constitutional referendum proposal, President Yeltsin retaliated by announcing a decree by which he would assume total responsibility for the conduct of affairs in Russia. Zorkin joined Khasbulatov to denounce the speech and moreover, Zorkin convened an emergency session of the Constitutional Court to evaluate the constitutionality of President Yeltsin's speech without waiting for a formal petition.

rebelled against his political endeavors. Many other justices did not agree with Zorkin's initiative to bring the Court into a highly politically sensitive issue and they demanded Zorkin resign from his position as Chief Justice.[28] With his brethren in contempt against him, Zorkin stepped down as the Chief Justice and President Yeltsin issued a decree that suspended the Constitutional Court.

Thorson posits that the easiest explanation of Chief Justice Zorkin's tragic fall is that he did precisely what a judge should not do; he failed to avoid a politically sensitive issue or maintain neutrality.[29] Instead, Zorkin chose to engage in extra-judicial behavior that went beyond his duty as Chief Justice. He became increasingly outspoken on issues related to the distribution of power and engaged in extra-judicial behavior that went beyond constitutional interpretation. Moreover, he involved the Court in "political sensitive questions," which was far from its business.[30]

The new Russian Constitutional Court reopened on January 1, 1994 with a new Chief Justice, new rules regarding the behavior of justices, and new procedures for handling petitions.[31] The new Chief Justice Vladimir Tumanov engaged in a different strategy by avoiding high-profile jurisdictional disputes. The Tumanov Court focused on civil rights issues and federalism questions raised by the republic and its regions.[32] Chief Justice Tumanov reached the mandatory retirement age in 1997 and was succeeded by Marat Baglai. Chief Justice Baglai continued Tumanov's strategy of keeping the Court out of the public eye by avoiding politically sensitive cases. [33]

As mentioned above, the analysis on the judicial leadership has implications on the study of institutional design. In the case of the Russian Constitutional Court, the role of Chief Justice is closely related to the Court's design on term limits. When Vladimir Putin became President in 2000, he moved to change the term limit of judges in order to protect the pro-executive judges like Chief Justice Baglai who would reach mandatory

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[28] Scheppelle, *supra* note 14, at 1832.

[29] THORSON, *supra* note 24, at 101.

[30] *Id.*

[31] *Id.* at 119. The reasons for the Court's survival are not entirely clear, but Carla Thorson provides some explanation on the effort of some politician to convince President Yeltsin that the court ought to continue.

[32] *Id.* at 121.

[33] *Id.* at 145.

retirement age of seventy in 2001. President Putin proposed to remove the mandatory retirement age and extend the judicial tenure from twelve to fifteen years.[34] While President Putin initially attempted to protect his friends, his political strategy was counterproductive. Chief Justice Baglai lost re-election in 2003 as his brethren began to see that Putin favored him. In a dramatic turn, Valerii Zorkin was reelected by his colleagues as Chief Justice to replace Baglai, and has remained the Chief Justice for more than ten years. Based on the current constitutional court procedures—there is no term limit or mandatory retirement age for the Chief Justice—Zorkin will remain in his post for a long time.[35]

The role of judicial leadership can also be traced in the work of Theunis Roux on the Constitutional Court of South Africa (CCSA).[36] Roux's book primarily focuses on the contextual factors that constrained the Constitutional Court's exercise of its judicial power. His work explores the political context of judicial review in South Africa from 1995 to 2005, which was under the leadership of Chief Justice Arthur Chaskalson. Although Roux's work focuses primarily on the theory of contextual factors that constrained the Court in exercising judicial review, one can still trace the role of Chief Justice Chaskalson in shaping the judicial empowerment of the CCSA.[37]

Roux traced the journey of Chaskalson back to the Apartheid era when Chaskalson sublimated his opposition to Apartheid into his role as a human rights lawyer.[38] Chaskalson built a powerful litigation firm, the Legal Resources Center (LRC) with a vision of the common law as the repository of principles of freedom and justice that could be used by activist

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[34] *Id*. at 147. President Putin's proposal was approved at the end of 2000 but was modified by the State Duma so that these new tenure rules would apply only to judges appointed after 1994. In 2001, Putin introduced another reform that restores the mandatory retirement age of 70 (beginning in January 2005) to all those justices appointed after 1994.

[35] The Law provides that the term of the office of the Judge of the Constitutional Court of the Russian Federation shall be indefinite. The age limit for the office of the Judge of the Constitutional Court of the Russian Federation shall be seventy years. The age limit for the office of the Judge, however, shall not apply to the President of the Constitutional Court of the Russian Federation. *See* Federal'nyi Konstitutsionnyi Zakon o Konstitutsionnom Sude Rossiiskoi Federatsii [Federal Constitutional Law on the Constitutional Court of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 13, Item 1447.

[36] *See* THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005 (2013).

[37] *See id.* In his book, Roux focuses on three major elements that the Court should consider in exercising its powers of judicial review: the Court's capacity to decide cases according to acceptable reasoning; support from the general public; and the Court's capacity to resist attacks on its independence.

[38] *Id.* at 221–22.

lawyers to protect individual rights against state encroachment.[39] In June 1994, President Nelson Mandela appointed Arthur Chaskalson as the President of the Constitutional Court where he remained until his retirement in 2005.

Ronald Dworkin had high praise for Chaskalson's leadership, especially in his role as the Chief Justice in leading the Court during the democratic transition period. Dworkin said:

> Since apartheid's end, Chaskalson has rendered what is probably an even more important service to his country. Under his intellectual and administrative leadership, the Constitutional Court has already become one of the most influential such courts in the world. The quality of its craftsmanship and the disciplined imagination with which it has interpreted South Africa's admirable Constitution has helped to ensure a remarkably smooth transition from oppression to a democratic rule of both and law and principle . . . .[40]

Roux believes Dworkin's remarks present a causal link between the way the Court responded to its judicial mandate and South Africa's relatively peaceful transition to democracy.[41] Roux argues that Dworkin's summary of Chaskalson's leadership must be interpreted in light of the Court's strategy on socio-economic rights, in that the judges were able to assert their institutional function in the post-apartheid era.[42] The Court's approach to socio-economic rights contributes to democratic consolidation by subjecting majority rule to constitutional restraints.[43]

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[39] *Id.* at 222. Justice Chaskalson founded LRC as South Africa's first public interest law firm to fight apartheid, modeling it after the NAACP Legal Defense and Educational Fund. Financing came largely from three American sources: the Ford Foundation, the Carnegie Corporation of New York, and the Rockefeller Brothers Fund. *See also* MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND UNITED STATES 32–33 (2009); Douglas Martin, A*rthur Chaskalson, Chief South African Jurist, Dies at 81*, N.Y. TIMES (Dec. 3, 2012), http://www.nytimes.com/2012/12/04/world/africa/arthur-chaskalson-south-african-chief-justice-dies-at-81.html?_r=0.

[40] Ronald Dworkin, *Response to Overseas Commentators*, 1 INT'L. J CONST. L. 651, 651–52 (2003).

[41] ROUX, *supra* note 36, at 41.

[42] *Id.* at 42.

[43] For the scholarship of the Court's strategy in the area of socio-economic rights see CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001); Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004); Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT'L L. & FOR. AFF. 369 (2008);

Roux praises the Constitutional Court of South Africa as one of the most successful of the post-Cold War constitutional courts. Roux believes the Chaskalson Court's ability to survive until May of 2005 without any debilitating attacks on its independence is a remarkable achievement.[44] In his book, Roux explains that there are several factors that led to the survival of the Chaskalson Court, but one of the key successes of the Chaskalson Court lay in its ability to find the balance between its role as a forum to bridge over the competing political forces and its consistent support for a range of constitutional rights.[45]

Chief Justice Chaskalson was a strategic Chief Justice who knew how to enhance the Court's authority by engaging in rights-based discourse while also fortifying the Court's status by playing a minimalist role in some policy areas. Chief Justice Chaskalson described his minimalist strategy as follows:

> I think in the early days it's appropriate not to decide more than you have to decide . . . . To that extent, then, the Court has indicated that it will endeavor not to decide more than it has to and that constitutional issue ought not to be raised if the matter can dealt with on other legal grounds.[46]

Nevertheless, he took a maximalist view on socio-economic rights. He stated that "the socio economic rights are entrenched in the Bill of Rights. Unless the courts resort to stratagem of declaring disputes concerning socio economic rights to be political questions and for that reason decline jurisdiction, they must confront and decide the hard cases that arise . . . ."[47] Thus, the Chaskalson Court was able to play an effective role in South African politics by playing a combination of minimalist and maximalist strategy.

Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as "Insurance Swaps"* 1–29 (U. Chi. Pub. Law & Legal Theory, Working Paper No. 436, 2013); KATHARINE G. YOUNG CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012).

[44] ROUX, *supra* note 36, at 188.

[45] *Id.* at 36.

[46] Kate Kempton & Malcolm MacLaren, *The Protection of Human Rights in South Africa: A Conversation with Justice Arthur Chaskalson, President of the Constitutional Court of South Africa*, 56 U. TORONTO FAC. L. REV. 161, 170 (1998).

[47] Arthur Chaskalson, *From Wickedness to Equality: The Moral Transformation of South African Law*, 1 INT'L J. CONST. L. 590, 604 (2003).

Ran Hirschl, in his seminal work *Constitutional Theocracy*, also includes an analysis on the importance of the Chief Justice's position in the context of political control of constitutional courts and judges.[48] Hirschl's analysis ranges from the Chief Justice Maher Abdul Wahed of the Supreme Constitutional Court of Egypt to Chief Justice Aharon Barak of the Supreme Court of Israel.[49] Haig Patapan also dedicated a small fraction of his scholarship on the rule of the Chief Justices in understanding the nature of judicial politics in Asia.[50] Some scholars have posited Chief Justice Ifthikar Muhammad Chaudhry of Pakistan as the exemplar of courage and bravery when he stood up against the military headed executive, General Musharraf.[51] Chaudhry's suspension and house arrest then led to an unprecedented revolt led by Pakistani lawyers in support of judicial independence.[52] Thus, Chaudhry's heroic leadership is one of the most striking examples of how the actions of an individual Chief Justice can have major implications.

The experiences of Chief Justices from different countries provide important data that judicial leadership is an important factor for understanding the nature of judicial politics. Moreover, the institutional design, including term limits and the general political landscape are factors that heavily influence the nature and extent of the judicial strategy that individual Chief Justices choose to employ.

III. THE HISTORICAL BACKGROUND OF THE INDONESIAN CONSTITUTIONAL COURT

In order to better understand the role of the Chief Justice in the Indonesian Constitutional Court, this part presents a brief survey of the Court's history. Historically, the Indonesian legal system is based on the civil law tradition of the Netherlands, under which a judge cannot invalidate a statute on the ground that it is unconstitutional. Within the civil law

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[48] *See* RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 85–95 (2010).

[49] *See id.*

[50] Patapan, *supra* note 8, at 3.

[51] *See* Charles Kennedy, *The Judicialization of Politics in Pakistan*, *in* THE JUDICIALIZATION OF POLITICS IN ASIA (Bjorn Dressel ed., 2012); Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35 N.C.J. INT'L. L. & COM. REG. 485 (2010); Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan Under Musharraf*, 35 LAW & SOC. INQUIRY 985 (2010)

[52] For further discussion on the "Lawyers' Movement" in Pakistan, see Moeen H. Cheema, *The "Chaudhry Court": Deconstructing the "Judicialization of Politics" in Pakistan*, 25 WASH. INT'L L.J. 448, 450–55.

tradition, Acts of Parliament are the supreme expression of the democratic will and consequently courts may not challenge them. Nevertheless, the Indonesian Supreme Court could review government regulations on the grounds that they violated Acts of Parliament.[53] But the judiciary was too weak to exercise even the limited power it had.[54]

One of the major factors that contributed to the Supreme Court's inability to use its limited judicial review authority was the executive's control of and interference in the courts. After the New Order military government under the leadership of General Soeharto came to power in 1966, the executive branch moved to control the judiciary. The 1970 Judiciary Law gave the Government tight control of the organizational, administrative, and financial aspects of the judiciary.[55] The Government then used this control over court administration to pressure judges into bowing to the interests of the government. After some time, the Court itself moved into voluntary compliance in order to prove its loyalty to the Government.[56]

For more than thirty-two years, Indonesia was under the authoritarian rule of General Soeharto's military regime. By 1998, General Soeharto was aging and ailing, but he gave no indication that he intended to step down in the near future. In March of 1998, he was sworn in as President for his seventh five-year term, and appointed his most trusted lieutenant, B.J. Habibie, as his vice president.[57] Soeharto's seventh term in office lasted only two months. He was forced to resign due to mounting popular unrest and a collapsed economy that he was unable to revive. After Soeharto tendered his resignation on May 21, 1998, Habibie was sworn in as the new President on the same day. His presidency marked the beginning of a new era called *Reformasi* (Reform). *Reformasi* brought new hope for institutional change, including opportunities to establish an independent

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[53] Law of the Republic of Indonesia, No. 14 of 1970 on the Basic Principles of the Judiciary.

[54] For detailed information about the performance of the Indonesian Supreme Court, see SEBASTIAAN POMPE, THE INDONESIAN SUPREME COURT: A STUDY OF INSTITUTIONAL COLLAPSE (2005).

[55] *See id.* at 111–29.

[56] *See id.* at 124–29.

[57] *See* ADAM SCHWARZ, A NATION IN WAITING: INDONESIA'S SEARCH FOR STABILITY (2000). Prior to his appointment, Habibie had held the post of Minister of Research and Technology for twenty years. *Id.* at 71. During his tenure as technology czar, Habibie presided over the many strategic government projects, ranging from aircraft manufacturing to satellite technology. *Id.* In the early 1990s, Soeharto extended a mandate to Habibie to become more active in political arenas. He became the Chairperson of the Association of Indonesian Moslem Intellectuals, *Ikatan Cendekiawan Muslim Indonesia* (ICMI), a new center of politico-bureaucratic power within the government. *Id.* at 85–86.

judiciary with judicial review authority.[58] Habibie's administration held parliamentary elections in June of 1999.

Following the parliamentary elections, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR) held a general assembly to elect a new President. Habibie, however, did not receive sufficient support to run as their next presidential candidate, and consequently had to withdraw his bid to recapture the presidency.[59] The Assembly instead elected Abdurrahman Wahid, who was supported by the Islamist political bloc, Central Axis, as the next President.[60] Wahid was the long-time religious leader of a Muslim organization known as *Nahdatul Ulama*.

The General Session of the Assembly (MPR) was also the first opportunity for politicians to address the issue of constitutional reform, including the power of judicial review, in the new government.[61] The First General Assembly Session in 1999, and the following Session in 2000, however, failed to reach consensus on the establishment of a constitutional court with judicial review authority. It was not until President Wahid's impeachment in July 2001 that politicians began to seriously consider the importance of the Constitutional Court.

Less than two years after the politicians elected Wahid as President, they impeached him based on the allegation that his aide used his name to illegally secure US 4,000,000 worth of funds from the State Logistics Agency. Vice President Megawati Soekarnoputri replaced the impeached President Wahid. Fearing she would be subject to the same fate as Wahid,

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[58] *See* Benny K. Harman, Perkembangan Pemikiran Mengenai Perlunya Pengujian UU Terhadap UUD Dalam Sejarah Ketatanegaraan Indonesia, 1945–2004 [The Development of Legal Thought on the Judicial Review of Act Parliament Against the Constitution in the Indonesian Constitutional History, 1945–2004] (May 20, 2006) (unpublished PhD dissertation, University of Indonesia) (on file with author).

[59] BACHARUDDIN JUSUF HABIBIE, DECISIVE MOMENTS: INDONESIA'S LONG ROAD TO DEMOCRACY 428 (2006).

[60] *See* YANG RAZALI KASSIM, TRANSITION POLITICS IN SOUTHEAST ASIA: DYNAMICS OF LEADERSHIP CHANGE AND SUCCESSION IN INDONESIA AND MALAYSIA 146 (2005).

[61] For a detailed discussion of the Constitutional Reform process, see SIMON BUTT & TIM LINDSEY, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS (2012); DENNY INDRAYANA, INDONESIAN CONSTITUTIONAL REFORM, 1999–2002: AN EVALUATION OF CONSTITUTION-MAKING IN TRANSITION (2008); DONALD L. HOROWITZ, CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA (2013).

Megawati proposed the creation of the Constitutional Court that could review impeachment motions against a sitting President.[62]

While acknowledging that the Wahid impeachment was an important trigger for the establishment of the Constitutional Court, many scholars have dismissed the impeachment as the sole reason behind the creation of the Court, but rather there were many factors at play.[63] Instead of dismissing Wahid's impeachment, this article would like to make a distinction between proximate and ultimate causation of the creation of the Court. Such distinction will lead us to a better understanding of the establishment of the Constitutional Court. This article argues that President Wahid's impeachment was the proximate cause of the establishment of the Constitutional Court. From a historical and political perspective, one of the ultimate causes of the establishment of the constitutional court was the culmination of the consistent demand made by lawyers, scholars, and non-governmental organizations (NGOs) to the long absence of judicial review in Indonesia.[64]

In the early days of Soeharto's New Order regime, the Judges Association and the government fought bitterly over the issue of judicial power and constitutional review. Nevertheless, the Judges Association stood alone and did not have sufficient support to bring about such reform. In the end the judges and their supporters lost.[65] Fast forward to the period after the fall of New Order regime, the activists and NGOs under the banner of *Koalisi Ornop untuk Konstitusi Baru* (NGOs Coalition for a New Constitution), proposed the establishment a Constitutional Commission, with some hope that the Commission will adopt judicial review.[66] The NGOs Coalition came out with several proposals on the establishment of an independent constitutional commission during the Assembly annual session in November 2001 including that members of the commission shall be

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[62] *See* Stefanus Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court*, *in* NEW COURTS IN ASIA 158, 162 (Andrew Harding & Penelope (Pip) Nicholson eds., 2010).

[63] Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 6 SING. J. INT'L & COMP. L. 244, 260–61 (2002). *See also* Harman, *supra* note 58; SIMON BUTT, THE CONSTITUTIONAL COURT AND DEMOCRACY IN INDONESIA (2015).

[64] Lindsey, *supra* note 63, at 261–66.

[65] *See* POMPE, *supra* note 54, at 213.

[66] Lindsey, *supra* note 63, at 266. The Coalition comprises of 17 NGOs, including the Center for Electoral Reform, the Independent Election Monitoring Committee, Indonesian Corruption Watch, the Indonesian Legal Aid and Human Rights Association, and the Indonesian Forum for the Environment.

democratically elected, and shall consist of independent civilians from all provinces, social groups, and experts.[67]

It was true that judges, lawyers, and NGOs had long pushed for judicial independence and judicial review. Nevertheless, civil society elements did not play a significant role in the creation of the Constitutional Court. During the constitutional reform process, the Assembly (MPR), however, rejected the proposal of the Constitutional Commission and decided that its Working Body should be responsible for preparing amendments.[68] Thus, the civil society represented by NGOs had no direct input on the amendment process in the Assembly (MPR) at all.

On November 9, 2001, the Third General Assembly Session voted in favor of a constitutional amendment that created the Indonesian Constitutional Court and endowed it with the authority to review impeachment motions against the President and/or Vice President.[69] Moreover, the constitutional amendment also equipped the new Court with the authority to review the constitutionality of statutes, to resolve disputes over the powers of state institutions, to review a petition for dissolution of a political party, and to resolve electoral disputes.[70]

It is important to note that the constitutional amendment provides that "[t]he judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court."[71] Essentially, the amendment divides the judiciary, in a broad sense, into two parts: the "Supreme Court" and the "Constitutional Court." This model assigns different tasks to each body: it assigns the Supreme Court the power of ordinary judicial functions to decide concrete cases in civil, criminal, and administrative matters, while it entrusts the Constitutional Court with the specific "constitutional function," of reviewing the validity of legislation.

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[67] *See* Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change?*, 6 SING. J. INT'L & COMP. L. 116, 143 (2002).

[68] DENNY INDRAYANA, INDONESIAN CONSTITUTIONAL REFORM 1999–2002: AN EVALUATION OF CONSTITUTION-MAKING IN TRANSITION 170 (2008)

[69] Undang Undang Dasar Negara Republik Indonesia [Constitution] art. 7A.

[70] *Id.* arts. 24(C)(1), (2).

[71] *Id.* art. 24(2).

With regard to judicial review, the Constitution maintains in the Supreme Court the authority to review ordinances and regulations made under any statutes.[72] At the same time, the Constitution equips the Constitutional Court with authority to conduct reviews of statutory legislation. This arrangement means that the right of judicial review is not uniformly given to a single court. Instead the Supreme Court and the Constitutional Court each share different judicial review authority, which this article refers to as "jurisdictional cohabitation."

The Constitution mandated that the Government erect the new Constitutional Court by August 17, 2003 at the latest.[73] The Government and the House of Representatives (*Dewan Perwakilan Rakyat* or DPR), however, did not approve the bill establishing the Constitutional Court until August 6, 2003, which was signed by the President on August 13, 2003.[74] Following the approval, the Government, the DPR, and the Supreme Court (*Mahkamah Agung*) had to rush to select judges for the Court before the Court opened its doors on August 18, 2003.

IV. THE AMBITION, SUCCESS AND FAILURE OF THE INDONESIAN JOHN MARSHALL, JIMLY ASSHIDDIQIE

Having explained the historical background of the Constitutional Court, this article will move to discuss leadership of the first Chief Justice of the Indonesian Constitutional Court, Jimly Asshiddiqie. The 2003 Constitutional Court Law provides that the Chief Justice and Deputy Chief Justice are elected by the Constitutional Court Justices.[75] The Nine Constitutional Court Justices were sworn in on August 16, 2003. Soon after their inauguration, the nine Justices held their first meeting to elect the Chief Justice, and elected Jimly Asshiddiqie as the first Chief Justice. Looking at Asshiddiqie's personal background and his rise to the bench helps to explain why his leadership style played an important role in building the Indonesian Constitutional Court.

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[72] *See id.* art. 24A.

[73] *Id.* Transitional Provision, art. III of the Fourth Amendment.

[74] MAHKAMAH KONSTITUSI REPUBLIK INDONESIA [CONSTITUTIONAL COURT], MENEGAKKAN NEGARA HUKUM YANG DEMOKRATIS: CATATAN PERJALANAN TIGA TAHUN MAHKAMAH KONSTITUSI 2003–2006 [TO BUILD A DEMOCRATIC STATE BASED ON RULE OF LAW: THREE YEARS OF THE INDONESIAN CONSTITUTIONAL COURT: 2003–2006] (2006) [hereinafter CONSTITUTIONAL COURT, THREE YEARS OF THE INDONESIAN CONSTITUTIONAL COURT].

[75] Law of the Republic of Indonesia, No. 24 of 2003 on the Constitutional Court, art. 4(3).

A. The Rise of Jimly Asshiddiqie: From Academia to Judiciary

Jimly Asshiddiqie received his doctorate in Constitutional Law from the University of Indonesia. In the early 1990s, he joined Association of Indonesian Muslim Intellectuals (ICMI), which had emerged as a new political force within the government. The rise of ICMI benefited Asshiddiqie as the Government appointed him as the Secretary to the Minister of Education in 1993. Five years later, Vice President Habibie appointed him as his Assistant for Social Welfare and Poverty Alleviation.[76]

When Habibe became President, he established the Council for Restoration of Security and Legal System (*Dewan Penegakan Keamanan dan Sistem Hukum*) in his attempt to overcome the political crisis in the country.[77] Habibie appointed Jimly Asshiddiqie as Secretary for the Council for Restoration. His primary duties included coordinating Cabinet ministers and political leaders who sat on the Council. On February 24, 1999, Habibie assigned Asshiddiqie to another important position as the Coordinator for Legal and Statutory Reform Team, which reported directly to the President.[78] There was little doubt that Asshiddiqie played a significant role in the legal reform process during the Habibie administration.

After his political patron Habibie lost his presidential bid in 1999, Asshiddiqie went back to academia to teach at the University of Indonesia. He returned to public service for a brief moment when the People's Consultative Assembly (MPR) called him to join an expert team on the constitutional reform process.[79] By the time the government established the Constitutional Court in 2003, Asshiddiqie had established a reputation as an expert on constitutional law and a skillful politician. With excellent credentials, he was one of the top choices to lead the new Constitutional Court.

The Constitution distributes the appointment power equally among the three branches of the government. The President, the House of

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[76] *See* ZAENAL ABIDIN E. P. & LISA SUROSO, SETENGAH ABAD JIMLY ASSHIDDIQIE: KONSTITUSI DAN SEMANGAT KEBANGSAAN [FIFTY YEARS OF JIMLY ASSHIDDIQIE: CONSTITUTION AND THE SPIRIT OF NATIONHOOD] (2006).

[77] Presidential Decree No. 191 of 1998.

[78] Presidential Decree No. 18 of 1999 (Feb. 24, 1999).

[79] *Assembly working group blasted over constitutional amendments*, JAKARTA POST (Mar. 22, 2001), http://www.thejakartapost.com/news/2001/03/22/assembly-working-group-blasted-over-constitutional-amendments.html.

Representative, and the Supreme Court all possess authority to appoint the Constitutional Court Justices.[80] In August 2003, the House of Representatives immediately appointed Jimly Asshiddiqie as a Constitutional Court justice along with the other two justices, Achmad Roestandi and I Gede Palguna.[81] The President appointed three justices, Achmad Natabaya, Abdul Muktie Fadjar, and Harjono (one name only). The Supreme Court appointed Laica Marzuki, Maruarar Siahaan, and Soedarsono (one name only) to fill the remaining three spots. None of these new justices had a public profile like Asshiddiqie. With his stellar reputation and political experience, Asshidiqie was elected by his colleagues as the first Chief Justice of the Indonesian Constitutional Court.

B. Jimly Asshiddiqie's Strategies to Build the Court

Jimly Asshiddiqie transformed the Court from an institution that lacked both external support and infrastructure into one that is now capable of standing independent from the other branches of government. Asshiddiqie's leadership strategies are important as they suggest the extent to which his style influenced the Court's performance. In other words, it shines light on whether his leadership helped the Court overcome the challenges and obstacles that prevented the Court from exercising its authority.

The first obstacle for the Court in exercising its authority was the statutory limitation imposed by the legislative branch. From the beginning, politicians in the legislative branch did not have any intention of creating a Court that could exercise a robust model of judicial review. They endowed the Court with the authority to review the constitutionality of statutes but not any governmental ordinances, regulations, or actions.[82] Furthermore, they only allowed the Court to review the constitutionality of statutes that were enacted after October 19, 1999, the date when the constitutional reform process began.[83] It is now obvious that the politicians designed the Court with limited authority and the legislature did not want to see the Court play a prominent role in the Indonesian political scene.

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[80] Article 24C(3) of the Indonesian Constitution provides that the Constitutional Court shall be composed of nine justices, in which three shall be nominated by the President, three nominated by the House of Representatives (*Dewan Perwakilan Rakyat* or DPR), and three nominated by the Supreme Court. Undang Undang Dasar Negara Republik Indonesia [Constitution] art. 24C(3).

[81] *Government Names Seven Candidates for New Court*, JAKARTA POST, Aug. 13, 2003.

[82] Law of the Republic of Indonesia, No. 24 of 2003 on the Constitutional Court, arts. 24(1), 24(2).

[83] *Id.* art. 50.

The second obstacle for the Court was the lack of governmental support. When the Court opened on August 19, 2003, it had no funding, no office, and no support staff. Chief Justice Jimly Asshidiqie frequently stated that he started the Court with only three pieces of paper: the Constitution, the Constitutional Court Law, and the Presidential Decree that appointed the Constitutional Court Justices.[84] With no office or infrastructure, the Court had to use the Chief Justice's mobile phone as its first contact number.[85] It was not until January 2004 that the government let the Court use a building that originally belonged to the Ministry of Communication and Information as a temporary headquarters. The lack of sufficient governmental support left the responsibility of building the Court squarely in the Chief Justice's hands.

Having reviewed the obstacles that the Court faced in its infancy period, the following section of this article will address the following questions: How did Chief Justice Asshiddiqie lead the Court to overcome this obvious lack of support as well as the many obstacles that beset the Court in the early days of its operation? How did he build the Court into an institution with the capacity to stand up against the other branches of government?

1. Setting a Doctrinal Foundation for Judicial Review

Chief Justice Asshiddiqie's first strategy was to remove any statutory rule that prevented the Court from exercising its authority. This strategy was primarily aimed at removing Article 50 of the Constitutional Court Law, which stated that the Court could only review statutes that were enacted after October 19, 1999. As a constitutional law scholar, Asshiddiqie fully understood that if the Court could not review longstanding statutes, the whole existence of the Court would be meaningless. During his nomination hearing in front of the House Judiciary Committee, he made it clear that

[84] Jimly Asshiddiqie, Creating A Constitutional Court for a New Democracy, Lecture at Melbourne Law School (Mar. 11, 2009). *See also* Jimly Asshiddiqie, *Bermodal tiga lembar kertas* [*With Three Pieces of Paper*], REPUBLIKA, Jan. 11, 2004.

[85] Jimly Asshidiqie, *Setahun Mahkamah Konstitusi: Refleksi, Gagasan Dan Penyelenggaraan, Serta Setangkup Harapan* [*The First Year of the Constitutional Court: Reflection, Idea, Action and Hope*], *in* MENJAGA DENYUT KONSTITUSI: REFLEKSI SATU TAHUN MAHKAMAH KONSTITUSI [KEEPING THE CONSTITUTION ALIVE: REFLECTION ON THE FIRST ANNIVERSARY OF THE CONSTITUTIONAL COURT] 3, 14 (Refly Harun et al. eds., 2004).

sooner or later the Court would nullify Article 50 because it was contrary to the Constitution.[86]

Indeed, it did not take very long for the Court to decide the constitutionality of Article 50.[87] The opportunity for the Court to review Article 50 came when it considered the *Chamber of Commerce Law Case* in 2005.[88] The claimants were members of the Medium and Small Scale Chambers of Commerce who challenged the constitutionality of the Chamber of Commerce Law of 1987. Furthermore, the claimants also asked the Court to review Article 50. The Court moved swiftly in declaring Article 50 unconstitutional and invalidated it entirely.[89]

Chief Justice Asshiddiqie stated that it required great courage for the newly established Court to invalidate Article 50.[90] He explained the Court's decision as *ijtihad*, a term in Islamic law that describes the process of making a decision by personal effort, independently of any school of thought of Islamic jurisprudence.[91] Moreover, Asshiddiqie said that he drew inspiration from John Marshall, a former Chief Justice of the United States Supreme Court and architect of the historic decision *Marbury v. Madison*.[92] It was in *Marbury* that the U.S. Supreme Court claimed for itself the power to judge the constitutionality of statutes. "If John Marshall had courage to set a cornerstone for judicial review in the American legal history, I can also do the same thing for my country," said Asshiddiqie.[93]

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[86] *Id.* at 13.

[87] When the Court decided its first case, it immediately grappled with the jurisdictional limitation imposed by Article 50. The claimant was a district court judge who challenged the constitutionality of the 1985 Supreme Court Law. The issue was whether the Court could review the law enacted in 1985. Nevertheless, the Court did not explicitly nullify Article 50, instead deciding "to set aside" (*mengenyampingkan*) Article 50. Why did the Court not explicitly nullify it? One plausible answer is because the claimant did not formally request the Court to do so. The claimant challenged the constitutionality of the Supreme Court Law, but not the Constitutional Court Law. Decision, Reviewing Law No. 1 of 1987 on the Chamber of Commerce and Industry, No. 066/PUU-II/2004 (Constitutional Court, Apr. 12, 2005), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_Putusan%20066_PUU-II_2004%20(UU%20MKRI).pdf.

[88] *See id.*

[89] *Id.* at 55.

[90] JIMLY ASHIDDIQIE, MENEGAKKAN TIANG KONSTITUSI: MEMOAR LIMA TAHUN KEPEMIMPINAN: JIMLY ASHIDDIQIE PROF. DR. J, S.H. DI KAHNAMAH KONSTITUSI (2003–2008) [MEMOIR OF FIVE YEARS OF LEADERSHIP] 165 (2008).

[91] *Id.*

[92] *See* Marbury v. Madison, 5 U.S. 137 (1803).

[93] Interview with Jimly Asshiddiqie, Chief Justice of the Indonesian Constitutional Court, in Jakarta, Indon. (July 31, 2006) (translated to English by author).

2. The Court as a Forum to Review Social, Economic and Political Issues

Initially, the politicians created the Court with limited authority. Hence, they never imagined a Court that would review many statutory regulations, touching on social and economic issues, and implicating the protection of fundamental rights. The driving force behind this surprising result was, indeed, Chief Justice Asshiddiqie.

Asshiddiqie believed that in a country experiencing economic and political transition like Indonesia, there should be a program for economic and political reform. Moreover, he believed that the Court could contribute to the economic and political reform process,[94] particularly by reviewing governmental policies.[95] Based on this belief, Asshiddiqie moved to expand the Court's limited authority, thus endowing it with the tools to scrutinize political decisions made by the executive and legislative branches.

The Court's decision in the *Electricity Law Case* is an example of how the Court reviewed economic policy.[96] The center of dispute in this case was the Electricity Law, which allowed the involvement of private enterprises in the electricity industry.[97] The Court ruled that electricity was an important sector for the country because it constituted a common good.[98] The Court further held that "it is only the state-owned enterprises that can manage the electricity industry."[99] The Court decided to strike down the

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[94] ROFIQUL-UMAM DKK., KONSTITUSI DAN KETATANEGARAAN INDONESIA KONTEMPORER: PEMIKIRAN JIMLY ASSHIDDIQIE DAN PARA PAKAR HUKUM [CONSTITUTION AND CONSTITUTIONALISM IN CONTEMPORARY INDONESIA: THE THOUGHTS OF JIMLY ASSHIDDIQIE AND OTHERS] 39 (Rofiqul-Umam Ahmad et al., eds. 2007).

[95] *See* Oral Argument, Reviewing Law No. 30 of 2002 on the Anti-Corruption Commission Law, Nos. 012/PUU-IV/2006, 016/PUU-IV/2006, 019/PUU-IV/2006 (Constitutional Court, Nov. 21, 2006), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_PUTUSN%20%20KPK%20%20%20(012-016-019)%20-%20Eng.pdf.

[96] Decision, Reviewing Law No. 20 of 2000 on Electrical Power, No. 001-021-022/PUU-I/2003 (Constitutional Court, Dec. 15, 2004) [hereinafter the *Electricity Law Case*]. An English translation of the case is available at http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_Putusan%20001-021-022_PUU-I_2003%20(UU%20Ketenagalistrikan)%20%20English.doc.pdf

[97] *See* Law of the Republic of Indonesia, No. 20 of 2002 on Electrical Power.

[98] *Electricity Law Case*, *supra* note 96, at 345. The Court used the term "*hajat hidup orang banyak*," which I translated loosely to the common good.

[99] *Id.* at 348.

entire statute because the involvement of private enterprises in electricity industry was contrary to the economic clause of the Constitution.[100]

The Court continued to deal with the privatization policies in the *Oil and Gas Law I Case*.[101] In this case, four human rights-based NGOs, a labor union, and an academic challenged the constitutionality of the Law no. 22 of 2001 on Oil and Gas. The Court held that the Law did not relinquish state control over oil and gas because all aspects of "controlled by the state," which include regulation, administration, management, supervision, remain in the hands of government.[102] Nevertheless, the Court agreed with the claimant that private business entities shall not be authorized to conduct exploitation and exploration activities because it will deprive the state control over oil and gas industry.[103]

Apart from the issue of the state control, the Court also had to address the fuel prices regulation and the production quota regulation, which mandated the private business entity to provide a maximum of twenty-five percent of its share of Crude Oil and/or natural Gas production to fulfill the domestic demands.[104] The Court held that the twenty-five percent maximum production quota was contrary to Article 33(3) because the principle of common good requires sufficient fuel stocks for domestic consumption. The Court held that the provision potentially could be abused by private business entities by providing a minimum amount of their oil and gas products, which eventually would threaten the domestic oil supply. Finally, the Court had to deal with the issue whether market mechanisms could properly govern fuel prices. It held that fuel prices should be regulated by the Government rather than by the market mechanism.[105]

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[100] Article 33(2) of the Indonesian Constitution states that "[s]ectors of production which are important for the country and affect the life of the people shall be under the powers of the State." Undang Undang Dasar Negara Republik Indonesia [Constitution] art. 33(2).

[101] *See* Decision, Reviewing Law No. 22 of 2001 on Oil and Natural Gas, No. 002/PUU-I/2003 (Constitutional Court, Dec. 21, 2004) [hereinafter *Oil and Natural Gas Law I Case*]. The case is available in English at http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_PUTUSAN%20PUU%20%20002-I-2003% 20(UU%20Migas)%20-%20English.pdf.

[102] *Id.* at 220.

[103] *Id.* at 222

[104] Law of the Republic of Indonesia, No. 22 of 2001 on Oil and Gas, art. 22(1).

[105] *Oil and Natural Gas Law I Case*, *supra* note 101, at 227.

In the *Water Resources Law I Case*, [106] the Court, however, refused to invalidate the Water Resources Law that accorded private corporations control over Indonesia's water resources.[107] Nevertheless, in its dicta the Court stated that the government has a duty to fulfill citizen access to clean water in several ways.[108] The Court stated further that "if the Law was interpreted different that the Court's guideline, then it can be reviewed further (conditionally constitutional)."[109] In other words, the Court viewed that the Law is constitutional as long as the Government implements the Law according to the Court's interpretation, but if the Government implements the law in different way, the claimant may challenge the statute for further review.[110]

Another important policy area for the Court was the protection of civil and political rights, as many citizens expected the Court to correct past human rights abuses. Indeed, in its first few years, the Court aggressively pushed the government to recognize the protection of fundamental liberties and correct its past errors. The first high profile civil and political rights case was the *Communist Party Case* in 2003.[111] The claimants were thirty-five political activists who filed a petition challenging the constitutionality of the General Election Law.[112] The Law banned a former member of the Indonesian Communist Party (*Partai Komunis Indonesia* - PKI) and its affiliate organizations from becoming a legislator in the national and local parliaments.[113] The ban existed since the late 1960s, after the government

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[106] Decision, Reviewing the Law No. 7 of 2004 on Water Resources, No. 058-059-060-063/PUU-II/2004 (Constitutional Court, July 19, 2005), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_Putusan%20058-059-063%20PUU-II-2004.%20008-PUU-III-2005%20(UU%20SDA).pdf [hereinafter *Water Resources Law Case*].

[107] Undang–Undang No. 7 Tahun 2004 tentang Sumber Daya Air [Law of the Republic of Indonesia, No. 7 of 2004 on Water Resources].

[108] *Water Resources Law Case*, *supra* note 106, at 492. The Court held that the state has 1) a duty as regulator to issue license for water usage; 2) a duty to provide daily supply and irrigation for community farming (*pertanian rakyat*); 3) regional owned water companies should be positioned as the state's operational unit and not as profit oriented company; and finally, 4) a duty to provide clean water is basically in the hand of central government and regional government, any involvement of private enterprises and cooperative are limited within the context that the government has not been able to provide clean water itself.

[109] *Id.* at 495

[110] *Id.*

[111] Decision, Reviewing the Law No. 12 of 2003 on the Election of National and Regional Parliament, No. 011-017/PUU-I/2003 (Constitutional Court, Feb. 24, 2004), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/Putusan0172003tgl240204.pdf [hereinafter *Communist Party Case*].

[112] *See* Law of the Republic of Indonesia, No. 12 of 2003 on General Election.

[113] *Id.* art. 60(g).

accused the Indonesian Communist Party of kidnapping and killing six Army generals.[114] The Constitutional Court struck down the provision in the General Election Law, and held "individual members of the Communist Party and its affiliates should be treated equally as citizens without discrimination."[115]

The Court continued to pressure the government to respect fundamental liberties in the *Lese Majesty Case*.[116] Eggi Sudjana and Pandapotan Lubis were two veteran activists who were facing charges for insulting President Susilo Bambang Yudhoyono. Both of them filed a petition asking the Court to nullify the *lese majesty* articles in the Criminal Code that formed the basis of their criminal charges.[117] The *lese majesty* is an offense against the dignity of a reigning sovereignty or against a state. The prohibition dated from the colonial period, but had been used by subsequent governments to jail political opponents and regime critics.[118] The Court accepted the petition and declared that the *lese majesty* articles were unconstitutional. The Court held that "*lese majesty* articles were irrelevant in a democratic state like Indonesia because they could negate the principle of equality before the law, and moreover it could harm the freedom of expression, freedom of information, and the principle of legal uncertainty."[119]

In the *Spreading Hatred Case*,[120] the Court unanimously invalidated the "spreading hatred" articles.[121] The claimant, Panji Utomo, is an activist based in Aceh, who was convicted by a district court for violating the "spreading hatred" articles. Utomo was found guilty of criticizing the work of the Aceh and Nias Reconstruction and Rehabilitation Agency. The Court

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[114] For details on the impact of anti-communist witch-hunts, see ARIEL HERYANTO, STATE TERRORISM AND POLITICAL IDENTITY IN INDONESIA: FATALLY BELONGING (2006).

[115] *See Communist Party Case*, *supra* note 111, at 36–37.

[116] Decision, Reviewing the Indonesian Criminal Code, No 013-022/PUU-IV/2006 (Constitutional Court, Dec. 21, 2004) [hereinafter *Lese Majeste Case*].

[117] Undang-Undang Hukum Pidana, arts. 134, 136–37 [Criminal Code].

[118] *See* JOSEPH SAUNDERS, HUMAN RIGHTS WATCH, ACADEMIC FREEDOM IN INDONESIA: DISMANTLING SOEHARTO-ERA BARRIERS 53–61 (1998), https://www.hrw.org/legacy/reports98/indonesia2/Borneote-07.htm.

[119] *Lese Majeste Case*, *supra* note 116, at 61.

[120] Decision, Reviewing Articles 154 and 155 of the Criminal Code, No. 6/PUU-V/2007 (Constitutional Court, July 17, 2007) [hereinafter *Spreading Hatred Case*].

[121] The "spreading hatred" articles (Articles 154–57 of the Criminal Code) involve "public expression of hate or insult to the government." Undang-Undang Hukum Pidana, arts. 154–57 [Criminal Code]. The articles are different than the "lese majeste" articles (Articles 134–37 of the Criminal Code), which criminalize insults directed at the president or the vice president. Undang-Undang Hukum Pidana, arts. 134–37 [Criminal Code].

ruled that the potential for the abuse of power through these articles is flagrant because the provisions could be subjectively interpreted based on the government's interests.[122] Prosecutors were not even required to prove whether the statement or opinion had resulted in the spread of hatred or hostility in general public. The Court ruled further that these articles were irrational because a good abiding citizen would not hate his country or his government, unless he plots a rebellion or coup d'état.[123] The Court finally decided that these provisions were unconstitutional because they violated constitutional rights to freedom of association and freedom of expression.

By the time the Court finished its first five-year term in 2008, it had struck down many important acts of the legislature. The Chief Justice's heroic leadership style played an important role in shaping the Court's decisions. He managed to apply his vision that the Court should solve the economic issues in transition and overcoming the legacy of Soeharto's authoritarian regime.

3. Standing Strategy that Enhanced the Court's Authority

One of the most important aspects of judicial review is the doctrine of standing. Standing refers to the issue of who can bring a claim to the court, including whether an individual or a designated institution can bring a claim. Under the leadership of Jimly Asshiddiqie, the Court crafted a doctrine of standing that expanded access for people to bring cases before the Court. Moreover, Chief Justice Asshiddiqie used the standing doctrine as a strategy to strengthen the judicial authority of his Court.

The Indonesian Constitutional Court established generalized grievance standing, which allows a petitioner to assert an injury suffered by all or a large number of class or citizens.[124] Generalized grievance standing was one of Chief Justice Asshiddiqie's strategies to enhance the Court's

[122] *Spreading Hatred Case*, *supra* note 120, at 77–78, para. 3.18.6.

[123] *Id.* at 78–79, para 3.18.7

[124] In the U.S. constitutional realm, the U.S. Supreme Court has adopted a principle preventing individuals from invoking generalized grievances standing. Thus, citizens are not allowed to sue if their only injury is as a taxpayer or citizen concerned with having the government follow the Constitution. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 91 (2011). Unlike the U.S Supreme Court, the Indonesian Constitutional Court allows individuals to have standing as a taxpayer or citizen.

authority.[125] On the one hand, Asshiddiqie knew that the Court would not be able to review economic and social policies if no one challenged those policies before the Court. On the other hand, there were many NGOs whose agenda was to challenge governmental policies, but were unable to do so in the past. Asshiddiqie thus saw the potential for collaboration between the Court and NGOs because they both shared a similar vision for political and economic reform.[126] Therefore, he led the Court to apply generalized grievance standing, which permits NGOs to challenge governmental policies with minimal barriers in terms of standing.

The Court established this standing doctrine in the *Electricity Law* case, discussed in the previous section of this article.[127] The claimants were human rights NGOs who argued that as non-profit organizations, they had standing to represent the public.[128] The Court held, "considering the claimants are electricity consumers, and taxpayers, they have rights to question every statute on economic policy that involved public welfare."[129] Thus, the Court allowed individuals and organizations to file petitions for judicial review as consumers and taxpayers.

Later in the *Oil & Gas Law I Case*,[130] the Court reinforced the generalized grievance standing approach. The claimants were four human rights NGOs, which argued that as non-profit organizations they had standing to represent the public in challenging the privatization of the state owned oil company, *Pertamina*.[131] The Court held that the objective of those NGOs was to fight for public interest advocacy, and therefore that the petitioners had standing to raise constitutional issues.[132] In other words, the

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[125] *See* St. Hendrianto, From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003–2008 (2008) (unpublished Ph.D. dissertation, University of Washington) (on file with author).

[126] Private Conversation with Jimly Asshiddiqie (Dec. 22, 2014). Interview with Jimly Asshiddiqie, *supra* note 93.

[127] Decision, Reviewing Law No. 20 of 2000 on Electrical Power, No. 001-021-022/PUU-I/2003 (Constitutional Court, Dec. 1, 2004), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_Putusan%20001-021-022_PUU I_2003%20(UU%20Ketenagalistrikan)%20-%20English.doc.pdf.

[128] *Id.* at 13–14.

[129] *Id.* at 8.

[130] Decision, Reviewing Law No. 22 of 2001 on Oil and Natural Gas, No. 002/PUU-I/2003 (Constitutional Court, Dec. 15, 2004), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_PUTUSAN%20PUU%20%20002-I-2003%20(UU%20Migas)%20-%20English.pdf.

[131] *Id.* at 19.

[132] *Id.* at 293–95.

Court permitted public interest NGOs to come before the Court as defenders of the people at large.

It appears that Chief Justice Asshiddiqie had total control over the Court. The Chief Justice is indeed the spokesperson and public face of the Court. Nevertheless, he is the first among equals, not a superior. The power structure of the Constitutional Court is horizontal instead of vertical. Each of the Court's members has authority to weigh in on important decisions. Moreover, there is always room for voices of dissent in the Court. Therefore the Chief Justice cannot easily twist the direction of the Court based on his own preference.

In some cases, Chief Justice Asshiddiqie faced opposition from his associate justices. On the issue of taxpayer standing, two justices filed dissenting opinions and argued against the application of the generalized grievance form of standing.[133] Chief Justice Asshiddiqie was fully aware that he did not have absolute control over the Court's decisions, and therefore he needed to find a strategy to bridge the differences among the justices. He decided to take on the role of the consensus builder. For example, on the standing issue, he tried to build a consensus among his colleagues that the Court needed to apply a more lenient standing test in its early years of operation. One of the associate justices confirmed that the Chief Justice managed to convince his brethren to apply a lenient standing test to allow more parties (and more issues) to come before the Court.[134]

Furthermore, Chief Justice Asshiddiqie successfully convinced his brethren not to express their dissent publicly. On the surface, the justices were conscious of avoiding open opposition to each other.[135] This gave the impression that the Justices were usually in agreement and that there was consensus among them on key issues. On the issue of standing, the minority agreed to set aside their differences and therefore there was no need for them to express their dissent publicly. In some cases, the dissenter did not write a separate dissenting opinion and the Court only mentioned the summary of the dissenting opinion without even mentioning the names of the dissenting

[133] Decision, Reviewing Law No. 24 of 2002 on the Government Securities Law, No. 003/PUU-I/2003 (Constitutional Court, Oct. 29, 2004).

[134] Private Conversation with Maruarar Siahaan, Associate Justice of the Constitutional Court, in Jakarta, Indon. (July 4, 2006).

[135] Simon Butt, Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions, 2003–2005, at 123 (Dec. 2006) (unpublished Ph.D. dissertation, University of Melbourne) (on file with author).

justices. Chief Justice Asshiddiqie might not have had total control over his court, but as a consensus builder he was effective in managing dissenting voices and minimizing the public impression of dissension on the Court.

Asshiddiqie's standing strategy was, indeed, successful in building the Court as a functioning institution. It enabled the Court to review various governmental policies and pushed the government to comply with the Constitution. Without Chief Justice Asshiddiqie's strategy on standing, the Court would not be able stand up against the other branches of government.

C. The Extra-Judicial Role of the Chief Justice

The most visible example of Chief Justice Asshiddiqie's heroic leadership style was the initiative he took in employing strategies outside of the courtroom to build the Court as a respected national institution. These strategies came out as responses to external challenges that might have otherwise undermined the Court's authority.

The first external challenge for the Court was the lack of awareness from general public about the very fact of the Court's existence. As a newly established institution, the Court struggled to find its place among the constitutional stakeholders in Indonesia.[136] In response to this challenge, Chief Justice Asshiddiqie launched campaigns to raise the profile of the Court. He initiated a weekly program to discuss the Court's decisions on national public television and radio.[137] He delivered many speeches about the Constitutional Court, and he met with various social and political groups.[138]

Secondly, the Court had to deal with the failure of the academic community to generate constructive consideration of the Court's decisions. There were no well-managed legal reviews that could serve as a forum for experts to discuss the Court's decisions. Under such circumstances, Chief Justice Asshiddiqie had to take initiative to explain the Court's rulings

[136] One of the best illustrations of this lack of awareness was an incident in which a University declined to facilitate a public speaking engagement for a Constitutional Court justice. The university administration assumed that the Constitutional Court fell under the Ministry of Justice, and therefore they preferred to invite the Minister of Justice to speak on campus instead of a lower ranking official. *See* Irmanputra Sidin, *Sembilan Pintu Kebenaran Konstitusi* [*Nine Constitutional Gates*], KOMPAS (Jan. 6, 2004), http://www.unisosdem.org/article_detail.php?aid=3463&coid=3&caid=21&gid=3.

[137] *See* CONSTITUTIONAL COURT, THREE YEARS OF THE INDONESIAN CONSTITUTIONAL COURT, *supra* note 74.

[138] *See* CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA, 2006 ANNUAL REPORT (2007).

through the media.[139] The Chief Justice's strategy was unorthodox. Nevertheless, he had to take such action in order to minimize the confusion among the constitutional stakeholders.

The Court's third major external challenge came from the government. The new democratic government in Indonesia was not always keen to implement the Court's decisions, giving rise to the possibility that the government might simply ignore them. For instance, it took almost a year for Chief Justice Asshiddiqie to persuade the government to implement the Court's decision in the *Independent Candidate Case*.[140] In this case, the Court ordered the government to make a new law that would facilitate the ability of independent candidates to run in regional elections. The Government, however, refused to create the legislation mandated by the Court.[141]

Having realized that the decision was ignored by the government, Chief Justice Asshiddiqie decided to confront the President directly in a private meeting. The day after the meeting, Chief Justice Asshiddiqie held a press conference in which he assured public that the Court ruling on independent candidates would be implemented soon.[142] Finally, in April 2008, nine months after the Court issued its decision, the government and the House of Representatives passed the law that set the rules for independent candidates.[143] The Court in its early stages needed a leader like

[139] For example, the Chief Justice had to explain the Court's decision in the *Communist Party Case*. As explained in the previous section, the Court decided in the *Communist Party Case* that a former member of the Communist Party may run for a position in the legislature. Decision, Reviewing the Law No. 12 of 2003 on the Election of National and Regional Parliament, No. 011-017/PUU-I/2003 (Constitutional Court, Feb. 24, 2004), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/Putusan017200 3tgl240204.pdf. The General Election Commission, however, did not know what to do with the Court's decision. By the time the Court announced its decision, the deadline for the submission of legislative candidates had passed, and therefore the former member of the Communist Party would not be able to run in the legislative election. Chief Justice Asshidiqie made a press statement and announced that the decision would not have immediate effect; hence it could only be implemented for the 2009 General Elections. *See Bekas PKI Boleh Memilih dan Dipilih* [*Former PKI May Cast a Vote and Be Elected*], TEMPO INTERAKTIF (Feb. 24, 2004), https://m.tempo.co/read/news/2004/02/24/05539980/mahkamah-konstitusi-bekas-pki-boleh-memilih-dan-dipilih.

[140] Decision, Reviewing the Law No. 32 of 2004 on the Regional Election, No. 05/PUU-V/2007 (Constitutional Court, July 23, 2007).

[141] *Pemerintah Bersikeras Tak Keluarkan Perpu* [*The Government Insisted Not to Issue Government Regulation in Lieu of Law*], HUKUMONLINE (Aug. 15, 2007), http://www.hukumonline.com/berita/baca/hol17376/pemerintah-bersikeras-tak-keluarkan-perpu.

[142] *Independent candidates can run in 2008: Jimly*, JAKARTA POST (Aug. 13, 2007), http://www.thejakartapost.com/news/2007/08/13/independent-candidates-can-run-2008-jimly.html

[143] *Independents To Start Running in June*, JAKARTA POST (April 3, 2008).

Asshiddiqie who was persistent in reminding the government that they should comply with the Court's ruling.

Chief Justice Ashiddiqie's strategies outside the courtroom, however, could provoke counter attack from the government. In the *Oil and Gas Law I Case*,[144] the Court invalidated the law the allowed the market to govern fuel prices.[145] The Court ruled that the government should determine the fuel prices, not the market. In response, the Government issued a Presidential Regulation that set fuel prices based on market mechanisms.[146]

Chief Justice Asshiddiqie wrote a letter to the President urging him to comply with the Court's decision.[147] The President wrote back and explained that the government had done nothing illicit, since the Court already gave authority to the government to determine fuel prices.[148] Furthermore, the President warned the Court not to trespass on other governmental branches' jurisdiction and authority.[149] In addition, the Parliamentary Speaker Agung Laksono also warned the Chief Justice not to meddle in politics by sending a letter to the President.[150] Having realized that the issue had become too sensitive, Chief Justice's Ashiddiqie decided to accept the government's explanation and closed the discussion.

The fourth external challenge for the Court was to build its profile as a respected institution. For many years the authoritarian government in Indonesia treated the judiciary as an extension of executive authority. The judges were treated as civil servants and subjected to compulsory membership in the government-sponsored civil service union.[151] Consequently, the judiciary had never enjoyed a respected status over the course of Indonesian history. Moreover, the Chief Justice of the Supreme

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[144] Decision, Reviewing Law No. 22 of 2001 on Oil and Natural Gas, No. 002/PUU-I/2003 (Constitutional Court, Dec. 15, 2004), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_PUTUSAN%20PUU%20%20002-I-2003%20(UU%20Migas)%20-%20English.pdf.

[145] *Id.*

[146] Presidential Decree No. 55 of 2005 on Domestic Fuel Prices (Sept. 30, 2005).

[147] Letter from Chief Justice of the Indonesian Constitutional Court to the President of Republic of Indonesia (Oct. 6, 2005) (on file with the author).

[148] Letter from the President of Republic of Indonesia to the Chief Justice of Constitutional Court, (Oct. 14, 2005) (on file with the author).

[149] *Id.*

[150] Agung Laksono, *Jimly Diminta Tak Berpolitik* [*Jimly Was Warned Not to Meddle in Politics*], KORAN TEMPO, Oct. 12, 2005.

[151] *See* POMPE, *supra* note 54, at 128.

Court had been considered a second-class officer in the government hierarchy.[152]

Within this context, Asshiddiqie fought for the recognition that the judicial branch was on par with its executive counterpart. For example, in his first months in office, Chief Justice Asshiddiqie complained that he did not receive facilities and benefits that reflected his status as a high-ranking official.[153] He went to the government, and demanded a house and car, because the other high-ranking officers in Indonesia received a house and a car. After long delay, the government agreed to grant him proper benefits as the Chief Justice of Constitutional Court. Later, when he was re-elected as Chief Justice in 2006, he took the oath by himself while President Susilo Bambang Yudhyono watched behind him.[154] This seemingly small gesture signified his efforts to place himself on an equal footing with the President.

Furthermore, Chief Justice Asshiddiqie believed that the Court needed a great office building to symbolize the importance of the institution. After using a temporary office for quite a while, he came up with a plan to build a new office. He proposed a budget of RP 191 billion (around US 180 million) for a sixteen-floor office building. In the beginning, the Parliament opposed the plan; however, he vigorously lobbied the House Judiciary Committee and convinced them to approve the Court's plan to build a permanent office building.[155] Finally the parliament approved the plan and by the time the Court finished its calendar year in 2007, it had a magnificent new facility with elaborate architecture.[156] The Chief Justice explained that the Greek style of the building represented the notion of democracy emerging from ancient Greece, and signified the Court's role as the guardian of the Constitution in democratic Indonesia.[157] The Chief Justice also decided not to build fences around the Court building, so that the people

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[152] The most telling incident in Indonesian judicial history was when the Chief Justice of the Supreme Court, Wirjono Projodikoro, joined President Soekarno on his 1959 state visit to the United States and was given the status of parliamentarian. Projodikoro was seated with senators and congressmen, while the American Chief Justice Earl Warren sat with Soekarno and President Eisenhower. *Id.* at 44.

[153] *Mahkamah Konstitusi Dapat Dana Talangan 10,6 Miliar* [*The Constitutional Court Received 10.6 Billion Dollar Contingency Fund*], KORAN TEMPO, Oct. 10, 2003.

[154] *Negara dalam Negara* [*State Within State*], MEDIA INDONESIA, Sept. 25, 2006.

[155] *Komisi III Tolak Pembangunan Gedung Mewah MK* [*The Commission III Rejects the Proposal for the Constitutional Court Luxurious Office Building*], MEDIA INDONESIA, Feb. 3, 2005.

[156] MAHKAMAH KONSTITUSI [INDONESIAN CONSTITUTIONAL COURT], SEJARAH PEMBANGUNAN GEDUNG MAHKAMAH KONSTITUSI [THE HISTORY OF CONSTITUTIONAL COURT BUILDING] (2007).

[157] *Wajah Romawi di Mahkamah Konstitusi* [*Roman Style in the Constitutional Court*], TEMPO MAGAZINE (July 2, 2007), http://majalah.tempointeraktif.com/id/arsip/2007/07/02/ART/mbm.20070702.ART124326.id.html.

could come freely to the Court. Moreover, he designated a special spot in front of the building for the people to have an open assembly. Again, Asshiddiqie wanted to signal that the Court was the forum for citizens to express their opinion.

Yet Ashiddiqie and his associate justices would only occupy the new office for a short period of time. The justices of the Constitutional Court would finish their terms in August 2008, and nobody knew whether they would be reappointed for their second five-year term. Three of them, Laica Marzuki, Achmad Roestandi, and Soedarsono were obligated to retire earlier, having reached the mandatory retirement age of 67.[158] Moreover, it was unclear whether Chief Justice Asshiddiqie himself would be reappointed for a second five-year term.

D. The Fall of Chief Justice Asshiddiqie

A skilled Chief Justice like Asshiddiqie might have been the proper figure to lead the Court in transition; nevertheless, he occupied a vulnerable position. Like the rest of the associate justices, Chief Justice Asshiddiqie had a limited term—the judge can only serve two five- year terms—and therefore he had to please those who had the authority to reappoint him for a new term.[159] Moreover, the Law states that the Chief Justice serves a three-year term, though he can be reelected for a new term.[160] As the Chief Justice, Asshiddiqie had to face reelection every three years and consequently was forced to please his own associate justices in order to be reelected. The discussion on this subject will give an insight on what the Chief Justices in a newly established Court might learn in building its judicial power.

In March 2008, the House reappointed Jimly Ashiddiqie for his second five-year term (2008–2013) and he was quite confident that he would continue to lead the Court. Asshiddiqie was elected Chief Justice for the first time in 2003 and was reelected in 2006, so presumably he would remain as Chief Justice until 2009.[161] Nevertheless, by the time the Court began its new calendar year in August 2008, six new associate justices joined the bench and they demanded the election of a new Chief Justice. On August

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[158] Law of the Republic of Indonesia, No. 24 of 2003 on the Constitutional Court, art. 23(1).
[159] *Id.* art. 22.
[160] *Id.* art. 4(3).
[161] *Jimly Asshiddiqie the Face of Controversial Constitutional Court*, JAKARTA POST, Jan. 3, 2008.

20, 2008, the Court held an election for Chief Justice and a new associate Justice. Mohammad Mahfud defeated Chief Justice Asshiddiqie by one vote in the election.

Chief Justice Asshiddiqie suspected that the Yudhyono administration orchestrated his removal due to the Court's decision to review the allocation of educational budget in the state budget.[162] The Constitution requires the government allocate a minimum of twenty percent of the state budget to education.[163] The Court held that the 2008 State Budget was in violation of the Constitution because it allocated less than the mandated twenty percent of the budget to education.[164] The Court ruled that the President and the House were guilty of deliberate defiance of the Constitution and demanded the full allocation be met in the 2009 budget. But the Court allowed the existing underfunded budget to stand until the 2009 budget cycle took effect, arguing a delay was necessary "to avoid governmental disaster".[165] The Court decided the *Education Budget III Case* on August 13, 2008 and Asshiddiqie believes that the decision prompted the Yudhoyono administration to arrange for his removal during the election of Chief Justice on August 20, 2008.[166] The new Chief Justice Muhammad Mahfud himself admitted that the then Vice President Jusuf Kalla asked him to run against Chief Justice Asshiddiqie.[167] Although Mahfud never explained the motivation behind the Vice President's encouragement, it is easy to suspect that the government wanted to replace Asshiddiqie because the government was annoyed with Asshiddiqie's leadership style.

One of the most plausible reasons for the Executive to support Mahfud was his view on the role of the Court. While he was serving as a member of the House Judiciary Committee, Mahfud expressed his disagreement with Asshiddiqie's approach to judicial review. He accused Asshiddiqie of steering the Court in the wrong direction, and he urged the Court to exercise judicial restraint in order to get back on track. He proposed a formula of "10 taboos" that could serve as a template for the

[162] Private Conversation with Jimly Asshiddiqie, *supra* note 126.

[163] Undang Undang Dasar Negara Republik Indonesia [Constitution] art. 31(4).

[164] Decision, Reviewing Law No. 16 of 2008 on the Amendment of Law No. 45 of 2007 on the 2008 State Budget, No. 13/PUU-VI/2008 (Constitutional Court Aug. 13, 2008). The decision was the third time since 2004 the Court has found the government and the House guilty of a constitutional violation in education spending.

[165] *Id.* at 101.

[166] Private Conversation with Jimly Asshiddiqie, *supra* note 126.

[167] RITA TRIANA BUDIARTI, ON THE RECORD: MAHFUD BEHIND THE CONSTITUTIONAL COURT DECISIONS 54 (2010) [hereinafter BUDIARTI, ON THE RECORD].

Court's self-restraint.[168] His first taboo was that the Court should not create any new rule or regulation in its decisions. Second, the Court should not review any governmental policy. Third, the Court should make its decisions solely based on the Constitution. As the fourth taboo, he stated that the Court should not impinge upon the jurisdiction of legislative. The fifth was that the Court should not make reference to any constitutional theories or case precedents from foreign countries. As the sixth taboo, he posited that the Court should recuse itself when it has self-interest in certain cases such as the cases addressing Article 50 that involved the Court's jurisdictional limitation. Giving interviews in the news media or offering public comments formed the seventh taboo. The eighth taboo was that the Court should not build close relationships with any groups or help them to bring cases before the Court. Mahfud envisioned the ninth taboo as a general prohibition on the Justices engaging in any activism outside of the Court. Finally, he was convinced that the Justices should not criticize the Constitution.[169] With this vision of extreme judicial restraint, Mahfud was the ideal candidate to dismantle Jimly Asshiddiqie's work as the Court's first leader. The government had grown irritated with Asshiddiqie, who led the Court in challenging many governmental policies. In Mahfud, Asshiddiqie's opponents believed they had found the right man to make the Court more subservient to the other branches of government.

Mahfud was sworn in as the second Chief Justice of the Constitutional Court on August 21, 2008. Initially, Asshiddiqie remained as an associate justice; however, on October 8, 2008, he submitted his resignation from the Constitutional Court. During a press interview, he explained that he quit due to "psychological" tensions that had jeopardized his relations with the other eight justices and all court officials. Asshiddiqie said at a press conference, "I think this is the right time for me to leave, in the hope that it will help the Chief Justice, the other Justices and all the court officials conduct their duties with ease."[170] Chief Justice Mahfud, however, denied Asshiddiqie's claim about psychological tension within the Court.[171] For this reason, there was doubt about the real reason behind the resignation of Jimly Asshiddiqie, but one thing was clear: his decision to step down marked the end of an era, and the beginning of the Mahfud Court.

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[168] MOHAMMAD MAHFUD, KONSTITUSI DAN HUKUM DALAM KONTROVERSI ISU [CONSTITUTION AND LAW IN CONTROVERSIAL ISSUES] 281–84 (2009).

[169] *Id.*

[170] *Jimly Quits MK for Personal Reasons*, JAKARTA POST, Oct. 8, 2008.

[171] BUDIARTI, ON THE RECORD, *supra* note 167, at 36–37.

After his resignation from the Court, Asshiddiqie initially took a break from politics. He came back to the stage of national politics in 2010 when President Yudhoyono appointed him as a member of the Presidential Advisory Board. Having spent six months as one of the President's Advisor, Asshiddqie tendered his resignation because he wanted to make a bid to be selected for the top post of Anti-Corruption Commission leader. Despite the massive public support for Asshiddiqie as a potential Anti-Corruption Commission's chief, he did not even made it through to the final selection test before the House Judiciary Committee.[172] Asshiddiqie's resignation from the Court and failure to secure a position in the Anti-Corruption Commission marked his waning political influence.

The fall of Chief Justice Asshiddiqie raised the critical issue of judicial independence in the Indonesian Constitutional Court, especially in regard to the term of the justices. Term length is a key component of judicial independence; if the appointment term is longer the judges are likely more independent in exercising their authority.[173] Mandatory term limits remain a weak point of the current structure of the Indonesian Constitutional Court. Although the government does not have direct control over the election of the Chief Justice, they can support associate justices likely to oust the Chief Justice from his leadership role. In sum, short mandatory term limits are a primary mechanism for the Indonesian government to control the agenda and reach of the Indonesian Constitutional Court.

V. REMAKING THE COURT: MOHAMMAD MAHFUD AND THE COURT HE MADE

Before reviewing the performance of Mahfud Court, an overview of Mahfud's personal background is helpful to explain his leadership style after he took the helm of Chief Justice.

A. Mohammad Mahfud: A Man Who Served in the Three Branches of Government.

Mohammad Mahfud Mahmodin (commonly known as Mahfud MD) grew up in Madura, an Indonesian island off the northeastern coast of

[172] *Jimly Vows to Keep Supporting KPK*, JAKARTA POST, Aug. 30 2010; Arghea Desafti Hapsari, *Jimly Plays Hard to Get with KPK*, JAKARTA POST, June 14, 2010.

[173] Ginsburg, *Economic Analysis*, *supra* note 5, at 65.

Java.[174] A majority of Madurese Muslims are proponents of *santri* tradition, a more orthodox version of Islam, which was influenced by Sunni Islam, the largest denomination school of the religion. Mahfud grew up in a family with *santri* tradition, and his early education took place in an Islamic boarding school (*pesantren*).[175]

Mahfud attended Faculty of Law of Indonesian Islamic University in Yogyakarta, where he was actively involved in the Indonesian Islamic Students Association (*Himpunan Mahasiswa Islam*).[176] Upon his graduation, Mahfud became a professor of constitutional law at his alma mater. Later, he obtained his doctoral degree in constitutional law from Gadjah Mada University, the oldest public University in the country. Mahfud rose to national prominence when the late President Abdurrahman Wahid appointed him Minister of Defense in 2000. There was some speculation that the appointment was solely based on Mahfud's affiliation with the *Nahdatul Ulama* (NU), the largest traditional Islamic organization in Indonesia, which was once led by President Wahid. For many Madurese like Mahfud, being a Muslim means "being a sympathiser of the NU[,]" but "[t]his strong identification . . . does not automatically mean that they have to officially become a member of the organization."[177]

After Mahfud served for nearly a year as the Minister of Defense, President Wahid appointed him to be the Minister of Justice. He did not hold that position for a long time, however, because the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*) impeached President Wahid in 2001. After Wahid's impeachment and removal from office, Mahfud became active in the National Awakening Party (*Partai Kebangkitan Bangsa* or PKB), which was founded by President Wahid. From 2004 to 2008, Mahfud represented PKB in the House of Representatives and served as the member of the Judiciary Committee. By the time Mahfud assumed the role of Chief Justice he was the only politician

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[174] Mahfud rarely uses his complete name Muhammad Mahfud Mahmodin, and thus, in this article, I use Muhammad Mahfud instead. Mahfud explains that the name of Mahmodin is basically his father's name and his primary school teacher added the name to his original name in order to distinguish him with many other students who were also named Mahfud. *See* AGUK IRAWAN MN, NOVEL BIOGRAFI MAHFUD MD: CAHAYAMU TAK BISA KUTAWAR [MAHFUD'S BIOGRAPHY: I CANNOT DENY YOUR LIGHT] 87–88 (2014).

[175] *Id.* at 34.

[176] *Id.* at 220.

[177] Yanwar Pribadi, *Religious Networks in Madura:* Pesantren*, Nahdatul Ulama and* Kiai *as the Core of* Santri *Culture*, 51 AL-JAMI'AH: J. ISLAMIC STUD. 1, 14 (2013), http://www.aljamiah.or.id/index.php/AJIS/article/view/151/54.

in Indonesia who served in all three branches of government. With his background and experience, Mahfud was a credible contender against a high profile Chief Justice like Jimly Asshiddiqie. Mahfud's social and political connections also advanced his ability to compete with someone like Jimly Asshiddiqie.

B. The Mahfud Court: Heavy on Promises, Mixed Record on Results

Chief Justice Mahfud came to the bench with a vision of strong judicial restraint and he did not present any sign of an unpredictable leadership style like his predecessor. Reviewing the decisions of Mahfud Court is helpful to evaluate his leadership style and how faithful he was to his vows of judicial restraint.

1. Less Favorable Treatment of Individual Rights

One of the important focuses of Asshiddiqie's Court was on the issue of civil and political rights. In many different cases, Asshiddiqie's Court tried to push the government to recognize the protection of individual rights. It is helpful to draw comparisons between the decisions of the Asshiddiqie Court and Mahfud Court.

The first major decision of Mahfud Court on the individual rights cases was the *Pornographic Law Case*.[178] The Pornography Law defines pornography as "pictures, sketches, illustrations, photographs, articles, sounds, voices, moving pictures, animations, cartoons, conversations, body movements or other forms of messages through various communication mediums and/or public displays that contain obscenity or sexual exploitation that violates community norms".[179] Some NGOs sought to challenge the Law before the Constitutional Court.[180] The Court rejected the claimant's petition and held that although the Constitution guarantees some fundamental rights, there is a general limitation to those rights as stipulated in the Constitution by Article 28J(2).[181] The Court further held that "the

[178] Decision, Reviewing the Law No. 44 of 2008 on Pornography, No. 10-17-23/PUU-VII/2009 (Constitutional Court, Mar. 25, 2010) [hereinafter the *Pornography Law Case*]. For background information on the litigation, see HOROWITZ, *supra* note 61, at 252–53.

[179] Law of the Republic of Indonesia, No. 44 of 2008 on Pornography, art. 1 (1).

[180] These NGOs include the Legal Aid Foundation, the Women's Coalition for Justice and Democracy, and the Women's Solidarity Union.

[181] *Pornography Law Case*, *supra* note 178, at 381. Article 28J (2) of the 1945 Constitution provides, "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and

limitation upon individual rights, including freedom of expression is not contrary to the Constitution, as long as such limitation is based upon recognition of other people's rights and freedoms plus consideration of morality, and public order in a democratic society."[182] Finally, the Court held the Law took into account Indonesian community values of propriety (*nilai–nilai kesusilaan*).[183] Nevertheless, the Court did not clarify the meaning of community values of propriety and it did not define the "right of others" that is believed should prevail over the freedom of expression.[184] The bottom line is that the Court recognized the authority of the government to curtail individual rights, an approach that stood in marked contrast from the approach of the previous Court that aggressively pushed the government to respect fundamental liberties.

Soon after the *Pornography Law Case*, the Court also upheld the constitutionality of the Blasphemy Law.[185] The Blasphemy Law dates from the era of Guided Democracy (1959–1965) when Soekarno, the first Indonesian President, tried to mobilize nationalist, religious, and communist forces to buttress his political power.[186] The Law recognized that the majority of the Indonesian people adhere to six major religions—Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism—and it mandated that the Government protect these religions.[187] The Law also created several protection mechanisms to achieve this aim. First, it was unlawful to communicate, propagate, or to solicit public support for an interpretation of a religion that deviates from the teaching of that religion.[188] Second, it set criminal penalties for intentionally criticizing or attempting to

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freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society." Undang-Undang Dasar Republik Indonesia [Constitution] 1945, art. 28J(2).

[182] *Pornography Law Case*, *supra* note 180, at 387.

[183] *Id.*

[184] BUTT & LINDSEY, *supra* note 61, at 202.

[185] Decision, Reviewing Presidential Decree No. 1 of 1965 on the Prevention of the Misuse/Insulting of Religion (Blasphemy Law), Law 5 of 1969, No. 140/PUU-VII/2009 (Constitutional Court, Apr. 19, 2010) [hereinafter *Blasphemy Law Case*]. For a detailed analysis of the Court's decision in the *Blasphemy Law Case*, see Melissa A. Crouch, *Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law*, 7 ASIAN J. COMP. L. 5 (2012). *See also* MELISSA CROUCH, LAW AND RELIGION IN INDONESIA: CONFLICT AND THE COURTS IN WEST JAVA (2014) [hereinafter CROUCH, CONFLICT AND THE COURTS].

[186] Brief for Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners, Abdurrahman et al, The Prevention of Mistreatment of Religion and/or Blasphemy (No. 140/PUU-VII) (2009).

[187] Law of the Republic of Indonesia, No. 1 of 1965, The Blasphemy Law, No. 1/PNPS/1965, art. 1 of Elucidation.

[188] *Id.* art. 1(1).

undermine the six major religions, including a maximum penalty of five years' imprisonment.[189] The Law, however, recognized other religions such as Judaism, Shinto, Taoism, and others as legitimate so long as they complied with the prohibition under the Blasphemy Law and other statutory regulations.[190]

Some NGOs and political activists requested that the Mahfud Court declare the Blasphemy Law unconstitutional because it ran contrary to the religious liberty clause[191] and freedom of expression clause of the Constitution.[192] The Court rejected the petition and took a similar approach to that adopted in the *Pornographic Law Case*. The Court held that the Blasphemy Law is the manifestation of Article 28J(2), and therefore the state has the authority to limit liberty as long as it based upon recognition of other people's rights and freedoms.[193] This restriction pertains to morality, religion, and public order in a democratic society.[194] The Court held that the Blasphemy Law was never intended to curtail religious freedom, but rather was aimed to protect religion.[195] On the issue of freedom of expression, the Court viewed that the claimants had misinterpreted the scope and meaning of freedom of expression as unlimited rights.[196] The Court held that freedom of expression can be limited and even be sanctioned.[197] Clearly, the *Blasphemy Law Case* reaffirmed the Court's stand on the general limitations of rights by Article 28J(2), which also include limitations on free speech. With this ruling, the Court supported the idea that religious "deviancy" leads to social disorder, which was argued by many Islamic leaders and the government during oral argument.[198]

After the Court announced its decision, the claimants went to the House of Representative and urged the legislators to examine the Court's

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[189] *Id.* art. 4.
[190] *Id.* art 1.
[191] Undang-Undang Dasar Republik Indonesia [Constitution] 1945, arts. 28E(1), 29.
[192] *Id.* arts. 28E(2), 28E(3)
[193] Decision, Reviewing Presidential Decree No. 1 of 1965 on the Prevention of the Misuse/Insulting of Religion (Blasphemy Law), Law 5 of 1969, No. 140/PUU-VII/2009 (Constitutional Court, Apr. 19, 2010) (*Blasphemy Law Case*).
[194] *Id.* at 293.
[195] *Id.* at 294.
[196] *Id.* at 299
[197] *Id.*
[198] CROUCH, CONFLICT AND THE COURTS, *supra* note 185, at 162.

decision in the *Blasphemy Law Case*.[199] The claimants alleged that the Court had manipulated the affidavit from the National Human Rights Commission, which stated the Law was necessary to preserve public order.[200] The claimants presented some evidence that the National Human Rights Commission suggested otherwise. Chief Justice Mahfud responded by accusing the NGOs who filed the complaint of merely seeking attention and he questioned their credibility as human rights advocates.[201]

Despite the Mahfud Court's tendency to defer to lawmakers, in some instances, the Court tried to protect constitutional rights of citizens. In the *Book Banning Case*, the Court decided to nullify the law which allowed the Attorney-General's Office (AGO) to ban books.[202] The case originated from the 1963 Law on Securing Printed Materials that allowed the AGO to ban distribution and confiscate books whose content could disrupt the public order. In 2009, the AGO banned five books, which included the book *Pretext for Mass Murder: The September 30th Movement and Suharto's Coup d'Etat in Indonesia* by John Roosa of the University of British Colombia.[203] The Court, however, did not make any explicit ruling on the freedom of speech. Instead, the Court appeared to consider the books as "property." The Court ruled the authority of the Attorney General to ban and seize the books and printed materials without any judicial proceedings could be considered an extra-judicial execution that violated individuals' rights to own property.[204]

Some of the Mahfud Court decisions in the area of civil and political rights signified an important departure from the Court's earlier approach. The Asshiddiqie Court believed that it was the duty of the Court to correct governmental infringement upon constitutional rights and therefore the court

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[199] *MK Dituding Manipulasi Fakta Persidangan UU Penodaan Agama* [*The Constitutional Court Was Accused of Manipulating the Facts of the Blasphemy Law Case*), HUKUMONLINE (Apr. 23, 2010), http://www.hukumonline.com/berita/baca/lt4bd14fbb6604f/mk-dituding-manipulasi-fakta-persidangan.

[200] Decision, Reviewing Presidential Decree No. 1 of 1965 on the Prevention of the Misuse/Insulting of Religion (Blasphemy Law), Law 5 of 1969, No. 140/PUU-VII/2009, at 182–83, 283 (Constitutional Court, Apr. 19, 2010) (the claimants asserted that the National Human Rights Commission never held a position that the Law was necessary, but rather, that it was unconstitutional).

[201] *Itu Genit yang Kebablasan* [*When Flirting Becomes Too Much*], KOMPAS (Apr. 22, 2010), http://nasional.kompas.com/read/2010/04/22/22444396/mahfud.md.itu.genit.yang.kebablasan.

[202] Decision, Reviewing Law No. 16 of 2004 on the Power of the Attorney General to Ban Books and Law No. 4/PNPS/1963 on the Seizure of Printed Materials that Cause Public Disturbance, No. 6-13-20/PUU-VIII/2010 (Constitutional Court, Oct. 13, 2010) [hereinafter the *Book Banning Case*].

[203] Camelia Pasandaran, *Court Hears Author's Legal Case Against Book Bans*, JAKARTA GLOBE (Mar. 9, 2010), http://www.thejakartaglobe.com/archive/court-hears-authors-legal-case-against-book-bans/.

[204] *Book Banning Case*, *supra* note 202, at 241.

should protect such rights. On the contrary, the Mahfud Court seemed to defer to the government in the arena of civil and political rights, but some of the Court decisions were often inconsistent with Chief Justice Mahfud's own rhetoric.[205] In many instances, Chief Justice Mahfud defended a progressive point of view and a flexible constitutional interpretation, but the Court decisions in the *Pornography Law Case* and the *Blasphemy Law Case* were far from a progressive and flexible interpretation.[206]

2. More Favorable Treatment to Administrative Law Cases

Although Mahfud came to the Court vowing judicial restraint, he did not remain faithful to that vow. He broke it in instances when the Court has reviewed administrative policies and produced a set of new rules. Take, for example, the Court's decision in the *ID Card Case*.[207] The case arose from poor election management that caused around forty-seven million voters to be unregistered in legislative elections.[208] Refli Harun was a political activist who was not registered as a voter. He filed a petition to the Court and challenged the Election Law. The Court held that all Indonesian citizens who were not registered on the final electoral roll could show their IDs in order to cast a vote and for those who are living overseas can use their passports to cast a vote.[209] The Court held further that voters using an ID card must also show their family card (*Kartu Keluarga*) and may only cast their ballot in their residential neighborhood.[210]

Chief Justice Mahfud broke his own enumerated taboos because the Court created a new rule about voting registration in this decision. Mahfud, however, argued that he had to make such decision in response to the critical situation in national politics.[211] Chief Justice Mahfud made a reference to presidential candidates Jusuf Kalla and Megawati Soekarnoputri who threatened to withdraw from the presidential race if the General Elections

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[205] HOROWITZ, *supra* note 61, at 254.

[206] *Id.* at 253–54.

[207] Decision, Reviewing the Law No. 42 of 2008 on the Presidential Election, No. 102/PUU-VII/2009 (Constitutional Court, July 6, 2009), http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_verdict%20no%20102_PUU_VII_2009.pdf [hereinafter the *ID Card Case*].

[208] *Bring KPU Members to Court, Analysts Say*, JAKARTA POST (July 7, 2009), http://www.thejakartapost.com/news/2009/07/07/bring-kpu-members-court-analysts-say.html.

[209] *ID Card Case*, *supra* note 207, at 19–20.

[210] *Id.* at 17.

[211] *Mahfud MD: Putusan Itu Hanya Butuh Sepuluh Menit* [*Mahfud MD: It Took Only Ten Minutes to Reach the Decision*], TEMPO MAGAZINE (July 13, 2009), https://majalah.tempo.co/konten/2009/07/13/WAW/130833/Mahfud-MdPutusan-Itu-Hanya-Butuh-Sepuluh-Menit/21/38.

Commission (*Komisi Pemilihan Umum* or KPU) did not allow unregistered voters to use their ID cards to cast a ballot. Mahfud argued that the withdrawal of Megawati and Jusuf Kalla from the presidential race would threaten the legitimacy of democracy in Indonesia, and therefore the Court should intervene and save the democratic process.[212]

Chief Justice Mahfud continued to break his taboos in the *Attorney General Case*.[213] The case originated from the political conflict between the Yudhoyono administration and a veteran politician, Yusril Ihza Mahendra. Mahendra served in the First Yudhoyono administration as the State Secretary; however, in May 2007, President Yudhoyono dismissed Mahendra due to his alleged involvement in several high-profile graft cases. On June 24, 2010, the Attorney General's Office named and charged Mahendra under the Anti-Corruption Law for his approval of the Ministry of Justice's online corporate registration system (*Sistem Administrasi Badan Hukum—Sisminbakum*). Mahendra fought back by filing a petition to the Constitutional Court, in which he challenged the appointment of the then Attorney General Hendarman Supandji. Mahendra argued that Supandji was an illegitimate Attorney General because he had never been formally re-appointed as the Attorney General after he finished his first term in office.[214] Mahendra argued that as an illegitimate Attorney General, Supandji had no authority to take legal actions against him. The President's legal team argued that formal re-appointment for the Attorney General was unnecessary because the Law prescribed that the Attorney General would remain in the office until he was dismissed from his post.[215]

The Court majority ruled that the Attorney General Law created legal uncertainty because it did not provide any clarity on when the Attorney General shall begin and end his term in office.[216] Nevertheless, the Court held that the law is "conditionally constitutional," as it should be interpreted to mean that the Attorney General should serve a five year term like the President and others cabinet ministers, and can be removed by the President at any time.[217] Here, the Court tried to frame its decision with different

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[212] *Situasi Agak Gawat* [*It Was a Critical Moment*], KOMPAS, July 7, 2009.

[213] Reviewing Law No. 16 of 2004 on the Attorney General Office, No. 49/PUU-VIII/2010 (Constitutional Court Oct. 16, 2010) [hereinafter the *Attorney General Case*].

[214] *Yusril Files Report Against Attorney General*, JAKARTA POST (July 1, 2010), http://www.thejakartapost.com/news/2010/07/01/yusril-files-report-against-attorney-general.html.

[215] *Attorney General Case*, *supra* note 215, at 64–66.

[216] *Id.* at 132–33, para 3.31.

[217] *Id.* at 133, para 3.32.

language, which can be confusing. Instead of declaring the Attorney General Law unconstitutional, it declared that the law is "conditionally constitutional."

In response to the Court's decision, Denny Indrayana, the President's legal adviser, argued that Supandji was still a legitimate Attorney General because the Court did not explicitly rule that his appointment was unconstitutional.[218] Mahendra, however, believed that Supandji was no longer legally the Attorney General.[219] Chief Justice Mahfud decided to intervene by urging the President to dismiss the Attorney General Hendarman Supandji immediately.[220] President Yudhoyono decided to uphold the Court ruling by removing Hendarman Supandji from his post. Mahfud explained that he had to intervene to resolve the conflict of interpretation between Mahendra and the President's legal adviser or otherwise there would be an endless conflict of interpretation.[221]

The Mahfud Court continued to be defiant of governmental policies in the area of administrative law when the Court decided the *Deputy Minster Case*.[222] The State Ministry Law allowed the President to appoint a deputy minister to assist some of the minister's responsibilities.[223] In his second administration, President Yudhoyono appointed twenty Deputy Ministers.[224] An NGO named the National Movement to Eradicate Corruption (GNPK) challenged the appointment of those deputy ministers and argued that the positions were unnecessary and a waste of state funds.

The Court struck down the elucidation of article 10 of the State Ministry Law which defined deputy ministers as career bureaucrats. The

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[218] Nivell Rayda, Camelia Pasandaran & Heru Andriyanto, *Surprise Ruling Sees Attorney General Lose Job*, JAKARTA GLOBE (Sept. 23, 2010), http://jakartaglobe.beritasatu.com/archive/surprise-ruling-sees-attorney-general-lose-job/.

[219] *Id.*

[220] *Mahfud MD: Hendarman Supandji Harus Berhenti*, [*Mahfud MD: Hendarman Supandji Must Leave*], HUKUMONLINE (Sept. 22, 2010), http://www.hukumonline.com/berita/baca/lt4c9a327ade2d2/hendarman-supandji-harus-berhenti.

[221] RITA BUDIARTI, MIFTAKHUL HUDA, SHOHIBUL UMAM, & ACHMAD DODI HARYADI, BIOGRAFI MAHFUD MD: TERUS MENGALIR [BIOGRAPHY OF MAHFUD MD: KEEP FLOWING] 430 (2013) [hereinafter BUDIARTI, BIOGRAPHY OF MAHFUD MD].

[222] Decision, Reviewing Law No. 30 of 2008 on State Ministry, No. 79/PUU-IX/2011 (Constitutional Court, June 5, 2012). The case is available in English at http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_eng_Ikhtisar%20Putusan-putusan%20wamen%20(ENG).pdf [hereinafter the *Deputy Minister Case*].

[223] Law of the Republic of Indonesia, No. 30 of 2008 on State Ministry, art. 10.

[224] *SBY Installs New Members of Cabinet*, JAKARTA POST (Oct. 19, 2011), http://www.thejakartapost.com/ news/2011/10/19/sby-installs-new-members-cabinet.html.

Court held that deputy ministers are not members of the cabinet minister. The Court considered that elucidation of article 10 would cause legal complication because there is no clarity of the term length for a deputy minister's position.[225] The Court expressed a concern that as a career bureaucrat, a deputy minister could stay in his position indefinitely even though the President and his cabinet ministers had finished their term in office.[226] Finally, the Court held that the President's Yudhoyono's appointment of deputy ministers based on Article 10 elucidation was unconstitutional.[227]

3. Preserving the Legacy of Standing Doctrines

One of Mahfud's ten taboos provided that the Court should not review governmental policy. Many of Chief Justice Mahfud's decisions were clearly inconsistent with this taboo. In some instances, he clearly broke his taboo by leading the Court to review some governmental policies. Moreover, Chief Justice Mahfud employed the same interpretation of standing as his predecessor, in which the Court applied general grievance standing in order to open the door to reviewing governmental policies.

An apt example of the Mahfud Court's reaffirmation of its predecessor's strategy is the Court's decision in the *Oil and Gas III Case*.[228] The claimants in this case were twelve Islamic based organizations and thirty individuals, chiefly led by *Muhammadiyah*, one of the largest Islamic organizations in the country. The claimants challenged some of the key statutory provisions, which mandated the government establish a Regulatory Agency to supervise the oil and gas sector.[229] They argued that these statutory provisions would reduce the state control over natural resources and those resources then could not be used to the greatest benefit of the people as mandated by article 33 section 3 of the Constitution.[230]

The claimants argued that the government policies to privatize oil and gas industries had infringed on their constitutional rights of development.[231]

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[225] *Deputy Minister Case*, *supra* note 222, at 80.
[226] *Id.*
[227] *Id.* at 81.
[228] Decision, Reviewing Law No. 22 of 2001 on the Oil and Gas Law, No. 36/PUU-X/2012 (Constitutional Court, Nov. 13, 2012) [hereinafter the *Oil and Gas III Case*].
[229] Law of the Republic of Indonesia, No. 22 of 2001 on Oil and Gas, arts 1(23), 4(3). *See also Oil and Gas III Case*, *supra* note 228, at 24.
[230] *See Oil and Gas III Case*, *supra* note 228, at 23.
[231] *Id.* at 17–18.

Moreover, *Muhammadiyah* as the chief petitioner also stated that they came before the Court as Islamic organizations that had the objective to establish Islamic civil society, and, thus, had standing to represent public interest.[232] The Court ruled that *Muhammadiyah* and others had standing to bring the case because their constitutional rights may potentially be injured by the application of the law.[233] In its ruling, the Court did not explicitly state that *Muhammadiyah* as a religious based NGO may enter the stage of constitutional litigation as a public defender. Nonetheless, by granting standing to *Muhammadiyah*, the Mahfud Court continued to apply a loose standing doctrine.[234]

The Court also allowed an NGO to challenge the authority of the Ministry of Forestry to grant large concessions to private mining companies for mining exploration in the *Indigenous Forest Case*.[235] The case was significant because Indonesia's central government had control over the country's vast forest area and thus the Ministry of Forestry had rights to grant large concessions to private companies for logging, plantations, and mining exploration even if the area had been managed for generations by indigenous people. The case was initiated by an NGO, Indigenous Peoples Alliance of the Archipelago (*Aliansi Masyarakat Adat Nusantara* or AMAN), which claimed that they represented indigenous people across the archipelago.[236] The Court ruled that as an NGO who had concern over indigenous issues, the petitioner had standing to challenge the Forestry Law before the Court.[237]

C. The Heroic Leadership Continued

While Mahfud's rhetoric emphasized judicial restraint, in many cases, the Mahfud Court demonstrated that it inherited many of the ambitions of

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[232] *Id.* at 20–21. *See also* Undang Undang Dasar Negara Republik Indonesia [Constitution] art. 28C(2).

[233] *Oil and Gas III Case*, *supra* note 228, at 179–80.

[234] *Id.* at 214. There is a dissenting opinion in which Justice Haryono argued that the plaintiffs have no standing to bring the case. Justice Haryono did not write a lengthy dissent and he simply criticized the Court majority for their lack of consideration with regard to the standing issue. He believed that the Court did not provide sufficient legal reasoning in reaching a conclusion that the plaintiffs have standing to argue before the Court.

[235] Decision, Reviewing Law No. 41 of 1999 on Forestry, No. 35/PUU-X/2012 (Constitutional Court, May 16, 2013) [hereinafter *Indigenous Forest Case*].

[236] *See Organization Profile*, ALIANSI MASYARAKAT ADAT NUSANTARA [INDIGENOUS PEOPLES ALLIANCE OF THE ARCHIPELAGO], http://www.aman.or.id/wp-content/plugins/downloads-manager/upload/Profil_AMAN.pdf (last visited Apr. 15, 2016).

[237] *Indigenous Forest Case*, *supra* note 235, at 164.

Chief Justice Asshiddiqie. During his tenure as the Chief Justice, Mahfud took the same path as his predecessor to expand the Court's authority. One of the Asshiddiqie Court's legacies preserved by the Mahfud Court was the Regional Election disputes. While he was still in office, Chief Justice Asshiddiqie made a proposal to the House of Representatives to grant new authority for the Court to handle regional election disputes.[238] Initially, the Supreme Court had authority to handle regional election disputes, which included elections for Governor and Head of Regency (*Bupati*).[239] Nevertheless, one of the most visible problems facing the Supreme Court was the extensive backlogs that plagued the Court for several decades.[240] The jurisdiction over regional elections disputes did not help the Supreme Court in overcoming backlogs. Chief Justice Asshiddiqie proposed to take over the regional election disputes in order to ease the burdens on the Supreme Court. On April 28, 2008, the House (DPR) passed a new law that authorized the Constitutional Court to handle regional election disputes.[241] Chief Justice Asshiddiqie then graciously accepted the new authority and tried to show that the Constitutional Court was better prepared than the Supreme Court to handle election disputes.

Chief Justice Asshiddiqie did not have to deal with the influx of the regional election disputes, as he resigned from the Court in October 2008. It was Chief Justice Mahfud who led the Court to handle these disputes. Despite the flood of cases, the Mahfud Court continued to broaden the scope of the Court's authority. Initially, the law prescribed that the object of adjudication could only concern the final result of the regional election.[242] The Mahfud Court, however, went further to review any infringement upon regional election processes, including both administrative and criminal infringement.[243]

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[238] *Penyatuan Rezim Pilkada dengan Pemilu Tergantung DPR dan Pemerintah* [*Unification of Regional and National Elections Depends on the House and Government*], HUKUSMONLINE (Aug. 15, 2006), http://www.hukumonline.com/berita/baca/hol15318/penyatuan-rezim-pilkada-dengan-pemilu-tergantung -dpr-dan-pemerintah.

[239] Law of the Republic of Indonesia, No. 32 of 2004, Concerning Regional Administration, art. 106(4).

[240] Sebastian Pompe, *Supreme Court Causes Backlogs, Not the Law*, JAKARTA POST (Dec. 23, 2003), http://www.thejakartapost.com/news/2003/12/23/supreme-court-causes-backlogs-not-law.html.

[241] Law of the Republic of Indonesia, No. 12 of 2008, Concerning Amendment of Law No. 32 of 2004 on Regional Administration, art. 236C.

[242] *Id.*

[243] Decision, Reviewing the Dispute of Regional Election East Java Province, No. 41/PHPU.D-VI/2008 (Constitutional Court Dec. 2, 2008). For detailed analysis of the expansion of the Constitutional Court authority in regional election disputes, see IWAN SATRIAWAN ET AL., STUDI EFEKTIFITAS

Chief Justice Mahfud also followed the path of his predecessor by trying to resolve political crises. The most obvious example was the *Hamzah & Riyanto Case*.[244] The claimants in this case, Chandra Hamzah and Bibit Riyanto, were the Commissioners of the Anti-Corruption Commission. The Commission managed to wiretap a high-ranking police official on the suspicion that the official was taking bribes. The Indonesian National Police then moved to incriminate Hamzah and Riyanto, alleging that they abused their power.[245] As Hamazh and Riyanto's trial loomed, there was significant public pressure on President Yudhoyono to save the Anti-Corruption Commission. President Yudhoyono issued a Government Regulation in Lieu of Law (*Peraturan Pemerintah Pengganti Undang—Undang* or PERPU) that gave himself power to appoint the Anti-Corruption Commissioner if three or more commissioner positions became vacant.[246] Prior to the enactment of this PERPU, the Law required the positions to be filled using a rigorous fit and proper test in the parliament. Under the PERPU, the President had authority to appoint temporary commissioners to fill the vacant positions with commissioners who had the same rights, powers, and obligation as did commissioners serving full terms.

Many legal analysts criticized President Yudhoyono for issuing the PERPU and moreover, they blamed the Chief Justice for advising the President to pass the PERPU. Chief Justice Mahfud admitted that he had advised President Yudhoyono to pass the PERPU.[247] But Mahfud stated that he had no hidden agenda other than to save the Anti-Corruption Commission.[248] Furthermore, Chief Justice Mahfud continued to advise the President on the selection process of temporary commissioners.

In the meantime, Hamzah and Riyanto went to the Constitutional Court and challenged the law that could cause their removal from the Commission. The Law stated, "The Anti-Corruption Commissioners are to

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PENYELESAIAN SENGKETA HASIL PEMILUKADA OLEH MAHKAMAH KONSTITUSI [STUDY ON THE EFFECTIVENESS OF THE SETTLEMENT OF LOCAL ELECTION DISPUTE BY THE CONSTITUTIONAL COURT] (2012).

[244] Decision, Reviewing the Law No. 30 of 2002 on the Anti-Corruption Commission Law, No. 133/PUU-VII/2009 (Constitutional Court, Oct, 29, 2009).

[245] For detailed analysis of the background of the conflict between the Anti-Corruption Commission and the National Police, see SIMON BUTT, CORRUPTION AND LAW IN INDONESIA (2012).

[246] *See* Government Regulation in Lieu of Law No. 4 (2009), article 33A(1). Prior to the criminal investigation of Hamzah and Riyanto, the Chief of Anti-Corruption Commission, Antasari Azhar had been detained on suspicion of murdering a businessman.

[247] BUDIARTI, BIOGRAPHY OF MAHFUD MD, *supra* note 221, at 105–06.

[248] *Id*. at 107.

leave their positions or to be removed from their positions if they become a defendant in a criminal case."[249] Hamzah and Riyanto argued that the provision contravened their constitutional right to a presumption of innocence.[250] Moreover, they argued that the Law is discriminatory because all other state officials had the benefit of the doubt until convicted, in which they could be suspended but not dismissed.[251]

Hamzah and Riyanto asked the Court to issue an interim injunction to prevent their dismissal before the Court could hear their case. Considering that the Court's authority was limited to determining the constitutionality of a statue and issuing appropriate declaratory remedies as claimed, in theory the Court had no authority to issue an injunctive remedy to prevent the criminal investigation of Hamzah and Riyanto. Surprisingly, the Court decided that it could issue an injunction. But on the question of to whom the injunction would be directed, the Court admitted that it lacked jurisdiction to order police and prosecutors to postpone the criminal investigations against Hamzah and Riyanto.[252] Finally, the Court ordered the President to refrain from suspending Hamzah and Riyanto until a final verdict was issued.[253]

Having realized that the Court lacked authority to stop the criminal proceeding, Chief Justice Mahfud criticized the police in the media and urged the police to bring the Commissioners alleged abuses of power to the State Administrative Court instead of the Criminal Court.[254] Furthermore, he stated that if he were the President, he would remove the Chief of National Police.[255] After the press conference, Chief Justice Mahfud met with the President Susilo Bambang Yudhyono privately and tried to convince the President to drop the case because the Police had no basis to incriminate the Commissioners of the Anti-Corruption Commission.[256]

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[249] Law of the Republic of Indonesia, No. 30 of 2002, Law on the Commission for the Eradication of Criminal Acts of Corruption, art. 32(1)(c).

[250] Decision, Reviewing the Law No. 30 of 2002 on the Anti-Corruption Commission Law, No. 133/PUU-VII/2009, at 6 (Constitutional Court, Oct, 29, 2009).

[251] *Id.* at 9–13.

[252] Decision, Reviewing Injunction, No. 133/PUU-VII/2009, at 31 (Constitutional Court, Oct, 29, 2009).

[253] *Id*. at 32.

[254] *The President Set to Issue Regulation on KPK Today*, JAKARTA POST, Sept. 23, 2009.

[255] *Kalau Saya Presiden Sudah Saya Pecat Kapolri* [*If I were President I Would Remove the National Chief of Police*], TEMPO INTERAKTIF (Sept. 28, 2009), http://www.tempointeraktif.com/hg/hokum/2009/09/28/brk,20090928-199729,id.html.

[256] BUDIARTI, ON THE RECORD, *supra* note 167, at 160.

Surprisingly, the former Chief Justice Jimly Asshiddiqie criticized Mahfud for his media interview and his effort to lobby the President. Asshiddiqie stated that it was inappropriate for Chief Justice Mahfud to criticize the Chief of National Police in the media.[257] Asshidiqie's criticism was ironic because he essentially criticized his own strategy. Consequently, it was easy for Mahfud to rebut Asshiddiqie, saying that he was just following in the footsteps of his predecessor, who was very active in the media and in lobbying the President.[258] Mahfud further argued that he had to speak to the media to appeal for public support because the Court lacked authority to stop the criminal investigation.[259]

Chief Justice Mahfud continued to give media interviews in the *Mohammad Sholeh Case*.[260] Mohammad Sholeh was a legislative candidate from the Indonesian Democratic Party of Struggle (PDI-P). He challenged the constitutionality of the Legislative Election Law, which ruled that the candidate with the highest-ranking position on the candidate list shall be elected as legislator.[261] The Court accepted his argument and declared the rules unconstitutional. The General Election Commission, however, refused to comply with the Court's decision. Chief Justice Mahfud issued a press statement and warned the Election Commission that there would be political and criminal consequences for all commissioners who refused to comply with the Court's decision.[262] He argued that the situation forced him to speak out to the media; otherwise the General Election Commission would have never followed the Court's decision.[263]

During his tenure as Chief Justice, Mahud gave many media interviews on politically sensitive issues and on the cases pending before the Constitutional Court. In 2011, Chief Justice Mahfud was named Newsmaker of the Year by *Seputar Indonesia*, a news program broadcast by

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[257] Jimly Asshiddiqie, *Sistem Penegakan Hukum Masih Kacau* [*Judicial Enforcement System Still Troublesome*], JIMLY.COM (2009), http://jimly.com/kegiatan/show/382?page=3.

[258] *Mahfud Siap Letakkan Jabatan* [*Mahfud is Ready to Step Down*], SEPUTAR INDONESIA (Dec. 8, 2010), http://www.seputar-indonesia.com/edisicetak/content/view/368650/.

[259] BUDIARTI, ON THE RECORD, *supra* note 167, at 158.

[260] Decision, Reviewing the Law No. 10 of 2008 on the Election of National and Regional Parliament, No. 22-24/PUU-VI/2008 (Constitutional Court, Dec. 23, 2008).

[261] *See* Law of the Republic of Indonesia, No. 10 of 2008 on the Election of National and Regional Parliament. Sholeh was ranked seventh in the candidate list, and he was unlikely to win the legislative seat based on that ranking.

[262] BUDIARTI, ON THE RECORD, *supra* note 167, at 92.

[263] Rahmat Sahid, *Kalau KPU Ngotot Akan Terjadi Bencana Besar* [*There Will Be a Disaster If the Election Commission Refuses to Comply*], SEPUTAR INDONESIA, Feb. 21, 2009.

private television station RCTI.[264] Chief Justice Mahfud's extra-judicial strategies, which included frequent media interviews, indicated that the Court still needed the leadership of a heroic Chief Justice to deal with the pressure from the government and other political actors. Without it, the government might have continued to ignore or disrespect the Court's decisions. Therefore, the Chief Justice must sometimes act outside of the courtroom, opening up confrontation with the government.

D. The Corruption Scandals

One of the biggest challenges for Mahfud during his tenure as the Chief Justice was his Court's several alleged corruption scandals. These scandals brought serious challenges to his legitimacy as the Chief Justice of the Constitutional Court. One of the high profile scandals involved Associate Justice Mohammad Arsyad and centered on allegations that he manipulated the Court's decision in a regional election dispute. In 2009, the Court examined a dispute over the Head of Regency Election in South Bengkulu. A candidate for the position, Nirwan Mahmud, bribed both Arsyad's daughter and Arsyad's brother-in-law to convince Justice Arsyad to sway the Court's decision in Mahmud's favor. Justice Arsyad admitted that his daughter indeed met the candidate; however, he denied that his daughter had introduced the candidate to him.[265]

Chief Justice Mahfud handled the scandal well. He decided to establish an independent ethics council which examined Arsyad's involvement in the affair. The Ethics Council found evidence of a meeting between the candidate and Arsyad's daughter and brother-in-law. Moreover, the Council also found that Arsyad's family members had held meetings with Arsyad's law clerk afterward. The Council concluded that Arsyad violated the judiciary code of ethics because he failed to stop his family members from making a deal with parties involved in cases being handled by the Court. Arsyad maintained that he did not commit any crime; nevertheless, he tendered his resignation and left the Court in disgrace.[266]

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[264] *Mahfud MD beats Obama, Sri Mulyani as newsmaker of the year*, JAKARTA POST (May 18, 2011), http://www.thejakartapost.com/news/2011/05/18/mahfud-md-beats-obama-sri-mulyani-newsmaker-year.html.

[265] *MK to Examine Judge Arsyad's Daughter Next Week*, JAKARTA POST, (Dec. 11, 2010), http://www.thejakartapost.com/news/2010/12/11/mk-examine-judge-arsyad%E2%80%99s-daughter-next-week.html.

[266] *Supreme Court to Find Substitute for Arsyad Sanusi*, ANTARA NEWS AGENCY, Feb. 11, 2011.

A few months after Arsyad left office, a new scandal surfaced. While he was in office, Arsyad was allegedly involved in the forgery of a letter that gave a seat of the House of Representatives to a losing candidate.[267] The scandal arose from the General Election dispute in 2009 between a politician from the People's Conscience Party (Hanura), Dewi Yasin Limpo, and a politician from the Greater Indonesian movement (Gerindra), Mestariani Habie. The Constitutional Court officially ruled that the seat should be given to Habie, yet Justice Arsyad collaborated with the Law Clerk to forge a letter to award a House of Representatives seat to the losing candidate, Dewi Yasin Limpo.[268] Chief Justice Mahfud decided to conduct an internal investigation into the case and found indications that Arsyad, the law clerk, and a commissioner of the General Election Commission had collaborated to forge the document awarding the seat to a losing candidate. Chief Justice Mahfud then reported Arsyad's alleged involvement to the police.

The disgraced Justice Arsyad launched a counter attack. First, he revealed how Chief Justice Mahfud lobbied him rigorously to vote against Chief Asshiddiqie in the election of Chief Justice in 2008. He then apologized to Chief Justice Asshiddiqe for siding with Mahfud and creating a plot to dethrone Asshiddqie.[269] Second, Arsyad accused Mahfud of being an incompetent Chief Justice because he neglected the Court's administration and focused too much on building his popularity outside of court activities.[270] Lastly, Justice Arsyad accused Mahfud of breaching the judiciary code of ethics when Mahfud held a private meeting with an Anti-Corruption Commissioner, Bibit Riyanto, and his lawyer while the Court was reviewing his case.[271] The truth behind Arsyad's accusations remains unknown; nevertheless, Arsyad's scandals and his counter attack tainted the reputation of Chief Justice Mahfud.

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[267] *Arsyad Questioned over Alleged Court Document Forgery*, ANTARA NEWS AGENCY, July 1, 2011.

[268] *Arsyad ready to confront ex-colleagues over forgery case*, JAKARTA POST (July 2, 2011), http://www.thejakartapost.com/news/2011/07/02/arsyad-ready-confront-ex-colleagues-over-forgery-case.html.

[269] *Arsyad Bilang Mahfud Pengemis Jabatan* [*Arsyad Said that Mahfud Is a Beggar for Power*], JAWA POST NETWORK (June 28, 2011), http://www.jpnn.com/read/2011/06/28/96507/arsyad-Bilang-Mahpud-pengemis-jabatan.

[270] Willy Widianto, *Arsyad: Mahfud MD Tak becus memimpin MK* [*Arsyad: Mahfud Is Incompetent to Lead the Court*], TRIBUNENEWS (June 28, 2011), http://www.tribunnews.com/nasional/2011/06/28/arsyad-mahfud-md-tak-mengerti-administrasi-peradilan.

[271] *Mahfud Bantah Tudingan Arsyad* [*Mahfud Denied Arsyad's Allegation*], ANTARA NEWS (June 29, 2011), http://www.antaranews.com/berita/265184/mahfud-md-bantah-tudingan-arsyad.

E. The Mahfud Court at Twilight

On June 21, 2011, the House of Representatives enacted the Amendment of the Constitutional Court Law.[272] The amendment process itself went largely unnoticed, and thus, it created an impression that the House wanted to avoid public discourse on the amendment.[273] The new Law established the Honorary Council of Judges of the Constitutional Court, which aimed to supervise the performance of the Constitutional Court Justices. The council members included some members of the House of Representative.[274] The new law also prescribed that the Court's judgment should not exceed what a claimant requested.[275] The then Minister of Law and Human Rights, Patrialis Akbar, explained that the Court would be forbidden from deciding a matter it has not been asked to make a decision upon, such as the nullification of a whole statute.[276] Moreover, the Law reduced the tenure of Chief Justice to two years and six months, implying that the House wanted to have more control over the Court.[277] The decision to reduce the term of Chief Justice signified that that position is quite important. By reducing the term of Chief Justice, the House wanted to minimize the position's influence on Indonesian constitutional politics.

Chief Justice Mahfud responded positively to the new law and stated that the Court would accept it without reservation.[278] Moreover, Mahfud denied the possibility that the Court could review the new law. He reaffirmed his old taboos that the Court should recuse itself when it had self-interest in certain cases that involved the Court's authority.[279] One plausible explanation for Mahfud's compliance with the new law is that he was

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[272] Law of the Republic of Indonesia, No. 8 of 2011, on the Amendment of Law No. 24 of 2003 on the Constitutional Court, art. 27A(2).

[273] *Revisi UU MK Cermin Ketakutan DPR* [*Amendment of the Constitutional Court Law Indicates the Fear of the Legislators*], POLMARK INDONESIA, (June 22, 2011), http://www.polmarkindonesia.com/index.php?option=com_content&task=view&id=2338.

[274] Law of the Republic of Indonesia, No. 8 of 2011, on the Amendment of Law No. 24 of 2003 on the Constitutional Court, art. 27A(2).

[275] *Id*. art. 45A.

[276] Dina Indrasafitri, *Minister lauds new constitutional court bill*, JAKARTA POST (June 4, 2011), http://www.thejakartapost.com/news/2011/06/14/minister-lauds-new-constitutional-court-bill.html.

[277] Law of the Republic of Indonesia, No. 8 of 2011, on the Amendment of Law No. 24 of 2003 on the Constitutional Court, art. 4(2).

[278] *Soal Revisi UU MK, Mahfud MD Bilang Terserah*, [*With Regard to the Amendment of the Constitutional Court Law, Mahfud Says Whatever*], REPUBLIKA (June 21, 2011), http://www.republika.co.id/berita/nasional/hukum/11/06/21/ln4kil-soal-revisi-uu-mk-mahfud-md-bilang-terserah.

[279] *Mahfud: MK Hormati Revisi UU MK* [*Mahfud: The Court Respects the Amendment of the Constitutional Court Law*], KOMPAS (June 22, 2011), http://nasional.kompas.com/read/2011/06/22/00571396/Mahfud.MK.Hormati.Revisi.UU.MK.

seeking re-election as the Chief Justice. In August 2011, Chief Justice Mahfud had to run for re-election, so he once again implemented judicial restraint in order to please the Executive and Legislative branches.

During his tenure as Chief Justice, Mahfud seemed to maintain good relations with his fellow judges and therefore did not face strong resistance during his re-election. The Government also appeared tolerant of Mahfud's behavior on the bench, and, consequently, Mahfud was reelected to be the Chief Justice until 2014.[280] It was therefore surprising when, in November 2012, Mahfud told the House of Representative that he intended to leave his job in April 2013.

There were rumors that Mahfud was a potential candidate for president in the 2014 election. [281] Therefore, his decision to resign, some believe, was part of his larger plan to run for president. In response to the rumors, Chief Justice Mahfud said, "That is part of democracy. So let it be . . . ."[282] On April 1, 2013, Chief Justice Mahfud officially resigned from the Court and reaffirmed his aspiration to run in the presidential race. "If the opportunity is really there, I am ready to be nominated as a presidential candidate," said Mahfud on his last day at the Court.[283] Mahfud's presidential ambitions indicate that the position of Chief Justice is indeed important in the Indonesian Constitutional Court. Mahfud has earned fame following his involvement in politically sensitive cases, frequent media interviews, and activities outside the courtroom. In other words, Mahfud earned his fame by following in the footsteps of his predecessor Jimly Asshiddiqie, who played a role as a heroic Chief Justice.

Mahfud's party, the National Awakening Party (PKB) had, indeed, considered him as a potential candidate for the 2014 presidential election. Unfortunately, the PKB only garnered 9.04 % of popular vote (i.e. 8.39 % of seats), which is far below the presidential threshold.[284] Having realized that it would not be able to nominate Mahfud as president, the PKB buried

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[280] *Mahfud retakes oath as constitutional court chairman*, ANTARA NEWS AGENCY (Aug. 22, 2011), http://www.antaranews.com/en/news/75006/mahfud-md-retakes-oath-as-constitutional-court-chairman.

[281] *Mahfud says he has no posture for presidency*, ANTARA NEWS AGENCY (Aug. 22, 2011), http://www.antaranews.com/en/news/75010/mahfud-says-he-has-no-posture-for-presidency.

[282] *Id*.

[283] *Mahfud says he's ready for presidential race*, JAKARTA POST (Apr. 2, 2013), http://www.thejakartapost.com/news/2013/04/02/mahfud-says-hes-ready-presidential-race.html.

[284] *See* Decision on the Result of Legislative Election, No. 412/Kpts/KPU/TAHUN (National Election Commission, May 9, 2014), http://www.kpu.go.id/koleksigambar/952014_SK_KPU_412.pdf.

Mahfud's presidential ambition and decided to join the coalition that nominated the Governor of Jakarta, Joko Widodo as president.[285] Mahfud could not hide his disappointment and decided to support Widodo's rival, a retired three star general, Prabowo Subianto. In a dramatic turn, he accepted an offer to become the head of Subianto's election campaign.

In the presidential election that took place on July 9, 2014, Joko Widodo, commonly known as Jokowi, defeated his archrival Prabowo Subianto. Widodo received 53.1 percent of the votes (71 million) and his opponent received 46.85 per cent (62.5 million). Mahfud admitted that he had failed to deliver victory for Prabowo Subianto. Subianto, however, refused to concede and claimed that he had been denied victory by fraud and immediately challenged the election result in the Constitutional Court. Soon after the General Election Commission announced the official results of the 2014 presidential election, former Chief Justice Mahfud resigned from his position as chairman of the Subianto's presidential campaign team.[286]

VI. MISCARRIAGE OF CHIEF JUSTICE: THE TRAGIC FALL OF AKIL MOCHTAR

On April 3, 2013, the Court elected Akil Mochtar as the new Chief Justice for the period of 2013–2015. Mochtar had no towering academic credential like his predecessors; he was a politician from Golkar Party, the former ruling party under the military dictatorship. He began to serve as the member of the House of Representative after the fall of military government in 1998. In his second term as the member of the House, he served as the Deputy Chairman of the House of Judiciary Committee.[287]

In 2007, Akil Mochtar ran for West Kalimantan governor and lost. But his failure in that election became a turning point for his political aspirations. In his bid for governor, Mochtar went against his own party candidate, the then Governor Usman Djafar. Thus, Golkar Party officials saw Mochtar as a traitor that split Golkar's vote, which resulted in his

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[285] Mohammad Syarrafah, *Kecewa PKB, Mahfud: Selesai Tugas Pada Partai* [*Disappointed with PKB, Mahfud: The Service to the Party Is Coming to an End*], TEMPO.CO, (May 21, 2014), http://www.tempo.co/read/news/2014/05/21/078579207/Kecewa-pada-PKB-Mahfud-Selesai-Tugas-di-Partai.

[286] Ina Parlina & Bagus BT Saragih, *Prabowo's intransigence leads to self-humiliation*, JAKARTA POST (July 23, 2014), http://www.thejakartapost.com/news/2014/07/23/prabowo-s-intransigence-leads-self-humiliation.html.

[287] *See* THE CONSTITUTIONAL COURT OF REPUBLIC OF INDONESIA, UPHOLDING THE CONSTITUTIONAL DEMOCRATIC STATE, 2011 ANNUAL REPORT xxi (2011).

loss.[288] Having realized that he would never be nominated for legislative candidacy again by Golkar, Mochtar lobbied politicians for consideration to be appointed as a Constitutional Court justice. Five years later, he became the third Chief Justice of the Constitutional Court.[289]

Akil Mochtar's election is rather puzzling for many people, especially considering his poor record. Akil Mochtar had long been suspected of involvement in corrupt activity while on the Constitutional Court. In 2010, he was linked to a bribery scandal that related to a case involving an election dispute in the Simalungun district. Refly Harun, the lawyer of the Head of Simalungun District accused Mochtar of receiving money from his client in exchange for a promise of a favorable decision in return.[290] The then-Chief Justice Mahfud established an independent ethics council to investigate the allegation. The Ethics Council, however, did not find any incriminating evidence and cleared Mochtar of all charges. Three years later, Mochtar could not escape from corruption charges when the Anti-Corruption Commission arrived with a warrant for his arrest and confiscated approximately USD 260,000 from his residence. The money was allegedly given so Mochtar would rule the Gunung Mas regional election dispute in the incumbent's favor.[291]

So why did the Constitutional Court Justices elect Akil Mochtar as the third Chief Justice? One of the plausible explanations is that Akil Mochtar was not the sole perpetrator involved in the corruption scandals. Budiman Tanuredjo, the chief editor of *Kompas*, the leading daily newspaper in Indonesia, wrote a detailed report on the involvement of Akil Mochtar in multiple bribery offences in regional election disputes.[292] Under the tenure of Chief Justice Mahfud, Mochtar sat on the same panel of judges with Justice Hamdan Zoelva and Justice Mohammad Alim that was equipped with the task of examining some regional election dispute cases.[293] Tanuredjo reported that in many instances Akil Mochtar received a bribe for

[288] Prodita Sabarini, *Akil Mochtar: Turning the tide*, JAKARTA POST (May 2, 2013), http://www.thejakartapost.com/news/2013/05/02/akil-mochtar-turning-tide.html.

[289] *Akil Mochtar chosen as new MK chief justice*, JAKARTA POST (Apr. 3, 2013), http://www.thejakartapost.com/news/2013/04/03/akil-mochtar-chosen-new-mk-chief-justice.html.

[290] *Honor council for justice Akil: MK Chief*, JAKARTA POST (Dec. 12, 2010), http://www.thejakartapost.com/news/2010/12/22/honor-council-justice-akil-mk-chief.html.

[291] *MK chief justice, Golkar lawmaker arrested for bribery charges*, JAKARTA POST, (Oct. 3 2013), http://www.thejakartapost.com/news/2013/10/03/mk-chief-justice-golkar-lawmaker-arrested-bribery-charges.html.

[292] *See* BUDIMAN TANUREDJO, AKAL AKAL AKIL [THE TRICKS OF AKIL] (2014).

[293] *Id.* at 109–15.

the Court to rule in favor of certain candidates.[294] The question is how Mochtar could steer the Court decision without the knowledge of his brethren who sat on the same panel. After he became the Chief Justice, Mochtar shuffled the panel of judges that examine the regional election disputes. Mochyar assigned himself to sit in a panel of judges with Justice Maria Farida and Justice Anwar Usman.[295] Tanuredjo reported that Mochtar received multiple bribes to issue a favorable ruling to certain candidates.[296] These facts lead into two different conclusions: first, Mochtar steered the Court's decision in collaboration with his fellow justices who sat on the same panel; second, he received bribes alone, but he was able to use his insider position to advocate strongly for certain positions while the other judges were oblivious.[297]

The tenure of Akil Mochtar as Chief Justice was short. He reigned from April 3, 2013 until his arrest on October 2, 2013. The arrest not only has tarnished the Court's reputation but also eroded the Court's legitimacy. Shortly after Mochtar's arrest, an angry crowd ransacked the courtroom where a trial was being held.[298] At that time, eight justices were reading out a verdict concerning a dispute of Governor Election in Maluku province. The supporters of the losing candidate stormed the courtroom and the justices immediately exited the courtroom after one of the angry supporters hurled a microphone at them. Obviously, the attack signified the lack of trust from general public. There would be a long way to go for the Court to rebuild its reputation.

The disgrace of Akil Mochtar reached its climax on June 30, 2014 when the Jakarta Anti-Corruption Court sentenced him to life imprisonment.[299] The Court found that Mochtar was guilty of corruption and money laundering during his tenure as an associate justice and Chief Justice, between 2010 and 2013. The tragic episode of Akil Mochtar signifies an important moment in the history of the Indonesian

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[294] *Id.* at 110–11.

[295] *Id.* at 78–04.

[296] *Id.* at. 83–105.

[297] In the *Central Tapanuli Regional Election Case*, Mochtar even received the bribe although he was not a sitting judge who examined the case. The Court ruled in favor of the candidate who bribed Mochtar. As a non-sitting judge, Mochtar wouldn't have been able to steer the Court decision unless he collaborated with the sitting judges. *See id.* at 120.

[298] Bayu Marhaenjati, *Farce in Constitutional Court as Maluku Ruling Turns to Riot*, JAKARTA GLOBE (Nov. 14, 2013), http://thejakartaglobe.beritasatu.com/news/farce-in-constitutional-court-as-maluku-ruling-turns-to-riot/.

[299] TANUREDJO, *supra* note 292, at 138–39.

Constitutional Court. The Chief Justice holds a crucial position in the Indonesian constitutional constellation. In his capacity as the Chief Justice, Akil Mochtar was the personification of the Court, and thus, the public could easily equate his personal crimes with the Court. Prior to the fall of Akil Mochtar, the Court had a reputation as a transparent and functioning institution. Mochtar's arrest, however, led the public to perceive the Court as another corrupt legal institution in the country, similar to the Supreme Court or the Attorney General's office.

VII. WILTING BEFORE BLOOMING: THE HAMDAN ZOELVA COURT

After the arrest of Akil Mochtar, the Deputy Chief Justice Hamdan Zoelva took over the leadership of the Constitutional Court, and subsequently was elected as the fourth Chief Justice of the Constitutional Court on November 1, 2013. Zoelva is a politician from the Star and Crescent party. Like the first two Chief Justices who have strong Islamic backgrounds, Zoelva also has strong ties with political Islam. His party, the Star and Crescent Party, claims that it is the continuation of Council of Indonesian Muslim Associations (*Partai Majelis Syuro Muslimin Indonesia* or Masyumi), a major Islamic political party in Indonesia in 1950s.[300] When the party was re-established in 1999 after the fall of Suharto regime, the original plan was to use the Masyumi name again, but after consideration, they settled on the Crescent Star Party.[301] Zoelva used to hold many strategic positions in the party. He was the Secretary of Star and Crescent caucus in the House of Representative from 1999 to 2004 and was a member of its Executive Committee.[302] He resigned from the Party after President Susilo Bambang Yudhoyono nominated him as an associate Justice of the Constitutional Court in 2010.[303]

When Hamdan Zoelva was inaugurated on November 6, 2013, he inherited a court in crisis. The biggest challenge for Zoelva was restoring public confidence in the Court after the tragic fall of his immediate predecessor. The first test for Chief Justice Zoelva's leadership was in the *Presidential Threshold Case*, in which the Court had to decide the

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[300] *See* BERHARD PLATZDASCH, ISLAMISM IN INDONESIA: POLITICS IN THE EMERGING DEMOCRACY 30–99 (2009).

[301] For the details of the debate on the adoption of the name of Bulan Bintang, see *id.* at 63–68.

[302] *Id.* at 353.

[303] Erwida Maulia, *Two new Constitutional Court Justices sworn in*, JAKARTA POST (Jan. 7, 2010), http://www.thejakartapost.com/news/2010/01/07/two-new-constitutional-court-justices-sworn.html.

constitutionality of presidential threshold requirements.[304] This was even more significant because Zoelva's appointment as the Chief Justice had drawn criticism from some political activists who believed that his background as a politician would only serve to weaken the public's waning trust toward the Court.[305] This concern was based on the fact that a number of the Star and Crescent Party officials frequently argued before the Court. The founder of the Star and Crescent Party, Yusril Ihza Mahendra, a high-profile lawyer and former Minister of Justice often argued before the Constitutional Court.[306] In the *Presidential Threshold Case*, many critics expressed concern that Chief Justice Zoelva might try to steer the Court decision in favor of Mahendra.

The case arose because on December 8, 2013, Mahendra announced his candidacy for the presidency despite his party having no seats in the House and little prospect of fulfilling either the seat or popular vote threshold in the 2014 legislative election.[307] According to the Presidential Election Law, a presidential candidate shall be nominated by a political party or a coalition of political parties who hold at least twenty percent seats in the House of Representatives or obtain at least twenty-five percent of the popular vote in the legislative election.[308] On December 13, 2013, Mahendra launched a legal challenge in the Constitutional Court to enable him to run for president on his party's ticket, the Star and Crescent Party.

In his petition, Mahendra postulated that the Constitution did not specify any threshold for the presidential election. Mahendra referred to the Constitutional provisions that states, "each ticket of presidential candidates shall be proposed prior to the holding of general elections by political parties or coalitions of political parties which are participants in the general elections."[309] Mahendra asserted that there were twelve political parties in

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[304] *See* Decision, Reviewing the Law No. 24 of 2008 on the Election of President and Vice President, No. 108/PUU-XI/2013 (Constitutional Court, Mar. 20, 2014).

[305] Rizky Amelia, *Hamdan Zoelva's Selection Stirs Debate*, JAKARTA GLOBE (Nov 4, 2013), http://www.thejakartaglobe.com/news/hamdan-zoelvas-selection-stirs-debate/.

[306] Stefanus Hendrianto, *The First Ten Years of the Indonesian Constitutional Court: The Unexpected Insurance Role*, ICONNECTBLOG (Aug. 25, 2013), http://www.iconnectblog.com/2013/08/the-first-ten-years-of-the-indonesian-constitutional-court-the-unexpected-insurance-role/.

[307] *Yusril and Crescent Star Party Throw Hat in 2014 Presidential Race*, JAKARTA GLOBE (Dec. 9, 2013), http://thejakartaglobe.beritasatu.com/news/yusril-and-crescent-star-party-throw-hat-in-2014-presidential-race/.

[308] Law of the Republic of Indonesia, No. 24 of 2008 on the Election of President and Vice President, art. 9.

[309] Undang Undang Dasar Negara Republik Indonesia [Constitution] art. 6(2).

the 2014 election, and, therefore, he urged the Court to declare that all of these parties have the right to nominate their candidates for president.[310]

On March 20, 2014, the Court issued a decision that addressed Mahendra's complaint. The Court considered that Mahendra had requested the Court to issue an advisory opinion in regards to the meaning of article 6(2) of the Constitution. The Court made a distinction between a declaratory judgment and an advisory opinion; the former aims to resolve concrete controversies and the latter does not.[311] The Court held that it had no authority to issue an advisory opinion, and thus that it could not grant Mahendra's petition.[312] The Court's decision signaled that it was on the verge of abandoning its old approach. Previously, under both the Assiddiqhie Court and the Mahfud Court, the Court had not been reluctant to issue opinions in similar cases. The decision was a signal that the Zoelva Court believed that the Court should play a minimal role in politically-charged cases.

The Court continued to signal its preference for judicial restraint in the recent *Regional Election Dispute Case*.[313] The Zoelva Court was also fully aware that the Court's reputation has been tarnished by many scandals that originated from regional election disputes. After the arrest of Chief Justice Mochtar, many constitutional stakeholders began to urge the President and the House of Representatives to reevaluate the Court's authority to handle these disputes. Nonetheless, neither the President nor the House took any steps to address the issue. The Zoelva Court thus took the issue into its own hands in its decision in this case.

The case originated from a claim made by a group of NGOs, chiefly led by the Law and Constitutional Assessment Forum (*Forum Kajian Hukum dan Konstitutsi*). The claimants posited that the Constitution only equipped the Court with authority to handle national election disputes, not regional election disputes.[314] Based on this presupposition, the Claimant concluded that the Court's authority to handle regional election disputes was unconstitutional.

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[310] Decision, Reviewing the Law No. 24 of 2008 on the Election of President and Vice President, No. 108/PUU-XI/2013, at 12 (Constitutional Court, Mar. 20, 2014).

[311] *Id.* at 21.

[312] *Id.*

[313] Decision, Reviewing the Law No 12 of 2008 on the Amendment of Law No. 32 of 2004 on Regional Governance, No. 97/PUU-XI/2013 (Constitutional Court May 18, 2014).

[314] *Id.* at 3.

The claimants also put forward a claim that the Court had shifted their energy and resources to handling the regional election disputes instead of statutory review. According to the claimants, the Court's new priority caused immediate harm to them because it lessened their ability to bring successful statutory review cases.[315] The nature of the claim was very abstract and the petitioners were asking the Court to reevaluate its own authority to handle regional election disputes.

The Court's majority sustained the claimant's petition and held that the drafters of the Constitution never intended to include the election of the Governor and the head of district (*Bupati*) within the textual phrase "general election."[316] The Court ruled that the drafters only intended to include the presidential election and the legislative election, including the members of the national parliament and the regional parliament.[317] The Court thus held that many regional election disputes are not within the scope of its authority.[318]

This case marked the second time in less than a year that the Zoelva Court minimized its role in constitutional politics. The Zoelva Court's approach is a contrast to both the Assidhiddiqie Court and the Mahfud Court. The Zoelva Court understood that the regional election dispute has created a tremendous burden for the institution. The Court had been overwhelmed with the regional election disputes on top of a recent influx in statutory review cases. From 2003 through 2008, the Court only received an average of twenty-five statutory review cases per year; however, since 2008 the Court has received an average of eighty statutory review cases per year. In addition, the Court must also handle a large number of national legislative election disputes every five years. In the recent 2014 legislative election, the Court received 702 national legislative election disputes.[319] Thus, the

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[315] *Id.* at 21–22.
[316] *Id.* at 60.
[317] *Id.* at 59.
[318] *Id.* at 60.
[319] Ina Parlina, *Constitutional Court starts hearing hundreds of election disputes*, JAKARTA POST (May 24, 2014), http://www.thejakartapost.com/news/2014/05/24/constitutional-court-starts-hearing-hundreds-election-disputes.html; *MK "Kebanjiran" Perkara Sengketa Pemilu* [*The Constitutional Court Was Flooded with Election Disputes*], HUKUMONLINE (May 13, 2014,), http://www.hukumonline.com/berita/baca/lt53722122093ed/mk-kebanjiran-perkara-sengketa-pemilu.; *MK "Kebanjiran" Perkara Sengketa Pemilu* [*The Constitutional Court Was Flooded with Election Disputes*], HUKUMONLINE (May 13, 2014,), http://www.hukumonline.com/berita/baca/lt53722122093ed/mk-kebanjiran-perkara-sengketa-pemilu.

Zoelva Court decided to remove regional election disputes from its docket entirely.

The latest evidence of the Court's advocacy for judicial restraint is the Court decision in the *MD3 Case*.[320] The Case involved judicial review over Law No. 17 of 2014 on *Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah dan Dewan Perwakilan Rakyat Daerah*—the People's Consultative Assembly, People's Representative Council and Regional Representative Council, and Regional People Representative Council ("MD3 Law"). The crux of the matter in this case was whether the winner of parliamentary election shall hold the position of the House Speaker.

In 2010, the Yudhoyono administration prepared the MD3 bill, aiming to address several issues such as the reorganization of the Regional Representative Council (*Dewan Perwakilan Daerah* or DPD).[321] Since its inception ten years ago, the DPD has been considered the weak second chamber because its authority is limited to discussions of how a prospective bill relates to regional issues. The second important issue that the bill aimed to address was the immunity of the members of the House of Representatives. According to the Anti-Corruption Commission, more than seventy-five members of parliament were detained and declared suspects in corruption cases in the previous seven years.[322] The pressing issue that the bill aimed to address was how to balance the effort to combat corruption and the immunity of the members of parliament.

The MD3 Bill stalled for almost four years, until an emerging political situation in the wake of the April 2014 Parliamentary Election revived the bill. After the 2014 Parliamentary Election, Prabowo Subianto and his Red-White Coalition, which controlled sixty percent of the seats in the Parliament, began to see an opportunity to manipulate the MD3 bill for their interest. The main agenda of the Red-White coalition was to control the

[320] Decision, Reviewing the Law No. 17 of 2014 on the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and Regional People Representative Council, No. 73/PUU-XII/2014 (Constitutional Court, Sept. 29, 2014).

[321] *See* Law of the Republic of Indonesia, No. 17 of 2014 Amendment to the Legislative Institution Law, arts. 163, 166 (MD3 Law).

[322] Ina Parlina, *KPK reminds govt to boost its budget*, JAKARTA POST (Nov. 14, 2014), http://www.thejakartapost.com/news/2014/11/14/kpk-reminds-govt-boost-its-budget.html.

leadership of the House.[323] According to the old MD3 Law No. 27 of 2009, "the House Speaker shall be a member of the political party that garners the largest vote in the legislative election."[324] As the winner of the 2014 Legislative Election, the Indonesian Democratic Party of Struggle (PDI-P) was supposed to hold the Speaker seat. But the PDI-P had to face a big disappointment when the Red-White Coalition manipulated the MD3 bill during the lame duck session of the Parliament. The Red-White Coalition successfully inserted an amendment that stipulated the House Speaker shall be elected by the members of the House.[325] On July 8, 2014, the House passed the new MD3 Law and it went largely unnoticed as all the eyes were focusing on the presidential election that took place a day later. The Chairwoman of the Indonesian Democratic Party of Struggle's (PDI-P), Megawati Soekarnoputri and two PDI-P lawmakers filed a claim to the Court and asserted that they were unfairly treated by the new law.[326] The Chief of the PDI-P legal team stated, "Within only a month, they amended the Legislative Institution Law, so now the House speaker position doesn't automatically belong to the election winner."[327]

The Zoelva Court again exercised judicial restraint. First, the Court held that the PDI-P and its Chairwoman Megawati Soekarnoputri had no standing to file the case because they simply disagreed with the enactment of the Law.[328] Moreover, the Court held that the PDI-P was involved in discussing the bill in the House, which means that they already had a chance to express their disagreement during the deliberation process.[329] On the merits of the case, the Court decided it is the province of the legislature to decide on how to choose leaders in legislative branch of government.[330]

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[323] *Red-and-White Coalition Sweeps House Leadership Posts*, JAKARTA GLOBE (Oct. 2, 2014), http://jakartaglobe.beritasatu.com/politics/red-white-coalition-sweeps-house-leadership-posts/.

[324] Law of the Republic of Indonesia, No. 17 of 2014 Amendment to the Legislative Institution Law, art. 82(2).

[325] *Id.* art. 84(1).

[326] *See* Decision, Reviewing the Law No. 17 of 2014 on the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and Regional People Representative Council, No. 73/PUU-XII/2014, at 60 (Constitutional Court, Sept. 29, 2014).

[327] *PDI-P files lawsuit MD3 Law with Constitutional Court*, JAKARTA POST (July 25, 2014), http://www.thejakartapost.com/news/2014/07/25/pdi-p-files-lawsuit-md3-law-with-constitutional-court.html.

[328] *See* Decision, Reviewing the Law No. 17 of 2014 on the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and Regional People Representative Council, No. 73/PUU-XII/2014, at 201 (Constitutional Court, Sept. 29, 2014).

[329] *Id.*

[330] *Id.* at 214.

The Court's holding on standing did not alter the Court's recognition of generalized grievances standing; nonetheless, it signaled a slight departure from the Court's standing precedent. The Asshiddiqie's Court used the standing doctrine as an avenue to review governmental policies. The Mahfud Court in some ways continued to apply a similar strategy and it did not see any need to alter the Asshiddiqie Court's standing doctrine. The Zoelva Court, however, turned towards judicial restraint and it had no inclination to play a tug of war with the President or the Parliament, as was done by previous Courts. By holding that the PDI-P has no standing because already participated in the deliberation process in the House, the Zoelva Court indicated that the Court would not trespass the authority of legislative branch.

The 2014 General Election has provided many opportunities for the Court and Chief Justice Hamdan Zoelva to play important roles in Indonesian Constitutional politics. These opportunities in some ways have become a blessing in disguise for Chief Justice Hamdan Zoelva to raise his own profile, especially in the recent Presidential Election Dispute case. On July 22, 2014, the General Election Commission declared Jokowi and his running mate Jusuf Kalla as the Presidential Election winners by a margin of 8.5 million votes. The defeated candidate, Prabowo Subianto, however, refused to concede and claimed that he had been denied victory by fraud and immediately challenged the election result in the Constitutional Court.[331] Having spent more than three weeks reviewing the case, the Court rejected all of Subianto's complaints and ruled that there was no evidence of systematic and massive electoral fraud in favor of Widodo.[332]

The Court decision in the Presidential Election disputes has elevated Chief Justice Zoelva to a very public position. Zoelva's leading role in presiding over the trial has won not only praise by political observers, who called him "the man of the hour" as the Court handed down its verdict that day, it has also transformed him into a social media darling.[333] For example,

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[331] *Prabowo Files Challenge to Election Result at Constitutional Court*, JAKARTA GLOBE (July 25, 2014), http://jakartaglobe.beritasatu.com/news/prabowo-challenges-election-result-constitutional-court/.

[332] Decision, Reviewing the Presidential Dispute between Prabowo Subianto and Joko Widodo, No. 1/PHPU-Pres-XII/2014 (Constitutional Court Aug. 8, 2014).

[333] Kennial Caroline Laia & Adelia Ajani Putri, *For Constitutional Court Chief Hamdan, Justice Will Prevail*, JAKARTA GLOBE (Aug. 28, 2014), http://thejakartaglobe.beritasatu.com/news/constitutional-court-chief-hamdan-justice-will-prevail/.

Zoleva raised to prominence among social media users for his appearance after the Court rendered its decision.[334]

Prior to the Court's decision in the *Presidential Dispute*, many critics were skeptical that the Court would be impartial in reviewing the case.[335] The concerns were based on the fact that Zoelva was a member of the Star and Crescent Party that supported the losing candidate Prabowo Subianto. In addition to Zoelva, Justice Patrialis Akbar was a member the National Mandate Party (PAN) and the Chairman of PAN, Hatta Rajasa was the running mate of Prabowo Subianto. Therefore, there was a concern that Chief Justice Zoelva, with some help from Justice Patrialis Akbar, might steer the Court decision in favor of Prabowo Subianto. Chief Justice Zoelva responded to the critics: "Whatever I said, people would not believe me. I had said repeatedly that the Court would be independent, but no one believed us."[336] Indeed, Chief Justice Zoelva turned the skepticism into delight by proving his impartiality.

The rise of Chief Justice Zoelva in the public consciousness signifies that the position of Chief Justice is important in Indonesian Constitutional politics. The public still believes that the Chief Justice is the personification of the Court, moreover, people have a perception that the Chief Justice might be able to steer the Court decision in a certain direction. Although the Chief Justice does not have as much power as the public imagines, the Chief Justice can still influence the path that Court will take.

Despite the success of Chief Justice Zoelva in repairing the Court's image, the Court has been unable to fully recover from the major setback caused by Akil Mochtar. First, the Court's advocacy of judicial restraint may be a sign of weakness, that Chief Justice Zoelva did not believe the court had the strength to overrule the Executive and Legislature. Second, the Court's decision that upheld Jokowi's electoral victory could also be interpreted as a sign of weakness because the Court was simply affirming a popular electoral result. Lastly, Chief Justice Zoelva's advocacy of judicial

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[334] *Fenomena Ketua MK Hamdan Zoelva Yang Gantengnya Seperti Bintang Film* [*The Phenomenon of Chief Justice Hamdan Zoelva Who is Handsome Like a Film Star*], VEMALE.COM (Aug. 22, 2014), http://www.vemale.com/inspiring/people-we-love/70413-fenomena-ketua-mk-hamdan-zoelva-yang-gantengnya-seperti-bintang-film.html.

[335] *Game over, Prabowo!* JAKARTA POST (Aug. 22 2014), http://www.thejakartapost.com/news/2014/08/22/game-over-prabowo.html.

[336] Dian Triyuli Handoko, *Hamdan Zoelva: This was our toughest case*, TEMPO.COM (Aug. 27, 2014), http://en.tempo.co/read/news/2014/08/27/241602631/Hamdan-Zoelva-This-was-our-toughest-case.

restraint did not help him to secure his position, as the new President Jokowi decided not to re-appoint him for a second term. Furthermore, Chief Justice Zoelva had to endure a humiliating experience in his effort to cling to his position.[337]

President Susilo Bambang Yudhoyono appointed Hamdan Zoelva as an associate Justice on January 7, 2010, which means that he would finish his first-five year term on January 7, 2015.[338] As Chief Justice Zoelva approached the end of his first five-year term, the Jokowi administration hinted that Chief Justice Zoelva would not be re-appointed for his second term.[339] On November 11, 2014, President Jokowi established a selection committee to find a successor for Hamdan Zoelva. Chief Justice Zoelva implied that he was prepared to be reappointed if Jokowi wanted him to keep the position. When the selection committee opened a public competition for Zoelva's position, Zoelva put aside his ego and applied for his position.

Chief Justice Zoelva soon realized that the Jokowi administration would not give him an easy pass when the selection committee called him for an interview. Zoelva sent a letter stating his objection to attend the interview with the selection committee. He said he had already fulfilled the requirement to serve on the bench when he was interviewed to become an associate Justice in 2010.[340] The selection committee maintained that Chief Justice Zoelva would not receive any special treatment and he could not take any shortcuts. The committee finally decided to drop the bid of Chief Justice Hamdan Zoelva.[341] This episode suggests that the Court was indeed weak

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[337] Stefanus Hendrianto, *The Indonesian Constitutional Court in Crisis over the Chief Justice's Term Limit*, INT'L J. CONST. L. BLOG, (Feb. 5, 2015), http://www.iconnectblog.com/2015/02/the-indonesian-constitutional-court-in-crisis-over-the-chief-justices-term-limit/.

[338] Chief Justice Zoelva was elected as Chief Justice on November 1, 2013 and he was supposed to stay in office until 2016. The problem arises when the term of Chief Justice does not run concurrently with the term of Constitutional Court justices.

[339] There was some speculation that President Jokowi did not re-appoint Chief Justice Zoelva because the Court did not rule in favor of Jokowi's political party, the Indonesian Democratic Party of Struggle (PDI-P) in some cases before the Court. For instance, the Court held that the PDI-P has no standing to challenge the MD3 Law. *See* Decision, Reviewing the Law No. 17 of 2014 on the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and Regional People Representative Council, No. 73/PUU-XII/2014, at 60 (Constitutional Court, Sept. 29, 2014). In addition, Zoelva's political affiliation is to the Star and Crescent Party that opposed Jokowi in the last presidential election.

[340] Ezra Sihite & Carlos Paath, *Constitutional Court in Fresh Crisis as Hamdan Zoelva Skips Selection Interview*, JAKARTA GLOBE (Dec. 23, 2014), http://jakartaglobe.beritasatu.com/news/constitutional-court-fresh-crisis-hamdan-zoelva-skips-selection-interview/.

[341] Ina Parlina, *Team disqualifies Hamdan from MK race*, JAKARTA POST (Dec. 24, 2014), http://www.thejakartapost.com/news/2014/12/24/team-disqualifies-hamdan-mk-race.html.

because Chief Justice Zoelva had to show submissive respect to the Jokowi administration, which eventually failed to save him from the sad ending.

Some politicians and analysts accused Zoelva of not acting like a statesman in the battle over his appointment, as he simply wanted to cling on to his position as Chief Justice.[342] Regardless of the motivation behind his decision to fight against the Jokowi administration, Zoelva raised some important concerns over the Constitutional Court's institutional design. Before he left the office, Chief Justice Zoelva urged lawmakers to reform the term limit for Constitutional Court justices and Chief Justice.[343] He argued that a longer term limit is necessary to preserve judicial independence. There is some truth in Zoelva's proposal because if the appointment term is longer, the constitutional court judges would likely be more independent in exercising their authority.

On January 12, 2015, the Constitutional Court Justices unanimously elected Arief Hidayat, a lesser-known academic from Diponegoro University, as the fifth Chief Justice of the Indonesian Constitutional Court. As the new Chief Justice, Arief Hidayat must reflect on what his future will look like and whether his career will end up like his predecessors. It appears that Arief Hidayat did not learn any lessons from his predecessors. Just barely one year in his tenure as Chief Justice, Hidayat shocked the public with indications of an ethics violation.[344] Hidayat allegedly wrote a memo to Widyono Pramono, the then Assistant Attorney General for Special Crime concerning Hidayat's recommendation for Pramono's promotion for becoming a Professor at the University of Diponegoro Law School, where Hidayat used to be the Dean. In return, Hidayat requested for a special treatment of his "family member," Zainur Rochman an assistant District Attorney at Trenggalek Regency, East Java.[345]

The Ethics Council then moved to investigate the allegations of an ethics violation. Hidayat admitted before the Ethics Council that he did

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[342] *Tolak Tahapan Seleksi Calon Hakim MK, Sikap Hamdan Zoelva Dinilai Tak Negarawan*, [*Refused to Be Interviewed as a Candidate, Many See Hamdan Zoelva Is Not Acting Like a Statesman*], BERITASATU.COM (Dec. 23, 2014), http://www.beritasatu.com/hukum/235469-tolak-tahapan-seleksi-calon-hakim-mk-sikap-hamdan-zoelva-dinilai-tak-negarawan.html.

[343] *Metro TV News Interview with Hamdan Zoelva*, YOUTUBE (Dec. 24, 2014), https://www.youtube.com/watch?v=Tl9LdEw83ls.

[344] *Constitutional Court Chief Under Fire for Memo to AGO*, JAKARTA GLOBE (Jan. 21, 2016), http://jakartaglobe.beritasatu.com/news/constitutional-court-chief-fire-memo-ago/.

[345] *Ethics Violation Allegedly Committed by Constitutional Court Chief Justice*, INDON. L. REFORM WEEKLY DIG. (Feb. 15, 2016), http://www.pshk.or.id/id/publikasi/lrwd-edition-01-january-2016-2/

write the letter, but that he never intended to seek a special treatment for his "relative" who happened to be an assistant District Attorney.[346] Hidayat argued that he simply wrote in the letter, "I am entrusting you (Promono) to take him (Rochman) under your wing and to treat him like your son."[347] According to Hidayat, what he meant by those words was a simple request for Pramono to be a mentor for Rochman in terms of improving his skill and knowledge as a young prosecutor.[348]

The Ethics Council was puzzled by some of its findings, such as that Hidayat and Rochmat had just met in 2015 and they did not have any familial relationship.[349] The Ethics Council ruled that the Chief Justice acted imprudently by writing a recommendation for someone whom he just knew briefly.[350] Furthermore, the Ethics Council ruled that the issuance of the letter was an unwise decision because it might create negative perceptions.[351] Nevertheless, the Ethics Council did not find any gross ethical violations as Hidayat was acting in good faith to help a young assistant district attorney to gain some skill and knowledge.[352] On March 2016, the Ethics Council came out with a recommendation that Chief Justice Hidayat be given private warning (*sanksi teguran*).[353]

Regardless of the result of the Ethics Council's investigation, obviously, Hidayat succumbed to alleged ethics violations, which could lead to a humiliating end of his career. Although he did survive the investigation of the Ethics Council, he has tarnished the reputation of the Court that he leads. As previously argued, the Chief Justice is the personification of the Court, and the public could easily equate Hidayat's alleged ethical violations with the Court. Hidayat will remain as the Chief Justice at least until 2017, but memories remain fresh enough for the public to perceive the Constitutional Court as yet another untrustworthy legal institution in the country.

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[346] Decision No. 13/Info-III/BAP/DE/2016, at 5 (Ethics Council, Mar. 15, 2016).
[347] *Id.* at 2. The original letter reads, "Mohon titip dan dibina, dan dijadikan anak Bapak."
[348] *Id.* at 5.
[349] Indonesia has an extended family system and in some way or another people can claim that they have a familial relationship.
[350] Decision No. 13/Info-III/BAP/DE/2016, at 23 (Ethics Council, Mar. 15, 2016).
[351] *Id.*
[352] *Id.* at 25
[353] *Id.*

VII. CONCLUSION

When Indonesian politicians decided to establish the Constitutional Court in 2001, they did not intend to create a robust judicial entity. The Court's structural design clearly indicates half-hearted commitment to judicial power among politicians when they established the Court. They designed the Court with limited authority, such that the Court could only review abstract cases and provide declaratory remedies. The politicians also showed lukewarm support when the Court opened for business in 2003. The executive and lawmakers did not provide sufficient logistical support for the Court and therefore it was without any money, an office building, and necessary staff upon its inception. They opposed the proposal to build a new office building and the Court did not have a permanent office until 2007.

Though political leaders intended the Court to be an innocuous creature, under Asshidique's leadership it became something of a Frankenstein's Monster possessed of the capacity to stand up against its creator. It became uncontrollable. Led by Asshidique, the Court struck down many governmental policies. It pushed the government to respect the protection of civil and political rights. Moreover, it even aggressively confronted the government to follow the Court's decisions. Asshiddiqie was not the government's man, but was rather a maverick Chief Justice who led the Court to expand its authority and fought for its equal status with the other branches of government.

One of the components to Asshidiqie's success in leadership was his capacity to use the limited resources that were available to increase the power of the Constitutional Court. The Court's authority to exercise abstract review seemed to be a weakness for the Court because its job was simply to answer the constitutional questions presented to it. Asshiddiqie, however, turned this handicap into a powerful force in which he used abstract review to evaluate many governmental policies. Under Asshiddiqie's leadership, the Court struck down legislation and directed the government to correct several of its policies.

Asshididqie continued to enhance the Court's authority through his strategy related to questions of judicial standing, which filled an existing doctrinal gap with a broad vision of who may bring a case before the judiciary. His expansive views on standing allowed plaintiffs to file petitions as taxpayers or consumers, and even bestowed standing on NGOs. Asshiddiqie believed that if the Court did not craft broad standing rules, then

many important cases would not come before the Court for review. He was convinced that the Court had a role to play in solving political and economic problems in Indonesia's democratic transition and therefore the generous view of standing enabled the Court to review many cases implicating political and economic issues in the transition.

The Court's aggressive approach aroused opposition in other branches of government and they tried to find ways to undermine the Court's authority. Though at first Jimly Asshiddiqie appeared to be the Indonesian judicial version of Frankenstein's Monster, in the end he was easily overpowered. The ouster of Asshiddiqie, indeed, signified the fragility of the newly established Constitutional Court. Through this experience it became clear that the weakest point of the Court is the limited terms of the associate justices and the Chief Justice. With such limited terms, the justices have to face the reality that their terms may not be renewed if they fail to please other elements of the government. Moreover, the Chief Justice also sits on the bench with additional insecurity, since he or she might not be re-elected to the position of Chief Justice if he or she fails to please the government or the other associate justices.

The departure of Jimly Asshiddiqie, however, did not automatically bring to an end the "conundrum" posed by a heroic Chief Justice. His successor, Mohammad Mahfud came with a vision of judicial restraint, and indeed his Court tended to defer to the government on some major policy issues. Nevertheless, Mahfud was unable to avoid the reality that his Court must review some governmental policies and offer directions to the government on correcting its policies when necessary. He also had to follow the footsteps of his predecessor in defending and promoting the Court's decisions through extrajudicial strategies such as media interviews and public statements on sensitive topics.

The paradox of judicial leadership in the Indonesian Constitutional Court is that the Court cannot avoid politically sensitive cases because it has jurisdiction to review the constitutionality of laws and government policies. The Court will always deal with constitutional issues that have powerful impact on the political realm. Consequently, the Court needs the leadership of a heroic Chief Justice who can command the institution in the sometimes stormy waters of constitutional politics. Chief Justices Ashiddiqie and Mahfud might be gone from the Constitutional Court, but their leadership examples remain relevant and necessary for the fragile Constitutional Court that still needs a heroic Chief Justice at its helm.

Although Asshiddiqie and Mahfud were dissimilar in many ways, they had similar political trajectories. Both Asshiddiqie and Mahfud had been constitutional law professors with deep Islamic roots before they were thrust into the role of Chief Justice. They both had established decorated political careers before they came to the bench. Both of them retained their interest in politics while they were sitting on the bench and they deployed some aggressive strategies in dealing with the different branches of government. When they saw disregard for their decisions, they tried to launch a counter attack and push the executive and legislators to comply with their decision. They both played the role of the heroic Chief Justice ready to solve the social and political problems in the country.

Asshiddiqie's aggressive approach aroused opposition in other branches of government and they tried to find ways to undermine the Court's authority. The government did not have direct power to remove the Chief Justice; nevertheless, it could support rival justices to replace Asshiddiqie. Those new justices were the ones who challenged Asshiddiqie's leadership and ousted him from his leadership position. Unlike his predecessor, Mahfud was able to survive and he managed to reduce any risk of attack. He retained some trust from his fellow associate justices that enabled him to finish his term as Chief Justice. Nevertheless, Mahfud did not shy from showing his ambition to run as a presidential contender, which eventually led to his early departure from the Court.

In both cases, the stars of Asshiddiqie and Mahfud were dimming after their departure as they both failed to return to power after they tried to obtain their political aspirations. Asshiddiqie failed to secure the top post of Anti-Corruption Commission and Mahfud could not secure the presidential nomination. In his attempt at a political career comeback, Mahfud took a job as the Head Campaign Manager for a Presidential Candidate, Prabowo Subianto. But Mahfud's political comeback quickly diminished after Subianto suffered a humiliating defeat in the 2014 presidential election.

Finally, the short tenures of Akil Mochtar and Hamdan Zoelva proved the Chief Justice still holds a crucial position in the Indonesian constitutional constellation. As the Chief Justice, Akil Mochtar was the personification of the Court and the public easily equated his personal crimes with the Court. His arrest immediately led public perception to put the Court in the same level as other corrupt legal institutions in the country. The public skepticism over the election of Chief Justice Zoelva reaffirms the importance of Chief Justice in the Indonesian Constitutional politics. The public still has a

perception that the Chief Justice might be able to steer the Court's decisions in a certain direction. When Chief Justice Zoelva turned the public skepticism into delight by proving his impartiality, the public immediately stood behind him. Nevertheless, Chief Justice Zoelva could not continue to play the role of a heroic Chief Justice. During his short tenure, Zoelva pursued a path of judicial restraint, underscoring the Court's weakness in relation to other branches of government. Moreover, his advocacy of judicial restraint failed him in the long run as it did not secure his position on the Court. As President Jokowi decided not to re-appoint Hamdan Zoelva, he was forced to exit the Court in a sad ending like his predecessors.

More than a decade after its inception, the Indonesian Constitutional Court still needs a heroic Chief Justice who can lead the institution in navigating the "stormy seas" of constitutional politics in Indonesia. The professional profile and background of a Chief Justice is one of the key factors that affect the rise and fall of judicial power in the Indonesian Constitutional Court. With frequent configuration changes due to normal or irregular mechanisms in the Court, there are no longer any judicial heroes available. Under this circumstance, the Court and its Chief Justice must decide whether it will continue to be an engine for change, or whether it will allow itself to be limited to the small scope envisioned for it by the legislature when it created the Court in 2003.